EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No:4104417/2020, 4104418/2020, 4104419/2020 (V)
(Multiple No. 9486)

Hearing Held by Cloud Video Platform (CVP) on 16, 17 and 18 November 2021 and deliberation day with members on 8 December 2021

Employment Judge J McCluskey sitting with Members J Auld and J Copland

Mr I Armstrong	**Claimant** **Represented by:** **Mr R Lawson** **Solicitor**
Mr R Carstairs	**Claimant** **Represented by:** **Mr R Lawson** **Solicitor**
Mr D Wilson	**Claimant** **Represented by:** **Mr R Lawson** **Solicitor**
API Foilmakers Limited	**Respondent** **Represented by:** **Ms Moretti** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

(1) For the reasons already given in the Tribunal's oral judgment on 16 November 2021 Mr David Wilson's written application dated 15 November

2021 to amend his ET1 to include additional claims under sections 44 and 47B of the Employment Rights Act 1996 is allowed. The respondent's application to amend its ET3 in response to these additional claims is also allowed.

(2) The claimants' claims under sections 137 and 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 and under regulation 5 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 do not succeed and are dismissed.

(3) Mr David Wilson's claims under sections 44 and 47B of the Employment Rights Act 1996 do not succeed and are dismissed.

REASONS

Introduction

1. The claimants are Iain Armstrong (IA), Robert Carstairs (RC) and David Wilson (DW). Claims were presented by the claimants on 18 August 2020 alleging refusal of employment and detriment, on grounds related to trade union membership or activities, contrary to sections 137 and 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 and refusal of employment for a reason related to a prohibited list contrary to regulation 5 of the Employment Relations Act 1999 (Blacklists) Regulations 2010.

2. On 15 November 2020, the day before the final hearing was due to start, DW made a written application to amend his claim. He sought to add two new grounds, alleging detriments related to raising a health and safety matter and having made a protected disclosure, contrary to sections 44 and 47B of Employment Rights Act 1996 (the 1996 Act). He said that he had only recently become aware of such claims as a result of documents disclosed by the respondent on 3 November 2021.

3. DW's amendment application stated that by letter dated 24 October 2019 his solicitors had intimated a claim for personal injury on his behalf to his previous

employer API Foils Limited. DW alleged that the contents of the letter constituted a protected disclosure under section 43B(1)(b) and (d) of the 1996 Act. He alleged that the letter tended to show that API Foils Limited had failed to comply with a legal obligation to which it was subject and that the health and safety of an individual had been endangered. He alleged that as the disclosure concerned health and safety, the disclosure was in the public interest. He alleged that the disclosure had been made under section 43C the 1996 Act. He alleged that he had been subject to a detriment under section 47B the 1996 Act, the detriment being the respondent's failure to offer DW employment and/or reject his application for employment.

4. The respondent objected to the application to amend. Oral submissions were made by both parties on 16 November 2021 in relation to the amendment application at the outset of the final hearing. The Tribunal considered the amendment application and delivered its oral judgment in the afternoon of 16 November 2021. Parties were advised that written reasons would not be provided unless a request was made by either party at the hearing or a written request was presented by either party within 14 days of the sending of this written record of the decision. No such request was made by either party at the hearing.

5. For the reasons given in the oral judgment, DW's application was granted and his ET1 was amended to include the additional claims under sections 44 and 47B of the 1996 Act. The respondent was given the opportunity to amend its ET3. It did so by way of written amendment and the respondent's application to amend its ET3 was granted on 17 November 2021.

6. Evidence was heard by the Tribunal on 17 and 18 November 2021. The claimants gave evidence on their own behalf and also led evidence from Mary Alexander (MA) who is the Deputy Regional Secretary, Unite the Union. The respondent led evidence from Lynsey Kennedy (LK) who is the respondent's HR Manager, Derek Blues (DB) who is the owner and Managing Director of Staffplus Recruitment (Staffplus) and Lynn Campbell (LC) who is the Operations Director of Staffplus.

7. The evidence in chief of all witnesses was contained in written witness statements, as directed in a previous case management preliminary hearing. The witness statements were taken as read in accordance with rule 43 of Schedule 1, The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Further evidence in chief was given by IA, RC, DW, LK, DB and LK at the outset of their evidence.

8. There was a joint bundle of documents extending to 147 pages, referred to as J1 – J147 in this judgement. The claimants lodged additional documents relating to wage loss.

Issues

9. The parties identified the following issues for determination by the Tribunal:

Refusal of employment on grounds related to trade union membership

(i) Did the respondent refuse employment to all or any of the claimants because they were members of a trade union in contravention of section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act)?

Detriment related to trade union membership or activities

(ii) Did the respondent subject all or any of the claimants to any detriment within the meaning of section 146 of the 1992 Act by the respondent's rejection of their applications for employment?

(iii) Having regard to section 148(1) of the 1992 Act, can the respondent show what was the sole or main purpose for which it acted or failed to act.

(iv) Were the claimants 'workers' within the meaning of that section having regard to section 151(1B) and section 296(1) of the 1992 Act?

Employment Relations Act 1999 (Blacklists) Regulations 2010

(v) Did the respondent compile or use a prohibited list within the meaning of regulation 3 being a list which:

a. contained details of persons who were or had been members or trade unions or persons who had taken part in the activities of trade unions, and

b. was compiled with a view to being used by employers for the purposes of treating people less favourably in relation to recruitment than others on grounds of trade union membership or trade union activities?

(vi) Did the respondent refuse to employ all or any of the claimants for a reason which relates to a prohibited list?

(vii) If so, did the respondent:

a. contravene regulation 3 in relation to that list, or

b. rely upon information supplied by a person who contravened that regulation in relation to that list, and did the respondent know, or ought the respondent reasonably to have known, that the information relied on was supplied in contravention of that regulation?

Protected disclosure

(viii) Did DW make a qualifying disclosure within the meaning of section 43B(1)(b) or (d) the 1996 Act, and to whom did he make such a disclosure?

(ix) Did the respondent subject DW to any detriment on the ground that he had made a protected disclosure in terms of section 47B the 1996 Act?

(x) Was the claimant a 'worker' within the meaning of the 1996 Act?

Health and safety detriment

(xi) Did the respondent subject DW to a detriment on the ground that he brought to his employer's attention, by reasonable means, circumstances connected with his work that he reasonably believed were harmful or potentially harmful to health and safety within the meaning of section 44(1)(c) of the 1996 Act?

