EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105206/2017

Held in Glasgow on 10th and 11th April 2018 (hearing)
10 **and 22nd May 2018 (deliberations)**

Employment Judge M Whitcombe
Mr KF Watson
Mr R Taggart

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Mr J Hood	**Claimant** **Represented by:** **Mr G Bathgate** 20 **(Solicitor)**
Joseph Gallagher Limited	**First Respondent** 25 **Represented by:** **Mr F McCombie** **(Counsel)**
30 **Costain Limited**	**Second Respondent** **Represented by:** **Mr R Bradley** **(Advocate)**
35 **Vinci Construction Grands Projets UK**	**Third Respondent** **Represented by:** **Mr R Bradley** **(Advocate)**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

E.T. Z4 (WR)

The unanimous Judgment of the Tribunal is that the Claimant was neither dismissed nor subjected to any detriment on grounds of having a protected disclosure. The claims are therefore dismissed.

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REASONS

Introduction

1. By a claim form submitted to the Tribunal on 13th October 2017, the Claimant has brought the following claims:

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   a. against the First Respondent, automatically unfair dismissal for having made one or more protected disclosures contrary to section 103A of the Employment Rights Act 1996;

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   b. against the Second and Third Respondents, that he was subjected to a detriment for having made one or more protected disclosures contrary to section 47B of the Employment Rights Act 1996.

2. All of those claims are denied by the Respondents.

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3. Since the Claimant lacked two years' continuous service at the effective date of termination, he cannot bring a claim for "ordinary" unfair dismissal. It is necessary for him to establish an automatically unfair reason for dismissal in order to be able to claim unfair dismissal at all.

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4. So far as the claims against the Second and Third Respondents are concerned, the Claimant contends that he fell within the definition of "worker" in section 43K of the Employment Rights Act 1996.

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5. The claims were originally listed for a three day hearing on 9th, 10th and 11th April 2018. The first of those days was lost as a result of a case management issue. The hearing was nevertheless completed within its original allocation of time. In order to achieve that, and by consent, the hearing was converted

to a hearing of liability issues only. The representatives also agreed to make their closing submissions in writing, with a right to reply to other parties' submissions in writing, as an alternative to attending on another day to make submissions orally. We are very grateful to all of the representatives for the obvious hard work done in order to provide those submissions and to enable the hearing to be concluded on the first occasion. That has helped to avoid additional costs and delay.

Background

6. In brief summary, these claims arise from the termination of the Claimant's employment by the First Respondent on the Shieldhall Tunnel project in Glasgow. That is a large construction project for Scottish Water, in which a new sewer tunnel is being constructed from Craigton industrial estate near Govan to Queens Park. The tunnel is nearly 5 km long and we were told that it will be Scotland's biggest waste water tunnel. The contract is valued in the region of £100M.

7. The Second and Third Respondents, acting in a joint venture, were the main contractors. The First Respondent was their subcontractor for the provision of labour.

8. The alleged protected disclosures at the heart of this case are as follows:

   a. a disclosure made orally to Mark Burrows of the Second Respondent on 4th July 2017 to the effect that a health and safety risk would arise if the Claimant were to leave site Gate B in order to pick litter;

   b. a further disclosure made orally to Gary Rodgers of the First Respondent on the same day to similar effect.

Summary of Decision

9. We unanimously concluded that the claims must fail because the Claimant had failed to establish that protected disclosures were made. There are two reasons for that finding. First, we found on the balance of probabilities that the alleged disclosures were not made at all. Second, we found that even if those disclosures had been made, they would not have qualified for protection because the Claimant's belief that his disclosure tended to show that health and safety would be endangered or that there was a breach of a legal obligation was not reasonable, as is required by section 43B of the Employment Rights Act 1996.

Evidence

10. We were provided with an agreed joint file of documents running to 221 pages. We only took into account those documents to which we were referred in evidence. At our request, photographs of the site were also obtained. We found them very useful and we are very grateful to those involved in obtaining them at short notice.

