EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104083/2017

Held in Glasgow on 10 and 11 April 2018

Employment Judge: **Ms M Robison**
Members **Ms M McAllister**
Mrs M Nelson

Mr A Hamilton — **Claimant**
Represented by
Mr R Lawson
Solicitor

Denholm Industrial Services Ltd — **First Respondent**
Represented by
Ms K Graydon
Solicitor

Brightwork Limited — **Second Respondent**
Represented by
Mr N McCluskey
Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that the claim is dismissed.

REASONS

Introduction

1. The claimant lodged an ET1 claiming detriment as a result of having made protected disclosures. The claim was initially served on the first and second respondent, as well as Staffline Group PLC, but the claim was withdrawn against them when the now second respondent explained that while they are owned by then, there was no link to the claimant. Both remaining respondents resist the

claim, arguing that the claimant was "dismissed" for misconduct in falsifying timesheets.

2. At this final hearing, the Tribunal heard evidence from the claimant and from Mr Mark Hunter. The Tribunal then heard from Ms Amanda Taylor, recruitment consultant with the second respondent, and from Mr Billy Fergus, who at the time was a senior contracts manager with the first respondent.

3. The Tribunal was referred to a joint file of productions, referred to in this judgment by page number.

Findings in fact

4. The Tribunal finds the following relevant facts agreed or proved, based on the evidence heard.

5. The claimant is a scaffolder. The claimant holds a Construction Industry Scaffolders Record Scheme (CSCS) card. This confirms the claimant's qualification and in particular that he has SQA level 2 (page 103).

6. Level 2 scaffolders are entitled to check, inspect and tag scaffolding, either which they have erected themselves or which has been erected by others, to confirm that it conforms to health and safety requirements.

7. It was a requirement of the first respondent to have scaffolding inspected weekly in order to fulfil its health and safety/regulatory requirements.

8. On 28 September 2016, the claimant signed a contract for services with the second respondent (page 71 - 76).

9. The second respondent is a temporary work agency through which the claimant secured work with the first respondent. The work involved the erection and dismantling of scaffolding.

10. The claimant was placed by the second respondent to work with the first respondent between 10 October 2016 and 3 February 2017. The claimant was again placed by the second respondent to work with the first respondent on 29 March 2017. The work related to a contract held by the first respondent with Ogilvie Construction.

11. On or around 30 March 2017, Mr Fergus communicated a request that the claimant "tag" (ie check/inspect) some scaffolding at the Ogilvie Construction site.

12. The claimant indicated at the time that he was not prepared to tag the scaffolding as he claimed he was not qualified to do so.

13. On 19 April 2017, Mr Fergus accused the claimant over-claiming his hours and claiming to be on site working at times when he was not in fact there.

14. On the evening of 19 April 2017, the claimant was informed by way of a text message from the second respondent that Mr Fergus had informed the second respondent that the claimant was no longer needed by the first respondent (page 80).

15. The claimants work placement with the first respondent was terminated with effect from 19 April 2017.

16. The second respondent has not offered the claimant any other work placement since 19 April 2017.

17. The second respondent operates a data base system (called Bond Adapt) for recording communications with clients and workers.

18. An entry dated 20 April 2017 states “unbook temp regular” and against 24 April 2017 it states "Candidate status is changed from placed by us to do not use. Billy Fergus has paid off as he has been claiming for hours that he didn’t work. He also went and untagged the scaffolding at the Ogilvie site - client doesn’t want him back” (page 85).