(xii) Was the claimant a 'worker' or 'employee' within the meaning of that section?

Remedy

(xiii) If all of any of the claimants' claims succeed, in whole or in part, to what remedy should each claimant be entitled?

Findings in fact

The Tribunal made the following findings in fact which are relevant to the matters to be decided:

10. The respondent is API Foilmakers Limited. The respondent is engaged in the production of foil products. It has a place of business in Livingston, West Lothian. The respondent acquired the business in Livingston, which was previously owned by API Foils Limited, on 26 February 2020. The business of API Foils Limited was placed in administration on 31 January 2020.

11. API Foils Limited, which had entered administration, and API Foilmakers Limited are two different legal entities.

12. The three claimants, namely IA, RC and DW, along with other employees of API Foils Limited, were made redundant by the administrators of API Foils Limited on 2 February 2020.

13. Around the time of the administration Unite the Union organised a workshop at West Lothian College to try to assist staff affected by the administration. LK asked IA for a list of all union members. This was so she could tell non-union members about the workshop if they wished to attend. IA declined to give LK a list of union members.

14. The previous company API Foils Limited would only have known of union members who paid their union dues through payroll. They would be unaware of those who paid through direct debit or standing order. LK did not have access to information from payroll as it was managed centrally within the previous company.

15. There was no “getting back list” compiled by the respondent containing a list of all trade union members of the previous company API Foils Limited.

16. The respondent began a recruitment exercise soon after its acquisition of the business of API Foils Limited from the administrators. The number of employees required by the respondent was less than the number of employees made redundant by the administrators. The respondent decided to undertake a recruitment exercise in order to decide which people to employ. The respondent outsourced the interview and assessment part of the recruitment exercise to Staffplus. LK knew Staffplus as she had outsourced recruitment to them when she worked for a previous employer. LK knew that Staffplus operated assessment centres which allowed many individuals to be interviewed and assessed over a short period of time.

17. All former employees of API Foils Limited in the production unit who had been made redundant were written to by LK on 26 February 2020 asking them to register their interest in working for the respondent. The respondent received 58 responses and 58 candidates attended the assessment centres for interview, including the three claimants. The three claimants had not previously worked for the respondent.

18. The interviews at the assessment centres were carried out by Staffplus. LC interviewed IA and RC. DB interviewed DW. Both DB and LC are highly experienced professionals in the recruitment industry and are experienced in carrying out interviews of the type carried out for the respondent.

19. DB and LC were given no background information by the respondent about any of the candidates who attended for interview. They were provided only with the names of the candidates when they arrived at the assessment centre.

20. The respondent was aware that the claimants had been trade union representatives when they were employed by the previous company, API Foils Limited. Staffplus did not have any information about any of the candidates’ trade union membership or activities.

21. LK had a conversation with RC prior to his interview with Staffplus. RC had asked why the respondent was carrying out interviews. LK told him that it was because the respondent wanted to test behaviours and skills. LK did not say that the recruitment process was to weed out bad blood or troublemakers.

22. IA was offered a slot to attend the assessment centre for interview on 6 March 2020. He could not attend then as the slot was during his working hours in his new job. After liaising with LK, IA was offered and attended the assessment centre for interview on 17 March 2020.

23. Staffplus asked the same interview questions to all candidates. The candidates were scored out of 5 for each question based on their responses. There were seven questions. The maximum score a candidate could achieve was 35. The questions were designed to test behaviour and other competencies, rather than technical skills. The questions were prepared by LK and Staffplus. The questions were like the questions which Staffplus would use for interviews. The competencies being tested were important to the respondent.

24. IA arrived for his interview wearing his uniform from the previous company API Foils Limited. This did not affect the scores which IA received. At the end of his interview IA asked to use the toilet and then went down into the production area. This did not affect the scores which IA received. LC noted on her handwritten notes taken at the time that IA had gone down into the production area after his interview in breach of health and safety (J86-89).

25. DW told DB that he had a disciplinary warning. DB did not have any information about this from the respondent. Staffplus had not been told by the respondent to ask candidates about disciplinaries.

26. On 24 October 2019 DW had intimated a claim for personal injury against the previous company API Foils Limited (J131-132).

27. DW told DB that he had raised a claim for personal injury against the previous company API Foils Limited. DB did not have any information about this from

the respondent. DW's personal injury claim had no impact on his scoring by DB against the set competency questions which were asked.

28. The scoring was carried out by DB or LC immediately after each interview and before the next candidate was sent in. IA scored 24. RC scored 18. DW scored 14. The scoring of the candidates was left entirely to the judgement of Staffplus. The scores given by Staffplus were reflective of the quality of the answers given in the interviews by the candidates.

29. After all the interviews had been completed Staffplus sent LK a spreadsheet with the overall scores of everyone who had attended the interviews. The spreadsheet also contained comments from Staffplus on the candidates, including the claimants (J90/91).

30. The comment on the spreadsheet about IA said "poor body language and wearing API uniform, answered questions well however I could feel something underlying with this candidate, could be easily distracted" (J91).

31. The comment on the spreadsheet about RC said "not a good team player spoke about 'cleeks'(sic) in the business" (J91).

32. The comment on the spreadsheet about DW said "seemed bitter, had undergone a disciplinary process at API in addition to filing a claim for injury – not suitable" (J91).

33. The handwritten interview notes completed by Staffplus immediately after the interviews, including those for the claimants (J78-89), were not sent to the respondent.

34. The respondent imposed a cut off score of 25 points. The respondent decided that only those who scored 25 points or above during the interview process would be offered employment. The cut off score was decided by the respondent at the beginning of the recruitment process. Staffplus was not aware of this cut off score at any time.

35. The respondent exercised discretion in some cases to depart from the cut off score. The respondent exercised its discretion in relation to one candidate

who had scored higher than the cut off score of 25 points. The respondent decided not to offer employment to this individual due to previous allegations of bullying and intimidation involving this individual. The respondent also exercised discretion by offering employment to two candidates who both scored less than 25 points. One candidate was an individual who had continued to work for the previous company API Foils Limited during the administration period in order to assist with a customer order. The respondent felt morally obliged to offer him employment despite his low score during the assessment centre. The other candidate was an individual whom the respondent knew to be very quiet and shy. The respondent decided that the interview process was not able to show his full competencies and so they exercised their discretion and offered him a role.

36. All other individuals who scored less than 25 points, which included the claimants, were not offered employment. The respondent did not consider there to be any special circumstances which would have justified them in exercising their discretion to offer employment to any of the claimants.

