EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4107105/2020, 4107073/2020 & 4107070/2020

Held by CVP on 3, 4, 5 and 6, 18 and 19 August, 15 October and 10 December 2021 and Members' Meeting on 17 January 2022

Employment Judge M Sutherland
Tribunal Member M Watt
Tribunal Member D Frew

Neil Bachi	**First Claimant** **Represent by Ms J Callan, Counsel** **(instructed by Ms R Kocher, Solicitor)**
Anthony Wood	**Second Claimant** **Represent by Ms J Callan, Counsel** **(instructed by Ms R Kocher, Solicitor)**
Terry Green	**Third Claimant** **Represent by Ms J Callan, Counsel** **(instructed by Ms R Kocher, Solicitor)**
Cryogenesis (UK) Limited	**Respondent** **Represented by Mr P Holmes,** **HR Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that –

1. The First Claimant's complaints of automatically unfair dismissal by reason of protected disclosures or health and safety activities do not succeed and are dismissed.

2. The Second Claimant's complaints of automatically unfair dismissal by reason of protected disclosures or health and safety activities do not succeed and are dismissed.
3. The Third Claimant's complaints of automatically unfair dismissal by reason of protected disclosures or health and safety activities do not succeed and are dismissed.

REASONS

Introduction

1. The First, Second and Third Claimants each made complaints of automatically unfair dismissal by reason of protected disclosure, health and safety activities or trade union activities (under Sections 100 and 103A of the Employment Rights Act 1996 and Sections 152 and 153 of the Trade Union and Labour Relations (Consolidation) Act 1992). The complaints were denied by the Respondent.

2. A final hearing was listed to determine the complaints. Following discussion at the start of the hearing it was agreed that the hearing would only hear issues pertaining to liability with a hearing on remedy listed subsequently if required.

3. At the start of the hearing the Claimants withdrew their complaint of automatically unfair dismissal by reason of trade union activities (under Sections 152 and 153 of the Trade Union and Labour Relations (Consolidation) Act 1992).

4. The Claimants asserted the following as protected disclosures in summary: that they made verbal complaints on an almost daily basis to the Respondent's Site Manager and Site Supervisor from around October 2019 until March 2020 that the cabins provided for their rest breaks ('the welfare cabins') at times: lacked heating (which posed a risk to health during cold temperatures); lacked electricity (which meant they were unable to refrigerate food or to make hot food and drinks); lacked lighting (which meant they had to use phone torches); and, at all times, lacked running water (which meant they were unable to maintain a clean environment during the COVID outbreak and which meant they required to carry water butts some distance in icy conditions for drinking water).

5. The Claimants asserted that these verbal complaints about the lack of heating, lightening, electricity and running water in the welfare cabins brought to the Respondent's attention circumstances harmful to health and safety.

6. The Claimants asserted that they left their place of work in circumstances of danger which were serious and imminent because of concerns about the transmission of COVID.

7. The Claimants asserted that the sole or principal reason for their dismissal was that they made those complaints and/or left their place of work in those circusmtances.

8. It was accepted following discussion that despite reference in the pleadings to toilet facilities, the Claimants were not asserting a protected disclosure regarding any complaints made about the toilet facilities given the lack of specification, nor were they asserting that any issues with the toilet facilities amounted to circumstances of danger.

9. The Claimants' prior application to include various detriments including that of dismissal was refused by Judgment of 28 July 2021. Following discussion the Claimants confirmed that they were not making a complaint of detriment under Section 47B (and they were not asserting that their dismissal constituted a detriment).

10. The Claimants gave evidence on their own behalf. Dominic Prichard (Trade Union Official) and Simon Bluer (ex-Site Manager) also gave evidence on behalf of the Claimants. Robert Mesure (Commercial Director) and Thomas Oliver (Solicitor) gave evidence on behalf of the Respondent. Evidence in chief was given by recourse to witness statements.

11. A joint bundle of documents was agreed and lodged.

12. Both parties made written and oral submissions.

13. During the course of the final hearing an application for strike out of the Response was made. The Respondent was represented by Bruce Henry, Counsel in

respect of that application. Following consideration of written and oral submissions the application was refused with detailed oral reasons given.

14. The following initials are used in this judgment by way of abbreviation –

Initials	**Name**	**Title**
AW, C2	Anthony Wood	Thermal Insulation Engineer (Second Claimant)
DR, DBL	Donald Ross	Manager, Doosan Babcock Limited ('DBL')
GP, CD	Guy Purser	Compliance Director, Respondent
JM, SS	James Macadie	Senior Site Supervisor, Respondent
NB, C1	Neil Bachi	Thermal Insulation Engineer (First Claimant)
RM, CD	Rob Mesure	Commercial Director, Respondent
SB, SM	Simon Bluer	Site Manager, Respondent
SO, DBL	Steven Oleski	Site Manager, DBL
SM	Stephen Mesure	Managing Director, Respondent
TO, GLS	Thomas Oliver	Solicitor, Glanvilles Legal Services
TG, C2	Terrance Green	Thermal Insulation Engineer (Third Claimant)

List of Issues

15. The issues to be determined were as follows:

Protected disclosure dismissal

Section 43B Employment Rights Act 1996

a. Did the Claimant make a disclosure of information to the Respondent?
b. Did the Claimant reasonably believe the disclosure was in the public interest?
c. Did the Claimant reasonably believe the disclosure tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject?
d. Did the Claimant reasonably believe the disclosure tended to show that the health or safety of any individual has been, is being or is likely to be endangered?

Section 103A ERA 1996

e. Was the sole reason or principal reason for dismissal of the Claimant that he had made a protected disclosure?