19. On Tuesday 25 April, Ms Taylor texted the claimant, and the claimant responded, as follows (pages 81-84):

- Ms Taylor: “Billy is deducting 2.5 hrs from you for the week comm 10th march so basically a half hour every day" (page 81);
- Claimant: “Cool it wasn’t Ogilvie”;
- Ms Taylor: “apparently it is accordingly to billy”
- Claimant:"he tells lies though” and "All take it all the way am not a tag man”;
- Ms Taylor: “speak to him then my hands are tied. I thought you said it was all sorted yday”:
- Claimant: “Am no letting it go Angela there wasent a problem with Ogilvie it was billy Ogilvie paid us last week and the week before and the 4 months before that an the day a had off’;
- Ms Taylor: “apparently you clocked in at 8 am and clocked out shortly after it And the site agent told billy you left at 2 pm one of the days so now billy has the sign in sheets he’s definitely deducting it from you so if you have any problems I suggest you take it up with billy";
- Claimant: “there clock sistim doesn’t work why where ogilve paying me if a wasent there; all go and see the site agent again its lies; a was there 4 months got docked once there wasent a problem with ma time keeping av got the pay slips to prove it. All leave it to my lawyer".

20. The claimant was placed in work with the first respondent by another employment agency at the beginning of May 2017. After two or three days in that placement, the first respondent realised that the claimant had previously been removed from a placement on 19 April 2017. Mr Fergus informed the agency that the claimant should not return to the placement with the first respondent.

Relevant law

21. The law relating to public interest disclosures is contained in Part IVA of the Employment Rights Act 1996 (ERA). Section 43B(1) states that 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", inter alia, "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject" (S43B(1)(b)); "that the health or safety of any individual has been, is being or is likely to be, endangered" (S43B(1)(d)).

22. A qualifying disclosure will be a protected disclosure if it is made to an appropriate person. Section 43C(1) ERA states that "a qualifying disclosure is made. …if the worker makes the disclosure a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to - (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that person".

23. Section 47B ERA states that "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground the worker has made a protected disclosure".

Claimant's submissions

24. Mr Lawson stated that this case relates to two disclosures, one made on or around 30 March 2018 and one made on 19 April 2017. He submitted, relying on **Cavendish v Geduld** [2010] IRLR 38 that these were disclosures which conveyed facts, and although this is a verbal communication, in **Kraus v Penna pic and another 2004 IRLR 260,** the EAT held that verbal communications are not subject to additional or more onerous considerations than written.

25. He submitted in this case that the claimant had a reasonable belief that the disclosures were made in the public interest and tended to show two relevant failures, namely "failure to comply with legal obligation - common law duty of care by employer to employees and requirements of Work at Height Regulations 2005"; and "health and safety of anyone working in or around the site obviously endangered if

scaffolding is at risk of collapse. System of inspection required in order to reduce risk". Both from an objective and subjective standpoint, the disclosure was in the public interest.

26. With regard to the method of disclosure, the first was communicated to Billy Fergus of Denholm albeit that was done through the site agent who worked with Ogilvie Construction. Denholm was the claimant's employer. The second was disclosed directly to Billy Fergus.

27. With regard to the detriment suffered, he was subjected (by the employer) to three detriments, namely removal of work placement, combined with the implementation of that request by Brightwork; Brightwork's failure to seek alternative placements for the claimant following disclosure; and removal of work placement by Denholm on second occasion in May 2017.

28. He submitted that there were two key disputed facts namely: i) whether there was a disclosure in terms of s43B(1)(b) and (d) and ii) whether the reason for the asserted detriments was over-claiming for hours worked. Mr Lawson submitted that if the claimant's version of events is accepted, then his claim should succeed. He has given evidence about the discussions with Gary Davidson and Billy Fergus. The respondents have failed to discharge the burden on them to prove the reason for the detriments. The allegation of over-claiming for hours worked was used as a cover for the respondent's real motivation, and does not stand up to scrutiny. The records of the finger-print system relied upon by the respondents have been established to be an entirely unreliable indicator of when the claimant was or was not on site.

29. Mr Lawson lodged an updated schedule of loss, and set out the relevant law in an appendix.

First Respondent's submissions

30. Ms Graydon lodged detailed written submissions, which she read out, supplemented in places to take account of evidence of Billy Fergus. She set out, in some detail, references to support her submission that the claimant's evidence was inconsistent and evasive, and that the witnesses for the respondents were honest, credible and reliable. She set out proposed findings in fact.

