EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4100500/2021 (V)

Held remotely by means of the Cloud Video Platform on 1, 2 and 3 November 2021 and 28 February 2022 (deliberation day)

Employment Judge W A Meiklejohn

Tribunal Member Ms M-C Macfarlane

Tribunal Member Dr S Singh

Mr W MacGregor	**Claimant** **Represented by:** **Mr R Lawson - Solicitor**
Corps Monitoring Ltd	**Respondent** **Represented by:** **Ms S Tharoo - Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Employment Tribunal is as follows -

(a) The claimant's complaint of unlawful detriment under section 47B of the Employment Rights Act 1996 having been withdrawn prior to the hearing, that complaint is dismissed.

(b) The claimant's claim of automatically unfair dismissal brought under section 103A of the Employment Rights Act 1996 does not succeed and is dismissed.

(c) The claimant's claim of ordinary unfair dismissal brought under sections 94 and 98 of the Employment Rights Act 1996 does not succeed and is dismissed.

REASONS

1. This case came before us for a final hearing, conducted remotely by means of the Cloud Video Platform, on 1, 2 and 3 November 2021. The claimant was represented by Mr Lawson and the respondent by Ms Tharoo.

Nature of claims

2. In terms of his ET1 claim form, the complaints brought by the claimant were -

    - Unfair dismissal
    - Automatically unfair dismissal under section 103A **(Protected disclosure)** of the Employment Rights Act 1996 ("ERA")
    - Detriment under section 47B ERA **(Protected disclosures)**

    All of these complaints were resisted by the respondent.

Procedural history

3. A preliminary hearing (before Employment Judge Strain) took place on 6 April 2021. The outcomes were various case management orders, identification of the issues and the appointment of a three day final hearing. There were some issues between the parties about compliance on the claimant's side with the case management orders but there was nothing outstanding that we had to resolve.

4. Shortly before the final hearing the claimant intimated that the complaint under section 47B ERA was no longer being insisted on. Accordingly, as recorded above, that complaint is dismissed.

Issues

5. Adapting the list of issues identified by EJ Strain to reflect withdrawal of the section 47B detriment claim and correcting a minor error as to the date of the relevant email, the issues which we had to determine were as follows -

    i. What the reason, or principal reason, for the dismissal was.

    ii. Whether the claimant was unfairly dismissed in terms of section 98(4) ERA.

iii. Whether the claimant's email of 21 June 2020 was a protected disclosure under section 43B ERA.

iv. Whether the reason or principal reason for the claimant's dismissal was the protected disclosure contrary to section 103A ERA.

Evidence

6. We heard evidence on behalf of the respondent from -

- Mr L Thomas, Company Secretary of Corps of Commissionaires Management Ltd ("CCML"), the respondent's parent company
- Mr R Hill, Managing Director of the respondent
- Mr M Bullock, Chief Executive of CCML

We also heard evidence from the claimant.

7. The evidence in chief of each of the witnesses was contained in written witness statements. These were taken as read in accordance with Rule 43 of the Employment Tribunal Rules of Procedure 2013.

8. We had a joint bundle of documents extending to 355 pages. We refer to these below by page number.

Findings in fact

9. The respondent provides a monitoring service which responds to alerts from intruder, building, fire and CCTV systems. It operates a monitoring centre (referred to by witnesses as the "CMC") in Glasgow.

10. The claimant commenced employment with the respondent in April 2001. Prior to the events described below, he became Technical Director. He was appointed as a company director of the respondent with effect from 1 July 2016. He was issued with a letter of appointment (55-58) dated 24 June 2016 reflecting that appointment.

Management changes

11. In or around March 2018 Mr Bullock was promoted from being Managing Director of the respondent to become the Chief Executive of CCML. The claimant was appointed as Acting Managing Director of the respondent. He received a *"salary supplement"* of £20k with effect from 1 April 2018. This was recorded in a letter of appointment dated 5 March 2018 (74).

12. Following discussions with Mr Bullock in April/May 2019, the claimant wrote to Mr Bullock on 8 June 2019 (81-83) withdrawing from the Acting Managing Director position and reverting to the role of Technical Director. A new contract of employment was issued to the claimant (59-69) recording this change with effect from 17 July 2019. The claimant's salary was adjusted to £70k with effect from 1 September 2019.

13. Mr Hill was appointed as Managing Director of the respondent with effect from 1 September 2019. In terms of the organisational chart from that time (70) the claimant reported to Mr Hill. Mr G Fulton, Operations Manager, also reported directly to Mr Hill. Mr Fulton had previously reported to the claimant.

National Security Inspectorate ("NSI")

14. The respondent is accredited by NSI in respect of compliance with British Standard BS5979 (and others). This relates to the operation of alarm receiving centres (such as the CMC) which receive signals from security systems. To maintain that accreditation the respondent has to be audited by NSI on a bi-annual basis. We understood that the purpose of the audit process was to check ongoing compliance with BS5979.

15. None of the witnesses was able to describe in any detail the arrangement between the respondent and NSI and how, if at all, it was documented. What was clear was that there were reciprocal obligations - NSI had to perform the audits and, if justified, provide the accreditation, while the respondent had to perform to the required standard and provide data for audit purposes.

16. There was a commercial benefit to the respondent in having this accreditation. According to the claimant, whose evidence about this we found no reason to

doubt, the respondent would without the NSI accreditation (a) find it difficult to obtain liability insurance at a competitive rate, (b) have difficulty getting the police to respond to alarms and (c) be seen as a lower level service compared to other providers.

17. The majority of the data required by NSI for audit purposes was available within Sentinel Plus, the alarm monitoring software used by the respondent. However, some data had to be obtained manually from legacy systems. In addition there were circumstances which could skew the data, for example where a site was undergoing testing of monitoring equipment.

18. The consequence of this was a practice of *"finessing"* the data before presenting it to NSI. It was generally known within the respondent that this occurred. As Mr Thomas put it - *"It was done in good faith. If it could be Justified, it was quite acceptable."* Our view of this was that (a) the respondent was under a legal obligation to NSI to provide at audit data which was accurate and (b) in order to do so, there were circumstances in which that data could justifiably be *"finessed"* to render it accurate.

19. Prior to the events described below an NSI audit had taken place in January 2020. At the time of this audit it was Mr Fulton who dealt with the NSI representative. Mr Hill and the claimant were in the building but not involved in the audit visit.

Claimant works from home/is furloughed

20. The claimant underwent a surgical procedure on 6 March 2020. Thereafter, apart from a few days in hospital in May 2020, the claimant worked from home. While working from home, the claimant undertook what he described as an *"initial review"* of the CMC. According to the claimant, he made recommendations for minor changes and his review was *"well received".*

21. The claimant was obtaining figures from the respondent's system while working at home and *"started collating these".* According to the claimant, he *"found some things that did not add up".* During April/May 2020 he worked on a more detailed review of the CMC.

22. On or around 28 May 2020 the claimant was placed on furlough. This was Mr Hill's decision. It was prompted by a request from Mr Bullock, following the introduction of the first national lockdown and the Coronavirus Job Retention Scheme, that senior managers should consider where savings could be made and which staff could be furloughed. Mr Hill's rationale for placing the claimant on furlough was that it would cause *"the least disruption"* and because the claimant's technical expertise *"could be covered by the central IT function or the use of outside IT experts".*

23. The claimant became aware of an incident which occurred on 10 June 2020 at a site in Yorkshire monitored by the CMC. He noted that the incident had not been logged. He formed the view that this was an attempt by Mr Fulton to conceal important information.