Health and safety dismissal

Section 100 Employment Rights Act 1996

f. Was there a health and safety at work representative or a safety committee at the place where the Claimant worked? Did the Claimant bring to the Respondent's attention, by reasonable means, circusmtances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety? Was the sole or principal reason for his dismissal that he did so? (Section 100(c))
g. Were there circumstances of danger which the Claimant reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert? Did the Claimant leave (or propose to leave) his place of work in those circumstances? Or did he refuse to return to his place of work while the danger persisted? Was the sole or principal reason for his dismissal that he did so? (Section 100(d))

Findings in fact

16. The Tribunal makes the following findings in fact:

17. The Claimants were employed by the Respondent to work on a boiler repair project at ExxonMobil's Fyfe Ethylene Plant at Mossmorran, Scotland ('the

Mossmorran project'). The main contractors on the project were Doosan Babcock Limited ('DBL'). The site manager was DBL was Steve Oleisky ('SO, DBL'). Around September 2019 Respondent was sub-contracted by DBL to supply labour for the project.

18. The Mossmorran Project was a new area of work for the Respondent. The Respondent enlisted the services of Simon Bluer (SB, SM) as an independent contractor to recruit a project team of staff to undertake the project work and to then supervise the Mossmorran project. Recruitment of the project team increased the size of Respondent's undertaking from around 12 employees to around 47 employees. The Respondent did not have a dedicated HR department and instead outsourced its HR work.

19. The project team recruited by SB, SM included the Claimants (NB, C1, AW, C2 and TG, C3). TG, C3 was employed by the Respondent from 16 September 2019 until 26 June 2020 as a Thermal Insulation Engineer ('lagger'). AW, C2 was employed by the Respondent from 16 September 2019 until 26 June 2020 as a Thermal Insulation Engineer ('lagger'). NB, C1 was employed by the Respondent from 16 October 2019 until 26 June 2020 as a TIE although he worked mainly as a 'pinner' (securing pins for the lagging work).

20. The project team (including the Claimants) who worked on the Mossmorran project undertook physically demanding, dirty and sometimes damp work over long hours. The project team reported to and was managed by the Respondent's site management team (JM, SS and SB, SM both of whom were independent contractors and were based on site). The Respondent's site management team reported to the Respondent's senior management team (which included RM (Commercial Director), GP (Compliance Director) and SM (Managing Director) (who were based off site).

21. DBL provided the Respondent's project team (including the Claimants) with 'welfare cabins' on the Mossmorran site in which to have their rest breaks. The welfare cabins did not have running water and the project team were unable to wash themselves or their dishes in the sinks. The project team had to carry water butts some distance in icy conditions to provide access to drinking water. The

electricity in the welfare cabins depended upon generators which regularly broke down and sometimes for lengthy periods (including overnight). When the generators broke down this affected the heating, lighting and cooking facilities making the cabins cold and dark particularly in winter and rendered the project team unable to have hot drinks or hot food and unable to dry their damp clothes.

22. The project team (including the Claimants) regularly complained at health and safety team meetings about the issue with the generator causing a lack of electricity, heating and lighting, etc and there being no running water. The project team (including Claimants) also regularly complained to the Respondent's site management (SB, SM and JM, SS) about the issues with the generator and the water and the health and safety risk this posed. When the Claimants complained to the Respondent's site management team they were complaining on behalf of project team. The Claimants also complained to SO and DR, both of DBL, directly about these issues. The complaints were made verbally (and not in writing) and the complaints made prior to 14 February 2020 were not passed on to the Respondent's senior management team.

February 2020

23. On 14 February 2020 the Respondent project team arrived on site to find once again that the generator that supplied electricity to a welfare cabin was not working. The generator had been off for a number of hours and the welfare cabin was particularly cold and dark given that it was the middle of winter and the weather was bad. These circumstances brought matters to a head because they had regularly complained to the Respondent site management team and nothing had been done. The Claimants had also complained to DBL site management and still nothing was done. They felt they had no choice but to draw the matter to the attention of ExxonMobil. The Claimants instigated a meeting with the project team to discuss the issue. The Respondent's project team collectively agreed to walked off the Mossmorran site in protest. Other subcontractor employees joined the protest in sympathy. The walkout had not been properly balloted and did not have union support. The protest amounted to unofficial wildcat industrial action.

24. The union asked the project team to return to site. The subcontractor employees (including the Respondent project team) tried to return to site on 15 February 2020 but were unable to do so because their passes had been revoked. The Respondent senior management team were made aware of the protest. Discussions took place between ExxonMobil, DBL (as main contractor), the sub-contractors (including the Respondent) and the union and other employee representatives. DBL undertook to rectify the issue with the welfare cabins. In light of the outcome of those discussions, the subcontractor employees (including the Respondent project team) returned to work on site on 17 February 2020. The protest resulted in a substantial financial cost to the Respondent.

25. Despite the undertakings from DBL, there continued to be regular problems with the welfare cabin generators in the period after the protest on 14 February 2020 and before the shutdown of the site on 21 March 2021. The Claimants continued to complain about to site management about these problems, but the project team (including the Claimants) did not walk off site again in protest or otherwise in relation to these problems. The Respondent senior management team were aware of some these complaints.

26. The Respondent elected to pay their project team during the shutdown but another sub-contractor refused to do so. The Respondent project team (including the Claimants) waked out on 19 February 2020 in sympathy for other subcontractor employees. Further discussions took place between ExxonMobil, DBL, and the sub-contractors, resulting in agreement that wages would be paid for the period of the shut down. The Respondent project team and the other sub-contractor employees returned to work on site on 21 February 2020.

27. On 25 February 2020 DBL advised the Respondent that the Mossmorran Project was to end on 5 March 2020. RM, CD had inferred from the timing of that decision that Exxonmobil had taken issue with the walkout which affected DBL's contract and who in turn had terminated the Respondent sub-contract. In light of that loss of work, on 26 February 2020 the Respondent issued notices of termination to the Mossmorran Project team (including the Claimants).

28. Around end February 2020 SB, SS heard from other colleagues that DBL wanted to know who was responsible for the walkout. Around this time SB, SS told the Claimants that DBL believed that they had orchestrated the walkout and were considered to be trouble makers.

