EMPLOYMENT TRIBUNALS

Claimant: **Mr R Garnett**

Respondent: **Ashford Specsavers Hearcare Ltd**

Heard at: **London South Employment Tribunal (by CVP)**

On: **17 and 18 March 2022**

Before: Employment Judge Dyal

Representation:

Claimant: in person

Respondent: Mr Davies, Counsel

JUDGMENT

1. The Claimant did make public interest disclosures (PIDs) on 26 February 2019, 7 March 2019 and 29 May 2019.
2. The reason for the Claimant's dismissal was not, even in part, any PID.
3. The Claimant was not unfairly dismissed within the meaning of s.103A ERA.

REASONS

Introduction

1. The Claimant complains of unfair dismissal contrary to s.103A Employment Rights Act 1996.

The hearing

2. *Documents before the tribunal*:

   2.1. Bundle of documents paginated to p324;
   2.2. Witness statements of witnesses identified below;

2.3. Case file (including Claimant's application to postpone of 13 March 2022, Respondent's response of 16 March 2022 and decision of REJ Freer of 16 March 2022; Claimant's application to strike-out of 17 March 2022);
2.4. Respondent's skeleton argument.

3. *Witnesses the tribunal heard from*:

3.1. The Claimant;
3.2. Mr Robert Marsden, Retail Director of Respondent
3.3. Mr Martin McNamara, Regional Relationship Manager of the Specsavers Group

4. *Application to adjourn and/or strike-out*

4.1. The Claimant applied to postpone this hearing on 13 March 2022. The application was refused by REJ Freer on 16 March 2022. As I read his decision he was essentially refusing the application for the time being but leaving it to the trial judge to ultimately determine.
4.2. On 17 March 2022 at 00.25 the Claimant applied to strike out the Respondent's response on similar grounds to those on which sought adjournment.
4.3. The Claimant renewed the application to postpone at the hearing.
4.4. In essence the Claimant C says that he has not had a fair opportunity to prepare for the hearing as a result of the Respondent's conduct and that he would be prejudiced if we did proceed. The relevant background is this.
4.4.1. A draft bundle was agreed between the parties some time ago. I do not have the exact date but my understanding is that it was some months ago. The issues in relation to the bundle are twofold:
4.4.1.1. The Claimant was not sent a paginated copy until 9 March 2022. It was sent electronically. He notified the Respondent's solicitor that he could not access the bundle on 11 March 2022. The problem was solved on 14 March 2022.
4.4.1.2. The bundle contained some new documents. One of which the Claimant says is relevant (p42P). He has had a chance to give that document careful thought. The others, on both sides' accounts, are not really relevant – they are at p201 -324 of the bundle. They have been adduced by the Respondent not because they are relevant to the issues in the case but to show more generally to show that the Respondent cares about health and safety.
4.4.2. Witness statements were not exchanged until 2pm on 16 March 2022, that is the afternoon before the hearing. The Claimant sent the Respondent a draft witness statement on 9 March 2022, however he indicated it was in draft form because he had not had access to the paginated bundle. The Respondent was ready to exchange at that point but since the Claimant's statement was in draft, the Respondent's solicitor deleted the Claimant's statement and told the Claimant that was what he was doing.
4.4.3. There were then the issues with the paginated bundle. The Respondent's solicitor suggested the exchange happen on 15 March 2022 and at 9am on 16 March 2022. The Claimant was not ready to exchange until 2pm.
4.5. By rule 30A there is a power to postpone a hearing. That rule must be read with the overring objecting and with regard to both side's right to a fair trial.
4.6. I gave most anxious consideration to whether or not, in the circumstances, the Claimant's right to a fair trial would be infringed if we were to proceed today. I am particularly concerned by the late exchange of witness statements. However, on

balance I concluded that the hearing could proceed consistently with the Claimant's right to a fair trial:

4.6.1. Mr Garnett said he would like several weeks to prepare further cross-examination. I did not think that was necessary at all in light of all:

4.6.1.1. Mr Garnett told me he had already prepared some cross examination;

4.6.1.2. His evidence could be heard on the first morning leaving the whole afternoon and rest of the day to finish his cross examination preparation.

4.6.1.3. The Respondent's statement are very short, 14 pages in total. The final page of each barely has any text so they are more like 12 pages in total.

4.6.1.4. The content of the statements is very simple – there is nothing complicated about them.

4.6.1.5. I have compared the content of statements with the Respondents Amended Ground of Resistance and I see nothing surprising in the statements. I asked the Claimant if there was anything surprising in them. He was not expecting Mr Marsden to be a witness. That does not make sense since Mr Marsden was at the dismissal meeting and co-signed the dismissal letter. But in any event the Claimant agreed that there was nothing surprising in the content of either statement.

4.6.1.6. It was plain from our discussion and from the content of his statement that the Claimant was a master of the materials in the case. He clearly understood his case, had long since understood what the Respondent's was, and had for months had all but one of the relevant documents.