Claimant's email to Mr Hill

24. On 21 June 2020 the claimant sent an email to Mr Hill (84) to which he attached two documents. The first (85) dealt with *"significant concerns. …regarding the CMC business".* The claimant made these allegations about the Operations Manager, Mr Fulton -

7 have noted over the last nine months that he has steadily and continually withheld important technical information, deliberately gone ahead with meetings without me (that I specifically requested to attend) and attempted to minimise all operational information available to me.

He has over 14 years of operational experience and has very little difficulty in hiding almost any information from most people and particularly those who don't have extensive backgrounds in monitoring. He can fabricate plausible explanations for almost any scenario and he routinely misreports information to colleagues and customers.

I have seen many activities over these months that are a risk to the business and on most occasions I have been able to neutralise those risks.

However, I have discovered that the operations manager is now hiding or delaying critical information that we both need as Directors, to make informed

business decisions that enable us to protect the business financially and reputationally."

25. The claimant's document then referred to the Yorkshire site incident, alleging that Mr Fulton had failed to record this. The document continued in these terms -

"*The operations manager has complete disregard for the company's processes and his inability to consider the risks, is a real concern to me and I now find myself having to check all information he provides in a very granular manner. I have also discovered that at the last NSI audit in Jan 2020, he actually edited pre-prepared Sentinel Operator Response Statistics Report, falsified the results and handed a hard copy of these altered results to the NSI Auditor for perusal on the last inspection, to make it appear that the operation is reaching the targets required. This level of deception is outrageous and puts us at risk of significant reputational damage."*

26. The claimant's second document (104-111) was headed *"Corps Monitoring Centre Review - May 2020".* Its purpose was explained in these terms -

"..../ have carried out some further analysis during May, with a view to assisting the operation to get back on track by identifying inefficiencies, areas of risk and improvements to the processes used within the CMC. It is anticipated that this would lead to the team reaching the required operator alarm handling performance required by the NSI."

27. The claimant's report contained a number of criticisms of Mr Fulton. There follows a selection of these -

"....I am finding that a number of processes that were previously in place have been abandoned or altered in such a way that they are no longer useful or effective. There seems to be a general resistance from the operations manager and the team to measure and identify the root causes of the operational failures, and I noted that since I started analysing the alarm volumes in April the operations manager has altered some working practices in a way that disguises the true level of false alarms."

"The night shift operation has been without one of the two required supervisors for over 12 months which has led to a drop in standards and consistency in dealing with incidents and customers. I noted considerable passive resistance from the operations manager when trying to persuade him to advertise and select appropriate candidates or trainees for this important role and this needs to be addressed more urgently."

7 noted some time ago that the operations manager was not administering the holidays correctly. ...At best this is Just very poor management and administration and at worst, possibly some form of fraudulent activity that needs to be investigated further."

(In relation to introducing passwords for sites without one) *"The operations manager has resisted my attempts to add this improvement and we continue to get complaints...."*

"The overtime sheets submitted by the operations manager only provide the dates ofeveryones overtime. ... These should be made more transparent. ..."

"There is a general lack of analysis being undertaken leading to poor management of the operation and a performance that is well below the requirement."

28. The claimant looked at the respondent's Whistleblowing Policy (88) before sending his email to Mr Hill but did not refer to it in his email. The claimant did not tell Mr Hill that he was raising whistleblowing concerns.

Mr Hill asks Mr Thomas to investigate

29. Mr Hill responded to the claimant by email on 23 June 2020 (86) indicating that Mr Thomas would conduct an investigation. Mr Thomas reviewed the documents which the claimant had sent to Mr Hill. Mr Thomas spoke with the claimant by telephone on 24 June 2020 and indicated that his investigation *"would be part of the respondent's grievance procedure".* The claimant did not take issue with this.

30. Mr Thomas emailed the claimant on 25 June 2020 (90) attaching copies of the two documents with various passages highlighted and questions for the claimant

in margin text (92-100). Mr Thomas' questions were broadly seeking examples to support the claimant's allegations.

31. The claimant replied to Mr Thomas on 25 June 2020 (89). He stated that -

"The NS/ Stats is probably the most important point to deal with and I can prove this by comparing the actual Statistics which still remain on the "Sentinel" alarm management system and cant be altered, with what the NSI auditor was given on the 24 Jan this year and has recorded on their audit system notes.

However I would like to request authorisation to access to the Ops Managers business emails through Mimecast archive which I anticipate will have the record of him emailing a copy of the NSI records to his laptop which has a PDF editor and then receiving an altered NSI records document on his Corps account."

32. Mr Thomas was not happy about allowing the claimant unrestricted access to Mr Fulton's emails. He responded to the claimant on 26 June 2020 suggesting that the claimant provide him with the relevant dates and any other information linked to his request to enable him (Mr Thomas) to access Mr Fulton's emails.

33. On 29 June 2020 the claimant emailed Mr Thomas (91) -

"Please find attached the documents with the questions you asked to be answered and a couple of other documents I thought would be relevant. I don't have access to the system logs at work due to my furlough leave, but I have done what I can to point you to some of these."

34. Mr Thomas replied on 30 June 2020 -

7 assume you still want Grant's emails reviewed so if you could provide approximate dates and/or subject headings then that will help narrow down the search. As soon as I have these I can question Grant."

35. Notwithstanding what Mr Thomas said in this email, he decided after reviewing the additional information sent to him by the claimant that he had sufficient information to question Mr Fulton. He confirmed this to the claimant by email on 2 July 2020 (101). In his evidence to us Mr Thomas said -

"The main claims put forward by Bill were that Grant had withheld important information from senior management and had falsified statistics submitted to NSr

Mr Thomas engages with Mr Fulton

36. After making telephone contact, Mr Thomas emailed Mr Fulton on 2 July 2020 (102) about the claimant's allegations and provided details of these -

"*In order for you to respond to those allegations I have attached various documents. The Word documents were sent by Bill together with the excel spreadsheet. The outlook item discloses an email with attachments to your personal email."*

37. Mr Fulton responded to Mr Thomas by email on 7 July 2020 (112). He attached (a) a letter headed *"Information I wish to be included in Investigate Notes"* (113-117), (b) a copy of the claimant's concerns letter to Mr Hill with his point by point response (118-121) and (c) the claimant's CMC Review document, again with his point by point response (122-138).

38. It would be fair to say that Mr Fulton's response was robust. In his *"Information ....to be included"* letter Mr Fulton referred to the claimant's allegations as *"completely unsupported "* and *"nothing more than a slanderous slur".* He described the claimant's allegations as "a *ferocious and sustained. …personal & professional attack aimed primarily at myself'.*

39. With reference to whether his *"supposed change in behaviour"* had started only since he began working directly for Mr Hill, Mr Fulton described this as "*an utterly absurd, preposterous, and ridiculous suggestion".* Mr Fulton suggested that the reason for the claimant's *"unwarranted attack"* was that he was *"incensed when he was repositioned to Tech Director from his prior MD position".*

40. Mr Fulton went on to allege that the claimant had used profane and offensive language when speaking with his colleagues, particularly in reference to the CCML senior management team, and had threatened his colleagues if they assisted CCML management. The claimant was also alleged by Mr Fulton to

have said that he would *"burn this place to the ground",* this said to have been stated "on *many occasions to multiple team members".*

41. Mr Fulton alleged that the claimant had slowed down projects in which he was involved and had failed to complete tasks assigned to him prior to being placed on furlough. The thrust of Mr Fulton's allegations was that the claimant had been working against the best interests of the respondent. He suggested that the catalyst for this had been the setting up by the claimant and Mr R Davies of a new company intended to compete with the respondent.