March 2020

29. Following negotiations between ExxonMobil and DBL, issues with the main contract were resolved and the Respondent in turn secured 4 more weeks of Mossmorran Project work from DBL. In light of that work the notices of termination issued to the project team (including the Claimants) were withdrawn on 17 March 2020.

30. On 19 March 2020 the Respondent was advised by DBL of the need to reduce the number of Pinners on the Mossmorran project. The Respondent selected a number of pinners for redundancy on the basis of last in, first out ('LIFO'). NB, C1 who worked as a pinner, and was regarded as such by the Respondent, was accordingly not selected for redundancy. Employers who are a party to NAECI (a national collective agreement between construction industry employers and unions) use length of service as a determining factor when selection scores are otherwise equal. The Respondent had not worked in the construction industry before and was not a party to NAECI. However the Respondent senior management team had anticipated that LIFO would apply. The project team (including the Claimants) believed that the Respondent was a party to NAECI, because they were working on a NAECI site, and they also expected that LIFO would apply.

31. As a result of the COVID-19 pandemic ExxonMobil closed the Mossmorran site on 21 March 2020. As a consequence the Respondent project team (including the Claimants) were put on furlough until 20 April 2020.

April 2020

32. On 15 April 2020 DBL contractors requested an initial return to site for a limited Respondent project team (including 2 laggers and 2 pinners) to work on the Mossmorran Project. DBL as main contractors determined which roles returned to site and on what basis. JM, SS proposed an initial team on behalf of the Respondent based upon length of service (with the longest serving being the first to return to site). The initial team proposed included AW, C2 and TG, C3 as laggers and others as pinners (but not NB, C1 who had shorter service). In the email JM noted "Spoke with Steve O [DBL] and he is saying as a customer he does not want the spoken few but bring back local lads and as things progress we will wait and see". RM, CD of the Respondent had spoken with SO and DR of DBL who had said that in view of government guidelines on restricted travel during the COVID 19 pandemic they were to bring back local staff first in order to minimise travel to site.

33. SO, DBL responded to the initial team proposed asking for AW, C2 and TG, C3 (who are based in Liverpool) to be replaced by two other laggers (who are based in Glasgow). In light of their discussion with DBL, the Respondent agreed and the initial team was chosen based upon the role required and travel time to site. The Respondent explained this to staff (including the Claimants). The 2 laggers who returned to site were based in Glasgow (which is substantially closer to site than Liverpool where AW, C2 and TG, C3 were based). The 2 pinners who returned to site were based in Doncaster (which is substantially closer to site than Barry, Wales where NB, C1 was based).

34. The remainder of the project team (including the Claimants) did not return to site and instead remained on furlough.

35. In late April 2020 DBL contractors permitted a return to site on 4 May 2020 for additional Respondent staff (including 5 laggers and 1 pinner) to work on the Mossmorran Project. On 29 April 2020, RM, CD proposed on behalf of the Respondent an additional team based upon length of service. The proposed team included the Claimants (AW, C2 and TG, C3 as laggers and NB, C1 as pinner). RM noted in his email that they had identified key roles required "as well

as considering both local personnel and our longest serving team members when selecting this crew".

36. DBL again advised that they should bring back local staff first in order to minimise travel time to site. The Respondent agreed and the additional team comprised local staff (which did not include the Claimants). The 7 laggers who returned to site were based in Glasgow (which is substantially closer than Liverpool where AW, C2 and TG, C3 were based). Some staff who were based near Liverpool did return to site but these staff performed different roles to that of the Claimants and were the closest to site for those roles. No pinners returned to site. The remainder of the project team (including the Claimants) did not return to site and instead remained on furlough.

37. In late April SB, SM learned that the Claimants were not being returned to site. SB, SM regarded the Claimants and others as his crew ("they travel 100s of miles on my say so"). He had made promises about their return to site which were being undermined. SB, SM advised RM, CD that the Respondent should be using length of service and not travel time for deciding who to return to site first and instead the three Claimants were being singled out by DBL because they believed that they had orchestrated the walkout and DBL considered them to be trouble makers. (There was no evidence that this issue had previously been raised with RM, CD by either DBL or anyone else.) As part of that meeting there was also discussion regarding a dispute between SB, SM and the Respondent regarding monies owed to him.

38. On 30 April 2020 SB sent 4 workers home due to being soaked by a steam leak.

<u>May 2020</u>

39. On 1 May 2020 SB, SM left site saying he was not returning. SB, SM received a text message from RM, CD stating "understand things have gotten a little outta today shape today and you're pissed off. None of this sits comfortable with me either but we are where we are and we gotta focus on finding a solution…we got 3 guys not welcome back on site but we can't tell them that". RM, CD tried to

persuade SB, SM to return to site. He asked SB, SM if a settlement agreement with the Claimants would resolve matters.

40. On 15 May 2020 the Respondent confirmed that they would not require a return of the full project team because the site accommodation was its maximum in light of COVID 19 guidelines. DBL confirmed to the Respondent that they were happy with the project team working on site and that they did not wish to change to any project team members still on furlough. Around that time a redundancy matrix was drawn up which showed that staff who were already working on site were to be retained because the client (DBL) was happy with that team and because the client did not wish to transfer any existing workers for those on furlough.

41. On 26 May 2020 the Respondent advised 11 members of the project team who had not returned to site that they were at risk of redundancy should alternative work not be found. This included the Claimants. These staff were invited to redundancy consultation meetings with GP, CD which were held in June 2020. They were advised of their right to be accompanied.

42. At his redundancy consultation on 19 June 2020 AW, 2C took issue with use of geography rather than length of service as a selection criteria for return to site. He had expected them to use LIFO ('last in, first out'). He further stated that DBL required the Respondent to get rid of them because they were troublemakers on the job and that they had been blacklisted by DBL. He considered that they were key workers and the Respondent could have justified their retention. GP, CD advised that this was not the case and that they had been instructed to bring back local lads first.