4.7. I was therefore satisfied that the Claimant had sufficient time to finalise his cross-examination preparation.

4.8. In coming to the decision that the appropriate course was to proceed I also took into account that:

4.8.1. The decision to dismiss was taken in the summer of 2019;

4.8.2. The case was previously postponed in in June 2021;

4.8.3. A further postponement would lead to delay in probability of about 6 months to a year; closer to a year based on recent experience of listing.

4.8.4. The case was going stale and that in itself risked the fairness of the trial, particularly where, as here, the reason for the dismissal, the mental processes of decision makers, were of the essence.

5. I note that, in the event we adjourned for the day just after 1pm on the first day leaving the whole of the rest of the day clear. On the second day, the Claimant conducted his cross-examinations. They were lengthy, detailed and forensic. Evidently the Claimant was properly prepared.

6. I declined to strike out the response among other things because:

6.1. A fair trial remained possible;

6.2. It would not have been proportionate to strike-out.

Findings of fact

7. The tribunal made the following findings of fact on the balance of probabilities.

8. The Respondent is part of the Specsavers Operational Group ('SOG'). SOG operates a franchise model whereby high street stores are operated by a specific limited company in

which the most senior staff of the store buy shares. There is a programme known as the Partner Development Programme (PDP) that is used to upskill chosen employees and equipment them to become Partners.

9. The Respondent operates the Specsavers offering in Ashford. There is an optics side to that business and an audiology side. The latter is known as Hearcare. There are two sites. On the one hand, a store in County Square. On the other hand, a very short distance away, an optical lab which makes lenses for glasses and an audiology suite. The Claimant primarily worked in the audiology suite.

10. At the outset of the Claimant's employment there were two directors at the store, Ms Liz Hutchinson and another who, by the material events in this claim, had been replaced by Mr Marsden.

11. The Claimant's employment with the Respondent commenced on 8 April 2018. He was employed as an audiologist in the Ashford store. The Claimant's offer letter stated as follows:

    "It is the Company's expectation that you will, upon successful completion of your Partner in Development Programme, be offered a position within the Specsavers Group as a Specsavers Hearcare Joint Venture Partner in Ashford.

    As such, it is a condition of your employment that at all times you apply yourself with this in mind, for example by attending such courses and training events as the Company, and the Group, may reasonably require to attend in furtherance of this objective. A failure by you to engage with the Development aspect of your role is likely to lead to the termination of your employment with the Company."

12. This offer letter reflected a discussion at the Claimant's interview at which it was made clear that the Respondent was looking to recruit someone with a view to them completing the PDP and at that point buying shares in the Respondent.

13. The Claimant had an annual salary of £40,000. As his contract explained, £30,000 was funded by the Respondent and £10,000 by the SOG. I accept the Respondent's evidence that £30,000 was the going rate for an audiologist and that the extra £10,000 was offered in recognition of the fact that the Claimant was on the PDP.

14. The Claimant's employment was immediately problematic:

    14.1. He lived in Dagenham and the plan, discussed at interview, had been that he work more locally to there initially before relocating with his family to the Ashford area later in 2018. Unfortunately, both Hearcare staff members in Ashford left in around April 2018 and the Claimant was therefore immediately required to work in Ashford. This involved a long commute which was exhausting.
    14.2. There was limited consultation space for Hearcare. There was one room in Ashford and use of a room one day a week in Whitstable.
    14.3. The Claimant had stiff targets and the Hearcare business was understaffed. He was immediately unhappy and very stressed.
    14.4. The Claimant was initially keen to undertake the PDP. However, upon commencement of his employment he found that he was simply too busy with work to do so. His view was that a further Hearing Aid Dispenser would be needed at the Ashford store to give him the opportunity of commencing the PDP.
    14.5. The Claimant had a difficult relationship with Ms Hutchinson. There was, generally, something of a clash between them.

15. Mr McNamara was a Relationship Manager, employed by SOG. The Claimant had some correspondence with Mr McNamara in late August 2018 and early September 2018. In essence they agreed that a locum should be hired at the Ashford store in order to free the Claimant up to pursue the PDP.

16. From October 2018, there was also a Specsavers consultation room in Sainsburys and a part-time audiologist was taken on by the Respondent there. The Claimant believes that this audiologist was paid £40,000 pro rata. However, Mr Marsden's evidence is that it was in fact £30,000. I found Mr Marsden's evidence on this point credible and convincing. I also think he is the more likely to have accurate information. On balance I prefer his evidence on this matter.

17. A locum was hired to assist with the workload at the Ashford store and commenced working in November 2018. Her name was Maria Amer. At around this time. The Claimant's diary commitments were reduced to 3 days a week (from 5) with a view to freeing him up to work on the PDP. In practice, he had a lot to do and he was not left with two clear days.

18. The Claimant was not given access to the online resources and to the relevant PDP OneDrive until December 2018. Accordingly he did not pursue any PDP work prior to that point. However, he barely did any PDP work at all after that point either.