37. The claimants were informed that they had been unsuccessful by letter dated 19 March 2020. The decision not to employ the claimants was based on the score they each received from Staffplus during the interview process, which was below the cut off score of 25 points.

38. The fact that DW had intimated a claim for personal injury against the previous company API Foils Limited had no impact on his rejection for employment with the respondent.

39. Of those who were offered re-employment by the respondent, 16 were trade union members. Whether the individual was a union member was not a factor in the decision making process of the respondent.

40. On 23 March 2020 MA, from Unite the Union, wrote to the respondent about electing trade union representatives and about other matters concerning workers in the respondent (J104). On 20 May 2020 the respondent wrote to Unite the Union and said that once their members had elected or nominated

a representative, the respondent management team would be ready to engage (J110).

41. The respondent's intention was to hire in stages in accordance with the needs of the business. The respondent recruited again for coaters and finishers in May 2020. The respondent decided to carry out another recruitment exercise and Staffplus assisted with this. The claimants could have applied for the roles advertised in May 2020 but did not do so.

Observations on the evidence

42. It is not the function of the Tribunal to record all the evidence presented to it and the Tribunal has not attempted to do so. The Tribunal has focused on those parts of the evidence which it considered most relevant to the issues it had to decide.

43. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event in fact occurred.

44. The Tribunal found the respondent's witnesses to be credible and reliable. There were a number of conflicts in the evidence. The Tribunal has resolved these mostly in favour of the respondent. The Tribunal did not regard the fact that it preferred the evidence of the respondent's witnesses as tainting the claimants' overall credibility. There were differences in recollection and differences in perception. The Tribunal is satisfied that the claimants sought to be truthful in their recollection and perception of events.

45. IA alleged that LK had deliberately altered or tampered with an email in the joint bundle. IA referred to an email invite dated 12 March 2020 at 10.32 from LK to IA inviting to him to interview (J64). IA also referred to a duplicate email sent to his email address at 10.32 but addressed "Dear Loxley" (J135). IA replied to the email addressed to Loxley the same day and said "Lynsey, was this meant for me or Loxley?" (J134). LK replied on 13 March 2020 and said "Hi Iain, Sorry it's for you!" (J135). IA invited the Tribunal to make a finding

that the email at J64 had been deliberately altered by LK to make it seem as if she had sent it to IA on 12 March 2020 at 10.32, when she did not.

46. The Tribunal was satisfied that LK had sent the email at J64 to IA at the date and time stated on it and had not subsequently altered or tampered with it. The Tribunal was also satisfied that the email at J134 had been sent to IA by LK at the date and time stated on it. This was consistent with the evidence of LK that both emails had been sent. The Tribunal understood that the email invites to interviews were being sent out by LK in bulk and that it would have been easy to have made a mistake in the body of the text of the email by using the wrong name or by sending more than one email to the same email address. In any event there was no dispute that IA received an email sent to his email address on 12 March 2020 inviting him to interview and that he subsequently attended for interview.

47. Evidence from the respondent's witnesses about the communication of a decision about the cut off score of 25 points differed. LK said in evidence that the respondent had agreed at the beginning of the recruitment exercise that the cut off would be 25 points and that Staffplus had been made aware of this. Both Staffplus witnesses in their evidence disagreed that they knew about any cut off score.

48. The Tribunal accepted the evidence of LK that the respondent had decided at the beginning of the recruitment exercise that the cut off score would be 25 points. However, the Tribunal preferred the evidence of DB and LC that they were not aware of any cut off score. It seems unlikely that DB and LC would both forget such a matter being communicated to them. The Tribunal is of the view that LK is mistaken in her recollection that the cut off score was communicated to Staffplus before they carried out interviews and scoring. This did not however affect her overall credibility or reliability in relation to her evidence.

49. IA asked the Tribunal to conclude that LK said that the cut off was decided before the scores were allocated, to make it appear less likely that the cut off was chosen to exclude him from employment. The Tribunal did not accept

this. The Tribunal was satisfied that the respondent required candidates to score well in relation to the behaviours and competencies tested in the interview questions. The Tribunal was satisfied that on balance it is more likely than not that the respondent had decided a cut off score at the beginning of the recruitment exercise, albeit the cut off score had not been communicated to Staffplus. The Tribunal is persuaded by this as it was satisfied that the behaviours and competencies being tested were of importance to the respondent, such that a cut off score was likely to have been decided by the respondent at the beginning of the recruitment exercise. The Tribunal accepted the evidence of LK that Staffplus were appointed to carry out an independent assessment and scoring of candidates. The Tribunal was satisfied that Staffplus did so, resulting in a score of IA of 24 points, which was 1 point below the cut off score.

50. Evidence differed about the content of a conversation between LK and RC prior to his interview with Staffplus. RC had asked LK why the respondent was carrying out interviews. LK's evidence was that she told RC that it was because the respondent wanted to test behaviours and skills. RC's evidence was that LK had said that the recruitment process was to weed out bad blood and troublemakers. The Tribunal preferred the evidence of LK. The set questions to be asked of all candidates appeared to the Tribunal to be the sort of questions which would be used by employers in competency based interviews. The Tribunal was also satisfied that an HR professional would not use language such as "weed out bad blood and troublemakers" to candidates.

51. Evidence differed about whether there had been discussion between Staffplus and LK after the interviews. LK stated that immediately following the assessments a "couple of people [were] discussed with Staffplus". LC said "there was never any discussion about any individual". The Tribunal did not find this to be a material divergence in the evidence. The Staffplus witnesses were clear that they did not have information about the candidates from the respondent, apart from their names. If there was any discussion about a couple of people immediately afterwards as LK has stated, the Tribunal is satisfied that this discussion would not have been about answers which the

claimants had given in their interviews or which would have affected the claimants' selection for employment.

52. Whether the personal injury claim previously raised by DW had influenced his scoring by DB was in dispute. At J91, the spreadsheet containing comments from Staffplus on candidates interviewed, DB noted DW "seemed bitter, had undergone a disciplinary process at API in addition to filing a claim for injury – not suitable". DB said in evidence that he did not accept that the score that he had awarded to DW was lower than it would otherwise have been because of his personal injury claim against the previous company API Foils Limited. The Tribunal accepted DB's evidence that DW's personal injury claim had not influenced the scoring. The Tribunal accepted that the scoring was based only on the specific questions asked of all candidates. This was consistent with the evidence of DB and LC about the interview and assessment centre process.