43. At his redundancy consultation on 19 June 2020 TG, C3 advised that they had been blacklisted because of the walkout and he believed this because in a redundancy situation they should have used LIFO (last in, first out). He said it wasn't fair because he was first on the job. He didn't believe geography had been used as a criteria for return to site because there were people from England on site. He considered that they could have travelled to site by car and not public transport thereby limiting any risk. He didn't think geography made any difference. He considered that they had been blacklisted because of the walkout.

GP, CD explained that the situation in February was resolved and he'd been permitted back on site.

44. At this redundancy consultation on 19 June 2020 NB, C1 advised that he has been victimised because DBL don't want him back on site because he speaks up in meetings and that DBL don't want AW, C2 and TG, C3 back on site because DBL believe they caused the walkout in February. He stated the Respondent needs to stand up to DBL and that the Respondent shouldn't have allowed staff back who had quit the job. He considered it unfair that only staff on furlough were being considered for redundancy simply because DBL don't want to change the project team. He considered that the matrix was not robust and transparent and that they should be adopting the NAECI approach. He consider that had they used a proper matrix system he would have been retained. He considered it didn't make sense to consider geography for return to site when all of these workers would also be staying away from home - making the decision who to return based on geography didn't make sense.

45. The decision to dismiss was taken by the Respondent Senior Management Team (mainly RM, CD in discussion with SM, MD).

46. On 26 June 2020 the Respondent advised the project team who were at risk of redundancy (including the Claimants) that their employment was being terminated due to redundancy effective 31 July 2020. They received a payment in lieu of notice, accrued holiday pay and redundancy pay. They were advised of a right of appeal. Five of the redundant employees (including the Claimants) lodged appeals.

47. On 29 June 2020 AW, C2 submitted an appeal against dismissal on the ground that he was being unfairly selected because of his activity with the union. On 29 June 2020 TG, C3 submitted an appeal against dismissal on the ground that he has been singled out and they had not applied skilled based selection criteria across the entire project team. On 29 June 2020 NB, C1 submitted an appeal against dismissal on the ground that the selection criteria should have included qualifications and experience.

48. The project staff who submitted appeals were invited to appeal hearings on 28 July 2020 before TO, GLS, a solicitor. They were advised of their right to be accompanied. As part of their appeal the Claimants submitted a witness statement prepared by SB, SM. In he it stated he was advised by JM, SS that DBL wanted to know who was responsible for the walkout.

49. TO, GLS, who is a solicitor in private practice, was appointed to conduct the appeal hearings on 28 July 2020. TO, GLS understood from the grievance hearings that the Claimants were asserting that they had been made redundant as a result of union activities. TO, GLS then took steps to investigate the issues raised. On 13 August 2020 TO, GLS advised the Claimants that their appeals had not been upheld. TG, GLS concluded that the Claimants had not been made redundant as a result of union activities – the changes made by DBL as to who was to be brought back to site were based upon geographical location having regard to the implications of travelling during the COVID-19 pandemic. He noted that whilst SB, SM's statement was taken into account it had been made by him as a potentially disgruntled ex-contractor (their relationship having become fractious for separate issues).

Observations on the evidence

50. 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 did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

51. Much of the evidence was not in dispute and the witnesses on the whole came across as generally credible and reliable in their testimony which was on the whole fair and measured, and consistent with the documentary evidence.

52. As to the state of the welfare cabins, AW, C2 asserted in evidence that he was not able to have a drink of water in the cabins but also gave evidence that he had to carry water butts to the cabins. It is considered more likely than not that AW, C2 was able to have a drink of water but this depended upon carrying water butts for some distance in sometimes in icy conditions. AW, C2 gave evidence in chief that the walk to get the water butts took 20 minutes but in re-examination

gave evidence that the walk took 10 minutes. It was understood that the duration of the walk depended upon the conditions.

53. SB, SM asserted in evidence that he believed there was an increase in sick leave due to the state of the welfare cabins. This was not supported by the records provided by the Respondent in respect of the period from January to March 2020. Further, there was no evidence that any sick leave was caused by the state of the welfare cabins.

54. On 30 January 2020 the World Health Organisation declared a public health emergency of international concern regarding COVID-19. On 31 January 2020 UK authorities announced the first two cases of COVID in UK associated with recent travel from China of which there was widespread media reporting. On 3 February 2020 the UK Department of Health launch a coronavirus public information campaign. On 28 February 2020 UK authorities announced the first transmission of COVID-19 within the UK. On 5 March 2020 UK authorities announced the first death in the UK from COVID-19. NB, C1 referenced in evidence the news pieces regarding the singing of Happy Birthday but those news pieces arose in March 2020. NB, C1 referenced 40,000 coronavirus cases in the UK but by 14 February 2020 (the date of the walkout) there were understood to be only 9 cases of coronavirus in the UK all from transmission abroad. In these circusmtances it is considered highly unlikely that the Claimants were at risk of catching COVID-19 from a lack of running water in a cabin in Mossmorran, Fife in mid February 2020. It is also considered highly unlikely in these circumstances that the Claimants were fearful of such a risk (and there was no evidence that they had complained about such a risk at any time).

55. The Claimants accepted in evidence that the purpose of the walkout in February 2020 had been to protest and to demand a resolution of their complaints about which nothing had been done.

56. As to knowledge of the complaints, the Claimants did not make their complaints to the Respondent's Senior Management Team and there was no evidence that their complaints had been passed to the Respondent's Senior Management Team prior to the walkout on 15 February 2020. It was considered likely that the

Senior Management Team, who were rarely on site, were not aware of the complaints prior to the walkout. They were however aware of the issue after the walkout.