42. For the sake of completeness, we record that the claimant and Mr Davies, then Sales Director with the respondent, established a company called Disaster Management Services Ltd ("DMS") in 2018. This was done because they thought the previous CEO of CCML was not supportive of the respondent offering a disaster management service. DMS did not trade and, after its establishment came to light, it was dissolved.

Mr Thomas speaks to Mr Smith and Mr McCartney

43. Mr Thomas spoke by telephone with Mr Smith and Mr McCartney on 13 July 2020. According to the notes recording those discussions (139-141) Mr Smith said the following -

(a) He was aware that there had been a delay in reporting the Yorkshire site incident but he attributed this to his working from home. He said there had already been a discussion with the client about the incident.

(b) He was aware that Mr Fulton had *"edited statistics"* for NSI audits. He believed that this was as a result of a direct instruction from the claimant. He could not recall ever hearing such an instruction from the claimant but believed it was not possible for the claimant not to have authorised the practice.

(c) He said that the claimant had *"threatened adverse consequences"* for his career unless he followed the claimant's instructions not to co-operate with Mr Hill.

(d) He said that he did not hear the claimant making the *"burn this place to the* ground" statement but said that Mr Fulton had told him about it.

(e) He referred to a project where the claimant had *"made very slow progress".* He said the claimant had been angry when he found out that Mr Davies' laptop had been forwarded to CCML. He also said that the claimant had told Mr Fulton, Mr McCartney and himself about setting up the new company.

(f) He said that the claimant had actively pursued an *"us and them"* agenda against Mr Hill.

44. In relation to Mr Thomas' conversation with Mr McCartney, the notes recorded Mr McCartney saying the following -

(a) He was aware of a delay in getting back to the client about the Yorkshire site incident but had told Mr Fulton that there was no need to report it as the client was fully aware of the matter. He was unsure whether the incident had been logged.

(b) He was aware that the NSI statistics had been *"edited".* He was not sure how long the practice had occurred *"but certainly in the last 3 years".* He confirmed that Mr Fulton had submitted the statistics and said that he had assisted Mr Fulton in making the changes. He believed this had been done with the claimant's knowledge and support.

(c) He said that he had not directly witnessed anything done by the claimant which undermined senior management

(d) He said that he could not recall the claimant making the *"burn this place to the ground"* statement.

(e) He said he had not witnessed the claimant delaying projects. He could not recall anything about Mr Davies' laptop. He confirmed what Mr Smith had said about the claimant setting up the new company but indicated that he understood this company would only actively trade if the respondent withdrew from providing a disaster management service.

Mr Thomas updates claimant

45. Mr Thomas emailed the claimant on 14 July 2020 (142) reporting that he had completed his initial investigations, having interviewed Mr Fulton, Mr Smith and Mr McCartney. He attached a copy of Mr Fulton's written responses and a copy of the notes of his telephone conversations with Mr Smith and Mr McCartney. Mr Thomas invited the claimant to comment.

46. When the claimant responded on 15 July 2020 (143) he indicated that he needed access to his laptop because *"Much of the evidence that I will be using to substantiate my concerns and also to refute the false allegations made yesterday are on my local hard drive."* Mr Thomas replied with access details and indicated that if the claimant needed any other company documents he should provide details so that a search could be conducted.

Claimant responds to Mr Fulton's allegations

47. The claimant emailed Mr Thomas on 20 July 2020 (144) attaching a covering letter (145-148) and extensive comments on the documents provided by Mr Fulton to Mr Thomas (149-187) and on Mr Thomas* notes of his telephone conversations with Mr Smith and Mr McCartney (188-192). The following give a flavour of the claimant's comments -

"This is a complete nonsense and stated to distract you from his dishonesty."

"It is a complete malicious fabrication made up by Mr Fulton with the aim of discrediting me and trying to persuade some sort of false barrier between me and the senior managers."

"This is a complete fabrication and a desperate malicious attempt to discredit me. Is he really suggesting that I would set fire to the building? This is his most outrageous slur and lie so far. ..."

"This conversation about workload and overloading the CMC did not ever take place and is fabricated by Mr Fulton."

"Exaggerated nonsense."

"This is deliberate mischievous lies, a distortion of events that took place and his most fabricated attempt to discredit me so far."

*"Deliberate malicious scaremongering fabricated to discredit me. **

"Complete fantasy."

"....this is the first time I have experienced such a vile and sustained attack on my character."

48. Mr Thomas did not prepare a report following his investigation. Instead he provided Mr Hill with all of the documentation referenced above. He (Mr Thomas) emailed the claimant on 21 July 2021 advising that Mr Hill was looking to schedule a Teams meeting for 23 July 2020.

Grievance hearing

49. This took place on Teams on 23 July 2020. The hearing was recorded and a transcript produced (194-199). This indicated that Mr Hill proceeded on the basis that there were two aspects to the grievance - the Yorkshire site incident and the falsification of statistics provided to the NSI auditor. The transcript recorded Mr Hill as stating that "we're *all agreed the process wasn't followed"* in relation to the Yorkshire site incident. It also recorded Mr Hill telling the claimant in relation to the allegation that Mr Fulton manipulated the NSI statistics that *"there is no denial of that from Grant as you are aware".*

50. The transcript recorded an exchange between Mr Hill and the claimant near the end of their discussion as follows -

"RH I think regarding the two specific allegations in your confidential concerns document which is treated as a grievance I think we have covered those off. I'll wrap up but will first ask if you think you have had a fair hearing in terms of being able to explain fully the nature of those concerns?

BM Yes, although I am not totally understanding the grievance structure, but I feel that I have brought things to your attention, you have listened. I have had the opportunity to express everything that is in my head to you, you understand

it. I have given you all the information and rm content with that and am sure you'll do whatever you need to do."

Grievance outcome

51. Mr Hill wrote to the claimant on 27 July 2020 (201-202) with his grievance outcome. After narrating the background and describing Mr Thomas' investigation, Mr Hill continued -

"One of the examples you provided as evidence of Grant hiding and delaying information concerned an incident at East Riding School Goole Depot. You claimed that Grant had failed to record an incident on 10 June 2020. The witness evidence supplied by Grant, David and Gavin indicated that any failure to report the incident was not Grant's fault. As the client was well aware of the incident Gavin felt it unnecessary to formally log the incident. While this was not in accordance with the correct procedure, I do not consider that any fault can be attributed to Grant in the matter.

In his written response Grant has strongly denied that he has withheld, delayed or hidden management information. The only example you supplied to support the allegation was the East Riding School Goole Depot incident referred to above. Based on this finding and the absence of any firm evidence to support your allegation I have reached the conclusion that I am unable to support this element of your complaint.

This leads me to the more serious allegation that Grant had deliberately falsified data submitted to the NSI in order to artificially boost the audit scores. Grant's response to that allegation was to concede that he had indeed falsified data but it had been done not Just with your full knowledge but under direct instruction from you. David's evidence was that he was aware that the data had been falsified but believed it had been done under your instruction. Gavin was also aware of the practice and admitted that he had assisted Grant in manipulating that data and believed it had been occurring for at least three years. Gavin also stated that he believed you were aware of the practice. In your response, you maintained that you were unaware of the falsification of records and would never have instructed Grant to fabricate information.

Whilst there is no documentary evidence indicating that you instructed Grant to falsify this information, I find it deeply troubling that the three most senior members of the CMC ail believed you were well aware of the practice. Whilst I note your argument that Grant and David have their own reasons to give evidence against you, it is difficult to accept that you were not aware of what was going on. The management team at the CMC is a very small one and would be in constant day to day communication with each other. I am sure you would have taken an active interest in the NSI audits, given their importance to the operation, and should have worked closely with Grant to ensure favourable audits were delivered. Accordingly, it stretches credibility to believe that you were ignorant of the data falsification. The balance of witness evidence does not support your denial that it was all done without your knowledge."

