EMPLOYMENT TRIBUNALS

Claimant: Mr D Beaumont

Respondent: Kemin (U.K.) Limited

FINAL HEARING

Heard at: Midlands (East) (by CVP) **On:** 17 to 21 January 2022

Before: Employment Judge Camp Members: Miss R Wills
Mr G Austin

Appearances
For the Claimant: in person
For the Respondent: Mr G Probert, counsel

RESERVED JUDGMENT

The Claimant's entire claim fails and is dismissed.

REASONS

Introduction & summary

1. The Respondent is a UK subsidiary of Kemin Europa N.V[1], a Belgian company that in turn is part of the global Kemin group of companies, the primary business of which is making and selling human and animal food ingredients. In these Reasons, when we refer to a company in that group of companies other than the Respondent, or to a number of companies in the group including the Respondent, we shall call it or them "Kemin". The Claimant was employed by the Respondent as a Sales Manager from 4 April 2016 until his summary dismissal, with pay in lieu of notice, on 20 March 2018. By a claim form presented on 18 June 2018, he claimed automatically unfair dismissal for making protected disclosures – for 'whistleblowing', in other words – under section 103A of the Employment Rights Act 1996 ("ERA"), that he had been subjected to detriments for making protected disclosures under ERA section 47B, arguably[2], that he had been denied the right to be accompanied under section 10 of

[1] If there is any doubt about this, the Belgian company is the only entity listed in Companies House online as a 'person with significant control' of the UK company, has the legal form 'parent company', and owns at least 75 percent of UK company's shares and voting rights. It has been listed as such since 6 April 2016, albeit there was another person with significant control, alongside the Belgian company, until April 2020.

[2] See paragraph 12.4 below.

the Employment Relations Act 1999, and that the respondent had breached his contract by not following a contractual disciplinary procedure when dismissing him.

2. In summary, our unanimous decision is:

   2.1 the Claimant made no relevant protected disclosures. To the extent he made any of the five disclosures he relies on, they were not qualifying disclosures in accordance with ERA section 43B;

   2.2 even if he did, none of them was the reason for his dismissal, nor was any of them any part of the reason he was subjected to any of the alleged detriments he complains about;

   2.3 there is no complaint before the Tribunal of denial of the right to be accompanied and, in any event, the Claimant did not have that right in relation to the meeting he wants to complain about;

   2.4 there was no relevant contractual disciplinary procedure, and even if there had been, it was not relevant to the claimant's dismissal, which was not for disciplinary offences.

Procedural background

3. These Tribunal proceedings have a long and rather tortuous procedural history. It is largely summarised in the written record of the preliminary hearing of 10 March 2020, to which we refer, and we do not intend to go into it here in any detail. The reason we go into it at all is because two things that were the subject matter of multiple preliminary hearings were raised during the course of this final hearing.

4. The first of those two things is the identity of the respondent. The Claimant has wanted there to be a number of other respondents and appears to have been concerned that the Respondent [the UK company], despite him (seemingly) agreeing that it was his employer, is not or might not be the correct respondent. Employment Judges Ayre and Hutchinson have between them made final decisions about that, which have not been successfully reconsidered or appealed. However, during the hearing, we kept having to stop the Claimant trying to resurrect this issue, by, for example, asking questions of witnesses that would only be relevant if the issue were still a 'live' one.

5. A further aspect of this is that the following are, respectively, issues (iii) and (iv) in the List of Issues (see paragraph 11 below): "*Which company dismissed the Claimant …*" and "*If it was not the respondent … was the dismissal ratified by the respondent …*".

6. It is unclear to us why this has ever been of concern to the Claimant. No defences have been put forward that would potentially defeat a claim against the Respondent but not a claim against a different company or individual; nor has the Respondent sought to suggest that it did not dismiss the Claimant; nor has there been any reason we are aware of for being worried about the Respondent's solvency. The Employment Judge at one point rhetorically asked the Claimant why he was trying to help the respondent by raising arguments against his own claim that the Respondent

had not raised. As we attempted to explain a number of times during the hearing: if the Respondent is not the correct respondent, the Claimant would lose his claim, because there are previous judicial decisions to the effect that the Respondent should be the only respondent, decisions we do not have the power to overturn even if we wanted to; if the Claimant was not dismissed – e.g. if the person who purported to dismiss him lacked any authority to do so – he would lose his unfair dismissal claim; if the Claimant was dismissed with effect on 20 March 2018 (and everyone agrees he was; and the timing of his dismissal does not affect any of the complaints before the Tribunal) then he can only have been dismissed by someone acting, with authority, on behalf of his employer – the Respondent; in any event, an unfair dismissal claim can only be brought against the Claimant's employer.

7. In the circumstances, we are proposing to ignore issues (iii) and (iv) from the List of Issues. They are not live issues from the Respondent's or the Tribunal's point of view and there are no conceivable circumstances in which us dealing with them would help the Claimant's claim.

8. Kemin appears to be set up in a way that is, in our experience, very common for multinationals, with individuals based in particular countries employed by subsidiary companies registered in those countries. For example, the Claimant, based in the UK, was employed by the Respondent, registered in the UK. As best we can tell, none of the Respondent's witnesses or other people involved in the events this claim is about other than the Claimant himself was employed by the Respondent; they were all employed by other companies in the Kemin group. Although this seems to have been a source of some concern to the Claimant, it has made absolutely no difference to the merits of his claim. This is because the Respondent accepts that:

    8.1 any alleged disclosures the Claimant made that were qualifying disclosures in accordance with ERA section 43B were protected disclosures in accordance with ERA section 43C, whoever employed the people they were allegedly made to;

    8.2 all acts and omissions that the Claimant is making his claim about were the Respondent's responsibility, whoever employed the people who took the relevant decisions.

9. The second matter dealt with at preliminary hearings that we also had to consider during the final hearing is to do with documents. Specifically, it is the Claimant's wish to rely on a supplementary bundle of documents and some additional documents, all sent to the Tribunal under cover of an email of 10 January 2022. We made an order, essentially by consent, at the start of day 1 of this hearing (mainly a reading day) giving the Claimant permission to refer to those documents. Reasons for that order were given orally at the time. Written reasons will not be provided unless asked for by a written request by any party made within 14 days of the sending of this written record of the decision.

10. The only one of those additional documents that has had any practical importance during this hearing is an email of 27 April 2018. Its significance is more in what it doesn't say than in what it does say – see paragraph 42 below.

Issues

11. The write-up of the preliminary hearing that took place on 24 April 2019 included a list of issues (the "List of Issues"), which we gratefully adopt (and which should be deemed to be incorporated into these Reasons), with a few qualifications, one of which – that we are not deciding issues (iii) and (iv) – we have just mentioned and the rest of which we shall highlight as and when we come to them.

12. In these Reasons, we shall refer to the issues by the paragraph numbers they were given in the List of Issues.

    12.1 There are five alleged protected disclosures, issues (i) a to e. The Claimant was given permission to amend to rely on disclosures a to c following a hearing in January 2019. Issue (ii) is supplementary to issue (i) and is broadly whether the requirements of ERA section 43B(1) are satisfied.

    12.2 Issue (v) concerns the reason for dismissal. In the List of Issues there are four subsidiary issues under issue (v), a to d, which we will touch on as part of our decision-making but which it is unnecessary for us to deal with in terms.[3]

    12.3 Issue (vi) consists of a list of evidential rather than legal points connected with the reason for dismissal which, like issues (v) a to d, we shall look at to some extent but not formally decide, because there's no need to.