57. The issue of whether or not there was a health and safety representative or health and safety committee was not addressed in parties' pleadings or in their witness statements. We heard evidence that there was likely to be a health and safety representative or committee on site but we did not hear evidence that they were appointed to represent to the Respondent team. In any event this issue was not put to the Claimants. In the circumstances it was considered more likely that there was no such health and safety representative or committee of the Respondent team. Furthermore there was little or no evidence that the Claimants were aware of such a representative or committee.

58. As to reasons for selection for redundancy the Claimants sought to draw inference from JM, SS's email of 15 April 2020 to SO, DBL. The Claimants and SB, SM asserted in evidence that JM, SS had stated the following in his email of 15 April 2020 to SO, DBL: "Aton Wood lagger days replace with Steven Martin; Terry Green lagger days replace with Kyle Cameron". This assertion did not appear to be correct having regard to the entirety of the email chain referred to in evidence. JM, SS, who was an independent contractor, was not called to give evidence by either party. It appeared likely that JM, SS had stated in his email "Aton Wood lagger days; Terry Green lagger days" and then SO, DBL in his reply of the same day had stated "Please amend with the following names and re submit please." To this end SO, DBL had amended JM, SS's email in the email chain by inserting the following words which he had also highlighted in red: "Aton Wood lagger days replace with Steven Martin; Terry Green lagger days replace with Kyle Cameron". Accordingly JM, SS had not referred to the replacement of AW, C2 and TG, C3 in is email of 15 April 2020.

59. In JM, SS's email of 15 April 2020 he had also stated "Spoken with Steve O and he is saying as a customer he does not want the spoken few but bring back local lads and as things progress we will wait and see." SB, SM and the Claimants asserted their belief that these words referred to AW, C2 and TG, C3 because

JM, SS had referred to their replacement in that email. Given that this was not in fact the case it could not reasonably be inferred that those words referred to AW, C2 and TG, C3. In the absence of evidence from JM, SS, it remained unclear as to who were the spoken few given that there were other team members who were not on that list.

60. SB, SM asserted that he believed that the real reason for the Claimants' dismissal was that DBL had required their dismissal because they had organised the walkout. He inferred this because: in February 2020 he was told, by two other Respondent employees, that DBL wanted to know who was responsible for the walkout; because the Respondent had been required by DBL to change from the usual criterion of length of service to geographical location; because other project team members based in Liverpool had been returned to site; and because JM, SS's email of 15 April referred to not wanting the spoken few. In the circumstances it was not apparent that there was a reasonable basis for his belief. The evidence regarding DBL's intentions was limited and third hand; the use of geographical location to restrict travel was consistent with government guidance including for key workers; other project team members based in Liverpool who had returned to site performed different roles; and his interpretation of JM, SS's email was based upon a misunderstanding.

61. As to the reason for dismissal the Claimant's sought to rely upon the following text message from RM, CD to SB, SM. On 1 May 2020 SB, SM received a text message from RM, CD stating "understand things have gotten a little outta today shape today and you're pissed off. None of this sits comfortable with me either but we are where we are and we gotta focus on finding a solution…we got 3 guys not welcome back on site but we can't tell them that". In that text RM was acknowledging what SB had just told him (rather than informing SB of it). RM, CD had no other evidence that that DBL were singling the Claimants out as trouble makers other than what SB had just told him. His priority was persuading SB, SS to return to site, hence his proposed solution.

62. The Respondent brought back George Duckworth a former employee to work as a fabricator in September 2020 which was after the Claimant's redundancy

dismissal. He was not local but was based in Liverpool. The Respondent also brought back Neil Matthews to work as a mate/ labourer in or about September 2020. The Respondent could have recruited a local fabricator and mate but instead chose to bring back ex-employees that they knew rather than engage in a recruitment exercise for a local employee.

63. As to the reason for dismissal, RM, CD stated in evidence that the reason for the Claimant's dismissal was because: they were informed by DBL that no more people would be required to return to site; the Claimant's hadn't returned to site because they weren't the closest for their role; DBL didn't want to swap out any of the staff who had already returned; the furlough scheme was being wound down; and there was no alternative work available.

64. AW, C2 accepted in evidence that the Respondent made him redundant because DBL (a third party) was refusing to allow him to return to site. NB, C1 stated in evidence that DBL didn't want him on site because he was too vocal at meetings and that the Respondent should have stood up to DBL. In re-examination NB, C1 stated that DBL's decisions were to do with union activity rather than where he lived. When suggested that the Respondent had no choice about who to return to site, TG, C3 stated that the Respondent should have stood up to DBL but they never did.

The law

Protected disclosure dismissal

65. Under Section 43A Employment Rights Act 1996 ('ERA') a protected disclosure is a qualifying disclosure made by a worker to his employer (Section 43C) or to a prescribed person (Section 43F). The burden of proving a protected disclosure rests upon the Claimant.

66. Under Section 43B ERA 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 relevant wrongdoing including "(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject" and "(d) that the health or safety of any individual has been, is being or is likely to be endangered."

Disclosure of information

67. The disclosure must be an effective communication of information but does not require to be in writing. The disclosure must convey information or facts, and not merely amount to a statement of position or an allegation *(Cavendish Munro Professional Risks Management Ltd v Geduld 2010 IRLR 38, EAT)*. However an allegation may contain sufficient information depending upon the circumstances *(Kilraine v Wandsworth London Borough Council [2018] ICR 1850, Court of Appeal).*

Reasonable belief

68. The worker must genuinely believe that the disclosure tended to show relevant wrongdoing and was in the public interest. This does not have to be their predominant motivation for making the disclosure *(Chesterton Global Ltd v Nurmohamed [2018] ICR 731, Court of Appeal*). Their genuine belief must be based upon reasonable grounds. This depends upon the facts reasonably understood by the worker at the time.

Relevant wrongdoing – (b) breach of a legal obligation

69. A qualifying disclosure arises where there is disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

70. There must be sufficient information for the recipient of the disclosure to understand broadly what legal obligation would be breached (*Arjomand-Sissan v East Sussex Healthcare NHS Trust UKEAT/0122/17, EAT)*.