52. Mr Hill went on to tell the claimant that he had decided not to uphold his grievance. He advised the claimant that he would contact him separately about Mr Fulton's allegations against him. He told the claimant that he had the right to appeal.

53. The claimant did not appeal. He did respond to Mr Hill's outcome letter by email on 30 July 2020 (217-218). In this the claimant set out the history of how data was compiled for NSI audits including the need for manual extraction of data from certain of the systems used by the respondent. He said that Mr Fulton had evolved the methods of obtaining data manually, and continued -

'*7 have always been aware of the manipulation required to get the information from the different systems collated and to try and present them in a useable format and it is a best endeavour to get an approximate overall status. Both Gavin and David are aware that I understand the need [for] to gather and edit the data from the different systems in preparation for an overall status report."*

54. The claimant defended his own position in these terms -

"Somewhere over the last years of evolving Grant chose to simply edit and falsify the numbers provided to the NSI. Both David and Gavin "believed" I was aware of this, however I was not and when I found out, it was brought to your attention.

I've been accused of threatening Grant to deliberately falsify the figures which is not the case. "

Breakdown in working relationships

55. It was apparent to Mr Hill that there had been a *"fundamental rift"* within the respondent's management team and that there was *"a complete absence of trust and respect"* between the claimant and Mr Fulton/Mr Smith. Mr Hill issued a second letter to the claimant on 27 July 2020 (203) in which he referred to Mr Fulton's allegations against the claimant being *"of a very serious nature and could lead to future disciplinary proceedings".* Mr Hill then told the claimant -

"....my *immediate concern is the breakdown in your working relationship with Grant and David"*

and

"Both Grant and David have made it clear to me that they would have serious concerns with your returning to the working environment to the extent of contemplating leaving the company."

56. Mr Hill advised that he needed to discuss these concerns with the claimant *"because if there is no prospect of the relationships being repaired then I may be faced with having to make a decision as to who needs to be retained most in the business".* Mr Hill said that this *"could lead to a decision to terminate your employment on grounds of an irretrievable breakdown in the working relationship".* Mr Hill invited the claimant to a meeting on MS Teams on 29 July 2020.

57. Mr Hill held the Teams meeting with the claimant on 29 July 2020. As before, this was recorded and a transcript produced (204-207). The claimant acknowledged that there had been a *"strong disagreement"* but expressed the view that it would be better now that this was *"out in the open".* The claimant said that he *"no malice"* in respect of what Mr Fulton and Mr Smith had done or said. The transcript recorded the claimant saying of Mr Fulton *"He is a good operations manager; he is absolutely needed by the company to run that place".*

58. Mr Hill referred to the language the claimant had used in relation to Mr Fulton. The claimant accepted that he had wanted Mr Fulton *"to read….and be aware"* of what he had written. He also accepted that some of what Mr Fulton and Mr Smith had written/said had been *"just to defend themselves".* The claimant told Mr Hill that he was *"happy to put things behind us and move the business forward"* and added that he was *"more than happy to be under a probationary period".*

59. The discussion between Mr Hill and the claimant then moved on to the possibility of mediation. Mr Hill was recorded as telling the claimant -

"….mediation only works if all parties buy into that process, so would need to be agreed by everybody that that was going to be a potential solution. And if it's not, it leads me back where [from where] I was when I wrote the letter, which is that you know, I'm going to need to make a business decision about who should stay and who should go."

60. The claimant responded by telling Mr Hill that he was happy to work alongside Mr Fulton and Mr Smith. The claimant was recorded as continuing -

"And both of them are essential to the business. …I can imagine the difficulty you resolve in replacing Grant at any point. …"

The discussion concluded with Mr Hill saying that would speak with Mr Fulton and Mr Smith to establish whether they were *"prepared to enter into some sort of mediation".*

61. Mr Hill made contact with Mr Fulton and Mr Smith later on 29 July 2020. Neither was receptive to the suggestion of mediation. Mr Hill reported on their reaction in an email to Mr Thomas on 30 July 2020 -

"David was vociferous in his refusal to enter into any form of mediation. He said he has no interest in either seeing or speaking to Bill again. …he simply could not accept the prospect of Bill returning and working alongside him once more."

"Similarly, Grant feels that the relationship has been broken to a fundamentally irreconcilable extent, describing it as "utterly toxic"….He does not think that

mediation will be beneficial and that, should Bill return, his position would be untenable. To that end he refuses to participate in any such process. "

Alternative employment

62. In his email to Mr Thomas, Mr Hill said that he found it *"difficult to see how Bill can return to work within the monitoring team".* He said that he would make enquiries of two senior colleagues (Mr P Lotter and Mr T Frost) as to whether there might be a suitable opportunity for the claimant elsewhere in the group. His view was that, given his senior management experience, the claimant might have more transferrable skills than Mr Fulton and Mr Smith.

63. In fact Mr Hill had already emailed Mr Lotter and Mr Frost on 29 July 2020 (208-210). Mr Hill received negative responses from both of them.

Mr Hill engages with claimant

64. Mr Hill wrote to the claimant again on 30 July 2020 (215-216). He reported on the reactions of Mr Fulton and Mr Smith. He told the claimant that they had rejected any form of mediation. He said that for mediation to have any chance of success *"it is imperative that all parties consent to it".*

65. Mr Hill went on to tell the claimant that he now had *"to make a decision as to who should remain".* Mr Hill indicated that, before making a final decision, he wanted to give the claimant an opportunity to provide any submissions he might want Mr Hill to consider. He told the claimant that "a *possible outcome could be the termination of your employment".*

66. The claimant responded to Mr Hill by email dated 2 August 2020 (219). He attached a response document (220-226). The claimant accepted that if he stayed, Mr Fulton *"would almost certainly choose to leave the business as he threatened".* The claimant thought it less likely that Mr Smith would leave. The claimant reminded Mr Hill that he (the claimant) had previously carried out all aspects of Mr Fulton's role and *"could easily include these functions as part of being the Technical Director".*

Mr Hill decides to dismiss claimant

67. Mr Hill described the matters he took into account in reaching a decision. He said he believed that if the claimant stayed it was *"almost certain"* that Mr Fulton would leave, and probable that Mr Smith would do the same. He had to consider which was the *"least worst"* option. Mr Hill believed, from a business and operational perspective, the departure of Mr Fulton and Mr Smith *"would have a profoundly negative impact".* He said that his *"clear view"* was that the respondent's business needs were best met if it was the claimant who left rather than Mr Fulton and Mr Smith.

68. Mr Hill considered whether one party was more culpable than the other in causing the relationship breakdown. He believed that the claimant's allegations were the *"catalyst"* for that breakdown. He had already reached the decision not to uphold those allegations. He concluded that *"if anyone was to blame for the breakdown in working relationships it was certainly as much Bill's responsibility as anyone else's"*

69. Mr Hill also considered whether there was any other alternative to terminating the claimant's employment. He did not believe that there was anything in the claimant's skillset and experience which would lend itself to a position in the alternative business of manned guarding, in which there were in any event no vacancies.

70. Mr Hill's decision was to terminate the claimant's employment. He advised the claimant of this by emailed letter of 4 August 2020 (228-230). In this Mr Hill set out the matters he had considered and the conclusions he had reached. He gave the claimant three months' notice expiring on 4 November 2020. He advised the claimant of his right of appeal.