    12.4 Issue (vii) relates to the right to be accompanied claim. What's missing from the List of Issues in relation to that claim is the preliminary issue: is there a right to be accompanied claim before the Tribunal?

    12.5 The alleged detriments are issues (ix) a to e, and issue (x) is whether the Claimant was subjected to any detriments on the grounds that he made protected disclosures.

    12.6 Issues (xii) and (xiii) are the breach of contract claim.

    12.7 The other issues are remedy issues, which we would only have dealt with, and then at a separate remedy hearing, had our decision been in the Claimant's favour.

The law

13. We adopt the statement of the relevant law set out in Respondent's counsel's skeleton argument. In addition, we emphasise the following points:

    13.1 in relation to whether qualifying disclosures were made in accordance with ERA section 43B, we note that we are asking ourselves questions relating to

[3] In addition, if we followed the List of Issues to the letter in relation to issue (v) we would potentially make an error of law. The List of Issues suggests that we have to consider whether the reason for dismissal put forward by the Respondent has been established before deciding whether the reason for dismissal was the making of protected disclosures. We don't, because the Claimant had less than 2 years' service and has no so-called 'ordinary' unfair dismissal complaint.

what the Claimant believed about any relevant disclosure of information that he made;

13.2 the first of those questions is whether, subjectively, the Claimant believed that the disclosure of information tended to show particular things – primarily "*that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*". The second is whether, if he did, it was, objectively, a reasonable belief. If the Claimant did not at the time actually believe that it tended to show any of the relevant things, it doesn't matter how objectively reasonable holding such a belief would have been. In addition, even if the Claimant reasonably believed [e.g.] "*that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*", it would not necessarily follow that he reasonably believed he was making a disclosure of information which tended to show this;

13.3 the third question is whether the Claimant believed the disclosure was made in the public interest and the fourth is whether any such belief was reasonable. We underline two aspects of this. First, we are again considering what the Claimant believed at the time, not what he may have come to believe later on. Secondly, the relevant thing the claimant has to reasonably believe is "*in the public interest*" is the making of the disclosure relied on; it is not whether, in the abstract, it would be in the public interest for the information disclosed to be disseminated in some way, shape, or form. We have to ask whether, when making it, the Claimant genuinely and reasonably believed a particular disclosure of information, to one or more particular people, in particular circumstances, was being made in the public interest;

13.4 the fact that a particular communication from the Claimant may not be a qualifying disclosure does not mean he did anything wrong in making it. For example, it was perfectly proper for the Claimant to raise with Kemin the issues an important customer had to do with paperwork that form the main subject matter of the emails allegedly containing the information disclosed in protected disclosures d and e. It was perfectly proper because doing so was not just in his own legitimate best interests but potentially in those of Kemin too. The only person suggesting the Claimant was criticised or mistreated because of the conversations and email he alleges were protected disclosures is the Claimant himself; and no one on the Respondent's side was or is suggesting he should have been;

13.5 as set out in footnote 3 above, and as explained to the Claimant during the hearing in response to something to the contrary he had put in his written representations dated 3 January 2022, because he was employed by the Respondent for less than two years, there is no legal burden of proof on the Respondent to show a reason for dismissal. However, it might have been significant if, as a matter of evidence, the Respondent had failed to satisfy us that the reason was – as it said it was – sales performance and a desire to avoid him reaching two years' service. This is because such a failure could well have helped the Claimant prove that the reason was him making protected disclosures. As it turned out, the Respondent did satisfy us of this, so the point has become academic;

13.6 the Claimant has given us the impression he thinks he will win his detriment complaints simply by showing that he made protected disclosures and that he was subsequently subjected to detriments. If that is what he thinks, he is misinformed. ERA section 48(2) does put the legal burden in a detriment case on the employer "*to show the ground on which any act, or deliberate failure to act, was done*", but that does not mean an employer who doesn't show this automatically loses. We refer to paragraph 61 of respondent's counsel's skeleton argument. We also note the decision of the Employment Appeal Tribunal in the case of Ibekwe v Sussex Partnership NHS Foundation Trust [2014] UKEAT 0072_14_2011, in which HHJ Peter Clark endorsed an Employment Tribunal's statement of the law relating to the burden of proof under section 48(2) of the ERA along these lines: where, following the making of a protected disclosure, the claimant is subjected to a detriment and there is no substantial evidence explaining the reason why the employee was subjected to that detriment, the claimant does not win by default; there remains an evidential burden on the claimant to establish a causal link between the making of the protected disclosure and the detriment.

Factual background

14. In terms of what happened, there is little that is important in dispute. In this section of these Reasons, we shan't make decisions about any of the few important disputes about that, nor about why things happened. Those decisions are set out later in these Reasons, following the heading "*Decision on the issues*", as are most of the facts relevant to the claimant's detriment complaints a, c and d.

15. The evidence before us consisted of an agreed file / bundle of documents of over 1000 pages, most of the documents in which were not referred to during the hearing and appeared to be of no or almost no relevance, and the Claimant's supplementary bundle, mentioned above. We were also provided with a Chronology that was not agreed because it included a few things that were contentious from the Respondent's point of view. It should be deemed to be incorporated into these Reasons. If we ignore the parts of it that the Respondent objects to – signified by them being struck-through – the Claimant does not seem to be alleging it is inaccurate, merely that it is incomplete. In any event, we are not aware of any material inaccuracies in it if we put those parts to one side. We also put to one side the parts of the Chronology that deal with the history of the Tribunal proceedings. Additionally, there is a 'Cast List', to which we refer and about which any disagreement between the parties is not, we think, relevant to our decision-making.

16. The Claimant's only witness was the Claimant himself. He had produced two witness statements which contained his evidence in chief and on which he was cross-examined and asked questions by the Tribunal. He had produced various other documents at various stages of the proceedings dealing with the facts to some extent and also made factual assertions when the respondent's witnesses were giving their oral evidence and in submissions, but we reminded him, and remind ourselves, that his witness evidence before the Tribunal consists only of the contents of his statements which he confirmed on oath and things he said when he was giving his oral evidence.

17. The Respondent had four witnesses:

    17.1 Mr D Abrate, at the time the claimant's manager and Kemin's Commercial Director for Europe, the Middle East, and Africa, based in Veronella, Italy. He is the main 'villain of the piece' from the Claimant's point of view. Alleged protected disclosure c was said by the Claimant to have been made to him, amongst others, and the email that is alleged protected disclosure e was addressed to him, again amongst others. He is alleged by the Respondent to be the main decision-maker in relation to the Claimant's dismissal. (The extent to which the Claimant accepts this remains unclear to us; but we have no good reason to reject what the Respondent says about this). With assistance from a legal adviser from Kemin's English solicitors at the time, he dealt with the meeting on 20 March 2018 at which the Claimant was dismissed. He has a reasonable working knowledge of English but is not fluent, his mother tongue being Italian. The original version of his witness statement is in Italian and a certified translation of it into English was provided[4]. Most of his oral evidence was given through an interpreter provided by the Tribunal;

    17.2 Ms V Dewil, Kemin's Compensation and Benefits Manager, based in Belgium. She gave evidence relating to the Claimant's detriment complaints about his bonus and employer's pension contributions. She was also copied into email correspondence within Kemin in December 2017 about terminating the Claimant's employment and supported the Respondent's payroll in processing the Claimant's termination payments;

    17.3 Dr A Yersin, a Senior Vice President, based in the US. His involvement was largely in his capacity as (until the end of 2017) Senior Vice President, Quality and Regulatory Affairs for the pet food side of Kemin's business. From January 2018 he has been Senior Vice President, Worldwide Quality Assurance. His evidence was about the nature of issues raised mainly by Kemin's customer, JG Pears (Newark) Limited ("JG Pears"), that form the subject matter of the alleged protected disclosures, the extent to which they were addressed by Kemin and how, and whether any breach of the law, as alleged by the Claimant, was involved;

    17.4 Mr E Creemers, who was Senior Vice President, Finance for Kemin Europa N.V, based in Belgium, until 31 March 2000, who remains a director of that company, and who also was a director of the Respondent at the time of the events with which this claim is concerned. His involvement in those events came after the claimant's employment had been terminated. In the List of Issues, he appeared to be accused of having subjected the claimant to detriments – part of detriment b – by not replying to an email from the Claimant of 23 March 2018 and by not granting the claimant an appeal against dismissal. He gave evidence about this, and also about the non-payment of expenses that is detriment d. As we shall explain later in these Reasons, the extent to which

[4] During Mr Abrate's cross-examination, it came to light that there was a slight mistranslation of one phrase in one paragraph of the English version, but that version is otherwise not criticised in any way.

the Claimant is in reality blaming Mr Creemers or anyone else in particular for any of the alleged detriments is unclear.