53. How DB had found out about a personal injury claim previously raised by DW was also in dispute. DW said he did not raise the matter with DB during his interview. DB said DW must have raised it with him during the interview as otherwise he would not have known about it. LK said she had not been employed by the former company API Foils Limited at the time of the injury. LK said that she had forgotten about the personal injury claim until she saw it referred to by DW in his witness statement for this case. LK checked her emails when she saw the witness statement and saw she had been copied into an email about the claim from HR down south. She had not dealt with the claim. It had been dealt with by HR down south and by the H&S Manager, who was not employed by the respondent. The Tribunal preferred the evidence of DB and LK to that of DW on this matter. Both DB and LC had been consistent in evidence that they did not have information about the candidates, apart from their names, from the respondent. The Tribunal was satisfied that there had been no discussion between LK and DB about a personal injury claim raised by DW and that on balance DW must have told DB about this at the interview.

54. LK's written responses to subject access requests sent by IA and another individual (SM), in around May 2020 were challenged by IA. The subject access request from IA is at J137. In response LK sent IA his scores from the interview (J115) but did not send the comment about IA in the spreadsheet from Staffplus (J91). The Tribunal is of the view that the comment about IA at document J91 ought properly to have been provided by LK to IA in response to his subject access request. The Tribunal did not however consider that this affected LK's overall credibility in relation to her evidence about the relevant matters to be decided by the Tribunal in this case.

Relevant law

Refusal of employment on grounds related to union membership

55. Section 137 of the 1992 Act says Refusal of employment on grounds related to union membership (1) It is unlawful to refuse a person employment- (a) because he is, or is not, a member of a trade union… (2) A person who is thus unlawfully refused employment has a right of complaint to an employment tribunal. (5) A person shall be taken to be refused employment if he seeks employment of any description with a person and that person- …(c) refuses or deliberately omits to offer him employment of that description…

56. Section 140 of the 1992 Act says Remedies (1) Where the employment tribunal finds that a complaint under section 137 or 138 is well founded, it shall make a declaration to that effect and may make such of the following as it considers just and equitable- (a) an order requiring the respondent to pay compensation to the complainant of such amount as the tribunal may determine… (2) Compensation shall be assessed on the same basis as damages for breach of statutory duty and may include compensation for injury to feelings.

Detriment related to trade union membership or activities

57. Section 146 of the 1992 Act says Detriment on grounds related to union membership or activities (1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of-… (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, . . .

58. Section 148 of the 1992 Act says Consideration of complaint (1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.

59. Section 149 of the 1992 Act says Remedies (1) Where the employment tribunal finds that a complaint under section 146 is well-founded, it shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure complained of. (2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained by the complainant which is attributable to the act or failure which infringed his right.

60. Section 151 of the 1992 Act says Interpretation and other supplementary provisions (1B) In sections 146 to 150- “worker” means an individual who works, or normally works, as mentioned in paragraphs (a) to (c) of section 296(1), and “employer” means- (a) in relation to a worker, the person for whom he works; (b) in relation to a former worker, the person for whom he worked.

61. Section 296 of the 1992 Act says Meaning of “worker” and related expressions (1) In this Act “worker” means an individual who works, or normally works or seeks to work- (a) under a contract of employment…

Blacklists Regulations

62. Regulation 3 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 says General prohibition (1) Subject to regulation 4, no person shall compile, use, sell or supply a prohibited list. (2) A "prohibited list" is a list which- (a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and (b) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers. (3) "Discrimination" means treating a person less favourably than another on grounds of trade union membership or trade union activities.

63. Regulation 5 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 says Refusal of employment (1) A person (P) has a right of complaint to an employment tribunal against another (R) if R refuses to employ P for a reason which relates to a prohibited list, and either- (a) R contravenes regulation 3 in relation to that list, or (b) R- (i) relies on information supplied by a person who contravenes that regulation in relation to that list, and (ii) knows or ought reasonably to know that the information relied on is supplied in contravention of that regulation. (2) R shall be taken to refuse to employ P if P seeks employment of any description with R and R-… (c) refuses or deliberately omits to offer P employment of that description… (3) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that R contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless R shows that it did not.

64. Regulation 8 of the Blacklists Regulations says Remedies in proceedings under regulation 5 or 6 (1) Where an employment tribunal finds that a complaint under regulation 5 or 6 is well founded, it shall make a declaration to that effect and may make such of the following as it considers just and equitable- (a) an order requiring the respondent to pay compensation… (2) Compensation shall be assessed on the same basis as damages for breach of statutory duty and may include compensation for injury to feelings.

Protected disclosure

65. Section 43A of the 1996 Act says Meaning of "protected disclosure" In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

66. Section 43B of the 1996 Act says Disclosures qualifying for protection (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-… (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 or safety of any individual has been, is being or is likely to be endangered…

67. Section 43C of the 1996 Act says Disclosure to employer or other responsible person (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure… (a) to his employer…

Health and safety detriment

68. Section 44 of the 1996 Act says Health and safety cases (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that-… (c) being an employee at a place where- (i) there was no such representative or safety committee…. he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety…

69. Section 47B of the 1996 Act says Protected disclosures (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done- (a) by another worker of W's employer in the course of that other worker's employment… on the ground that W has made a protected disclosure. (1B) Where a worker is

subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

70. Section 48 of the 1996 Act says Complaints to employment tribunals (1) An employee may present a complaint to an [employment tribunal] that he has been subjected to a detriment in contravention of section … 44(1) … (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B. (2) On a complaint under subsection (1) … [or] … (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

71. Section 49 of the 1996 Act says Remedies (1) Where an employment tribunal finds a complaint under section 48(1) … [or] … (1A) … well founded, the tribunal- (a) shall make a declaration to that effect, and (b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

Submissions

72. Both parties provided detailed and helpful written submissions within 14 days of the final hearing concluding. The Tribunal thanks both representatives for doing so. The Tribunal has taken time to consider the written submissions carefully. The Tribunal does not intend to repeat the parties' submissions at length here but has attempted to summarise them as noted below.