Claimant appeals

71. The claimant emailed Mr Hill on 7 August 2020 (231) indicating that he wished to exercise his right of appeal. Mr Hill responded on 10 August 2020 advising that Mr Bullock would be hearing the appeal via MS Teams and requesting more detail as to the grounds of appeal. The claimant emailed Mr Bullock on 19 August 2020 stating his grounds of appeal as -

- *I have never been invited to a disciplinary hearing.*
- *I have never attended a disciplinary hearing.*
- *And I'm having my employment terminated unfairly.*

72. The appeal hearing took place by MS Teams on 20 August 2020. The claimant was accompanied by his Unite representative, Mr J Smith. Once again the meeting was recorded and a transcript produced (239-250).

73. Early in the meeting the claimant referred to having downloaded the respondent's whistleblowing policy (268-269). He directed attention to the part of the policy which stated -

"The aim of this policy is to ensure that colleagues are confident that they can raise any matter with the Company that concerns them in the knowledge that it will be taken seriously, treated confidentially and that no action will be taken against them. "

74. The claimant then made reference to Mr Thomas' email which spoke about *"the next stage of the grievance"* and indicated that he had been confused by this *"because it wasn't a grievance I was raising. It was a whistle blowing concern. "* Mr Bullock asked whether the claimant had made this clear, and the claimant responded that he *"assumed that they were just using the wrong language for what I'd done. I'd blatantly raised a whistleblowing concern. ...".*

75. The transcript recorded Mr Smith making a similar point (at 242) quite forcefully –

"....he [Mr Hill] talks about procedures not being followed. He says based on these findings he has not upheld the grievance. If the complaint was the fact that somebody was falsifying information. And then we have a situation where they admit they falsified information, then I really don't get how they don't uphold that. So it was [a] whistle blowing; the whistle blowing was on the basis, that information and [had?] been falsified. Somebody then in the grievance hearing has admitted they did falsify, but they don't uphold the grievance."

76. Our view of this was that the claimant had looked at the respondent's whistleblowing policy before raising his concerns with Mr Hill on 21 June 2020 but he had not, prior to the appeal, described it as whistleblowing and it had not occurred to Mr Thomas and Mr Hill that they were dealing with a whistleblowing issue. With the wisdom of hindsight, they should have realised that the claimant's concerns had more of a flavour of whistleblowing than a grievance. However, notwithstanding his misgivings about the process being described as a grievance (see paragraphs 29 and 50 above), the claimant had not previously described his raising of concerns as whistleblowing.

77. After the appeal hearing Mr Bullock emailed the claimant on 20 August 2020 (251) and summarised the appeal points in these terms -

"1) You feel you were unfairly dismissed

2) That you followed the whistleblowing policy as per the Company procedure

3) You have not attended any disciplinary hearing or meeting

4) That you have not been able to state your case

5) Mediation option was not progressed

6) Your 19 years of service have not been taken into account"

78. Following the appeal hearing Mr Bullock emailed Mr Hill and Mr Thomas on 27 August 2020 asking them to comment on various points. Both did so on the same date (253-258). Mr Bullock emailed the claimant on 1 September 2020 (259) attaching the responses from Mr Thomas and Mr Hill, and seeking his comments. The claimant responded on 2 September 2020 indicating that he had no further comments.

79. Mr Bullock spoke to Mr Fulton and Mr Smith on 3 September 2020. A transcript of the call with Mr Smith was in the bundle (262-263) but we had no similar record of the call with Mr Fulton.

80. Mr Bullock wrote to the claimant on 8 September 2020 (264-267) with the appeal outcome. The points covered in Mr Bullock's letter included the following -

    (a) The claimant was neither invited to nor attended a disciplinary hearing because this was not required under the *"irretrievable breakdown in working relations"* ground upon which Mr Hill made his decision to dismiss.

    (b) The claimant had not mentioned whistleblowing until the appeal. However, it made no material difference because, whether raised as a grievance or whistleblowing, the claimant's concerns required full and proper investigation. Mr Bullock was satisfied that had been done.

    (c) Mr Bullock found no evidence that the claimant had been unable to state his case.

    (d) Mr Bullock referred to his interviews with Mr Fulton and Mr Smith where both had stated that they would not consider mediation.

    (e) Mr Bullock noted that Mr Fulton had over 16 years' service and Mr Smith had 12 years. He did not accept that length of service was a basis for overturning Mr Hill's decision.

81. Mr Bullock rejected the claimant's appeal. He concluded as follows -

    "Based on all the evidence presented and the ongoing requirements of the business, I must agree with and uphold Mr Hill's decision to terminate your employment on the grounds of irretrievable breakdown in working relationships. It is clear to me that he had genuine and substantial grounds to reach the conclusion that here had been such a breakdown in your working relationships. It was this, rather than your original disclosures, that was the reason for your employment being terminated."

Mitigation

82. At the time of his dismissal the claimant's gross weekly pay was £1346.07. His net weekly pay was £982.94. The respondent contributed to his pension at the rate of 8.75%. We had no other details of the pension scheme in which the claimant participated while employed by the respondent.

83. For a short period after his dismissal the claimant worked as a self-employed courier earning £580.45 net. He had to give this up after suffering an injury to his left knee. At the end of November 2020 the claimant was offered employment with Herongrange Recruitment and Training Solutions Ltd. He was due to start in early January 2021 but this was postponed to early April 2021. In the meantime the claimant commenced consultancy work with Safer Scotland in March 2021. With effect from 1 May 2021 the claimant left Herongrange and took up full time employment with Safer Scotland.

84. The claimant earned £988.00 net with Herongrange. He estimated his net consultancy earnings with Safer Scotland at £5670.00. His net salary from Safer Scotland for May 2021 was £3245.57 and thereafter £3068.43 per month. His Safer Scotland payslips (328-332) disclosed employee pension contributions of £229.17 per month but did not disclose employer pension contributions.

85. The claimant accepted under cross-examination that he had not provided details of any other jobs he had applied for. He also accepted that he had not provided any evidence of seeking better paid employment since he started with Safer Scotland.

Comments on evidence

86. It is not the function of the Employment Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have focussed on those parts of the evidence which had the closest bearing on the issues we had to decide.

87. All of the witnesses were credible. We did not have to resolve any conflicts as between their respective accounts of the events leading to the claimant's dismissal. We had a considerable volume of contemporaneous documentation which we found useful in recording those events.

88. While the claimant was quite robust at some points during cross-examination, we found that he was at times too willing to accept matters put to him by Ms Tharoo. We return to this below.

Submissions

89. There was insufficient time for submissions following conclusion of the evidence on 3 November 2021 . We agreed with the parties that written submissions would be provided. We are grateful to Mr Lawson and Ms Tharoo for the evident care taken in preparing these. Unfortunately it did not prove possible to convene a meeting to discuss and decide the case until 28 February 2022. We apologise to the parties for the delay in providing this Judgment.

90. The written submissions are available in the case file and we do not propose to rehearse them here. Instead, we refer to those submissions where appropriate within the discussion section below.

Applicable law

91 . The provisions of ERA dealing with protected disclosures are, so far as relevant in this case, as follows -

43A Meaning of "protected disclosure"

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

43B Disclosures qualifying for protection

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

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

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

(c) that a miscarriage of Justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed. …

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -

(a) to his employer. …

92. The protection against dismissal for making a protected disclosure is set out in section 103A ERA -

103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

93. The right not be unfairly dismissed is found in section 94(1) ERA -

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

94. The fairness of a dismissal is dealt with in section 98 ERA -

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to Justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it -

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) ….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case….