31. In respect of her legal arguments, she submitted, based on the claimant's evidence, that the claimant's refusal to check/inspect the scaffolding did not amount to a "qualifying disclosure", relying on **Cavendish** and **Eiger Securities LLP v Korshunova [2017] IRLR 115.** She submitted, based on the respondent's evidence,

that the claimant's refusal to tag the scaffolding did not materially influence the first respondent's treatment of the claimant in any event, and did not form any part of the decision to remove the claimant from the site. The evidence heard supported her submission that the true and sole reason was that he had been caught claiming for hours that he had not worked.

32. Finally, Ms Graydon set out factors to be taken into account in the event that an award of compensation is considered.

Second Respondent's submissions

33. Mr McCluskey adopted Ms Graydon's submissions. He accepted that the matter came down to credibility and reliability, and he submitted that the Tribunal should prefer the respondent's witnesses, who were straightforward, and mainly respectful and not argumentative. Although Mr Fergus was not entirely reliable, he has no vested interest in the outcome since he no longer works for Denholm. He submitted that by the time Mr Fergus made the decision to terminate, he had accumulated much information to support his decision, including from Gary Davidson and colleagues, from the print out and from his own experience of using the turnstile and lack of complaints from others.

34. In contrast the claimant, given not least the manner in which he gave evidence which he said was truculent, monosyllabic and aggressive and disrespectful, should not be accepted. The evidence relating to payments for Saturday shows that he was prepared to mislead in relation to hours worked.

35. The claimant has failed to establish that he made a protected disclosure: all he said was that he was not qualified to carry out checks on the scaffolding. He submitted that the Tribunal should accept Mr Fergus's evidence that he was in fact qualified to do so, given Mr Fergus's qualifications and experience in a more senior role. In any event, it was not in the interests of the company or in Mr Fergus's interests to get someone who was not qualified to do the inspection.

36. He accepted that in principle the second respondent could be liable for detriment following whistleblowing in similar circumstances, but he did not accept that they were in this particular case. Even if the claimant did make a protected disclosure to someone with sufficient connection to the second respondent, the critical fact is the reason for his dismissal. He submitted that there was ample evidence for the

Tribunal to conclude that the disclosure was not the reason. Ms Taylor acted on information which she was given, and did not therefore consider it necessary to conduct her own investigation, and in any event she was aware that he had been accused of overclaiming hours before.

Tribunal observations and decision

37. In this case, there was a dispute on the facts, on the question what was said and whether that amounted to a protected disclosure at all, and in particular in respect of the reason for the termination of the engagement.

38. It was difficult for us to make definitive findings in fact in respect of certain issues. This was because we did not find any of the witnesses in this case to be entirely forthcoming or candid in the way that they gave their evidence. We found both Mr Fergus and Ms Taylor were, to a certain extent at least, rather defensive in the way they gave their evidence. With regard to the claimant, his manner of giving evidence did not give the Tribunal confidence that he was being entirely open and candid. He was at least nonchalant in the way that he gave his evidence. His evidence about what he was qualified to do, as did his explanation of the circumstances a level 2 scaffolder, or advanced or inspector would undertake checks and inspections. Our concerns about his evidence were not so much about the inconsistencies which Ms Graydon identified, many of which could be put down to recall, but rather the lack of clarity of his answers, which we found to be evasive.

39. In contrast, we found Mr Wallace to be a credible witness, who, as Mr McCluskey established, had nothing to gain from coming along to the Tribunal, except, we found, to tell the truth in relation to difficulties with the turnstile. As it transpired, matters did not turn on that, and in any event we did not find that the matter of the records of the turnstile could be said to show conclusively that the claimant was not attending work when he ought to have been.