18. In the bundle there is a letter dated 3 August 2018 from Ms S Morais, to whom alleged protected disclosures a, b, and d (all of which were oral disclosures) were made, addressing the Claimant's allegation that he had been blowing the whistle about breaches of EU regulations. It is not a statement as such and Ms Morais, who no longer works for Kemin, was not a witness before this Tribunal; but we nevertheless take it into account, albeit give its contents limited weight. At the relevant time, Ms Morais was Regulatory Manager for Europe, the Middle East, Africa and Asia, based in Belgium.

19. The claimant had and signed a contract of employment, incorporating ERA section 1 particulars, naming the Respondent as his employer. It includes an entirely conventional clause providing for termination of employment by notice and/or payment in lieu. It also has a clause headed "*Disciplinary procedures*" in which it is stated that, "*The disciplinary rules applicable to your employment are set out in our Disciplinary Rules and Procedures document*". The Claimant has never seen a Disciplinary Rules and Procedures document and the Respondent's evidence is that no such document existed at the relevant time.

20. The claimant's job was essentially to sell pet food products produced by Kemin Nutrisurance to UK customers. At some stage in early 2017, a sales target was set for the Claimant. How much of a say he had as to what it was is in dispute, but he was spoken to about it when it was set, knew what it was, and did not object to it.

21. During 2017, particularly between April and July, there were email conversations between the Claimant and Kemin management – mainly Mr Abrate – concerning the Claimant's sales performance and whether, and if so how, the claimant was going to meet his target. By the end of June the claimant was already predicting that he would miss it by at least 200-250,000 euros and on 27 June 2017, Mr Abrate wrote to him stating, "… *I would like to know what you need to improve your sales in your regions. What can I help you?*"

22. There was a mid-year performance review covering the first six months of the year in or around July 2017. Contrary to what is suggested in the List of Issues, the Claimant agrees it took place. What he is in fact saying about it is that it was an entirely paper process. Whether that is right or not, the gist of what was communicated by Mr Abrate to the Claimant in it was that the Claimant's sales performance was below par and needed to improve. The Claimant may not have picked up that message, but it was plainly there for him to see.

23. The Claimant's sales performance – measured against his sales target – did not improve during 2017. There are complications with the precise figures which we don't need to explore, but the broad picture is that his target for yearly sales over which he had some control was around €2.8m and towards this he achieved sales of just under €2m by the end of 2017.

24. Mr Abrate visited the UK in November 2017 in order to spend time with the Claimant visiting clients. The Claimant and Mr Abrate have differing views as to how it went.

But what is important for the purposes of this claim is not how successful an impartial observer who had followed them around would have said it was, but how Mr Abrate actually felt about it. We accept, having no good reason to do otherwise, that he was unimpressed, in particular with what he perceived as the Claimant's failure to have built good relationships with customers the two of them were visiting. That may not have been a fair assessment, but it was the assessment he made.

25. On 6 December 2017, at 16:13 hrs, the Technical Manager of JG Pears, a Ms A Evans, emailed the Claimant and two others as follows: "*Could you please let me know who I need to speak to about your GMP+ certification, I raised a query a few weeks ago regarding the labelling of the products I have discussed this with my auditor as although I know the product from today and when we have looked into it we have several issues. Please let me know who I should be discussing this with.*" That was the start of an email conversation running through at least to 22 December 2017 involving, amongst others, the Claimant, Ms Evans, Ms Morais, and, from around 15 December 2017, Dr Yersin, and to which we refer. Mr Abrate was not copied into any of the emails and the Claimant did not allege at the hearing that Mr Abrate knew about them at the time. Some of the emails are between Ms Evans and people at Kemin and some are internal within Kemin. The subject matter of the email conversation is, broadly, the subject matter of the alleged protected disclosures.

26. The Claimant emailed Ms Evans back almost immediately, copying Ms Morais in and suggesting that she was the person Ms Evans should contact. Less than 20 minutes later, Ms Evans emailed the Claimant and Ms Morais and the other people to whom the Claimant's email had gone. The bulk of the email was in terms addressed to Ms Morais rather than the Claimant:

> *Hello Sofia*
>
> *There are several issues that we need to discuss:*
>
> *Belgium is not GMP certified and this is "traded" through your GMP+ registration GMP014487 which is ok however when I have checked a CMR* [a document that accompanies a consignment of goods being transported internationally by road] *that accompanies the delivery it is not your GMP registered address but one in Brescia. There is also no GMP statement for the delivery – which I believe should be there as although the product is not a GMP product you are a GMP trader and we have requested GMP goods.*
>
> *My main concern is that you are now producing anti-oxidants in your Italian facility which you are shipping as GMP+ goods however when I check the GMP website your registration GMP014257 says you are certified for the production of premixtures. Anti-oxidant is not a pre-mixture but a feed additive which according to the GMP+ website you are not certified to produce.*
>
> *I hope the above makes sense if not please call me tomorrow to discuss. If I am to continue purchasing goods from yourselves I need to understand what is happening and what you will do to put it right.*

27. We have quoted this in full because it is the key contemporaneous document setting out what the alleged protected disclosures were about. The Claimant's case is that he disclosed essentially the same information each time he made a protected disclosure and that the first two times he did so – disclosures a and b – were in

telephone conversations with Ms Morais on 6 and 7 December 2017. What this means is that the Claimant must be saying he had all of that information on 6 December 2017.

28. We shall go through the emails in a little more detail and make our findings as to what was disclosed by the Claimant and when and whether he made protected disclosures later in these Reasons. For now it is enough for us to note that:

28.1 on the face of it, Ms Evans is making allegations of non-compliance with GMP / GMP+ requirements. By the end of the hearing, it seemed to be common ground – and whether it is or not, this is what we have decided – that GMP (short for Good Manufacturing Practice) is a quality standard which, in this particular context at least, was not regulatory in the sense that if the things mentioned by Ms Evans were breaches of it, this would not mean there was necessarily a breach of EU Regulations. In any event, the Claimant confirmed that he was not saying his alleged disclosures were protected disclosures because of any non-conformity with GMP / GMP+;

28.2 there are three things the Claimant says he blew the whistle about and at least two of them can be seen in Ms Evans's email to some extent.

28.2.1 The first of those three things – the one that isn't clearly mentioned by Ms Evans – is an allegation that on one or more invoices and/or shipping documents/CMRs, the registered or legal address (by which the Claimant means the local equivalent of a registered office address in the UK) of the Kemin company involved was given incorrectly. Upon reflection, we are not sure whether the allegations the Claimant made in his claim form include this. It appears to be a distorted version of the second allegation, which we come on to now.