Discussion

95. We reminded ourselves of the list of issues we had to determine (see paragraph 5 above). We considered that it was appropriate to approach these in a different order, dealing firstly with whether the claimant had made a protected disclosure or disclosures.

Protected disclosures

96. This took us to the claimant's *"significant concerns"* document (85) attached to his email to Mr Hill of 21 June 2020 (84). We have set out the claimant's allegations about Mr Fulton at paragraphs 24 and 25 above. We adopt the summary of the matters asserted by the claimant to be protected disclosures in Ms Tharoo's submissions -

(a) The allegation that Mr Fulton hid or withheld critical information from the claimant.

(b) The allegation that Mr Fulton had not responded to a customer enquiry (ie the Yorkshire site incident).

(c) The allegation that Mr Fulton had had falsified the NSI audit figures.

97. Ms Tharoo referred us to the summary of the components of a protected disclosure by Auberach HHJ in ***Williams v Michelle Brown AM UKEAT/0044/19*** at paragraph 9 -

"*It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.*"

98. Before considering the alleged protected disclosures in this case on the basis of these elements, we reminded ourselves of a number of cases which seemed to us to be relevant. We also reminded ourselves that to qualify for protection, there

had to be sufficient detail provided to make it reasonably clear what information was being disclosed. A general assertion of wrongdoing would not be enough.

99. In ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 235*** the Employment Appeal Tribunal said that what was required was a disclosure and not merely an allegation. However, the Court of Appeal in ***Kilraine v London Borough of Wandworth 2018 ICR 1850*** stressed (at paragraph 31) that there is no rigid distinction between disclosure and allegation - *"Whether a particular allegation amounts to a protected disclosure under section 43B(1) will depend on whether it falls within the language used in that provision".* There can still be a *"disclosure of information"* where the employer is already aware of what is disclosed - section 43L(3) ERA.

100. In relation to whether a disclosure is in the public interest, in ***Chesterton Global Ltd v Nurmohamed 2018 ICR 731*** the Court of Appeal (per Underhill LJ at paragraph 37) regarded consideration of four factors as a *"useful tool''*- (a) the numbers in the group whose interests the disclosure served, (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed, (c) the nature of the wrongdoing disclosed and (d) the identity of the alleged wrongdoer. Underhill LJ said that *"The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case".*

101. In ***Dobbie v Felton UKEAT/01 30/20*** the EAT (per Tayler HHJ) said this (at paragraph 28) after listing (at paragraph 27) the key points to be extracted from Underhill LJ's reasoning in ***Chesterton -***

"(8) while motivation is not the issue; so that a disclosure that is made with no wish to serve the public can still be a qualifying disclosure; the person making the disclosure must hold the reasonable belief that the disclosure is "made" in the public interest. If the aim of making the disclosure is to damage the public interest, it is hard to see how it could be protected. ...Generally workers blow the whistle to draw attention to wrongdoing. That is often an important component of why in making the disclosure they are acting in the public interest."

102. We proceeded to look at each of the matters disclosed with a view to assessing whether they qualified for protection. Firstly, we considered the allegation that Mr Fulton hid or withheld critical information from the claimant. With some hesitation we were prepared to accept that this was a disclosure of information. That hesitation arose because of the lack of detail as to what critical information was said to have been withheld.

103. We then considered whether the claimant believed this disclosure was made in the public interest. We did not consider that the claimant held that belief. There might well be circumstances where hiding or withholding critical information from a colleague would engage the public interest. An example would be misuse of publicly funded grant monies. However, in the present case, without more information being provided at the time of making the disclosure, it was not in our view possible to say that this disclosure was made in the public interest nor that the claimant believed it was so made.

104. It was also in our view not possible to say that this disclosure tended to show any of the matters in section 43B(1)(a) to (f). Without some information as to what was said to be hidden or withheld, it was not possible to identify any possible criminal offence, any legal obligation not being complied with, any miscarriage of justice, any endangerment to health and safety, any possible damage to the environment nor any concealment of one or more of these. Accordingly, our view was that this was not a disclosure which qualified for protection.

105. We looked next at the allegation that Mr Fulton had not responded to a customer enquiry (the Yorkshire site incident). In this case we were satisfied that there had been a disclosure of information and that the information provided was sufficient. The claimant gave the location, the contract number and the date of the incident and he referred to sixteen minibuses being vandalised.

106. Ms Tharoo argued that the claimant had failed to provide any information on how he considered that this disclosure was made in the public interest, such that we could assess whether such a belief was reasonably held. She also submitted that the claimant had accepted under cross-examination that none of the matters set out in section 43B(1)(a) to (f) was made out.

107. Our view of this was that the claimant had, at the time he wrote to Mr Hill on 21 June 2020, believed that he was making a disclosure in the public interest. The vandalising of sixteen minibuses was a criminal act. Prevention and detection of crime are in the public interest. There is also a broad public interest in the monitoring of CCTV and other security systems being carried out efficiently as a deterrent to crime.

108. We were satisfied that the claimant's belief that this disclosure was in the public interest was reasonable. It seemed to us that this was self-evident and did not require further explanation.

109. What Ms Tharoo said about the claimant's evidence under cross-examination was correct. We believed that this was an example of the claimant being too willing to accept matters put to him. What we had to determine was whether, at the time he made the disclosure, the claimant believed that his disclosure tended to show one or more of the matters listed in section 43B(1)(a) to (f).

110. The claimant made reference to the installer of the system, which was being monitored by the respondent, relaying to the CMC that *"intruders were on site between 4am and 5am".* This and his reference to the minibuses being *"vandalised"* indicated that the claimant clearly had in mind when he wrote to Mr Hill on 21 June 2020 that a crime had been committed.

111. We were again satisfied that the claimant's belief that a crime had been committed was reasonable. As with his belief about his disclosure being in the public interest, we found that this was self-evident and did not require further explanation.

112. We looked finally at the allegation that Mr Fulton had falsified the NSI audit figures. Here Ms Tharoo accepted that there was a disclosure of information. She acknowledged that the claimant might well be correct in asserting public interest on the basis that having NSI accreditation would impact on whether a client used the services of the respondent or not. However, she questioned whether the claimant <u>believed</u> that his disclosure was in the public interest.

113. Ms Tharoo's argument was that if it was right that the claimant had been involved in any falsification of audit figures, in that he had required or authorised such falsification on a regular basis, that called into question his reason for making the disclosure. Was it because he believed it was in the public interest or did he have personal motivation for doing so? Ms Tharoo made a number of points in her submission about the claimant's involvement in the NSI audit process, particularly his knowledge of *"finessing"* of the data. Ms Tharoo also referred to aspects of relationships within the CMC - the change whereby Mr Fulton reported to Mr Hill rather than the claimant, deterioration in the relationship between the claimant and Mr Fulton, and the claimant being furloughed.

114. Our view of this was that the claimant's disclosure about falsification of NSI audit figures was made in the public interest, and the claimant believed at the time that it was so made. The claimant's reference to the respondent being at risk of *"significant reputational damage"* (see paragraph 25 above) reflected his belief that having NSI accreditation was of commercial benefit to the respondent. Without that accreditation, the respondent would be at a disadvantage compared with its competitors.

115. The public interest in the prevention and detection of crime extended in our view to public confidence in companies, such as the respondent, which monitor alerts from intruder, building, fire and CCTV systems. NSI accreditation indicated compliance with British Standards applicable to such monitoring. Falsification of data supplied to NSI undermined that confidence. The claimant's belief that disclosure of such falsification was in the public interest was reasonable.