19. A central dispute in this case is when it became unequivocally clear that the Claimant would not pursue the PDP. The Claimant's evidence is that in February 2019, he told Ms Hutchinson that he did not want to continue on the PDP. He says that her response was that she understood and that his employment could continue on otherwise the same terms but simply as a Hearing Aid Dispenser. As a result of this his clinical work needed to increase. The Respondent's case is that the position in February 2019 was more equivocal than that and a temporary pause on the PDP programme was agreed.

20. There are some text messages that are relevant to this issue:

    20.1. On 12 February 2019, the Claimant texted Ms Hutchinson and stated: *As I need to start doing more clinical work, can we use our clinic 6 room a little more? At the moment Maria is there on a Monday.*

    20.2. On 25 February 2019, Ms Hutchinson texted the Claimant: *We need to get you into the diary 5 days a week <u>now you're not a partner in development</u>.* The Claimant responded: *Can we have a chat about this as I need time for home visits, dealing with Whitstable as it's impossible to do everything in one day, I would find it difficult to support Naz* [the audiologist working at the consultation room in Sainsbury's] *too. It would be useful to know exactly what you now expect of me.*

21. The Claimant had a meeting with Ms Hutchinson and Mr Marsden to discuss work going forwards. At the meeting, he was told that his position was safe and he could continue in employment as a hearing aid dispenser on the same salary as he was already on. He was given a print-out from the Specsavers intranet site of what a dispenser was supposed to do.

22. Stepping back and considering all of the evidence in the round, I find that it was never expressly stated that the Claimant was 'pausing' his participation in the PDP. However, in my view it was not definitively stated or established that the Claimant would not

resume it in due course either. In my view it was left open that he might do so and that he certainly could do so if he wanted to:

22.1. I think it is significant that the Claimant continued to be paid £40,000 at this time; it is improbable that his salary would have remained at this level if a permanent change in his position had been agreed/intended. That would put his salary at 1/3 above market rate, as Mr Marsden saw it, and that is implausible.
22.2. The Claimant was not given new terms of employment and nothing at all was put in writing. This again implies something short of a permanent change of employment had been agreed. It was more in the way of: stop the PDP for the present at least and see how you go.
22.3. In this context I think Mr McNamara's evidence (which I accept) is also important. the Claimant had blown hot and cold on the PDP for a long time. At times he had indicated enthusiasm for it and other times the opposite. Although Mr McNamara was not at the meeting or involved in the correspondence of February 2019 his evidence resonated and I think helps explain why matters were not set in stone in February 2019. The Respondent was accustomed to the Claimant 'flip-flopping' on the issue.

23. From the outset of his employment the Claimant noticed and was disturbed by bad smells from the optical lab. Making and tinting lenses is a sort of industrial process that does use chemicals. I accept that these were genuinely a matter of concern for him. I also accept that his concern was not only that the smells were horrible to smell, but also that they may be bad for health. Bad, for the health, that is, of not only the Claimant, but also his colleagues and members of the public who were customers at Hearcare.

24. The Claimant raised this matter with Ms Hutchinson on 26 February 2019 initially by text message:

> *The smell from the Lab is sometimes very bad and there is no special ventilation system. To be honest I am concerned but with Esme being pregnant it is a bigger concern, could you look into this for us?*

25. Ms Hutchinson responded in a series of text messages the gist of which was that:

    25.1. There was no risk;
    25.2. Esme had a pregnancy risk assessment;
    25.3. There was a report from the health and safety auditors that had just been received. She said it covered Hearcare and the lab. She sent the Claimant the report. That report is in the bundle. The Claimant does not accept that it relates to the optical lab because the address of the site given on the cover is that of the store. However, it is plain from the content of the audit that it must relate additionally to the lab because it refers to gas equipment and tint baths that exist only in the lab and not in the store.

26. The Claimant further responded on the same day:

> *I still think the lab needs a better air handling system. There was an acrid smell this morning which affected me. Normally I find some of the smells unpleasant but this morning my breathing was affected slightly. My wife used to be a chemical engineer so I am aware of the need for filtration but this should cover fine particles and gases.*

27. The Claimant also emailed Ms Hutchinson that day in response to a request from her that he do so. He wrote:

As requested I am putting down my concerns in an email.

Most days I find that some of the odours that come from the lab are not very pleasant. There are times when the smells are extremely unpleasant and not ideal when we are running a hearing service next door.

This morning, there was a very powerful acrid smell that was very unpleasant and affected my breathing slightly. I texted you and intimated that I was concerned for myself but especially Esme as she is pregnant.

My wife used to work as a chemical engineer in the plastics industry. She feels strongly that the lab needs better ventilation. I accept that the machines have fine particle filters, but surely there should be either a good way of removing air much more quickly or a means to filter the air. Surely, if the air in hearcare is at times unpleasant, something is wrong. If the problem related to toilets and unpleasant smells were being created, the solution would involve more powerful air extractors.