Claimants' submissions

73. A short summary of Mr Lawson's written submissions is follows: Did the respondent reject the claimants' applications for employment due to their union membership/activities (whether under s.137 or s.146 of the 1992 Act)? The Tribunal was invited to find the evidence of the respondent's witnesses, and in particular LK, to be incredible and unreliable. The evidence pointed towards the respondent wishing to avoid having union representatives amongst its workforce and/or to de-unionise the workplace. Whether known to Staffplus or not, the assessment process was used by the respondent as a way to avoid employing the claimants due to their status as trade union

representatives. In any event, the respondent wielded significant discretion to offer whoever it wished employment irrespective of scores awarded during the assessment process. This discretion was utilised by the respondents to the claimants' disadvantage. There is no question that section 137 of the 1992 Act is potentially engaged. The claimants argue that section 146 of the 1992 Act is also engaged.

74. The claimants assert that it was their positions as union representatives, rather than their trade union membership alone, that led to their rejection for employment by the respondent. See **Harrison v Kent County Council** 1995 ICR 434 EAT at p.442F – "Participation in the activities of a union is one of the ways in which membership of a union is manifested and the rights incident to it are realised. In our view, if a person is refused employment because he was or is a trade union activist or for a reason related to his union activities it is open to the industrial tribunal, under the provisions of section 137(1)(a), to conclude that he is refused employment because he is a member of a union."

75. Did the respondent compile or use a 'blacklist' and refuse the claimants' employment as a result of such blacklist? Although a copy is not produced, certain passages of evidence point to the existence of such a list. Given that the contents of any such list would have been known to the relevant decision-makers in any event, the existence of such a list may be academic.

76. Was the rejection of DW's application due to his having made a personal injury claim or because he has raised a health and safety issue? DW made a qualifying disclosure. He was subjected to a detriment for having made that disclosure. DW is afforded the protection of the whistleblowing legislation by virtue of s.47B(1A) DW was subjected to a health and safety detriment in terms of s.44 of the 1996 Act. Reference was made to the case of **Williams v Michelle Brown** UKEAT/0044/19/00 para 9 where the EAT set out the necessary components of a qualifying disclosure "It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public

interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held. Reference was made to the case of **Kuzel v Roche Products Ltd** 2008 ICR 799 at para.58 "The importance of credibility and reliability is heightened in a case of this nature as there is inevitably an absence of concrete evidence which supports the claims. The law recognises this reality, and it provides that the ET is entitled, and should, draw inferences from the primary facts"

77. What award should be made to the claimants if their claims succeed? The Tribunal is invited to make a declaration that the claimants' claims are well-founded and to make an award of compensation to include an award for injury to feelings.

78. When considering these issues, the Tribunal is invited to bear in mind the comments of the EAT in **Croke v Hydro Aluminium Worcester Ltd [**2007] ICR 1303 at 1314B – "…where statutory provisions are explicitly for the purpose of providing protection from discrimination or victimisation it is appropriate to construe those provisions so far as one properly can to provide protection rather than deny it."

Respondent's submissions

79. A short summary of Ms Moretti's written submissions follows: The Tribunal has had sight of the agreed list of issues setting out the issues to be determined in respect of the 5 different heads of claim. The respondent denies each of the claims, and submits that several of the claims are misconceived due to either; the claimants not having the requisite worker or employee status to make them, or in the case of the claim under the Employment Relations Act 1999 (Blacklists) Regulations 2010, the claimants not having led any evidence that a prohibited list actually existed. Where it is necessary for the Tribunal to consider the respondent's decision not to employ the claimants, it is the respondent's position that this decision was not related to their trade union membership or activities. The decision not to offer employment to the

claimants was based on the scores they obtained during an interview process carried out by an external recruitment agency, Staffplus, and trade union membership or activities was not a factor in those scores. The respondent submits that the Tribunal should dismiss all of the claims.

80. In considering the claim for detriment related to trade union membership or activities section 146(1) makes clear that this is a right which applies only to workers. The definition of 'worker' for the purposes of a claim under section 146 is set out in section 151(1B) and means "an individual who works, or normally works, as mentioned in paragraphs (a) to (c) of section 296(1)". Section 296(1) lists the meaning of 'worker' as being; an individual who works, or normally works or seeks to work— (a) under a contract of employment, or (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his….". However, in accordance with section 296(3) the definition in section 296(1) "has effect subject to" the definition in section 151(1B). If the definition in section 296(1) was intended to apply in full to section 146 claims then there would have been no need for section 151(1B). The difference between the definitions in section 296(1) and section 151(1B) is that section 151(1B) notably excludes the words "seeks to work". It is submitted that if the words "seeks to" were intended to be contained in that section and accordingly within the definition of a worker for the purpose of a section 146 claim, then they would be there. The fact that the definition in section 151(1B) was specifically crafted for section 146 claims indicates there was a deliberate intention to exclude those "seeking work" and so there is no basis, as the claimants suggest, for the Tribunal to 'read down' the legislation to extend it to those who are. The case of **National Union of Professional Foster Carers v Certification Officer** [2021] IRLR 588, referred to by the claimants, can be distinguished on the basis that it related to foster carers who, although they did not have a contract with the local authority, they had a relationship which was governed by statute. On the other hand, the claimants in this case had no relationship whatsoever with the respondent.

81. In order for a claim under the Employment Relations Act 1999 (Blacklists) Regulations 2010 to be successful a list must exist which contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in trade union activities. The claimants have pled no facts or produced any evidence which point to there being any such list.

82. In considering the claim under section 137 for refusal of employment on grounds related to trade union membership, the reason for refusing to employ a person must be looked at carefully. When considering the mental processes that caused the decision-taker to act as they did, it is not enough to look for a "but for" causative link and ask whether the claimants would have been treated in the way they had if they had not been union members. It is necessary to consider the 'reason why' the decision was made. This is set out in case of **Miller and others v Interserve Industrial Services Ltd** UKEAT/0244/12 In that case, a Unite official put pressure on a manager to recruit the claimants (who were members of the union) for a particular project. The manager refused to employ them on principle, because he resented the union trying to dictate whom he should employ. The EAT upheld the tribunal's decision that the refusal was due to the conduct of the Unite official, and was not due to the claimants' membership of the union per se. In this current case, it is submitted that the claimants were not refused employment on grounds related to trade union membership. The claimants were not offered employment due to the scores obtained during the interview process with Staffplus.

83. Section 47B requires DW to have been a worker of the respondent. Section 44(1)(c) requires DW to have been an employee of the respondent. DW, having never been employed or engaged or having carried out any work whatsoever for the respondent, does not have the requisite worker status or employee status to make such claims.