116. Ms Tharoo questioned the claimant's motivation in making his allegation of falsification. We reminded ourselves of what Auerbach HHJ said at paragraph 27 in ***Dobbie*** when listing Underhill LJ's key points in ***Chesterton*** -

"(2) while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it - Underhill LJ doubted whether it need be any part of the worker's motivation"

117. Ms Tharoo argued that the claimant's disclosure was made *"for purely personal reasons, namely to protect his own position and reputation despite having played a key part in the manipulation of the figures in the first place".* It was correct for Ms Tharoo to say that the claimant had not evidenced his allegation by reference to Mr Fulton's emails despite being invited by Mr Thomas to identify what he (Mr Thomas) should search for. We believed that there was a personal element to the claimant's motivation in making the NSI falsification allegation. However, we were not persuaded that this meant his belief (that it was in the public interest) when he made the disclosure was other than genuine and reasonable.

118. We moved on to consider whether the claimant believed that the disclosure tended to show one or more of the matters in section 43B(1)(a) to (f) ERA. The claimant relied on (i) breach of legal obligation and (ii) health and safety being endangered.

119. Ms Tharoo argued that the claimant could not point to any specific legal obligation. She said that the respondent did not dispute that providing false information was morally wrong, but that was not the test. How could the claimant believe the respondent was in breach of a legal obligation if he could not say what that obligation was?

120. Mr Lawson's position was that the respondent was under a legal obligation to provide accurate data to NSI. He referred to the evidence of Mr Thomas accepting that there would be a contract in place between the respondent and NSI. He also referred to the evidence of Mr Hill that the failure to provide accurate data to NSI was *"certainly a breach of a requirement which was contrary to accreditation".*

121. Our view of this was as follows -

    (a) The reciprocal obligations which we found to exist between the respondent and NSI (see paragraph 15 above) were in the nature of legal obligations. The respondent agreed to provide the data and NSI agreed to provide the accreditation.

(b) The existence of those legal obligations was not negated because the claimant could not point to the specifics. Section 43B(1)(b) ERA did not require a worker to specify the exact nature of the legal obligation in respect of which he believed there was non-compliance. What was required was belief on the part of the worker that (i) there was a legal obligation and (ii) there was non-compliance with that obligation.

(c) The claimant's disclosure about falsification of NSI data met that requirement.

(d) We considered it self-evident that the claimant's belief in non-compliance by the respondent with a legal obligation was reasonable.

122. Although the point was not argued before us, we believed that there might be a second *"failure to comply with a legal obligation"* issue. That arose in the context of the legal obligation which the respondent had to its customers who were paying for the monitoring service. Those customers had a reasonable expectation that the respondent, being accredited by NSI, would deliver their service to the standard required to hold that accreditation. However, as this was not explored in the evidence, we say no more about it.

123. In relation to health and safety being endangered, we understood that some of the systems monitored by the respondent included fire alarms. We could see the logic in saying that falsifying NSI data indicated that the respondent was not performing to the required standard, which might mean a delay in response to a fire alarm, which might in turn endanger anyone on the affected premises and/or the emergency services personnel who attended.

124. We were not persuaded that this was a belief held by the claimant at the time of his disclosure. We took Ms Tharoo's point that the claimant made no reference to this at any stage during the investigation. As we did not find that the claimant held this belief, we did not need to consider whether, if held, it was reasonable.

125. In summary, therefore, we found that the claimant had made protected disclosures in relation to (a) the Yorkshire site incident and (b) the falsification of NSI data.

Section 103 A ERA

126. Returning to the list of issues, we next addressed whether the reason or principal reason for the claimant's dismissal was his protected disclosure or disclosures. Although we can deal with this quite briefly, it was an issue which caused us considerable difficulty.

127. We had no doubt that but for the claimant's protected disclosures, he would not have been dismissed. Those disclosures started the chain of events which ended with the dismissal. However, we reminded ourselves that this was not the correct test. We had to focus on the reason for the claimant's dismissal. Had the claimant been dismissed because he made protected disclosures or because there was an irretrievable breakdown in relationships within the CMC management team?

128. Mr Lawson referred to the respondent's position that the claimant was dismissed not for making his disclosures but due to a breakdown in working relationships. The respondent had however accepted that the breakdown in working relationships was caused by the claimant's disclosures. Mr Lawson submitted -

"A *breakdown in working relationships is almost inevitable when a complaint of this nature is made against colleagues. To find that a distinction exists between the making of the disclosure and the impact of making that disclosure would fundamentally undermine the legal protection afforded to whistle-blowers."*

129. Mr Lawson referred to ***Croke v Hydro Aluminium Worcester Ltd 2007 ICR 1303*** where the EAT said (at 1314B) that -

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

130. Ms Tharoo drew a distinction between the claimant's allegations which were said to be protected disclosures and the breakdown in the relationship between the claimant and Mr Fulton/Mr Smith. She argued that the breakdown was not motivated by any specific allegation. She referred to Mr Fulton's description of the two documents which the claimant submitted on 21 June 2020 as a *"character assassination"* If there were protected disclosures, Ms Tharoo submitted that they were *"simply one small part of a wider attempt by [the claimant] to criticise and undermine the other members of the management team in such a way that the relationship was broken beyond repair".*

131. That there can be such a distinction was highlighted (albeit in a slightly different context) in the case of ***Ezsias v North Glamorgan NHS Trust 2100 IRLR 550.*** There, the EAT (per Keith J) said this (at 559, para 53) -

"It is apparent. …that the tribunal was alive to the refined but important distinction between dismissing Mr Ezsias for his conduct in causing the breakdown of relationships, and dismissing him for the fact that those relationships had broken down. In these circumstances, the only fair reading of the tribunal's finding... .about the reason for Mr Ezsias' dismissal is that although as a matter of history it was Mr Ezsias' conduct which had in the main been responsible for the breakdown of the relationships, it was the fact of the breakdown which was the reason for his dismissal (his responsibility for that being incidental). "

132. Mr Lawson referred to Mr Hill accepting in evidence that the claimant's allegations were *"certainly the largest contributing factor"* to the breakdown in working relationships. He said that Mr Bullock had accepted that the breakdown in working relationships was caused by the claimant's disclosures of 21 June 2020.

133. We reminded ourselves that when dealing with section 103A ERA we were concerned with the reason (or principal reason) for the dismissal. This contrasted with section 47B(1) ERA which provides that -

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

134. In ***Fecitt v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372*** the Court of Appeal said that -

"….liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act".

135. We came to the following conclusions -

(a) The claimant's protected disclosures were a material factor in the breakdown in his working relationships with Mr Fulton/Mr Smith.

(b) The strident language in which the claimant's allegations were expressed was also a material factor in that breakdown.

(c) Mr Fulton's strenuous denial of any wrongdoing and his counter-allegations against the claimant, also expressed in strident language, were also material factors in that breakdown.

(d) It was the breakdown in working relationships, rather than any one contributing factor causing that breakdown, which was the reason for the claimant's dismissal.

136. Accordingly, we found that the reason for the claimant's dismissal was not the fact that he had made protected disclosures. This meant that his claim of automatically unfair dismissal under section 103A ERA did not succeed.

Reason for dismissal

137. The next issue we considered was whether the respondent had shown a reason for dismissal in terms of section 98(1) ERA.

138. Mr Lawson's primary position was that the respondent had failed to show a reason for the claimant's dismissal. His secondary position was that, if there was a potentially fair reason for dismissal it should be categorised as conduct rather than some other substantial reason ("SOSR"). Mr Lawson argued that the respondent was using SOSR as a pretext to conceal the real reason for dismissal. Mr Lawson referred to ***Ezsias*** (at page 560, para 58) -

"We *have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal."*

139. Ms Tharoo's position was that it was *"very clear that the reason for the Claimant's dismissal was a fundamental breakdown in the working relationships"* between the claimant and Mr Fulton/Mr Smith.