11. All of the witnesses from whom we heard oral evidence gave that evidence on oath or affirmation and were cross-examined.

    a. The only witness called by the Claimant was the Claimant himself.

    b. The First Respondent called Mr Gary Rodgers, who was at the relevant times the First Respondent's site supervisor at the Shieldhall site and the most senior employee of the First Respondent on site.

    c. The First Respondent also called Claire Dale (also known as Claire Gallagher). She is the First Respondent's Managing Quantity Surveyor and has also been a director since 2015. Her responsibilities included human resources issues. She does not herself have any human resources training but took advice from an external consultant. She also had responsibility for health and safety issues.

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d. The Second Respondent called Mark Burrows. He was the Second Respondent's tunnelling works manager and has nearly 20 years of experience as a tunnelling foreman or tunnelling works manager on a number of-profile projects in the UK and elsewhere in Europe.

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e. The Second Respondent also called the following witnesses: Stephen Postlethwaite (Safety Health and Environmental manager); James Flanigan (a supervisor with Lyndon Scaffolding) and John Carlile (security guard and traffic marshal employed by H&M Security Services Ltd.

Issues to be determined

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12. As the tribunal deliberated it became clear to us that our conclusions on one or two of the many issues potentially arising in the case would be determinative. Having resolved the first two essential issues in the case it was not necessary for us to go on to address all of the other issues raised by the parties during the hearing and in their written submissions. We will not summarise those submissions in full, we will instead address particular points made by the parties in the course of expressing our reasoning.

Findings of fact

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13. We made our findings of fact on the balance of probabilities. We emphasise that our findings were made in accordance with that standard of proof, which essentially entails asking what is *most likely* to have occurred. For the purposes of our reasoning, if we find it to be more likely than not that a particular event occurred, then it is deemed to have occurred. Conversely, if we consider it more likely than not that a particular event did not occur then it is deemed not to have occurred. We are not required to be satisfied of anything "beyond reasonable doubt", as would be the case in a criminal court. All of this will be well understood by the representatives. We emphasise it

largely to explain to the Claimant how it has come about that his evidence has not been accepted on certain contentious matters. We would not want him to think that our findings amount to calling him a liar because they certainly do not. On certain points the Respondents' evidence has been preferred to the Claimant's simply because we think it is more likely to be correct for reasons which we will explain below.

14. We have already set out in the introduction some background information about the parties in this case.

15. The Claimant's employment with the First Respondent commenced on 30th May 2016. He was employed both as a tele-handler driver and also as a general operative. He frequently acted as the site van driver. Subsequently, he was also trained in the operation of the overhead crane. At weekends he also covered the stores. In March 2017 the Claimant was trained to act as a traffic marshal. The Claimant was regarded as a multi-skilled and flexible employee.

16. The Claimant reported both to Gary Rodgers (of the First Respondent) and also to Mark Burrows (of the Second Respondent). In practice, Mr Burrows decided what staff should do on site and it was Mr Rodgers' role to manage the First Respondent's employees in accordance with Mr Burrows' wishes and instructions.

17. The events leading to the Claimant's dismissal began on 4th July 2017. On that day the Claimant was acting as a traffic marshal at "Gate B", which was an exit for site traffic onto Barfillan Drive. At times when the site was closed Gate B was closed up with a substantial metal gate. At times when the site was open the metal gate at Gate B was open but a red and white barrier was in operation to check traffic.

18. A one-way system operated on site. Vehicles would enter via Gate A and would leave via Gate B. Both gates were supervised. It was the role of traffic marshals working at Gate B to raise the barrier as appropriate and to supervise the safe passage of vehicles off site and onto public roads. Barfillan Drive was a residential area and it was necessary for vehicles to cross a public footpath in order to leave site. Traffic could include a variety of vehicles. An important category were the "muck away" lorries which removed spoil from the tunnelling process and took it away for disposal at other locations. The Claimant had carried out traffic marshal duties a handful of times prior to 4th July 2017.

19. Also working at Gate B on that day was a security guard, John Carlile. The Respondents' case was that all security guards were also trained to act as traffic marshalls. The Claimant's case was that, in general, security guards were not trained also to act as traffic marshalls. However, it is not necessary for us to resolve that dispute because the Claimant agreed that at any rate Mr Carlile certainly <u>was</u> trained to act as a Traffic Marshal even if other security guards were not. If it were necessary to make a finding regarding the training of the other security guards then we would prefer the Respondents' evidence because the Claimant admitted in cross-examination that he was "not sure" about the other guards.