71. It is not necessary for the disclosure to explicitly reference the category of wrongdoing relied upon. However the information contained in the disclosure may be evidentially relevant to whether the worker held the reasonable belief (*Twist DX Ltd and ors v Armes and anor EAT 0030/20, EAT*).

Relevant wrongdoing – (d) endangering health or safety

72. A qualifying disclosure arises where there is disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered.

73. Unlike sub-section (b), sub-section (d) does not necessarily entail breach of a legal obligation.

In the public interest

74. 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 relevant wrongdoing.

75. The worked must genuinely believe that disclosure is in the public interest. That belief must be based upon reasonable grounds which may be easier to satisfy where the wrongdoing amounts to a criminal offence or an issue of health and safety. Where the worker has a personal interest in the relevant wrongdoing, it may be relevant consider the number of other workers affected, the nature and importance of the interest, and the identity of the wrongdoer (*Chesterton*).

Automatically unfair dismissal

76. Under section 103A ERA an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

77. A reason for the dismissal of an employee is a set of facts known to the employer, or beliefs held, which cause the employer to dismiss (*Abernethy v Mott Hay and Anderson [1974] ICR 323*, Court of Appeal).

78. Where a decision maker is manipulated by someone more senior within the employer's hierarchy of responsibility the reason for their manipulation should be attributed to the decision maker (*Royal Mail Group Ltd v Jhuti [2020] ICR 731, Supreme Court*).

79. The burden of proving the reason or principal reason is upon on the employer. Where the claimant lacks the qualifying period of employment the Claimant must produce some evidence that the reason for the dismissal was the protected disclosure (*Maund v Penwith District Council [1984] IRLR 24*, Court of Appeal)

80. The reason for dismissal (or detriment) may be the means or manner of disclosure rather than the act of disclosure itself but such a distinction must be scrutinised carefully given the risk of abuse (*Shinwari v Vue Entertainment UKEAT/0394/14, EAT*).

Health and safety dismissal

81. Under section 100 ERA an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –

Drawing attention to harmful circumstances

Section 100 (c): being an employee at a place where there was neither a representative of workers on matters of health and safety at work nor a safety committee, etc, the employee brought to the employer's attention, by reasonable means, circusmtances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

Leaving in circumstances of serious and imminent danger

Section 100 (d): in circumstances of danger which the employee reasonably believed to be serious and imminent, and which he could not reasonably have been expected to avert, the employee left (or proposed to leave) his place of work or (while the danger persisted) he refused to return to his place of work or any dangerous part thereof.

A health and safety at work representative or a safety committee

71. The health and safety at work representative must be formally appointed or acknowledged as such by the employer.

Reasonable grounds for belief

72. The fact that circumstances are not unlawful under health and safety regulations does not necessarily mean the employee's belief that it is harmful is unreasonable *(Joao v Jurys Hotel Management UK Ltd UKEAT/0210/11*).

Imminent and serious danger

73. Imminent and serious danger suggests a proximate and material risk which may result in death or serious personal injury. The danger must not be one which the employee could reasonably have taken steps to prevent or avoid.

Drawing attention by reasonable means

74. Taking unlawful industrial action does not constitute either "bringing to attention" or "reasonable means" for the purposes of sub-section (c) unless the conditions of sub-section (d) are met (*Balfour Kilpatrick Ltd v Acheson and ors 2003 IRLR 683, EAT)*. Where there are circumstances of imminent and serious danger the employee may communicate these circumstances by any appropriate means including staging a walkout which is unlawful for want of balloting, etc.

Reason for dismissal

75. The burden of proving the reason or principal reason is upon on the employer. Where the claimant lacks the qualifying period of employment the Claimant must produce some evidence that the reason for the dismissal was the health and safety activities (*Maund v Penwith District Council [1984] IRLR 24*, Court of Appeal)

76. Whilst it is possible for there to be a distinction made between health and safety activities and the manner in which those activities are undertaken, the scope of protection afforded is broad given the importance of health and safety at work (*Sinclair v Trackwork Ltd 2021 IRLR 557, EAT*).

77. Dismissing an employee because of their absence will be to dismiss an employee for the purposes of sub-section (d) if it is known, actually or constructively, that the reason for that absence was the circumstances of serious and imminent danger.

Claimants' submissions

78. The Claimants' submissions were in summary as follows –

a. Where the employer produces evidence to show that the reason for the dismissal is for redundancy, the burden passes to the Claimant to show that there is a real issue as to whether redundancy was the true reason for dismissal which requires evidence that casts doubt upon the stated reason but the Claimant does not bear the burden of proving the true reason for dismissal (*Kuzel v Roche Products Ltd* , EWCA, [2008] IRLR 530)

b. Although in a construction site it would usual for there to be a safety committee, the Respondent was a new and inexperienced contractor.

c. Circumstances of danger may be wider than physical features or arrangements in the workplace (*Harvest Press Ltd v McCafferty* [1999] IRLR 778)

d. Reliance upon geographical location was a pretense to hide the true reason which was that the Claimants were perceived to be the instigators of the walk out in mid February 2020 and were trouble makers for raising health and safety concerns. The Claimants were regarded by DBL as trouble makers. RM admitted by text that the Claimants were not welcome back on site for nefarious reasons (because he can't tell them). The workers were travelling in their own cars. There were exceptions for construction workers. There were good protocols to allow safe travel. The criterion of geographical location is not in the selection matrix.

e. The Respondent has not pleaded pressure from a third party or shown that it made sufficient efforts to persuade them otherwise.

f. Under reg 12(2) of the Management of Health and Safety at Work Regs 1992 (SI1992/2051) there is a positive obligation on an employee to make certain H&S complaints.

g. the state of the cabins were harmful to their health and safety and were in breach of the minimum welfare facilities required for constructions sites as set out in Sch 2 of the Construction (Design and Management) Regulations 2015.