Discussion and decision

Refusal of employment on grounds related to trade union membership

84. The claimants' argued that they were deliberately scored below the cut off score of 25 points in order that the respondent could decline to offer employment to them. The reason for this, say the claimants, was because the respondent knew that the claimants had previously been trade union representatives and the respondent did not want trade union representatives in their workplace. The claimants argued that Staffplus, who were engaged by the respondent to carry out the interview process, deliberately colluded with the respondent to score the claimants below the cut off score of 25 points.

85. There was a difference in evidence between LK and the Staffplus witnesses about whether Staffplus were told in advance by the respondent that the cut off score was to be 25 points. The Tribunal resolved that difference in evidence by favouring that of the two Staffplus witnesses. Both of these witnesses were consistent in their responses that they did not know about the cut off score of 25 points at any time whilst they were carrying out the interviews or prior to submitting their scores to the respondent.

86. The respondent witnesses said that Staffplus used their own judgment when it came to scoring and the Tribunal accepted that. The Tribunal had no hesitation in finding that they carried out their role with professional integrity. On the basis that they did not know about the cut off score it could not be the case that Staffplus had deliberately colluded with the respondent to ensure that the claimants received a score below 25 points.

87. Alternatively, the claimants argue that the interview questions which were asked of all candidates, including the claimants, were designed to facilitate low scores for trade union representatives, thus ensuring that the claimants were not offered employment with the respondent due to their trade union status.

88. The Tribunal's observation is that the questions asked of all candidates at interview were of the type that would typically be asked in a competency based interview process. They were not unusual questions or questions which were designed, in the Tribunal's view, to draw out information about trade union membership or activities. On that basis the Tribunal disagreed with the

claimants' argument that the interview questions were designed to facilitate low scores for trade union representatives, such that the claimants were not offered employment with the respondent on grounds related to their status as trade union representatives. In the Tribunal's view such a scheme on the part of the respondent would have been rather fanciful, with no guarantees of reaching its objective, and thus unlikely to have occurred.

89. The claimants argued that they were given low scores due to their status as trade union representatives. There was, however, no evidence that Staffplus were aware of the claimants' status as trade union representatives or, in the case of RC and DW, that they knew the claimants prior to interview. IA said that he knew LC but accepted he did not know her well and had not seen her for many years. LC said that she did not know IA although had a recollection of his family from school days. IA and DW accepted that Staffplus had no information about them prior to their interviews. The Tribunal was satisfied that Staffplus did not know that the claimants were trade union representatives and did not have any information about them prior to interviews.

90. The claimants stated that they did not consider the interview notes to be a fair assessment of the interviews which took place. The suggestion was that they had performed in the interviews such that they should have been given higher scores above the cut off. They suggested that the interview notes and scores had been altered or manipulated by Staffplus, whether on instruction of the respondent or otherwise. The Tribunal disagreed with this. The Tribunal were of the view that DB and LC were skilled professionals. DB and LC explained that the interview notes in the bundle (J78-89) were taken at the time of the interviews. The Tribunal found no basis for the suggestion by IA that these notes were re-written. LC confirmed that these notes were the ones she took during and immediately following her interview with IA and the comments regarding his work wear and whereabouts were factual observations that she made at the time. The Tribunal accepted that the notes contained within the joint bundle (J78-89) were made during and immediately after each interview and are likely to be an accurate record of their interviews with the claimants.

In any event the respondent did not receive a copy of the interview notes from Staffplus and so the content of these notes could not form part of the respondent's decision.

91. DW alleged that during his interview he was asked whether he had any disciplinary warnings on his record and whether he felt "victimised". DB's evidence was that he did not initiate a question about disciplinaries. DB confirmed that he did not have any information about the candidates in advance and that he was not told by the respondent to ask any questions about disciplinaries. DB said that any follow up question about the disciplinary would only have been in response to information volunteered by DW in the first instance. The Tribunal is satisfied that, as a recruitment professional, it is unlikely that DB would have strayed from the set questions that he had been told to ask. The Tribunal was satisfied that the more likely scenario was that DW volunteered details of the warning in response to the set list of interview questions. DB did not recall asking DW whether he felt "victimised" by the disciplinary warning. The Tribunal is of the view that this would have been an unusual word to use and that on balance it was not used. Even if he did use such a word DB did not know about DW's trade union status, such that the word was being used because of his trade union status.

92. In relation to IA, who scored 24 points, he argued that the cut off score of 25 points was selected by the respondent after the scoring of all candidates was complete. This being to avoid having to offer employment to IA.

93. The Tribunal did not agree with this. The Tribunal is of the view that the cut off score of 25 points was decided by the respondent in advance of the interviews commencing. This was so that the candidates who were offered employment were the ones who had scored well against the competencies which were being tested at interview. These competencies were important to the respondent and LK had drawn up the questions, with input from Staffplus, to reflect these competencies.

94. All three of the claimants were below this cut off and RC and DW were well below the cut off score. There were two individuals who scored less than 25

points who were offered employment as the respondent exercised discretion for them. One had worked during the administration period and the respondent felt a moral obligation to him. The other was a very quiet and shy individual whom the respondent considered would not have been able to fully demonstrate his competencies in the interview process. The respondent also exercised discretion in relation to an employee who scored less than 25 points due to prior allegations of bullying and harassment. All other individuals who scored less than 25 points, which included the claimants, were not offered employment. The Tribunal was satisfied that the respondent was entitled to exercise discretion for the reasons given in those circumstances.

95. In relation to IA, who scored 24 points, the Tribunal was satisfied that the cut off score of 25 was not selected by the respondent after the scoring of all candidates was complete, to avoid having to offer employment to IA. The Tribunal was of the view that it was more likely than not that a cut off score had been decided by the respondent prior to the interview process being commenced. The respondent was keen to measure behaviours and other competencies during the interview process, as those were important to the respondent. On that basis the Tribunal was of the view that a score would likely have been decided by the respondent beforehand, below which employment would not be offered. As a result employment was not offered to IA.

96. The claimants submitted that there was a background which was suggestive of anti union sentiment. They relied principally on the evidence of MA, full time official with Unite the Union. Her evidence concerned the actions she had taken to communicate with Sean Harley (SH) of the previous company API Foils Limited prior to administration and with him again following the set up of the respondent. She said that immediately prior to entering administration API Foils Limited did not engage with the union and that it had been difficult to get any information from SH after the respondent had been set up. The claimants asked the Tribunal to accept the evidence of MA and to draw an adverse inference from the fact that the respondent did not lead any evidence to counter the evidence given by MA.