28.2.2 The second allegation is that the – or an – address shown on one or more invoices and/or shipping documents/CMRs was not the address of the premises that were registered for the production of the goods in question.

28.2.3 The third allegation is that on one or more shipping documents/CMRs, goods which were in fact 'pre-mixtures' were labelled as feed additives.

28.2.4 The way the second and third allegations were put in the claim form was, "*The shipping documents* [obtained by the Claimant in February 2018] *showed that the company* [Kemin] *was in fact in breach of EU legal obligations by declaring the products being sold to customers as Animal Feed Additives when in fact they were actually and should have been legally declared as premixtures contrary to EU Regulation 2003/1831. In those same documents the company was also declaring and signing off the documents with an incorrect legal address which would be a fraudulent declaration and would be contrary to EU Regulation (EC) 183/2005 as those premises would have to be registered or approved and must not operate without such approval. It is an offence not to comply with these two EU Regulations.*"

29. There was a sales team meeting in Verona, Italy on 13 and 14 December 2017 attended by (amongst others) the Claimant, other Sales Managers, Mr Abrate and Ms Morais. On 14 December 2017, the Sales Managers, including the Claimant, gave presentations in front of their colleagues, including Mr Abrate, about their successes during 2017 and their hopes for 2018. The claimant alleges that he made protected disclosure c during his presentation and that this was how his protected disclosures came to Mr Abrate's attention.

30. Part of the email chain from 6 to 22 December 2017 referred to above is an email of 15 December 2017 from Ms Morais to the Claimant, Dr Yersin and others at Kemin that begins, "*All, I discussed this with David* [the Claimant] *… while in Italy* [i.e. at the meeting in Verona]*. David told me there is another customer with the same issue (MJ* [a reference to an important UK customer of the Respondent called MJ Petfoods]*).*" The final email in the chain was from the Claimant to Ms Evans, on 22 December 2017, checking, "*if the queries re GMP had now been resolved regarding the despatch note and invoices?"*

31. On 22 December 2017, a Mr M Bertuzzo (an HR Manager for Kemin, based in Italy) wrote to some HR colleagues: "*We are talking about Sales Manager, UK David Beaumont. Daniele Abrate is worried about sales performances and wants to understand if it possible to have an exit agreement with him by Dec 2018 or, in alternative, to terminate his contract within 2 years (in April 2018) as to save as much as possible for Kemin; Could you please advise if it is possible?*" There was further email correspondence within Kemin's HR referring to the fact that the claimant would have two years' continuous service in April 2018 and (in late December 2017 / early January 2018, with Ms Dewil) to a desire to "*understand more in details rules about unfair dismiss in uk*".

32. There was a further paper performance review of the Claimant, covering his performance for the whole of 2017, conducted on or about 31 January 2018. Mr Abrate rated the Claimant as needing improvement in most categories, commented "*Expectations are more higher than results*", and rated his overall performance as "*below expectations*".

33. On 20 February 2018, the claimant sent an email to Ms Morais, copying Mr Abrate in (this being the first email on the topic into which Mr Abrate was copied that we are aware of), in relation to the concerns raised in December by JG Pears. The email began, "*I am very deeply concerned that we have lost the majority of our business at JG Pears (582,000 euro) due to a history of non conformances at this account.*" We shall go through the email (and the email constituting alleged protected disclosure e) in more detail later, when deciding whether protected disclosures were made. Alleged protected disclosure d is, in theory, a conversation on 20 to 23 February 2018, described in the claim form as follows: "*The Claimant spoke with Sofia Morais Regulatory Affairs Manager for Kemin Nutrisurance EMEA & Asia and she agreed the company would be in breach of EU Regulations if what the customer had reported via their GMP+ audit was found to be true and reminded me that she had previously discussed these issues also with Mr Beltrami Operations Director for Kemin Nutrisurance Srl Italy.*" However, at this hearing the claimant confirmed that what he allegedly said to Ms Morais that he believed to be a protected disclosure was substantially the same as the contents of this email.

34. Mr Abrate emailed back the same day[5] asking a series of questions in a way that suggested he had previously been completely unaware of the situation. What he wanted to know in a nutshell was when it had been raised and who had been dealing with it at Kemin. After a short email exchange between them, the Claimant replied (still on the same day) to the effect that the issue had been raised on 6 December 2017 and that Ms Morais and Dr Yersin had mainly been dealing with it. The Claimant did not mention the alleged fact that he had made exactly the same disclosures to Mr Abrate and others at the sales conference on 14 December 2017.

35. On 23 February 2018, the Claimant sent the email that is alleged protected disclosure e. It covered similar ground to the disclosure d email of 20 February 2020 just mentioned. The impression given by it is that, from the Claimant's point of view, things had moved on slightly, in that he had got hold of some relevant documents. The email began, "*I attach the following documents which I have obtained over the last few days to try to understand the concerns of the customer and the auditor of their certification scheme and to provide you the necessary information that's needs to be addressed.*" [sic]

36. On 13 March 2018, Mr Abrate emailed the Claimant to arrange a meeting on 20 March 2018 at a hotel at Heathrow airport. The email gave no indication that his employment was going to be terminated.

37. The meeting duly took place on 20 March 2018. Mr Abrate was accompanied by a Mr Chalmers from DLA Piper solicitors, who advised Kemin on employment issues at the time. Mr Abrate had apparently wanted to explore with the Claimant the possibility of him continuing in a short-term consultancy role, but that did not happen because right at the start of the meeting the claimant asked if he was going to be fired and upon being told that he was, he left. His summary dismissal, with pay in lieu of notice, was confirmed by a letter dated 20 March 2018 which stated that dismissal was "*due to the current performance in the UK and the sales situation for which you are responsible. Absent you having two years' service, the Company is entitled not to follow a formal process in respect of terminating your employment and the Company considers, based on its review of the current position and its belief this is not likely to improve, that this is the correct decision.*"

38. On 23 March 2018:

    38.1 a Kemin quality manager, a Dr Zonaro, wrote to JG Pears addressing their concerns. The Respondent's uncontradicted evidence is that: that letter put an end to those concerns; Kemin has not changed its practices in relation to any client other than JG Pears;

    38.2 the Claimant emailed Mr Creemers asking for "*a copy of the Company Disciplinary Rules and Procedures Document as per 4 of April 2016*" (an indirect reference to his contract of employment – see paragraph 19 above)

[5] The time stamps on the emails are a little confusing, with some apparently being replied to before they were sent. We assume this is due to people being in different time zones.

and stating, "*I understand I have the right to appeal my dismissal to whom should that be addressed to?*" [sic].

39. On 6 April 2018, Mr Bertuzzo responded to the claimant's email of 23 March 2018 stating that he could confirm there was no Company Disciplinary Rules and Procedures Document and that, "*This reference in the contract is incorrect.*", and stating that a decision had been taken "*at a high level and with careful consideration*" that there would be no right of appeal.

40. On 16 April 2018, the Claimant wrote to Mr Creemers asking for his personal reply to the email of 23 March 2018, seemingly ignoring what Mr Bertuzzo had written to him. He also stated, "*I am totally shocked at the treatment I have received since notifying management and regulatory colleagues of legal wrong doings. I have provided actual copies of the documentation showing the breaches in which an incorrect legal address was continuously provided to customers and suppliers over a number of years. The documentation also shows that the products being placed on the market again over a significant period of time have been declared with the wrong EU legal classification. Quite clearly, discussions and follow up actions by Regulatory colleagues in Belgium and USA have agreed with me that these wrong doings needed to be corrected and I am not sure they have been fully corrected. // Perhaps you can look into this urgently?*"

41. On 27 April 2018, Mr Creemers replied. Amongst other things:

    41.1 he confirmed that the document the Claimant was seeking did not exist, that in any event the Claimant's dismissal was not disciplinary but was based on performance, and that there would be no appeal;

    41.2 he said that the claimant's allegations would be looked into by a Mr May, Senior VP Human Resources, based in the US.