h. The risk of COVID was gaining widespread media attention from mid January 2020. The Claimants' belief that the cabins were harmful was reasonable. The state of the cabins amounted to serious and imminent danger because of concerns about COVID.

i. The proper question is not whether the Claimant's acted reasonably or not, but whether they were dismissed because of their health and safety activities (*Shillito v Van Lear Ltd [1997] IRLR, EAT)*

j. All TIEs were able to do fabrication and this was not a distinct role. The Respondent brought back George Duckworth from Liverpool to work as a fabricator rather than the Claimants. The Respondent brought back Neil Matthews from Manchester who had left their employment rather than someone local.

k. The appeal officer's knowledge was shaped by RM, CD who was closely involved in the appeal and accordingly the appeal was flawed and does not negate the reason for dismissal.

l. Although the submissions referenced risk of electric shock from wet clothes and risk from chemicals on clothes it was accepted by the Claimants that this had not been pled.

Respondent's submissions

78. The Respondent's submissions were in summary as follows –

a. The test for causation is stricter for automatically unfair dismissal than for whistleblowing detriment requiring primary motivation rather than material influence (*Fecitt v NHS Manchester [2011] EWCA Civ 1190* Court of Appeal*).*

b. The employer must show the reason for dismissal but the Claimant must produce some evidence that the reason was the protected disclosure or the health and safety activities *(Kurzel).*

c. On balance of probabilities there was a health and safety representative and/or safety committee because SB, SS talked about Rob Boni being the

informal spokesperson for the Scottish staff and Frank Goldie for the night staff and because such a committee would be common in a large and heavily unionised industry

d. It was reasonably practicable for the Claimants to raise their issues with the safety reps or committee or their union reps

e. There was no clarity regarding any risk to health and safety – the situation with the cabins was an inconvenience but did not amount to circumstances which were potentially harmful to health and safety

f. Senior management were never advised of the complaints or risks to health and safety prior to the walkout and the failure to do so meant that the issues were not raised by reasonable means

g. The conditions in the welfare cabin were unchanged after the walkout but the Claimants continued to use the cabin suggesting that did not believe they were in serious or imminent danger

h. The Claimants accepted that the walk out was a protest at the conditions and not because they thought they were in serious and imminent danger

i. The Claimants did not reasonably believe they were at risk of catching covid at the time of the walk out

j. The union asked them to return to site after the walkout and would not have done so in circumstances of risk or danger

k. The Claimants were dismissed because the client DBL did not want additional staff to return to site and the Respondent had no other work. Had the Respondent wanted to terminate the Claimants' employment because of protected disclosures or health and safety activities they could have done so immediately after the walkout when DBL terminated their contract with the Respondent, and they could also have done so instead of putting them on furlough. Other staff were made redundant at the same time. The basis upon which staff were returned to site or made redundant was wholly consistent with the criterion of job role and geographical location.

l. It was clear from their appeal hearings and witness statements that the Claimants' primary position was blacklisting by DBL, only for those claims to be subsequently withdrawn

m. There was no clear evidence that DBL did not want the Claimants back on site because of health and safety activities. In any event DBL's reasons cannot be attributed to the Respondent who dismissed because DBL did not want additional staff to return to site and the Respondent had no other work.

n. Rob Boni and Frank Goldie were vocal at raising issues on site but were returned to site because they were based in Glasgow.

o. The Respondent attempted to return the Claimants to site only for this to be refused by DBL.

p. The information disclosed in any complaints regarding the welfare cabins was too vague and opaque to amount an endangerment to health and safety. Their issues with the cabins amounted to nuisances and not risks to health and safety. Although nothing had changed they took no further action beyond daily verbal complaints - this suggests that they did not reasonably believe that their health and safety was endangered.

q. The senior management team (including RM, CD) was not aware of the daily complaints said to amount to the protected disclosures and accordingly these cannot have been the principal reason for the decision to dismiss.

Discussion and decision

Protected disclosure

Did the Claimant make a disclosure of information to the Respondent?

79. The Claimants each complained to their line managers that the intermittent lack of electricity in the welfare cabin meant that the cabin was dark and cold in winter months and rendered them unable to dry clothes or make hot food and drinks and that the lack of running water meant they had to carry water butts to the

cabin in sometimes icy conditions. The Claimants each made a disclosure of information to the Respondent by virtue of these complaints.

Did the Claimant reasonably believe the disclosure was in the public interest?

80. The Claimants each believed that this disclosure was in the public interest because it was a matter of health and safety which affected the entire project team. That belief was reasonable in the circumstances.

Did the Claimant reasonably believe the disclosure tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject?

81. The Claimants each believed that the disclosure about the intermittent lack of electricity and the constant lack of running water in the welfare cabin tended to show that their employer was failing to comply with its obligation to provide a safe place to take rest breaks. That belief was reasonable in the circumstances having regard to the undernoted.

Did the Claimant reasonably believe the disclosure tended to show that the health or safety of any individual has been, is being or is likely to be endangered?

82. The Claimants each believed that the intermittent lack of electricity and the constant lack of running water in the welfare cabin tended to show that the health or safety of an individual was likely to be endangered. That belief was reasonable in the circumstances. The carrying of water butts to the cabin in icy conditions of winter created an obvious slipping hazard. A lack of lighting rendered the cabin dark in the winter months making movement within the welfare cabin an obvious tripping hazard (albeit this was somewhat mitigated by use of their mobile phones as torches). A lack of heating created an obvious risk of intolerably low temperatures in the winter months.

<u>Health and safety dismissal</u>

Was there a health and safety at work representative or a safety committee at the place where the Claimant worked?

83. There was no health and safety at work representative or a safety committee at the place where the Claimants' worked.