28. On 27 February 2019, the pregnancy risk assessment was updated: it identified "*using chemicals"* as a factor contributing to risk. Under the heading control measures it stated *"exposure to certain chemicals may harm an unborn baby and one being breast fed. Avoid using and contact with chemicals*". Under the heading "*action provided*", in hand written text that belongs to Esme (the pregnant colleague) herself it states: "*I have no direct contact with chemicals. I recognise a different smell of burning sometimes. Don't' think is harmful. Maybe better ventilation is required."* I accept Mr Marsden's evidence that he and Ms Hutchinson considered the matter but decided that no action was required and that the ventilation was adequate.

29. On 7 March 2019, the Claimant sent a report to a colleague who was responsible for health and safety in relation to the smells. He essentially summarised what he had told Ms Hutchinson on 26 February 2019 and added:

    The main issue appears to be when high index lenses are being edged which results in the release of hydrogen sulphide.

    My wife used to be a chemical engineer and has worked in the plastics industry. She is aware of the need to have filters to remove fine particles that could pose a health risk if they become air born. She also stressed that gases and odours also require filtration. I have made searches on the internet to see if this a common issue. One website was interesting. The company specialise in dust collectors and filters. They advise on their website that there are a number of issues in labs where there is inadequate ventilation and filtration

30. On 29 May 2019 the Claimant emailed Ms Hutchinson at 11.26 am about some expenses. In that email he went on to say:

    On another subject- I have another GP appointment because of a cough and asthma. This is often worse when I am at work. It would be very useful if I can provide the GP with information about the air quality in the lab and Hearcare room. Something from the lenses is affecting me and it would be useful to know exactly what is in the air and at what levels, when 2 or 3 machines are edging high density lenses at the same time.

    The following is from a website:

"Under the Health & Safety at Work Act etc 1974 and the Occupiers Liability Act 1984, an employer has a duty of care to ensure that a safe and healthy environment is provided. The Approved Code of Practice accompanying the Workplace (Health, Safety and Welfare) Regulations, states that indoor air quality should be at least equal to, but ideally better than, the air outside your building".

Are you able to tell me that the air quality where we work is acceptable? The air must have been analysed at some time in the past so you could be sure the ventilation system is working properly. If you have this information to hand I would very grateful for a copy. It is also important that the GP has all the information as it may be possible that I have a low tolerance to certain substances.

31. At 11.54 am on the same day, Ms Hutchinson responded by clicking reply to his email. She dealt with the Claimant's points about expenses and health and safety briefly and then among other things she stated:

    Reading your email I feel that the tone and content require us to meet face to face to discuss these issues.

    One of my tasks for tomorrow is to write a letter to you to invite you to an Investigatory Interview as I wish to discuss some matters relating to your record keeping, home visits and your days at Whitstable.

32. Mr Marsden says that in or around mid-May 2019 two performance issues had been raised with Ms Hutchinson (he gave the date March 2019 in his statement but corrected this in oral evidence). I accept his evidence:

    32.1. A complaint was made by a customer following a home visit;
    32.2. A oral complaint was made by Ms Amer in relation to the Claimant's record keeping.

33. By May 2019, the Respondent was in active discussions with Ms Amer about her becoming a Partner. She had been following the PDP although she had not completed it. The Claimant describes this pejoratively as the Respondent "grooming" Ms Amer. It greatly irritated him that she was considered for the PDP. That, in my view, is an indicator that he had not entirely closed his mind to the possibility of returning to the PDP. That is why he was aggrieved that someone who had been taken on to support him might become a partner.

34. Mr McNamara explained, and I accept, that had Ms Amer been taken on as a partner that would not necessarily have been in the Ashford store. *If* the Claimant had decided to resume the PDP Ms Amer would not have been a partner in Ashford. It was Mr McNamara's job to have a constant pipeline of people to deploy to partner positions when and where needed, thus the interest in Ms Amer was not limited to the Ashford store and was not contingent on the Claimant accepting/refusing the position.

35. On 1 June 2019, Ms Hutchinson sent the Claimant a formal invitation to an investigation meeting stating that she was investigating "*an allegation of failure to maintain 'full and contemporaneous' records*". The meeting was scheduled for 6 June 2019.

36. On 1 June 2019, Mr McNamara also wrote to the Claimant stating that the Claimant had asked to meet with him to discuss "*various issues about your employment*" – the Claimant had indeed done this. He indicated that in light of the investigation meeting, he would reschedule their meeting to 18 June 2019.

37. On 3 June 2019, Ms Hutchinson said on a group chat, that the lab was out of bounds to the Hearcare Department unless then needed to retrieve files from the storage area. She did not give reasons for this, and initially declined to do so when the Claimant asked. Her messages are markedly terse and ultimately she said the reason was that "*tea and coffee activities get in the way of the lab doing their work*" and that the Claimant's presence in the lab was getting in their way.