40. In any event, as discussed below, we came to the view that, even if we accepted the evidence of the claimant in its entirety, we could not find for him because the facts as applied to the law did not justify the legal remedy sought.

Public interest disclosure claim - general

41. In this case, the claimant argues that the reason that his engagement was terminated was because he had made two protected disclosures which he asserts tended to show that there was "a failure to comply with a legal obligation" and "the health and safety of an individual has been or is likely to be endangered".

42. These disclosures were alleged to have been made on or around 30 March 2017 and on 19 April. It was a matter of agreement that these matters had been raised on these dates.

43. In broad terms, the law relating to public interest disclosure requires the claimant to have made a "protected disclosure". In order to be a protected disclosure, the disclosure must be a 'qualifying disclosure", that is made by protected workers and disclosed to certain people in a specified way. A qualifying disclosure is a disclosure of information, which must convey facts and is not simply an allegation or opinion, which in the claimant's reasonable belief was disclosure in the public interest and would (here) breach a legal obligation and/or be a danger to the health and safety of any person, or attempts to conceal such dangers.

44. Having shown that there is a protected disclosure, and that he suffered a detriment, the burden of proof being on the claimant, it is for the respondent then to show that the treatment done was not done because of the protected act.

45. There was no argument advanced in this case that the claimant was not a relevant protected worker nor that he could not, in principle, pursue claims against the first or second respondent. Nor did the respondents argue that the claimant had not disclosed information to a relevant person, notwithstanding the fact that Mr Davidson was employed by Ogilvie.

Has the claimant made a protected disclosure?

46. Neither the first nor second respondent accepted that the claimant had made a protected disclosure. They relied in particular on the cases of **Cavendish Munro Professional Risks Management v Geduld [2010] IRLR 38 and Eiger Securities LLP v Korshunova [2017] IRLR 115.**

47. We considered what it was that the claimant had said that might amount to a protected disclosure. We have made as a finding in fact, because it was a matter of agreement, that the claimant "was not prepared to tag the scaffolding as he claimed he was not qualified to do so". The parties had also agreed that this had happened on two occasions, although we heard limited evidence about the first, and Mr Fergus was not at all sure about the date. Mr Lawson said that these were disclosures

which tended to show two relevant failures, namely a failure to comply with legal obligation and risks health and safety.

48. In the **Cavendish** case, at paragraph 24, the EAT states that "the ordinary meaning of giving information is conveying facts. In the course of the hearing before us a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "the wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "you are not complying with health and safety requirements" In our view this would be an allegation not information"

49. Thus in this case we had to consider whether the claimant's assertion could be stated to be simply a general allegation or whether it "conveyed facts". On the face of it, relying on the agreed facts, we considered that this was a borderline case, and that the answer was not clear cut.

50. However, in coming to our conclusion regarding the "disclosure", we also took into account the fact that there was at least a question mark over whether this statement was accurate, and over whether the claimant had reasonable belief that it was accurate.

51. Surprisingly perhaps, we heard conflicting evidence about whether the claimant was qualified or not. If he was a competent person, then he could not legitimately refuse to undertake the tagging by reason that it would be a breach of any relevant legislation.

52. It was a matter of agreement that the claimant had claimed that he was not qualified to check the tagging, and Mr Fergus's position was that he had understood from Mr Davidson that he had said that he was not qualified to do it, but that of course was second hand.

53. We heard further evidence however in respect of what the claimant had said regarding the request to him that he should tag the scaffolding. While the claimant confirmed he had said that he was not qualified to do it, he also said in evidence that he had said that he would do it if he was given time to "sort" the scaffolding, expressing concern that it was "not fit", that it was "not the best job". But he also said that he was "really busy" and that it was not his job to do it.

54. We did not hear evidence from any expert relating to this question, which, as is often the case, is more complicated that it might appear. Mr Fergus explained that there are different "grades" of scaffolding, and beyond "general purpose" scaffolding, there may be a requirement for advanced qualifications in respect of scaffolding for bridges, and hanging scaffolding. Level 1 is the trainee level, and a trainee would not

be allowed to erect or dismantle without supervision. Level 2 can erect and inspect general purpose scaffolding, but would only be permitted to erect other grades if working with an advanced scaffolder.