97. The Tribunal was satisfied that there was no background of anti union sentiment on the part of the respondent. The respondent had engaged with MA and with Unite the Union on the set up of the respondent. On 23 March 2020 MA wrote to the respondent about electing trade union representatives and about other matters concerning workers in the respondent (J104). On 20 May 2020 the respondent wrote to Unite the Union and said that once their members had elected or nominated a representative, the respondent management team would be ready to engage (J110). The Tribunal was satisfied that this correspondence demonstrated that the respondent was engaging with the union. The Tribunal also noted that the correspondence was at a time when the respondent company had just been set up and was also during the first lockdown period following the start of the coronavirus pandemic.

98. The respondent referred to the case of **Miller and others v Interserve Industrial Services Ltd** UKEAT/0244/12 as authority for the proposition that it is necessary for the Tribunal to consider the 'reason why' the decision was made. In that case the EAT upheld the Tribunal's decision that the refusal of employment was due to the conduct of the union official, and was not due to the claimants' membership of the union per se. The Tribunal was satisfied that the reason why the claimants were not offered employment was due to the scores obtained during the interview process with Staffplus, which scores were below the cut off score of 25 points.

99. The claimants' claims against the respondent, in so far as brought under Section 137 of the 1992 Act are dismissed.

Detriment related to trade union membership or activities

100. Section 146(1) of the 1992 Act provides that; (1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer…." The wording of section 146(1) states that this is a right which applies to workers. The worker must be subjected to the

detriment by his employer. There must therefore be a contract, of a kind which makes him a worker, between him and the person who subjected him to a detriment. The definition of 'worker' for the purposes of a claim under section 146 is set out in section 151(1B) of TULRCA as "an individual who works, or normally works, as mentioned in paragraphs (a) to (c) of section 296(1)"

101. However, in accordance with section 296(3) the definition in section 296(1) "has effect subject to" the definition in section 151(1B). The fact that section 296(1) is "subject to" other provisions, in this case section 151(1B) means that section 296(1) must be read with the modifications provided in section 151(1B). If the definition in section 296(1) was intended to apply in full to section 146 claims then there would have been no need for section 151(1B). The difference between the definitions in section 296(1) and section 151(1B) is that section 151(1B) notably excludes the words "seeks to work". If the words "seeks to" were intended to be contained in section 151(1B) and accordingly within the definition of a worker for the purpose of a section 146 claim, then they would be there. The fact that the definition in section 151(1B) was specifically inserted by section 31(7) of the Employment Relations Act 2004, for section 146 detriment claims indicates there was a deliberate intention to exclude those "seeking work".

102. The claimants' position was that the absence of the words "or seeks to work" in s.151(1B) does not suggest that parliament's intention was to preclude applicants from the protection afforded by s.146 given that the section specifically refers to s.296(1) which clearly does extend to applicants. The Tribunal does not accept that interpretation. Given the wording of section 151(1B) and its addition to the 1992 Act by way of subsequent legislation the Tribunal is satisfied that it was the intention of parliament to exclude applicants for work under section 146 of the 1992 Act.

103. The claimants also submitted, in the alternative, that the Tribunal should 'read down' the legislation to extend it to applicants for work such as the claimants. Reference was made to the case of **Croke v Hydro Aluminium Worcester Ltd** EAT [2007] ICR 1303 at 1314B – "…where statutory provisions are

explicitly for the purpose of providing protection from discrimination or victimisation it is appropriate to construe those provisions so far as one properly can to provide protection rather than deny it."

104. In support of their argument that the legislation should be 'read down' the claimants referred to the case of **National Union of Professional Foster Carers v Certification Officer [**2021] EWCA Civ 548, [2021] IRLR 588. The decision of the Court of Appeal in that case was that for the purpose of section 1 of the 1992 Act, the definition of 'worker' in s.296(1) extended to persons who were parties to a foster carers agreement (which governed the relationship between foster carers and the local authorities or fostering agencies which engaged them) with a fostering service provider. The claimants submitted that from the perspective of the current claimants the Court of Appeal held that Article 11 ECHR (freedom of assembly and association) was engaged and the term 'worker' in s.296(1) could be read down so as to include foster carers notwithstanding that they did not work under a contract.

105. The Tribunal did not agree that the legislation should be 'read down' in this case as asserted by the claimants. The relationship between the foster carers and the fostering service provider is not analogous to the relationship between the claimants and the respondents in this case. In this case the claimants are applicants for employment and have no current relationship with the respondent. The view of the Tribunal that there is no requirement to 'read down' the legislation in this case is strengthened by the fact that the Tribunal has noted that parliament legislated in section 151(1B) specifically to exclude the words "seeks to work" and this Tribunal is not persuaded to read beyond that wording. This view is also strengthened by the fact that the claimants do have a remedy in their capacity as applicants for employment under section 137 of the 1992 Act, albeit the requirements of that section are different from section 146 of the 1992 Act.

106. Having reached the decision that the claimants are not afforded rights under section 146 of the 1992 Act as they are not "workers" within the meaning of

that section, there is no requirement for the Tribunal to consider whether all of any of the claimants were subject to a detriment under that section.

107. The claimants' claims against the respondent, in so far as is brought under Section 146(1) of the 1992 Act are dismissed.

Blacklists Regulations

108. Did the respondent compile or use a prohibited list within the meaning of regulation 3 of the Blacklists Regulations being a list which: a. contained details of persons who were or had been members or trade unions or persons who had taken part in the activities of trade unions, and b. was compiled with a view to being used by employers for the purposes of treating people less favourably in relation to recruitment than others on grounds of trade union membership or trade union activities?

109. The Tribunal was satisfied that there was no list in existence which contained details of persons who are or had been members of trade unions or persons who are taking part or had taken part in trade union activities in breach of regulation 3 of the Employment Relations Act 1999 (Blacklists) Regulations 2010. LK had at one point asked IA for a list of union members in order that she could tell non-union members about an event being run by Unite at West Lothian College. This was shortly after the previous company API Foils Limited had gone into administration and the administrators were in the process of winding down API Foils Limited with no expectation that it would be bought over. Therefore any list provided by IA could not have been requested with a view to it being used for the purposes of discrimination in recruitment by the respondent. In any event, IA did not give LK such a list. IA said that the previous company API Foils Limited would only have known union members who paid through payroll but would be unaware of those who paid through direct debit or standing order. LK said she had no way of knowing who was a trade union member. Although some of this information may have been contained on payroll, she did not have access to this information as it was managed centrally within the previous company. The claimants said that

they had overheard a comment allegedly made by Greg Hannah of the respondent about a "getting back list". LK said that no such list existed. The claimants were not aware themselves of any list nor did they have any information about such a list. On balance the Tribunal reached the view that no such getting back list existed or any other list in breach of regulation 3. As the Tribunal is satisfied that no such list existed the claimants cannot have been refused employment for a reason related to such a list.