20. Security guards also had other duties. At Gate B, the security guard also signed visitors in and out of the site. The visitor car park was nearby. The Gate B security hut was located in between the entrance to the visitor car park and Gate B itself. Both could be seen from the hut and the hut could be entered from either direction.

21. It is common ground that at about 4.30pm Mr Burrows asked the Claimant to leave Gate B to do a litter pick around the site, and that the Claimant refused to do so. It is also common ground that at that time Mr Carlile, who was trained

as a traffic marshal, was the security guard on duty at the gate and was in the security hut. Precisely what was said next is very much in dispute.

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Claimant's version of events

22. The Claimant's case is as follows. The Claimant said to Mr Burrows that he was not happy to leave the gate because a health and safety issue would arise if he did. It was the school holiday period in a residential area, vehicles and plant would still be operating until 6pm and the Claimant thought that there would be a risk to pedestrians if he left the gate. In response Mr Burrows said that if the Claimant did not want to do the litter pick then he would have to leave the project - no one was keeping him there. The Claimant replied that he would not be "walking off the job" because he was tied into a training contract, referring to an arrangement under which the Claimant was liable to reimburse the First Respondent for the costs of his training on the overhead crane if he left voluntarily within a certain period. Mr Burrows asked the Claimant to come with him for a chat which took place outside the visitor entrance. Mr Burrows told the Claimant that he was no longer simply the site van driver and that this (i.e. working on the gate and carrying out litter picks) was part of his role from now on. If the Claimant did not do the litter pick he would have to leave. The Claimant repeated what he had said before – that he was not happy to do the litter pick because it gave rise to a health and safety risk. The Claimant also raised concerns regarding what Mr Burrows had said about his changed role, the Claimant's understanding having been that he was only covering the gate because the site was short staffed that week. The conversation ended when Mr Burrows asked for a final time whether the Claimant would do the litter pick, the Claimant said that he was not happy, so Mr Burrows said "you've made your decision" and walked away.

23. The Claimant returned to the gate but did not finish his shift. About 30 or 40 minutes later Mr Rodgers asked the Claimant for a chat. They walked away

from the gate and, on the Claimant's case, Mr Rogers said that Mark Burrows "wants you gone" and that the Claimant was effectively sacked. The Claimant was asked to give Mr Rodgers his radio and told to go home. Mr Rodgers would call the Claimant the next day. The Claimant protested that he had done nothing wrong and that he would therefore come into work. Having gone home, the Claimant's partner advised him to go to his trade union which he did the next morning.

The Respondents' version of events

24. We will begin with Mr Burrows, and the alleged disclosure to the Second Respondent.

25. Mr Burrows regards litter picking as a necessary task on construction sites. Litter is "a common enemy". It becomes a hazard for slips, trips, falls and fires as well as making a site look generally untidy. A litter pick should be done at least once a day. Mr Burrows had been underground for three or four hours during the afternoon of 4th July 2017. When he returned to the surface he noticed several people standing at Gate B. There were no vehicles at Gate B. In Mr Burrows' view the busy period for traffic was over. The busy period for traffic was between 8am and about 3.30pm. After that the "muck away" trucks stopped running and the situation was much quieter. There might only be the odd vehicle to process, for example a late delivery.

26. Mr Burrows therefore asked the Claimant whether the Claimant had taken his break. Since there was no traffic about, Mr Burrows asked the Claimant if he would do a litter pick around site. The Claimant said "no" which surprised Mr Burrows, who regarded the Claimant as a "nice enough bloke". Mr Burrows asked the Claimant to repeat himself. The Claimant said something along the lines of "this is not for me". Mr Burrows saw it as a simple safety request and something which was done daily. The Claimant appeared to him quite incensed and to feel that it was beneath him.

27. Mr Burrows did not wish to make a scene and therefore asked the Claimant to move away from the gate in order to discuss the matter. The Claimant said that he was fed up, had had enough of working for the First Respondent, and had had enough of the job. He was ready to leave. The one thing that was holding him back was the recoupment of training costs if he left. Mr Burrows asked the Claimant once again whether he would do the litter pick and the Claimant refused.