42. The reply was sent under cover of an email from Mr May himself, which stated, "*the allegation that you raised in your letter will be looked into and evaluated based on the background of situation.*" It did not, as the Claimant has alleged, suggest that Mr May would necessarily or even probably revert to the Claimant. Mr Creemers gave unchallenged evidence, set out in paragraphs 8 to 10 of his witness statement, to the effect that Mr May had indeed looked into the Claimant's allegation that his dismissal had something to do with him "*notifying management and regulatory colleagues of legal wrong doings*" and had concluded that this was not the case and that his dismissal was, "*based entirely on his sales performance, his short period of service and the view of Daniele Abrate that he just did not meet our standards.*"

Decision on the issues – were protected disclosures made?

43. The first issues we have to decide – issues (i) and (ii) – are, effectively: were alleged disclosures a to e qualifying disclosures in accordance with ERA section 47B? If they were qualifying disclosures, the Respondent accepts they would be protected disclosures.

44. Alleged disclosure a is, "*A telephone call on 6 December 2017 with Sophia Morais, in which he claims he discussed an incorrect legal address, unapproved premises*

and shipping documents having been declared incorrectly as animal fe[e]*d additives rather than premixtures in breach of EU Regulations*". Alleged disclosure b is "*a further disclosure in relation to the same issues which the Claimant claims he made to Sophia Morais by telephone on 7 December 2017*".

45. Given that the Claimant did not allege until 2019 that he had made these disclosures and given that there are other good reasons to doubt the accuracy of the Claimant's account vis-à-vis what disclosures he made (see below), we are not satisfied that the Claimant disclosed to Ms Morais anything over and above what we can see in the contemporaneous emails.

46. As explained above, the relevant email chain begins with an email from a Ms Evans, a customer, and the Claimant's reply 10 minutes or so later. There is nothing in either of those emails making the disclosures the Claimant relies on. The first email that has at least some of the information the Claimant relies on is that sent by Ms Evans (to the Claimant and Ms Morais) about 20 minutes after the Claimant's first reply to her.

47. Pausing there, we note that this is not information disclosed by the Claimant. He may subsequently have discussed the contents of that email from Ms Evans with Ms Morais, but a conversation about information that someone else has disclosed at the same time to both of the people having the conversation is not the Claimant disclosing that information to Ms Morais any more than it is Ms Morais disclosing that information to the Claimant.

48. The Claimant has been unclear in the totality of his evidence as to what particular point in time in relation to the emails that were sent on 6 and 7 December that his alleged conversations with Ms Morais come; but we are of the view that, insofar as there was a relevant conversation on 6 December 2017 at all, it must have been after Ms Evans sent her email we have just mentioned, in which she first gave details of the problem that JG Pears was having. Moreover, again as we have already explained, in her email, Ms Evans is not making an allegation about an incorrect legal address, nor about breach of EU Regulations, nor about breach of any legal requirement that the claimant alleges he made disclosures about, but about potential non-compliance with GMS/GMS+ standards or protocols, something the Claimant himself said a number of times during the hearing was not what he made protected disclosures about.

49. The next two emails in the email train were emails of 6 December 2017 and 12 December 2017 from the Claimant to Ms Morais, amongst other people. Neither of them expressly or implicitly contains the information the Claimant alleges he disclosed that forms the subject matter of alleged protected disclosures a. and b; neither of them expressly or implicitly suggests he thinks there has been any breach of a legal obligation, let alone a breach of EU Regulations leading to the commission of a criminal offence, or the provision of an incorrect legal address. On the contrary, what he writes in those emails – "*None of the antioxidant product specs are described as premixtures would that be useful to amend*" (in the first email) *and* (in the second) "*It would be nice you send a holding email if you need more time by confirming all products we sell are premixtures and you will send her the relevant documents*

confirming this" – suggests he thinks there is no serious problem. This is also indicated by the tone of his emails.

50. His contemporaneous emails are inconsistent with him:

    50.1 having had conversations in which he disclosed information that he genuinely believed tended to show breaches of legal obligations of the kinds he alleges he had;

    50.2 actually believing that there had been breaches of legal obligations of those kinds.

51. If the Claimant genuinely believed – as he is now alleging he did – at this stage, in early December 2017, that there were serious breaches of the law that could result in criminal liability to Kemin and, potentially, significant reputational damage both to Kemin and to its customers, akin to what he alleges happened in connection with a contamination issue Kemin had had to deal with in 2013[6], he would surely not, as a conscientious and loyal employee, be sending emails with that tone and those contents. Indeed, if that is what he really believed, then sending emails like those he sent would have been a dereliction of his duties to the Respondent as his employer. We don't think the Claimant is the kind of person to neglect his responsibilities, which is why we also don't think he believed at the time what he says he did.

52. In addition, there is no hint in any of the contemporaneous emails of any consideration other than to keep Ms Evans and JG Pears happy. The first line of the Claimant's email of 12 December 2017 to Ms Morais says it all: "*Please don't forget to reply to Alison they buy over 1/2 million euros worth of product from us.*"

53. Moreover, alleged protected disclosures a to c were not mentioned in the particulars of claim that formed part of the claimant's claim form when it was presented, in June 2018. He did, however, refer to events of December 2017 and mentioned a conversation he had allegedly had with Ms Morais in February 2018: the conversation which is alleged protected disclosure d. Given that he was making a whistleblowing claim, and that he is alleging all of his protected disclosures had essentially the same contents, and that in his particulars of claim he was giving details, as a protected disclosure, of a conversation with Ms Morais, we can think of no plausible explanation for why he failed in his particulars of claim to mention two earlier similar conversations with Ms Morais other than that they did not, in fact, take place.

54. In conclusion, in relation to alleged protected disclosures a and b we are not satisfied that:

    54.1 the Claimant disclosed any relevant information of any substance at all;

    54.2 he disclosed anything that he believed (reasonably or otherwise) tended to show a breach of a legal obligation or commission of a criminal offence, or anything of that kind;

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[6] Both sides agree that such an issue, involving a product recall, arose in 2013. There may be a dispute as to the extent to which significant reputational damage was caused.

54.3 if he did believe he had disclosed any such thing, it was a reasonable belief, given the very limited information he provided in his conversations (which, as above, we find to have been no broader in scope than what he wrote in his emails);

54.4 he believed that his disclosures, such as they were, were made in the public interest;

54.5 if he did believe that, it was a reasonable belief. There is no discernible public interest involved in him discussing internally within Kemin, in the limited way he did, the concerns that had been raised by Ms Evans.

55. To emphasise a point already made, in paragraph 13.4 above: we are not here, or anywhere else, criticising the Claimant for what he did in relation to the issues Ms Evans had brought to him (and to others) and neither – so far as we can tell – is or was the Respondent or Kemin more generally; there is nothing wrong with an employee in the Claimant's position sending the emails he sent or being concerned to maintain a good relationship with a customer. But it doesn't follow from there being nothing wrong with what the claimant was communicating, or with how he was communicating it, that he reasonably believed he was making disclosures in the public interest.