38. On 3 June 2019, Mr McNamara wrote to the Claimant. He stated

    I acknowledge the fact you have not formally told me of your decision to not pursue Partnership, however you are employed by the Ashford Hearcare Business, and therefore Liz and Rob are your employers (not the Specsavers group) so your conversation with Liz where you stated you did not want to continue with the Pathway process was conveyed to me in the correct manner. I know that both I and Paul Kittlety have had conversations with you in the past about whether you wanted to continue down the Pathway route so the fact you informed Liz of your decision was not a surprise and I felt did not require a follow up.

39. Mr McNamara's oral evidence is that this was a reference to a conversation he had had with Ms Hutchinson and Mr Marsden in May or June 2019. I accept that.

40. Also on 3 June 2019, Ms Amer wrote to Ms Hutchinson and Mr Marsden sending them a statement "*as requested to aid in your investigation*". In the statement that followed, she said that there were a variety of occasions on which the Claimant had failed to make any proper notes of consultations with patients. She made the point generally and gave examples. For reasons I defer to my conclusions, I find that Ms Amer did write this statement and that it is not fraudulent.

41. The Claimant responded to Mr McNamara's email on 4 June 2019. The terms of his email show he was very upset about:

    41.1. The lengthy commute he had to work and the parking arrangements following it;
    41.2. Issues in relation to expenses
    41.3. The lack of training to work in Ashford, Whitstable or for home visits;
    41.4. Being told he was to be investigated within 30 minutes of raising a complaint about air quality;
    41.5. Hearcare feeling isolated from the main store;
    41.6. Banning Hearcare staff from the optics lab.

42. On 5 June 2019, the Claimant had a meeting with Mr McNamara and Ms Hutchinson. A number of matters were discussed at that meeting including that the complaint about the home visit would not be pursued any further. Ms Hutchinson considered it 'spurious' and there to be no case to answer. However, the meeting also discussed the Claimant's future more generally and Mr McNamara asked the Claimant whether he would resume the PDP. The Claimant was non-committal. Mr McNamara asked the Claimant to think about it and tell him at a further meeting upon Mr McNamara's return from holiday. There are no notes of this meeting, but Mr McNamara gave an account of it that I found credible in his oral evidence.

43. On 6 June 2019, the investigation meeting was due to take place but did not because the Claimant's representative was unavailable. On 10 June 2019, the investigation meeting was due to proceed. The person whom the Claimant was expecting to accompany him indicated that they had not agreed to do so to Ms Hutchinson. There was a difficult

conversation between the Claimant and Ms Hutchinson. She was upset by it and did not want to meet the Claimant that day.

44. It was then agreed that Ms Hutchinson would put questions to the Claimant in writing. She did so by letter of 11 June 2019.

45. The Claimant responded on 14 June 2019. He proposed they meet for him to answer the questions. Ms Hutchinson agreed.

46. The investigation meeting took place on 16 June 2019. At the meeting that Claimant said that he understood the standards required in relation to notetaking but "*I just don't always have the time*". The Claimant accepted that there were occasions where his notes had been incomplete or not taken. At the meeting Ms Hutchinson offered to help the Claimant with his CPD portfolio just in case there were ever a regulatory investigation. The conclusion of the investigation was that no disciplinary action was necessary. That was an extremely benign outcome.

47. On 17 June 2019 the Claimant met with Mr McNamara, Mr Marsden and Ms Hutchinson to discuss his future. It was a difficult meeting. The Claimant was by this stage deeply unhappy in his employment:

    47.1. The Claimant complained about the investigation and various aspects of it;
    47.2. In the course of the meeting the Claimant stated that he had lost trust in the business and did not feel he could work with the business;
    47.3. The Claimant was asked if he wanted to restart the PDP. He said: "*I was disillusioned with Pathway. I have spoken to Liz and said no I don't want to. As the situation is right now, I don't want to continue it – it has been a tough year. Its hard for me to stay. .. It might have been an idea that it was paused but I did say to Liz that I don't want to continue.*"

48. The Claimant was then dismissed, the reason given was that he did not want to continue with the PDP. He was dismissed on notice but not required to work the notice period.

49. On 17 June 2020, an investigation report was produced. In essence it was found that there were issues with the Claimant's record keeping. However there was mitigation for those issues and the Claimant would accept support to resolve them. An action plan would be put in place but no disciplinary action was required.

50. On 26 June 2019, Mr McNamara and Ms Hutchinson confirmed the Claimant's dismissal in writing in a letter they both signed. The reason for the dismissal was stated to be the Claimant confirming that he did not want to continue with the PDP programme. They considered it a condition of his employment that he pursue the PDP and dismissed him accordingly.

51. On 5 July 2019, the Claimant raised a grievance in which he complained of a number of matters including the investigation into his record keeping and his dismissal.

52. A grievance hearing took place on 31 July 2019, chaired by Ms Bolton. Mr McNamara was also interviewed. An outcome was given by letter date 28 August 2019. The grievance was largely rejected. Ms Bolton upheld a minor allegation in relation to the investigation documentation and upheld an allegation in relation to the Claimant initially being unable to commence PDP.