140. Our view was that the respondent had shown that it was the breakdown in the working relationships between the claimant and Mr Fulton/Mr Smith which was the reason for the claimant's dismissal. We agreed with Ms Tharoo when she submitted -

"*The size of the management team was such that it was essential that they worked constructively together, and this was clearly impossible [moving] forward. "*

141. We considered that it was apparent from the way in which both the claimant and Mr Fulton expressed themselves when referring to the other in their allegations and counter-allegations that the working relationship between them had been seriously damaged. The respondent attempted to address this through proposed mediation but this was met with strong resistance from Mr Fulton and Mr Smith, further confirming the breakdown in working relationships.

142. We found that the breakdown in working relationships was a SOSR for dismissal in this case. It was not a pretext to conceal another reason. In particular, it did not conceal that the real reason for dismissal was the claimant's conduct. It was apparent from the evidence that there were aspects of the claimant's conduct, at least as alleged by Mr Fulton, that might have resulted in a disciplinary process. However, given that he was suggesting mediation, it could not in our view be said that the facts or beliefs in Mr Hill's mind which caused him to dismiss the claimant related principally to the claimant's conduct.

143. In so finding we recalled what the Court of Appeal (per Lord Cairns) said in ***Abernethy v Mott, Hay and Anderson 1974 IRLR 213 -***

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee."

Was dismissal fair or unfair?

144. Mr Lawson expressed his main arguments on the fairness or otherwise of the claimant's dismissal in these terms -

"If SOSR, dismissal was unfair as there were alternatives to dismissal, including compulsory mediation or allowing another employee to leave employment voluntarily.

Moreover, the ET is entitled to, and should, consider the reason for any breakdown in working relationships. It is manifestly unfair to dismiss in circumstances where the cause of the breakdown is that the employee has raised issues of misconduct which are admitted by those who are the subject of the allegations.

Whether conduct or SOSR, the respondent failed to follow a fair procedure due to: (i) breach of natural justice and the ACAS Code by not convening a disciplinary hearing; and (ii) breach of R's whistleblowing procedure."

145. Ms Tharoo's response was in these terms -

"It is very clear that R followed a fair and reasonable process in this case prior to making any decision. C was made aware of the concerns which R had about how the management team could move forward, and was made aware that one possible option might be the termination of his employment. He was invited to a meeting to discuss the matter, and was provided with the other information which RH had ascertained following his investigations, and was given an opportunity to comment. Alternatives to dismissal were considered, and attempts made to seek an alternative role. C was provided with clear reasons in writing for the decision that was ultimately made, and was given the opportunity to appeal. That appeal process considered both matters that C had raised in his grounds of appeal and

matters that he raised for the first time at the hearing and a full outcome was provided in writing. "

146. There was a superficial attraction in Mr Lawson's argument. The claimant had alleged misconduct by Mr Fulton. Mr Fulton had admitted the misconduct. This had led to a breakdown in their working relationship. Yet it was the claimant who was dismissed.

147. We reminded ourselves of our task when applying section 98(4) ERA. We had to decide whether in the circumstances the respondent had acted reasonably or unreasonably in treating the fundamental breakdown in working relationships as a sufficient reason for dismissing the claimant, and we had to determine that question in accordance with equity and the substantial merits of the case.

148. We have described the attraction in Mr Lawson's argument as *"superficial"* because it focussed on three aspects of the process which ended with the claimant's dismissal (the allegation of misconduct, the admission of that misconduct and the breakdown in working relationships). In our view there was more to it than that.

149. We considered that these additional aspects were relevant -

(a) The claimant's allegations against Mr Fulton, and his responses to Mr Fulton's counter-allegations, were expressed in language which seemed to us designed to give offence.

(b) While Mr Fulton had admitted falsification of NSI data, he had asserted that this was done with the claimant's knowledge and on his direction. He had also made his own allegations of potentially serious misconduct by the claimant.

(c) Mr Fulton had also used language which appeared designed to give offence.

(d) While there were conduct issues both on the part of Mr Fulton and, potentially, the claimant, the breakdown in their working relationship occurred before these could be investigated.

(e) The respondent had explored mediation, and had considered the likelihood and the consequences of Mr Fulton and Mr Smith leaving if the claimant stayed. To

his credit, the claimant recognised Mr Fulton's value to the respondent's business (see paragraph 60 above).

(f) The respondent had made enquiries to ascertain if there might be an alternative role for the claimant elsewhere in their group.

150. We also considered the procedure followed by the respondent leading to the claimant's dismissal. We did not agree with Mr Lawson that there had been a breach of natural justice and a failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "Code") by not convening a disciplinary hearing. The respondent did not initiate a disciplinary process such as to engage the Code. To hold that they should have done so (if we were so minded - which we were not) would be an impermissible substitution of our own view for that of the respondent.

151. We were concerned that the respondent had not dealt with the claimant's disclosures under their whistleblowing policy (268-269). However, we recognised that we were in effect judging the respondent with the wisdom of hindsight. The claimant might have looked at the whistleblowing policy before he wrote to Mr Hill on 21 June 2020 but he did not reference this. We believed it was more important that the matters raised by the claimant were properly considered by the respondent than the label attached to the process at the time.

152. That said, it seemed to us that the key point in the whistleblowing policy was the one captured in the excerpt we have quoted at paragraph 73 above. A whistleblower could raise any matter 7n *the knowledge that….no action will be taken against them".*

153. The issue for us was whether, as Mr Lawson contended, the respondent had acted in breach of its whistleblowing policy and, if so, whether that rendered the claimant's dismissal unfair. Our view was that the matters raised by the claimant (so far as relating to the Yorkshire incident and the NSI data) were whistleblowing disclosures and that the claimant was entitled to the protection of the respondent's whistleblowing policy.

154. It was however also our view that the process which led to the claimant's dismissal, and the dismissal itself, were not actions taken against the claimant

because he had made protected disclosures. Matters had moved on, with the breakdown in working relations becoming the driver for the respondent's actions.

155. We were not entirely comfortable with this, ie that the claimant should lose the protection afforded by the respondent's whistleblowing policy due to the way in which events unfolded following his protected disclosures. We wrestled with the argument that this undermined the protection to which the claimant as a whistleblower was entitled. However, we also recognised that being a whistleblower did not confer complete immunity from future action by the employer.

156. It seemed to us that the protection which the claimant enjoyed was against having action taken against him as a whistleblower. We have already recorded above our finding as to the reason for the claimant's dismissal. The claimant's whistleblowing was a key element in the story but it was the breakdown in working relations which resulted in his dismissal. The action taken by the respondent in dismissing him was in response to that breakdown and not to his protected disclosures. We therefore concluded that the respondent had not acted in breach of its whistleblowing policy.

157. We should add that, had we found that the respondent did act contrary to its own whistleblowing policy, we would not have regarded this as rendering the claimant's dismissal automatically unfair. That would be the case only where the protected disclosure was the reason, or principal reason, for the dismissal. A failure to adhere to the whistleblowing policy would be one of the circumstances to be taken into account when applying section 98(4) ERA and determining whether the dismissal was fair or unfair.

Disposal

158. Accordingly, for the reasons set out above, we found that the claimant's claims of automatically unfair dismissal and *"ordinary"* unfair dismissal did not succeed and required to be dismissed.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 22 March 2022
Entered in register: 23 March 2022
and copied to parties