56. Alleged protected disclosure c. is "*a further disclosure about the same issues which the Claimant claims was made on 14 December 2017 during a sales meeting in Italy at which he states Mr Abrate, Miss Morais and the whole sales team were present*".

57. We do not accept that this further disclosure was made.

58. The Claimant's version of events, in his oral evidence, was that during a presentation he was giving to the whole sales team, he disclosed concerns about "*an incorrect legal address, unapproved premises and shipping documents having been declared incorrectly as animal fe*[e]*d additives rather than premixtures in breach of EU Regulations*" and expressed the view that the Respondent was committing serious breaches of EU Regulations, leading to criminal breaches of UK Regulations. He again told us, in support of his contention that he reasonably believed his disclosures were made in the public interest, that the issues he was raising were of similar severity to those that had led to the product recall in 2013, with all of the implications for the Respondent that that might entail. Had he done what he alleges he did, it seems to us that there would have been a considerable amount of intense discussion and debate; even consternation. It would have been memorable, and it would almost certainly have been at least indirectly referred to in contemporaneous documents.

59. The many reasons why we do not accept the Claimant's evidence in this respect include:

59.1 the fact that he did not mention making disclosures at the sales meeting in his original particulars of claim. As he expressly referenced the meeting in those particulars (which he did), it is inconceivable that he would not also have mentioned in them having made such a dramatic set of disclosures at that sales meeting if he had done so;

59.2 the emails passing between Ms Morais and the claimant and others on and shortly after 15 December 2017 – the day after he claims he made these disclosures – are inconsistent with him having made them. In particular, there is no sense of urgency or alarm in any of them and no reference to possible breaches of the law, or anything of that kind. For example, Ms Morais would surely not have written an email like the one timed as having been sent at 15:18 hours on 15 December 2017 which begins, "*I discussed this with David and briefly with Diego while in Italy*", had the claimant said what he alleges he said and had then immediately gone to the airport and flown home (as he says he did and as the respondent does not dispute). The contemporaneous emails are entirely consistent with the Respondent's case, which is that the only relevant conversations at the sales conference on 13 and 14 December 2017 between the Claimant, and Ms Morais, (and possibly one or two others) concerned how to keep the customer happy. The entire email chain consists of the customer sharing a problem that it has, discussion within the Respondent as to how that problem might be addressed, the Claimant and others asking questions of people with more knowledge than them about what the Respondent was doing and what the technical requirements were, and those people with more knowledge, in particular Dr Yersin, answering questions and providing clarification, to the apparent satisfaction of the Claimant;

59.3 the Claimant alleges that something he wrote on one of the slides he was using for his presentation demonstrates that he made his disclosures at the sales meeting. The relevant part of the relevant slide states as a "*2018 improvement suggestion*", "*Look to speed up customer questionnaires re certification*". Any problem with customer questionnaires relating to certification was absolutely nothing to do with the issues about which the Claimant alleges he raised protected disclosures. The customer questionnaires in question were questionnaires for the Respondent to fill in as part of the GMP+ certification process. No one, the Claimant included, suggests that there was a particular, relevant problem consisting of the Respondent failing to respond timeously to questionnaires of this kind. Even if there was such a problem at the time, it had nothing to do with an incorrect legal address or mislabelling of shipping documents. As already mentioned, at this hearing the Claimant told us a number of times that his alleged protected disclosures did not concern the GMP certification issue. We think that had he wanted to raise within his presentation important issues to do with what he believed were breaches of EU Regulations and criminal breaches of UK Regulations, he would have flagged this up very clearly and would not have done so with a vague reference to "*customer questionnaires re certification*";

59.4 when Mr Abrate was first copied into emails about these issues, on 20 February 2018, his reaction (in his email of 20 February 2018 timed at 11.36 am), is that of someone learning of them for the very first time. Moreover, the Claimant's replies to Mr Abrate's emailed questions about what had happened do not mention the alleged fact that Mr Abrate ought to have been well aware of everything because of his presence at the sales meeting on 13 to 14 December 2017 when the Claimant supposedly told everyone about it.

60. Alleged protected disclosure c therefore simply did not happen as a matter of fact.

61. We should add, in relation to all of alleged protected disclosures a to c, that what the Claimant wrote in his first email answer to the questions posed by Mr Abrate in *his* first email of 20 February 2018 is inconsistent with the idea that at the time the Claimant believed there had been breaches of legal obligations (and so on) in December 2017: "*It was around 6 December when I was contacted by the customer … I tried to confirm situation with her just before Xmas and first thing in the New Year but she never replied to my calls or emails, today was my first time to speak to her face to face*". In that email, the Claimant appears to be suggesting that he had been unsure of the situation and had been seeking clarification of it since 6 December 2017 and had only had confirmation of what the situation was that very day: 20 February 2018. At least up to and as late as 20 February 2018, then, the email correspondence evidences the Claimant asking questions in an attempt to find out whether there had been any breaches of any relevant legal obligations, rather than – as he alleges – him believing there had been breaches and communicating information tending to show this.

62. In light of this, we do not accept the Claimant can genuinely have believed in December 2017 that there had been a breach of the legal obligations (or any other relevant thing), or that the information he disclosed tended to show that. At best, he might conceivably have believed that the information provided by Alison Evans tended to show that that might possibly be the case.

63. In relation to protected disclosure d, we refer to the Claimant's email timed as being sent at 2:28 pm on 20 February 2018 to Ms Morais and others. As explained above, the contents of that email are said by the Claimant to be substantially the same as the contents of the alleged discussion with Ms Morais – by telephone, as we understand it – that is protected disclosure d.

64. The first thing we note about the email is how it begins: "*I am very deeply concerned that we have lost the majority of our business at JG Pears (582,000 euro) due to a history of non-conformances at this account".* That tells us why the Claimant is writing the email: he is concerned that the Respondent has lost sales, something that would affect his own sales figures, on the basis of which his performance was assessed. He is once again not saying that he was very concerned that the Respondent had been breaching EU Regulations and because of that breaching British criminal law. Of course it is theoretically possible that he was concerned about these things as well as being concerned about lost sales, but that is not how it comes across to us.

65. In the middle of the email there are three paragraphs numbered 1, 2, and 3. If the protected disclosures are to be found anywhere, it is in those paragraphs.

66. Paragraph 1 is about the feed additives and premixtures issue (in the list of issues, "*shipping document*[s] *having been declared incorrectly as animal fe*[e]*d additives rather than pre-mixtures in breach of EU Regulations*"). This paragraph contains things like, "*I know we sent the product labels which clearly show we are selling premixtures but I still feel the auditor and the customer would like to see our specs amended to make it clear we are supplying premixtures".* What the Claimant was saying, broadly, was that the customer was not happy with what was being done to address this issue. He was not remotely saying that the Respondent had been doing wrong in an unlawful and potentially criminal way. We repeat the point that if he had

genuinely believed this it would have been a dereliction of duty for him not to say so; and we do not think the Claimant is the kind of man to behave like that.

67. Paragraph number 2 is also about that feed additives/premixtures issue. In it, the Claimant gives, "*my understanding from the customer*". Again, he says nothing to the effect that he thinks there has been a breach of the law or even that that might be the case.

68. In the paragraph numbered 3, in its first sentence, the Claimant states: "*I am advised the invoice address does not match the certification address for the same location*". In that sentence, he is undoubtedly disclosing some information. However: within the second sentence, which makes up the whole of the rest of the paragraph, he is asking questions to which he does not suggest he knows the answers; in addition, what he is asking appears to relate to GMP+ certification issues rather than EU regulatory issues.