55. Mr Fergus explained that a level 2/part 2 scaffolder is qualified to tag scaffolding after he has erected it, then he is qualified to check and tag scaffolding which had been erected by others. This was contrary to what we understood the claimant's evidence to be, which was that an advanced scaffolder could check the scaffolding, and that Mr Miller was an advanced scaffolder, but at one point in this evidence as Ms Graydon highlighted, he claimed that neither of them were qualified.

56. We heard from Mr Fergus that arrangements had been made, at the request of Ogilvie Construction, for an inspector to attend each week to inspect and tag the scaffolding (in compliance with legislative requirements). We heard that a Thomas Winters had been engaged to attend the site each week but on this occasion he was absent.

57. Surprisingly, we heard from Mr Fergus, for the first time, that the claimant had in fact carried out the inspection and undertaken the tagging. This was not however put to the claimant.

58. In the absence of any independent expert evidence, we accepted Mr Fergus's evidence on this issue, on the basis that he has greater qualifications and experience in a more senior role. We took the view that there was a certain logic to Mr Fergus's position that if a scaffolder was qualified to check and tag his own work, then they would be qualified to tag someone else's job after checking and altering it if necessary. Further, as Mr McCluskey submitted, it would not be in the interests of the first respondent or indeed in Mr Fergus's interests to ask a man who was not qualified to do the job.

59. We were fortified in this view by reference to the statements of the claimant himself given in evidence, that is that he would have been prepared to do the tags if he was given the time. Although we did not make a finding in fact that he had in fact undertaken the tagging on conditions, we concluded, from the claimant's evidence, that he did in fact offer to do the tagging, the implication being from his own evidence that he was qualified to do so.

60. We therefore did not accept that he was not qualified to undertake the tagging in these circumstances.

Reasonable belief

61. While we had no issue in accepting that, had the claimant raised concerns about the implications of him inspecting scaffolding when he was not a competent person, that it would have been made in the public interest, we accepted Ms Graydon's submission that if he raised concerns at all that these were for personal reasons, and in his personal interest.

62. Further and in any event, nor did we accept, given our findings in fact, that the claimant had a reasonable belief that the disclosure tended to show that there was a failure to comply with a legal obligation. We have found that the claimant is entitled to inspect scaffolding and therefore to ask him to undertake tagging would not be a breach of any legal obligation.

63. Even if the claimant argued that his belief although wrong was genuinely held, we accepted Mr McCluskey's submission that it was not reasonable for the claimant to have an inaccurate understanding of the scope of work that he was qualified to do. We concluded therefore that even if the claimant had believed, as he claimed, that he was not qualified to tag the scaffolding in this particular case, that was not a reasonable belief for him to hold.

64. We therefore concluded that the claimant did not establish that he had made a protected disclosure in terms of the ERA.

Did the claimant suffer detriment because of making a protected disclosure?

65. Since we were of the view that the incidents relied on by the claimant did not amount to protected disclosures, we did not require to come to a conclusion about whether there was a causative link between the termination of the engagement and any disclosure, as the burden of proof did not even shift to the respondent to show that.

66. We did hear evidence that the reason for the termination of the engagement was that the clamant had falsified time sheets. The claimant denied this. He did say that Mr Fergus had spoken to him a week or so before the termination of the engagement, and Mr Fergus in evidence said that he had raised concerns with him and his co-worker around a week before as an informal warning.

67. In support of their position, the respondents relied on the evidence of Mr Fergus and Ms Taylor. As Mr McCluskey said, Ms Taylor's evidence was not central because she was acting on what she had been told. Much of Mr Fergus's evidence was what he was told by Mr Davidson, but we did not hear from Mr Davidson.