Did the Claimant bring to the Respondent's attention, by reasonable means, circusmtances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

84. The Claimants each believed that the intermittent lack of electricity, and the constant lack of running water, in the welfare cabin, were potentially harmful to their health and safety. The tribunal considered that this belief was reasonable in the circumstances. The carrying of water butts to the cabin in icy conditions of winter created an obvious slipping hazard. A lack of lighting would render the cabin dark in the winter months making movement within the welfare cabin an obvious tripping hazard (albeit this was somewhat mitigated by use of their phones as torches). A lack of heating would create an obvious risk of intolerably low temperatures in the winter months. In the absence of a health and safety at work representative or a safety committee at the place where they worked, the Claimants and others made complaints to their line managers about these circumstances. Accordingly the Claimants each brought to the Respondent's attention, by reasonable means, circusmtances connected with their work which they reach reasonably believed were harmful or potentially harmful to health or safety.

Were there circumstances of danger which the Claimant reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert? Did the Claimant leave (or propose to leave) his place of work in those circumstances? Or did he refuse to return to his place of work while the danger persisted?

82. The Claimants' did not genuinely believe that there were circumstances of danger which were serious and imminent. The lack of running water was constant problem but the project team (including the Claimants) only walked off site once and returned before the issues were addressed (albeit under promise they would be). That walk off was by their own admissions in protest at the failure to address their complaints. The Claimants did not leave site to reach a place of

safety because they believed they were circumstances of serious and imminent danger because of concerns about the transmission of COVID or otherwise. In any event such a belief would not have been reasonable given the information reasonably known to the Claimants at the time. There was no proximate and material risk of death or serious personal injury. By 14 February 2020 (the date of the walkout) there were no reported cases of transmission of COVID within the UK and only 9 reported cases in the UK from transmission abroad. Accordingly on 14 February 2020 there was no reasonable basis on which to believe that there was a risk of transmission of COVID because of a lack of running water in a cabin in Mossmorran, Fife.

Sole or principal reason for dismissal

What was the sole or principal reason for the Claimant's dismissal? Was it that he had made a protected disclosure, or brought attention to circumstances of harm, and/ or left his place of work in serious and imminent circumstances of danger?

85. The Claimants believed that they had been dismissed by the Respondent at DBL's request because they had orchestrated the walkout in protest. Their focus at appeal was that they had been dismissed because of union activity. Their claims had contained a complaint of automatically unfair dismissal by reason of trade union activities which was withdrawn at the start of the final hearing.

86. The decision to dismiss the Claimants was taken by the Respondent's senior management team which included RM, CD. The facts known to the senior management team at the time of dismissal were as follows: whilst the Claimants and others had regularly made complaints about the state of the welfare cabins to their line managers prior to the walkout, the Respondent senior management team were not aware of those prior complaints; the entire project team had walked out in protest at the state of the welfare cabins on 14 February 2020; shortly after the walkout DBL had terminated the contract for the Mossmorran Project which RM, CD believed was because of the unlawful protest; the project team (including the Claimants) were given notice of redundancy which was withdrawn following negotiations with DBL; after the walkout the Claimants (and others) complained about continuing problems with the welfare cabin; in March

2020 the entire site was closed because of COVID and the entire project team (including the Claimants) was put on furlough; in mid April 2020 a partial return to site was permitted by DBL; the Respondent proposed an initial project team based upon job role and length of service (which criteria had the effect of including the Second and Third Claimants but excluding the First Claimant and others) but DBL insisted upon an initial project team based upon job role and geographical location (which criteria had the effect of excluding all of the Claimants and others); in late April DBL permitted a return to site of some additional staff; the Respondent proposed additional staff based upon length of service (which criteria included the Claimants) but DBL again insisted upon local staff (which had the effect of not including the Claimants and others); SB, SM advised RM, CD that the Respondent should be using length of service and not travel time and instead the three Claimants were being signed out by DBL because DBL believed they had orchestrated the walkout and were considered to be trouble makers; on 15 May 2020 DBL advised the Respondent that they would not require a return of the full project team because the site accommodation was at its maximum in light of COVID 19 guidelines; DBL advised the Respondent that they were content with the project team already on site and that they did not wish to swap in any project team members still on furlough; the Respondent advised those who had not returned to site (including the Claimants) that they were at risk of redundancy; and there was no alternative employment for those project team members at risk of redundancy.

87. The issue is what was in the mind of the Respondent senior management team at the time of selecting for redundancy and taking the decision to dismiss. The issue is not what was in the mind of DBL as client (of which there was very limited evidence other than what had been heard indirectly by SB, SS in February). There was no evidence that the Respondent senior management team had an issue with the walkout not least given that they had recalled the notices of redundancy which had been issued after the walkout and had also proposed the Claimants for return to site. They were not aware of the prior complaints other than the walkout in protest itself. There was no evidence that they had any negative response to the subsequent complaints about the welfare cabins. The Respondent senior management team had put forward a project team for return

to site which included the Claimants and that had been refused by DBL on stated grounds. The issue is not what was in the mind of DBL in insisting upon that criteria but what was in the mind of the Respondent Management Team in selecting for redundancy.

88. The tribunal was entirely satisfied upon the evidence that the sole or principal reason for dismissal was not that the Claimants had complained about or brought to the Respondent's attention the circumstances with the welfare cabin and it was not because the Claimants had walked out because of the circumstances with the cabin. The reason for their dismissal was because DBL as client did not require a return site of the full project team, DBL had insisted upon return to site based upon job role and geographical location, DBL did not want to change the team already on site, and because the Respondent did not have other work for the Claimants to do. There was no reasonable basis upon which it could be inferred that the reason for the dismissal of any of the Claimants was because of their complaints or the walkout.

89. Accordingly the Claimants' complaints of automatically unfair dismissal by reason of protected disclosures or health and safety activities do not succeed and are therefore dismissed.

Employment Judge: Michelle Sutherland
Date of Judgment: 24 January 2022
Entered in register: 31 January 2022
and copied to parties