69. Near the end of the email, he writes: "*I advised Alison that I would clarify with her what we can do to rectify the non-conformances but she has told me that they will not order any further product from us until we have corrected the issues brought to her attention*". For the email to end with a reference to loss of business, or potential loss of business, is of a piece with the reference to it at the beginning and reinforces our view that that is what this email is really about. The claimant cannot, we think, have believed that he was making disclosures in the public interest. Yet again, he was – perfectly properly – entirely concerned with his own and with Kemin's interests.

70. Nowhere in the email does the Claimant directly or indirectly mention EU Regulations. We do not believe that at the time he sent the email he thought that such information as he disclosed tended to show a breach of EU Regulations. If he had thought that, he would surely have said so.

71. This is a convenient point to discuss what the Claimant is alleging in terms of what he supposedly believed the information he was disclosing tended to show. In the list of issues, four of the things listed in ERA Section 47B are referred to: the commission of a criminal offence; failure to comply with a legal obligation; danger to health or safety; deliberate concealment. During the hearing, the focus has been entirely on the first two of these things. In paragraph 6 of his [claim form] particulars of claim, he set out the precise basis of his allegations, citing three things and three things only:

    71.1 "*declaring the products being sold to customers as Animal Feed Additives when in fact they were actually and should have been legally declared as premixtures*". This is said to be "*contrary to EU Regulation 2003/1831*";

    71.2 "*the company was also declaring and signing off the documents with an incorrect legal address which would be a fraudulent declaration and would be contrary to EU Regulation (EC) 183/2005 as those premises would have to be registered or approved and must not operate without such approval*;"

    71.3 "*It is an offence not to comply with these two EU Regulations*". The Claimant has since clarified what offence he had in mind: breaches of EU Regulation 1831/2003 would, he says, be a breach of regulation 10 of The Animal Feed (Composition, Marketing and Use) (England) Regulations 2015; breaches of

EU Regulation 183/2005 would breach regulation 5 of The Feed (Hygiene and Enforcement) (England) Regulations 2005.

72. That is the Claimant's case as it has consistently been put forward from the outset. We mention this because, during the course of the hearing, when he was being asked questions by Respondent's counsel and by the Tribunal, there seemed to be a certain 'shifting of the sands' on the Claimant's side. In particular, he seemed to have some difficulties identifying the particular parts of the EU Regulations that he thought there had been a breach of. This was a surprising state of affairs for somebody who alleges that he was confident from 6 December 2017 onwards that the Respondent had breached particular EU regulations in particular respects.

73. We note, in passing as it were, that at various points in the hearing the Claimant veered between, on the one hand, declaring himself to be an expert on the relevant legislation because of his decades of experience of working with and applying it and its predecessors, and, on the other, emphasising that he was not a lawyer and could not be expected to go into technical detail and that given this, it was entirely reasonable for him to believe there had been breaches of things, even if that was in fact not the case.

74. When, during the hearing, the Claimant mentioned specific articles within the two EU Regulations referred to in his claim form, he appeared to have considerable difficulty explaining how those Regulations had been breached by what he is alleging the Respondent did. It was at this point that he appeared to change tack, suggesting that the company address issue was a concern about possible breaches of Italian company law (about which he did not claim to know anything at all) and that the feed additives/premixtures issue was, or might be, to do with breaches of customs regulations, regulations he was unable to identify. It seemed to us that at this point in his evidence, the Claimant was improvising. If breaches of Italian law and of customs regulations had been in his mind at any relevant stage, they would most certainly have been mentioned in his claim form. We do not accept that at the time he made any relevant disclosures, he believed any information he was disclosing tended to show either of these things.

75. We have no idea on what basis it might be alleged that the Claimant's alleged disclosures tended to show that the health or safety of any individual had been, was being or was likely to be endangered, not least because the goods to which the alleged disclosures related were animal and not human foodstuffs. In any event, health and safety did not feature in the Claimant's case as presented during this hearing; and there is no basis in the evidence for us thinking that the Claimant believed that that was what any information he disclosed tended to show, let alone that he did so reasonably.

76. Turning to whether the information tended to show that any matter falling within any one of the categories in ERA section 43B(1) had been, was being or was likely to be deliberately concealed:

    76.1 the Claimant during the hearing did at one or two points talk about a "*cover-up*", something which we will specifically deal with later in these Reasons;

76.2 if he at any relevant stage thought that there actually was a cover-up (and we do not think he did), it was certainly not anything he articulated, and none of his alleged protected disclosures had anything in them, even the slightest hint, to that effect;

76.3 in so far as the Claimant is actually alleging he believed that any information he disclosed tended to show such a thing, we do not accept that allegation; nor was any such belief a reasonable one.

77. In assessing the reasonableness of the Claimant's belief that there was a breach of relevant EU regulations and therefore of the UK criminal law, we do bear in mind the fact that he is not a lawyer; but also the fact that, as already mentioned, he professes to detailed expert knowledge of the regulations to which he refers, gleaned from his many years working in the animal feedstuffs industry.

78. The first thing referred to both by the Claimant and by the Respondent is Article 2 of Regulation (EC) No. 1831/2003, which is the "*Definitions*" section. Articles 2(a) and (e) state:

> *(a) 'feed additives' means substances, micro-organisms or preparations, other than feed material and premixtures …*
>
> *(e) 'premixtures' means mixtures of feed additives …*

79. In other words, if one adds two feed additives together, one gets a premixture. Feed additives and premixtures are therefore not fundamentally different things. The Claimant has never been able to explain to us which part of which of the EU regulations he refers to was allegedly breached by the Respondent describing on shipping documents or on an invoice a premixture as a feed additive. The Respondent has consistently (and plausibly) maintained that on shipping documentation there is nothing wrong with describing a premixture as a feed additive, as in that context what is important is what, generically, the goods are; and that premixtures, being made up of two or more feed additives, can generically be described as feed additives.

80. What we are concerned with here is whether the Claimant had a reasonable belief that there was a breach of particular EU regulations, and consequently of British regulations that criminalise certain breaches of EU regulations, and that information he disclosed tended to show this. We repeat that it has never been his case – before part-way through the hearing, at least – that at the time he made his disclosures he believed the information he disclosed tended to show other breaches of legal obligations. The fact that he has been unable during the course of these proceedings, including at this final hearing, to point to an EU regulation he now thinks was breached would not necessarily be determinative. However, what is more damaging to his case is the fact that he appears to be unable to explain what regulation(s) he allegedly thought at the time had been breached; or, to be more precise, what regulation(s) he thought the information he allegedly disclosed tended to show had been breached.

81. In relation to this additives/premixtures issue, the one and only regulation he has pointed us to that might conceivably be relevant is that just quoted from.

Notwithstanding him not being a lawyer, if he really thought that the definitions section of 1831/2003 made what the Respondent did unlawful, thereby meaning the Respondent had committed criminal offences in British law, it was not a reasonable belief. More than that, even to a lay person, albeit one who professes expertise in this area, the proposition that breaches of the law are to be derived from and solely from the definitions section of these regulations is so manifestly absurd that we do not accept the Claimant can genuinely have believed that at any relevant time.

82. On the address issue ("*an incorrect legal address*" in the list of issues), the Claimant referred us to specific articles from EC Regulation 183/2005: Article 11, which provides: "*Feed business operators shall not operate without: (a) registration as provided for in Article 9; or (b) approval, when required in accordance with Article 10*"; Article 16, which deals with amendments to registration or approval of an establishment; Article 19, which provides for the competent authority to record on a national list or lists the establishment it has registered in accordance with Article 9; Article 9, which requires feed business operators to provide details of their establishments and provides for the maintenance of a register or registers of establishments.