Law

53. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *[…]*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *[…]*
>
> *(c) that the health and safety of any individual has been or is likely to be endangered*

54. In *Williams v Michelle Brown AM*, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

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

55. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> *'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other […]*
>
> *31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.*
>
> *[…]*
>
> *35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).*
>
> *[…]*
>
> *36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.*
>
> *[…]*

41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the Cavendish Munro case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.'

56. The Court of Appeal considered the 'public interest' test in ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731. There is lengthy discussion of that leading case in ***Dobbie v Felton (t/a Feltons Solicitors)*** **- [2021] IRLR 679**, in which HHJ Tayler **said this:**

There are a number of key points I consider it is worth extracting from Underhill LJ's reasoning, and re-emphasising:

(1) the necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence
(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
(3) the exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest
(4) a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith
(5) there is not much value in trying to provide any general gloss on the phrase 'in the public interest'. Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression
(6) the statutory criterion of what is 'in the public interest' does not lend itself to absolute rules
(7) the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest
(8) the broad statutory intention of introducing the public interest requirement was that 'workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers'

(9) Mr Laddie's fourfold classification of relevant factors may be a useful tool to assist in the analysis:

i. the numbers in the group whose interests the disclosure served
ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
iii. the nature of the wrongdoing disclosed
iv. the identity of the alleged wrongdoer

(10) where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest.

57. HHJ Tayler went on to say this:

There are a few general observations I consider it worth adding:

(1) a matter that is of 'public interest' is not necessarily the same as one that interests the public. As members of the public we are interested in many things, such as music or sport; information about which often raises no issue of public interest
(2) while 'the public' will generally be interested in disclosures that are made in the 'public interest', that does not necessarily follow. There may be subjects that most people would rather not know about, that are, nonetheless, matters of public interest
(3) a disclosure could be made in the public interest although the public will never know that the disclosure was made. Most disclosures are made initially to the employer, as the statute encourages. Hopefully, they will be acted on. So, for example, were a nurse to disclose a failure in the proper administration of drugs to a patient, and that disclosure is immediately acted on, with the consequence that he does not feel the need to take the matter any further, that would not prevent the disclosure from having been made in the public interest – the proper care of patients is a matter of obvious public interest
(4) a disclosure could be made in the public interest even if it is about a specific incident without any likelihood of repetition. If the nurse in the example above disclosed a one off error in administration of a drug to a specific patient, the fact that the mistake was unlikely to recur would not necessarily stop the disclosure being made in the public interest because proper patient care will generally be a matter of public interest
(5) while it is correct that as Underhill LJ held there is 'not much value in trying to provide any general gloss on the phrase 'in the public interest' – noting that 'Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression' – that does not mean that it is not to be determined by a principled analysis. This requires consideration of what it is about the particular information disclosed that does, or does not, make the disclosing of it, in the reasonable belief of the worker so doing, 'in the public interest'. The factors suggested by Mr Laddie in Chesterton may often be of assistance. While it certainly will not be an error of law not to refer to those factors specifically, where they have been referred to it will be easier to ascertain

how the analysis was conducted. It will always be important that written reasons set out what factors were of importance in the analysis; which may include factors that were not suggested by Mr Laddie in Chesterton. As Underhill LJ held 'The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case'. It follows that if no account is taken of factors that are relevant; or relevant factors are ignored, there may be an error of law

(6) for the disclosure to be a qualifying disclosure it must in the reasonable belief of the employee making the disclosure tend to show one or more of the types of 'wrongdoing' set out in s 43B(a)–(f) ERA. Parliament must have considered that disclosures about these types of 'wrongdoing' will often be about matters of public interest. The importance of understanding the legislative history of the introduction of the requirement for the worker to hold a reasonable belief that the disclosure is 'made in the public interest' is that it explains that the purpose was to exclude only those disclosures about 'wrong doing' in circumstance such as where the making of the disclosure serves 'the private or personal interest of the worker making the disclosure' as opposed to those that 'serve a wider interest'

(7) while the specific legislative intent was to exclude disclosures made that serve the private or personal interest of <u>the worker making the disclosure</u>, that is not the only possible example of disclosures that do not serve a wider interest, and so are not 'made in the public interest'. There might be a disclosure about a matter that is only of private or personal interest to the person <u>to whom</u> the disclosure is made and does not raise anything of 'public interest'

(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. Were a worker to disclose information to his employer, that demonstrates that it is discharging waste that is damaging the environment, with the aim of assisting in a coverup, or to recommend ways in which more waste could be discharged without being found out; while the disclosure would otherwise be a qualifying disclosure, it is hard to see how the disclosure could be 'made' in the public interest. The fact that a disclosure can be made in 'bad faith' does not alter this analysis. A worker might make public the fact that the employer is discharging waste because he dislikes the MD, and so is acting in bad faith, but nonetheless hold the reasonable belief that making the disclosure is in the public interest because the discharge of waste is likely to be halted. 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.