28. Mr Burrows said that he was left with no alternative but to have to report this to the Claimant's line manager. He asked the Claimant if he was happy for him to do that and the Claimant said "yes", he had had enough.

29. Mr Burrows was very clear that the Claimant did not at any time mention health and safety issues. The first mention of health and safety issues that Mr Burrows was aware of came after the claim had been submitted.

30. We now turn to Mr Rodgers, and the alleged disclosure to the First Respondent.

31. Mr Rodgers first became aware of an incident when at around 4:30 pm Mr Burrows told him that he had spoken to the Claimant, asked him to leave the gate to do a general litter pick on site and that the Claimant had refused, saying that he felt it was beneath him, he was employed as a plant operative and it was not something that he was going to do. Mr Rodgers undertook to speak to the Claimant in an effort to resolve the issue.

32. Mr Rodgers found the Claimant about 20 metres away from the gate near the telehandler which was parked beside the gantry crane. He asked the Claimant, "are you trying to get yourself sacked from the project John, all you have to do is to get away from the gate to do a bit of a litter pick?" The Claimant was calm. He shrugged and said that he did not want to do it. Mr Rodgers replied that if the Claimant was not going to do it then he would have

to be sent home. The Claimant was instructed to go home and await further contact about the incident. Mr Rogers would have to speak to head office because it was a human resources matter. The Claimant was shocked. Mr Rogers was absolutely clear that at no point did the Claimant mention that he did not wish to leave the gate because of health and safety issues or because of traffic issues.

33. We now return to the chronology.

Events after 4th July 2017

34. On 5th July 2017 Mr Burrows emailed Mr Rodgers saying that the position of van driver had been made redundant after a labour review on 7th June 2017, after which the Claimant had been offered and accepted a position as general operative. He went on to set out a short summary of his version of events regarding the litter pick request.

35. On the same date, emails exchanged between members of the First Respondent's organisation asked Mr Rodgers to call the Claimant in to tell him that if he failed to fulfil the duties requested by the Second and Third Respondent "we will have no option but to let him go".

36. Mr Rodgers emailed Claire Gallagher (as she was then known) on 6th July 2017 setting out a summary of the incident from his point of view, stating that the request to carry out a litter pick had not been unreasonable.

37. We were shown text messages passing between the Claimant and Mr Rodgers. They are not dated but were agreed to relate to the days immediately following the Claimant's suspension. The gist is that the Claimant was stating his availability for work and requesting information regarding his suspension and its implications. We return to those text messages below.

38. On 10th July 2017 the Claimant attended site accompanied by his trade union representative, although that representative was not allowed to come onto site and waited just outside. The Claimant was given a letter of the same date informing him that his employment would come to an end on 17th July 2017. It stated that the work the Claimant had been employed to do on site had finished, and that although he had been offered alternative work he had refused a reasonable request. It also stated that "the Client" had requested that he was removed from the project. The Claimant refused to sign for the letter but agrees that he received it.

39. On 12th July 2017 the Claimant emailed Claire Gallagher and others seeking to appeal his dismissal. He asserted that his dismissal was unfair because no investigation had been carried out into the circumstances of the incident on 4th July 2017 and because no disciplinary hearing had been carried out either. The Claimant did not refer even in vague terms to any protected disclosures, or to health and safety risks.

40. On 13th July 2017 the First Respondent received advice from its retained HR Consultant which completely missed the point, apparently thinking that the issue concerned a promise of site specific work and a refusal by the Claimant to move to a new site.

41. The Claimant contacted ACAS on 21st July 2017.

42. The Claimant emailed the First Respondent once again on 24th July 2017 asserting that he had been made redundant, and therefore that training costs should not have been deducted from his final payment of wages. The Claimant did not refer even in vague terms to any protected disclosures, or to health and safety risks.

43. By 1st August 2017 the First Respondent had become aware that the Claimant alleged that his employment had been terminated "due to H&S

whistleblowing". Emails exchanged internally asked whether anyone was aware of any whistleblowing. No one contacted was aware of any, including Mr Rodgers.