68. The respondents relied on various sources of information to conclude that the claimant had overclaimed for hours. These included the information from the

fingerprint turnstile, and although there was a mention of a print out from the computer records of the turnstile, and the claimant mentioned "a piece of paper", these were not lodged. In any event, we accepted the evidence of Mr Hunter that the fingerprint turn stile was temperamental and therefore would not be an accurate record of the comings and goings of workers. The claimant said he had used the vehicle access and Mr Fergus was aware that it could be used. Mr Lawson raised a telling point in relation to the records which Mr Fergus said that he relied on, which he said indicated that the claimant had entered at 8 am and left at 8.10 am on one occasion, and as Mr Lawson highlighted, if a worker was going to falsify their time sheets it was at least surprising that they would "clock out" using the turnstile, if they could just walk out through the vehicle access.

69. We were conscious too that no time sheets had been lodged. The claimant said that he did not complete time sheets, but sent Ms Taylor a text. In evidence Mr Fergus mentioned time sheets he received from Mr Davidson of Ogilvie, but again these were not lodged. We also found it surprising that if there were accurate time sheets that Ms Taylor would advise the claimant (in the text of 25 April) that he would be told they were deducting a half hour every day "for the week comm. 10th march" (which we assumed should be 10 April). This does not tally with the evidence we heard about the claimant having arrived at 8 am and left at 8.10 on one occasion, and having left at 2 pm one day and early on others. The claimant also mentioned in the texts that he had been paid for "the day [he] had off.

70. Further, we did note that Ms Taylor said in answers in cross examination that one of the reasons she did not think it necessary to investigate what she was being told before terminating the engagement was that the claimant had previously been accused of falsifying hours. We thought that it was surprising that this was not mentioned previously in the pleadings. We also noted that Mr Fergus said that the tag issue was "water under the bridge" by the time it came the termination of the engagement, because the claimant had in fact done the tagging and this might have been a crucial fact, but again this had not previously been mentioned.

71. We also noted, from the text messages, that neither the issue of deducting hours, nor the issue of tagging, was raised until 25 April, that is six days after the termination of the engagement.

72. It seemed to us that the real reason the claimant was not prepared to do the tagging was because he did not think that it was his job to do it. We noted that the claimant had said in evidence that it was "my job to erect and dismount, not to inspect". Mr Fergus also said in evidence that the claimant had said to him that it was not his job

to inspect the scaffolding, and that was not what he was employed to do. Indeed we got the impression that the claimant thought inspectors were paid more, and therefore that he was not prepared to do it because he was not being paid to do it.

73. We heard evidence relating to payment for Saturdays, again this being the first time this was raised. That did not however influence our conclusion, and we did not accept, as Mr McCluskey submitted, that this necessarily supported the conclusion that the claimant had falsified hours, because as we understood it this was essentially an authorised work around, rightly or wrongly, and that this did not reveal dishonestly on the part of the claimant.

74. It may well be that the reason they did not want him back was because he was not being co-operative in refusing to assist with the tagging (initially at least). Clearly, his emphasis now on his lack of qualifications, given our findings, is an inappropriate attempt to seek redress for the termination of his engagement. As it is, we did not have to decide the matter because in this case the claimant has failed at the first hurdle, that is that he has failed to establish that he made a protected disclosure.

75. Thus, given the legal provisions relied on in this case, we did not require to decide the reason for the termination of the claimant's engagement. We have found that no protected disclosure was made and in those circumstances it cannot be said, whatever the reason for the termination of the claimant's engagement, that it was because of the protected disclosure.

Conclusion

76. We have found in this case that the statements made which the claimant relies upon do not amount to a protected disclosure. In these circumstances, the claimant's claim that he has suffered detriment for making protected disclosures cannot succeed and is dismissed.

Employment Judge: M Robison
Date of Judgment: 16 April 2018
Entered in register: 26 April 2018
and copied to parties