<u>Automatically unfair dismissal</u>

58. S.103A ERA provides:

> *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.*

59. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason (*Fecitt v NHS Manchester* [2012] ICR 372 CA).

60. Where, as here, the Claimant does not have two years of continuous employment, the burden of proving that the reason or principal reason for the dismissal in a claim for automatic unfair dismissal is upon the Claimant (see *Ross v Eddie Stobart* UKEAT/0068/13).

61. The approach then is different to the case in which the employee does have two years of continuous employment where the operation of the burden of proof is as described by Mummery LJ in *Kuzel v Roche Products* [2008] ICR 799. However, as Mummery LJ said

> *[55]* ". . . the burden of proof issue must be kept in proper perspective. As was observed in *Maund* . . . when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof."

62. This case does not turn on the burden of proof. As set out below, I have been able to make a positive finding of fact about the reason for the dismissal.

Submissions

63. *Submissions*:

    63.1. Mr Davies relied upon a detailed skeleton argument which he supplemented with a short oral closing statement.

    63.2. The Claimant focussed his submissions on three central points:

        63.2.1. That the Respondent had made limited disclosure in relation to the H&S concerns he made and had done nothing to allay the veracity of the content of those disclosures;
        63.2.2. The investigation into his conduct was trumped up and is evidence that his dismissal was an act of retaliation for his PIDs.
        63.2.3. There had been an agreement in February 2019 that he would not longer pursue the PDP. It did not make sense then for him to be dismissed for not pursuing the PDP in June 2019.

Discussion and conclusions

Did the Claimant make one or more PIDs?

64. In my judgment the Claimant did make public interest disclosures on 26 February 2019, 7 March 2019 and 29 May 2019:

    64.1. The Respondent accepts that he disclosed information to his employer on those occasions. That is plainly right. The gist of the information disclosed is that the optical lab was generating chemical fumes that were sufficiently strong and bad they might be bad for the health of people inhaling them. The context known to both parties was that the fumes could be inhaled by the Claimant, by his colleagues and by the customers of the business. The Claimant drew particular

attention to a pregnant colleague in relation to whom there was obviously particular cause for concern given she was carrying an unborn baby.

64.2. The Claimant certainly believed that information disclosure tended to show that health and safety was at risk.

64.3. In my view there was a reasonable basis for the Claimant's belief. This is given by a combination of factors: the smells that he personally smelt in the course of his work were very strong and chemical in nature; the fact that the smells did indeed come from a sort of industrial process that used chemicals; the fact that these smells existed despite the ventilation measures that there were; the fact that the optical lab was right next to his place of work; the fact that inhaling chemical vapours can be bad for health; the fact that the Claimant personally experienced some breathing problems he associated with fumes; his wife had background in chemical engineering and told him there was a basis for concern. I do not accept that the H&S audit or any other matter objectively speaking allayed the Claimant's concerns to the point that they ceased to be objectively reasonable. The audit dealt extremely briefly with chemicals and it did not, and this is not a criticism simply a relevant fact, test air quality.

64.4. In my view the Claimant did subjectively believe that the disclosures were in the public interest. He raised the matters because he was concerned about not only his own health but also the health of a pregnant colleague, other colleagues and members of the public who were the Respondent's customers. That is why he thought the matter was important to raise and raise again and again. That was in my view a belief that there was a public interest in raising the matter.

64.5. In my view, the Claimant's belief as to the public interest was a reasonable one. The same factors that made it reasonable to believe that there was a risk to health and safety are repeated here. Health and safety at work and health and safety of visitors to workplaces/shops/clinical areas are inherently likely to be public interest matters. And they were here.

What was the reason or if more than one, the principal reason for dismissal?

65. Before making any conclusions I stood back from all of the evidence and considered it in the round.

66. I find that the reason for the dismissal was that by June 2019 it became finally clear to the Respondent that the Claimant would not resume the PDP and more generally that the Claimant no longer wanted to work for the business.

67. There is a significant amount of positive evidence for that, in the form of Mr Marsden and Mr McNamara's evidence, the notes of the meeting of 17 June 2020 and the letter of dismissal.

68. However, I acknowledge that there was also a reasonable case to the contrary, as advanced by the Claimant, and I therefore will explain why I do not accept it.

69. The central plank of the Claimant's case was that there was an agreement in February 2019, evidenced in the text message of 26 February 2019, that he would cease to be on the PDP and would simply be a HAD. It therefore makes no sense for him to be dismissed in June 2019 on the grounds that he was ceasing to be on the PDP.

70. I do see force in this point but ultimately reject it:

70.1. As set out in my findings of fact, I do not accept that matters were so clear cut in February 2019. I do not accept that it was clear or decided unequivocally that the

Claimant would remain off the PDP forever. There remained a real possibility he would resume the PDP.

70.2. It seems highly implausible that the Respondent would indefinitely pay the Claimant at the rate of £40,000 for a role – HAD - that was usually paid at £30,000. This corroborates my assessment that it remained a real possibility following the discussions in February 2019 that the Claimant would resume the PDP - certainly so far as the Respondent understood matters.