5 44. In an email dated 17th August 2017 the Claimant emailed senior employees of the First Respondent including Claire Gallagher alleging that he had made protected disclosures on 4th July 2017 and that his contract had been terminated as a result.

10 **Reasoning and Conclusions**

Whether the disclosure was made

15 45. We prefer the Respondents' evidence regarding the nature of the key conversations on 4th July 2017 for the reasons set out below. We have not found any single factor listed below to be determinative. We have weighed all of them in the balance before concluding that the Respondents' version of events is more likely to be correct.

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46. The Second and Third Respondents' version of events was supported by two witnesses who were not employed by any of the Respondents. Neither of them had any reason to mislead the Tribunal or to misrepresent what they had heard. We regarded them as being sufficiently independent that we could 25 give their evidence weight. In our judgment their integrity was not impugned in cross-examination and they were likely to have heard the key parts of the Claimant's first conversation with Mr Burrows.

47. Both Mr Flanigan and Mr Carlile were present at the gate when the Claimant 30 spoke to Mr Burrows but neither of them remembered hearing the Claimant say anything about health and safety. We find that it is likely (though of course by no means certain) that they would have heard and remembered references to health and safety if the Claimant had made any. It would have

been a memorable statement, particularly in the context of an obvious clash with a senior figure on site.

48. We recognise that Mr Carlile's evidence is problematic in one respect: Mr Carlile was the only witness who remembered the Claimant and Mr Burrows going into the security cabin for a further conversation. All of the other witnesses including the Claimant and Mr Burrows said that the second conversation took place at or just outside the visitor gate. While Mr Carlile is certainly isolated in that respect, we see no reason to disregard the whole of his evidence, especially where it is consistent with that of other witnesses on the critical matter. We also allow for the possibility that Mr Carlile thought that the Claimant and Mr Burrows were talking in the security cabin whereas in fact they had used that cabin as a route to reach the other gate where they had their second conversation.

49. Overall, the evidence of Mr Flanigan and Mr Carlile tends to support the Second and Third Respondents' case and corroborates the evidence of Mr Burrows.

50. We think it is probable that if the Claimant had made any disclosures about health and safety on 4th July 2017 then he would also have repeated or referred to those disclosures over the following days and weeks during his suspension and after his dismissal. He had reason to do so, if they were in his view a potential explanation for ongoing adverse treatment.

51. The Claimant was corresponding with the Respondent in various ways for other reasons but did so without repeating his health and safety complaint or putting it forward as a reason for adverse treatment. We find that those omissions are significant when the following documents and events are considered.

a. The text messages at pp.171-173 of the bundle, sent in the immediate aftermath of suspension. The Claimant does not make any allegations regarding health and safety, or the reason for his suspension.

b. The Claimant made no mention of health and safety issues or protected disclosures when attending site to collect his dismissal letter. On that occasion a trade union representative was also present, although he was not allowed onto site and waited just outside.

c. When the Claimant emailed Claire Gallagher on 12th July 2017 in order to appeal the decision to dismiss him, the email criticises procedural fairness but completely omits any reference to health and safety or protected disclosures (p.177). The email was written with trade union assistance, which increases the significance of those omissions. The Claimant states elsewhere that he had told the union the whole story.

d. The same can be said of the follow-up email sent on 13th July 2017 and another on 24th July 2017 (pp.178 and 181).

e. The allegation that a similar disclosure was made to Mr Rodgers was absent from the original claim (see p.13-14 of the bundle, paragraphs 2, 4 and 7) which identified only a disclosure to Mr Burrows.

52. This should be put in further context.

a. First, the Claimant sought trade union advice at an early stage, so if the union were told the full facts then they would surely have advised the Claimant to draw attention to the fact that he had made potentially protected disclosures, and to argue that he should not be subjected to a detriment or dismissal as a result. The union would also be likely to make the same points on the Claimant's behalf. The Claimant has indicated in one communication that the trade union *were* told of his health and safety concerns (see below).