110. The claimants' claims against the respondent, in so far as is brought under regulation 3 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 are dismissed.

Protected disclosure

111. DW alleges that he made a protected disclosure under Section 43A of the 1996 Act and that he suffered a detriment under section 47B of the 1996 Act as a result of having done so. The protected disclosure which he says he made was when he wrote to the previous company API Foils Limited on 24 October 2019 (J131 – 132) intimating a personal injury claim sustained by him whilst working for API Foils Limited. The detriment which he alleges he suffered was the refusal of employment by the respondent.

112. Section 43A of the 1996 Act says a protected disclosure "means a qualifying disclosure (as defined by section 43B) which is made by a worker…." Section 230(3) of the 1996 Act says the definition of worker is "an individual who has entered into or works under (or, where the employment has ceased, worked under)— (a) a contract of employment, or (b) any other contract…."

113. Section 230(3) of the 1996 Act requires a contractual relationship between the individual and the entity to which work is supplied in order for the individual to be a worker. The submissions by DW's representative indicate that he was a worker of the former company API Foils Limited and that he made a disclosure to that company. However API Foils Limited are not a party to this claim. It is the Tribunal's view that in order to bring such a claim against the

respondent, DW must be a worker of the respondent. DW was not, and never has been, a worker of the respondent.

114. DW having never been employed or engaged or having carried out any work for the respondent, does not have the requisite worker status and has not therefore made a protected disclosure within the meaning of section 43A. The Tribunal is satisfied that as DW was only ever a job applicant of the respondent, and the whistleblowing legislation does not afford protection to job applicants (other than limited protection to those in the NHS) his claim that he made a protected disclosure must fail.

115. DW in submissions by his representative also refers to section 47B(1A) of the 1996 Act which says that "A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done…(a) by another worker of W's employer in the course of that other worker's employment…on the ground that W has made a protected disclosure." DW's representative argues that DB's awareness of the personal injury claim must have derived from an employee of the respondent and that this triggers protection for DW under section 47B(1A). The Tribunal does not accept this. The Tribunal was satisfied that on balance it was DW who told DB about his personal injury claim and not LK or any other worker of the respondent. The Tribunal was also satisfied that although reference to the personal injury claim was made in the spreadsheet comments at J91 this was not something which the respondent considered when deciding not to offer employment to DW. Rather it was his score of 14 which meant that he fell significantly below the cut off score of 25. This is further supported by the evidence of LK who said that she had "completely forgotten" about the personal injury claim and that the claim was being handled by the HR team down south and not by LK.

116. Section 47B(1A) refers to the right of a worker not to be subjected to any detriment. The Tribunal is satisfied that DW has not and has never been a worker of the respondent and cannot rely on section 47B(1A) to bring a protected disclosure complaint.

117. DW's representative submitted that if the sections to which he refers do not provide DW with an entitlement to protection as he is not a worker of the respondent then the Tribunal should 'read down' the legislation and interpret it to extend to the claimant in the current circumstances. Reference was made again to **Croke v Hydro Aluminium Worcester Ltd [2007] ICR 1303**. The Tribunal did not consider that it was obliged to read down the legislation to interpret in such a way that DW had protection. The Tribunal was satisfied that it was parliament's intention that job applicants such as DW did not have the protection of the whistleblowing legislation. If parliament had intended such protection it would have legislated for this. It had however not done so.

118. DW, having never been engaged by the respondent, did not, and does not, have the requisite worker status for the purposes of section 43B or 47B of the 1996 Act. As such, he is unable to rely on the relevant sections for the purposes of this claim.

119. DW's claim against the respondent, in so far as is brought under sections 43B or 47B of the 1996 Act is dismissed.

Health and safety detriment

120. DW alleges that he is entitled to the protection of section 44(1)(c) of the 1996 Act. He alleges that he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. DW alleges that he was subjected to a detriment for having done so. DW relies upon his written communication to the previous company API Foils Limited on 24 October 2019 (J131 – 132) intimating a personal injury claim sustained by him whilst working for API Foils Limited. The detriment which he alleges he suffered was the refusal of employment by the respondent.

121. Section 44 of the 1996 Act says "Health and safety cases (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that…"

122. Section 44(1)(c) of the 1996 Act requires the claimant to have been an employee of the respondent. Section 230(1) of the 1996 Act says an employee "means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment". Section 230(1) requires a contractual relationship of employment between the individual and the entity to which work is supplied. DW, having never been employed or engaged or having carried out any work for the respondent, does not have the requisite employee status under section 44 of the 1996 Act. The claimant, having never been engaged by the respondent, did not, and does not, have the requisite employee or worker status for the purposes of section 44 of the 1996 Act. As such, he is unable to rely on the relevant section for the purposes of this claim.

123. DW's representative submitted that if the sections to which he refers do not provide DW with an entitlement to protection as he is not a worker of the respondent then the Tribunal should 'read down' the legislation and interpret to extend it to the claimant in the current circumstances. Reference was made again to **Croke v Hydro Aluminium Worcester Ltd [2007] ICR 1303**. The Tribunal did not consider that it was obliged to read down the legislation to interpret in such a way that DW had protection. The Tribunal was satisfied that it was parliament's intention that job applicants such as DW did not have the protection of the whistleblowing legislation. If parliament had intended such protection it would have legislated to include such protection. It had however not done so and the Tribunal was not persuaded to interpret the legislation in such a way as to create a potential liability for the respondent where one did not exist based on the current legislation.

124. DW's claim against the respondent, in so far as is brought under section 44(1)(c) of the 1996 Act is dismissed.

Remedy

125. As none of the claimants' claims have succeeded there is no need for the Tribunal to consider remedy.

Employment Judge: Jacqueline McCluskey
Date of Judgment: 04 January 2022
Entered in register: 14 January 2022
and copied to parties

I confirm that this is my judgment in the case of Mr I Armstrong & others v API Foilmakers Limited case no:4104417/2020 & others and that I have signed the judgment by electronic signature.