70.3. It is plain that the Ashford store needed a Partner on the Hearcare side of the business. The original plan had been for that to be the Claimant. Until around late May 2019 there was a backplan (Ms Amer). However, the back up plan fell through and the Claimant's willingness to undertake the PDP took on a new importance.

70.4. The Claimant's case is that the real reason for his dismissal was that he made PIDs and that the reason given by the Respondent was a false one to mask the true reason. Of course employers do sometimes do mask the real reason for a dismissal with a false one and I am alive to that possibility here. However, in my view if the Respondent wanted to dismiss the Claimant for a false reason to hide the true reason it is implausible that it would have chosen the one it did. Here, there was a much more obvious ulterior reason that could have been given if an ulterior reason were wanted: the record keeping failures. That however requires some further analysis of its own (below).

71. Another major plank of the Claimant's case is that his PID of 29 May 2019, in the context of the previous PIDs, so irritated Ms Hutchinson that she retaliated against him with the conduct investigation and ultimately dismissal:

71.1.1. The Claimant quite properly points to the temporal proximity (28 minutes) between that PID and Ms Hutchinson telling him that she was going to investigate him. He also quite properly points out that Ms Hutchinson responded to his PID and notified him of the investigation in the same email and by clicking reply to the PID.

71.1.2. The Claimant alleges, in essence that the allegations were 'trumped up'. He believes that the only written evidence supporting it, Ms Amer's statement, was fraudulent. He does not accept Ms Amer wrote it. I agree with the Claimant that the statement has some odd qualities. It is a little odd that Ms Amer refers to herself in the third person (using her first and given name in the statement). It is also odd that Ms Amer, an experienced audiologist states that 'Sycle' automatically saves patient records, when the agreed evidence before me is that it does not. Unlike the Claimant, I do not think it is odd that it was sent at 11.54pm or that it was sent from an iPhone – details of that sort being routine in my experience.

71.1.3. The Claimant also points to various procedural shortcomings in relation to not-taking, notetakers, notice of meetings, drafting of invitations and the like.

72. Overall however, although I would accept that Ms Hutchinson probably found the PIDs a bit irritating because they were repeated and she thought there was nothing in them, I reject the proposition that the investigation was trumped up and the proposition that the witness statement was other than Ms Amer work:

72.1. The fact of the matter is that record keeping in a clinical setting is extremely important.

72.2. The fact of the matter also is that the Claimant himself admitted that there were significant gaps in his record keeping when the matter was investigated. In mitigation he referred to his workload.

72.3. The Claimant himself said in his witness statement that Ms Amer could be very critical and that he felt undermined by her. The criticism of his record keeping is consistent with that characterisation of Ms Amer.

72.4. For these reasons I think it is much more likely that Ms Amer did complain and that the statement is her work than that she did not complain and that the statement is fraudulent.

72.5. Finally, the outcome of the investigation process was extremely benign. No disciplinary action was taken at all. That was certainly not the only way of dealing with the matter. Having read the notes of the investigation and the admissions that the Claimant made in them, there were some really quite significant failings in relation to his notes. These could easily have been treated as a very significant disciplinary issue in my view. The Claimant's mitigation, being busy, could easily have been treated as wholly inadequate to explain away or significantly mitigate the matter. If the Respondent had wanted to mask the true reason for dismissal with a false one there was ample and obvious material here for it to do so. The fact there was such a benign outcome to the investigation, the most benign reasonably possible, in my view undermines the Claimant's case that this was anything other than a genuine investigation.

73. Ultimately, I am satisfied and find, that the reason for the dismissal was the one that the Respondent has given. By 17 June 2019 it became definitively clear that the Claimant did not want to pursue the PDP. The Respondent understood it to be a term of his contract that he pursue the PDP, based on what his offer letter said and the fact that the discussions in February had not amounted to an agreement that he would forever leave the PDP. Quite simply, the business needed a HAD on the PDP track.

74. Further, and this was an additional complementary reason for dismissal, in the meeting of 17 June 2019, the impression from what the Claimant said was that he really did not want to work for the business any longer. He said words to the effect of "*I have lost trust with the business and I don't feel I can work for a business I don't trust".*

75. Finally, I agree with the Claimant that the manner of his dismissal was unimpressive. He was dismissed at the meeting of 17 June 2019, on notice, in a way that was obviously lacking in formality and procedure (such as written notice in advance of the meeting that dismissal may be an outcome of it). However, I do not see any cogent reason to infer that the Claimant's PID's were the reason for dismissal or any part of the reason. In my view the Respondent simply thought that the end of the road had been reached. The Claimant did not want to pursue the PDP and appeared not to want to work for the business more generally. Mr McNamara had asked the Claimant to think things through when they had spoken on 5 June 2019. On 17 June 2019 the Claimant told the meeting his thoughts and they were as I have described.

____

Employment Judge Dyal
Date 23 March 2022