b. The Claimant was alert to health and safety issues and to ways of reporting them. He was told of the whistleblowing policy at induction. The Claimant was a member of the health and safety committee and

had attended several meetings. That committee considered health and safety issues raised on site including those raised through a card system. The cards were “LIFE reporting cards” also known as observation cards. The Claimant was well aware that they were one of the ways of reporting health and safety concerns. The point is not whether the Claimant had time on 4th July 2017 to fill in a card, the point is that he knew that his employer encouraged the reporting of health and safety complaints and provided means through which to do so. It should therefore have been obvious to the Claimant that if he had a health and safety complaint to make he would be able to do so by using certain formal procedures. He did not, and the omission is significant.

c. Notably, the Claimant claims that he did raise serious health and safety concerns with the Health and Safety Executive on 6th July 2017 (see the email of 17th August 2017 at p.187), and that he had also raised those concerns previously with his trade union on 5th July 2017. That suggests to us that the Claimant was well able to raise health and safety complaints through official channels when he wished to do so, and that the omissions from the correspondence referred to above are therefore all the more significant.

53. For those reasons, our finding on the balance of probabilities is that there were no references at all to health and safety concerns in the Claimant’s communications with Mr Burrows and Mr Rodgers on 4th July 2017. The alleged disclosures were not made. The claims fail for that reason.

Whether the alleged disclosures were qualifying disclosures

54. Although it is strictly unnecessary to consider this issue given that we have already found that the alleged disclosures simply were not made, we would have found that the claims failed for an additional reason even if the

disclosures had been made as alleged. The alleged disclosures were not qualifying disclosures.

55. The Claimant relied on section 43B(1)(b) and (d) of the Employment Rights Act 1996, arguing that his disclosures *in his reasonable belief* tended to show that health and safety was being endangered and/or that the Respondents were in breach of a legal obligation to which they were subject. The reasonableness of that belief is to be assessed objectively, taking into account the personal circumstances of the person making the disclosure (***Korashi v Abertawe Bro Morgannwg University Local Health Board*** [2012] IRLR 4. The question is whether it was reasonable for *the Claimant* to believe the relevant matters. We firmly reject the Claimant's submission that "the question is not to be approached from an objective viewpoint".

56. Our finding is that the Claimant could not have had a *reasonable* belief in the relevant matters for the following reasons.

   a. The Claimant was working at the gate with a trained traffic marshal because the security guard was also trained to act as one. The gate would not have been left without a trained traffic marshal if the Claimant left to carry out a litter pick as requested.

   b. We accept the Respondents' evidence that the request was made at a quiet time of day when most traffic had ceased. While there might I have been some vehicles still to leave site after 4.30pm, the volume of traffic was much reduced. One traffic marshal could easily have coped with the likely volume of traffic and there was no need for two.

   c. Even if there had been a significant volume of traffic, or even if the security guard were to be occupied with his other responsibilities at any particular moment, the consequence would simply be the build-up of a queue at the barrier. Vehicles would not have left site unsupervised. We do not accept Claimant's the suggestion that drivers

would raise the barrier themselves and drive off rather than wait for the security guard to raise it.

d. We reject the Claimant's suggestion that the Respondent's own policy required that there should be two traffic marshals at the gate at all times. One marshal was sufficient to meet the requirements of the "Tunnelling Muck Away Procedure" at pp.86-89 of the bundle. Where the plural "marshals" is used that is because the plural "gates" has been used, or because the procedure is talking in general terms. See also p.93 which refers to "a competent vehicle banksman or traffic marshall". The security guard fulfilled that role.

e. Although a minor point, we note that Mr Rodgers found the Claimant some distance from the gate and near the telehandler when he spoke to him on 4th July 2017. That does not suggest to us that the Claimant had a reasonable belief that health and safety might be endangered if he left the gate. The Claimant's explanation that he could see the gate from there applies at least as strongly to a security guard and trained traffic marshal stationed in or near the security hut.

57. On that basis we conclude that the Claimant could not have had a reasonable belief that his disclosure tended to show breach of a legal obligation or a health and safety risk. For that reason, the alleged disclosures could not be "qualifying disclosures" for the purposes of section 43B of the Employment Rights Act 1996 or "protected disclosures" for the purposes of section 43A of the Employment Rights Act 1996. The claims must fail for that additional reason too.

Employment Judge: Mark Whitcombe
Date of Judgment: 31 May 2018
Entered in register: 13 June 2018
and copied to parties