83. Beyond referring to those articles, the Claimant was unable to explain to us how putting the wrong address on an invoice or on shipping documents might be a breach of the regulation. In so far as we can understand what the Claimant is now alleging – and in fairness to him, this is not new, in that it is reflected in the claim form – it is: first, feed business operators have to provide details of and register their establishments; secondly, they therefore have to give accurate details of a registered establishment on documents connected with consignments of animal feed products. The difficulty we have with this is that the second part of it does not logically, or in any other way, follow from the first part of it. The articles of the regulation the Claimant has referred us to are not concerned with what goes on shipping documents or invoices; they are concerned with the registration of establishments. It is conceivable there are other articles of other regulations requiring shipments of animal feed products to be accompanied by documentation accurately stating that they originated from an establishment registered pursuant to 183/2005 and giving that establishment's correct registered address, but if they exist the claimant has been unable to point to them. They are not any of the articles of 183/2005 he has referred us to; and he cannot have had them in mind in 2017 and 2018 if he still cannot identify them.

84. If the Claimant believed at the time that particular parts of 183/2005 were being breached by "*an incorrect legal address*" it was an unreasonable belief. But it is a big 'if'; and we don't accept the Claimant did believe this in December 2017 or February 2018. The factor we keep coming back to in relation to this is that the Claimant is alleging he believed, at all relevant times, that Kemin was making (using his own words from the particulars of claim) "*fraudulent*" declarations, resulting in breaches of EU regulations and the commission of criminal offences, and yet he never wrote anything to that effect, but instead chose to write things like the email of 20 February 2018 that we considered above. Whatever he now thinks, and whatever he had persuaded himself of by the time he came to make his claim, he did not believe any such thing at the time of the alleged protected disclosures, because if he had done so what he wrote to his employer would have been very different.

85. Alleged protected disclosure e is an email the Claimant sent to Mr Abrate and others at 4.52 pm on 23 February 2018.

86. Similarly to the email of 20 February 2018 relevant to disclosure d, the first thing we note about this email of the 23rd is that, from its first sentence, its focus is on the customer's concerns arising under the customer's certification scheme, which, moving through the email, appear to boil down to concerns relating to the GMP+ certification scheme. In the body of the email there is no hint or suggestion of the Claimant having the concerns about breaches of EU Regulations and of British criminal law that he alleges he had. As is noted in paragraph 41 of respondent's counsel's skeleton argument, to which we refer and with which we agree, most of the email consists of the Claimant asking questions which he does not suggest he knows the answers to. He comes nowhere near suggesting he thinks the answers are to the effect that there have been the breaches of the law that he has identified.

87. In the first part of the email, the Claimant discusses GMP+ certification issues. These are, we remind ourselves, issues which the Claimant has consistently said, particularly during this hearing, were not the subject matter of his alleged protected disclosures. On those issues he asks non-rhetorical questions and makes points seemingly inconsistent with the case put forward in these proceedings such as, "*With regard to the invoice I do not see anything wrong but of course someone should check it?"*.

88. Later in the email, under the heading "*Product specifications*", the Claimant does not suggest that there are regulatory issues; what he seems to be doing is asking whether additional information can be provided in order to keep the customer happy.

89. Under the heading "*Veronella Delivery Note Vital Petfood Groups*", having set out information about what "*a typical Veronella delivery note*" looks like, he asks "*… it would be useful to check if the type of product needs to be declared eg do we need to say premixture?*". We are in danger of belabouring the point, but he would not be asking this question in this way if he believed that Kemin definitely did need to "*say premixture*" in order to avoid criminal liabilities, which is what he is alleging he believed. In the email, immediately after that question, the Claimant poses three more. Suffice it to say: these questions do not relate to the alleged protected disclosures the Claimant is relying on; in any event, the Claimant is asking questions in a way that suggests he does not know the answers to them.

90. The only hint in the email that, as alleged, the Claimant thinks there are serious breaches of the law, is the email's final sentence: "*I think my questions highlight that we have some potential legal, regulatory, quality, certification selling and marketing issues to address*". However, he does not say what those issues might be, he refers to them as "*potential … issues*", and it seems to us that if he thought he was disclosing information which tended to show the existence of the serious breaches of law he alleges he did, he would have said so in terms, and done so way back in December 2017, because he is not the kind of person who would neglect their duty to tell their employer things like that.

91. In conclusion in relation to alleged protected disclosures d and e:

    91.1 the Claimant did not genuinely believe he was disclosing information that tended to show the things he alleges he did;

    91.2 if he did, any such belief was not reasonable;

    91.3 his reasons for writing the emails of 20 and 23 February 2018 referred to were entirely reasonable concerns about his and the Respondent's position vis-à-vis a valuable customer;

    91.4 there is no public interest involved in his disclosures, nor are we satisfied that he thought he was making his disclosures in the public interest;

    91.5 if he thought he was, it was not a reasonable belief.

92. In summary:

    92.1 none of the alleged qualifying and protected disclosures relied on was a qualifying or protected disclosure;

    92.2 all of the Claimant's complaints therefore necessarily fail.

Unfair dismissal

93. We shall now consider the Claimant's complaints as if we had concluded that the Claimant had made qualifying and protected disclosures. This requires a certain amount of mental gymnastics, but what we are doing is proceeding on the basis of the following assumptions: that all of the disclosures that were made had similar contents; that their contents were, essentially, the contents of the emails of 20 and 23 February 2018 which we have just been considering (and this is a reasonable assumption to make, given that the Claimant's case on paper is that he made the same disclosures five times); that we are wrong about them not being protected disclosures. With those assumptions in mind, we are asking ourselves: was the reason the Claimant was subjected to the treatment he complains about the fact that he made those disclosures?

94. We start with the complaint of unfair dismissal under ERA section 103A.

95. Although the legal burden of proof is on the Claimant to show that the reason or principal reason for dismissal was that he made a protected disclosure, it is instructive to look at the reasons put forward by the Respondent for dismissal and to examine whether the evidence supports the Claimant's case or the Respondent's case. We note that the only person who knows why the Claimant was dismissed is Mr Abrate. The Claimant does not know the reason and can only speculate as to what the reason might be, on the basis of the evidence, just as we can.

96. We refer to the internal Kemin emails of late December 2017 / early January 2018 discussing the Claimant's future, in particular that from Mr Bertuzzo of 22 December 2017 recording what Mr Abrate had told him – see paragraph 31 above. They were sent at a time when no one within Kemin could have dreamed that some kind of

Tribunal claim would be in the offing and that those internal emails might come to light as part of a Tribunal disclosure exercise. There is no good reason not to take them at face value. For us to take them otherwise, we would have to assume either that Mr Abrate anticipated a future Tribunal claim and that the Claimant would somehow find out about his conversation with Mr Bertuzzo, and that Mr Abrate therefore lied to Mr Bertuzzo; or that Mr Abrate and Mr Bertuzzo got together and between them anticipated the Tribunal claim and thought that they should lay a false paper trail; or some other similarly unlikely scenario. And nothing like that has been alleged by the Claimant anyway.

97. What the Claimant's case is in relation to these emails is something of a mystery to us. Insofar as we can understand what it is, it seems to be that the email from Mr Bertuzzo merely mentions the possibility of dismissing the Claimant, but that the actual decision to dismiss him was taken later. As we shall explain in a moment, we do not accept that interpretation of this email of 22 December 2017, but even if we did, this would not help the Claimant overcome the fact that the email not only suggests that Mr Abrate wanted to dismiss him before either of protected disclosures d and e were made, but that his apparent reasons for doing so had nothing to do with the disclosures the Claimant had allegedly made and everything to do with the concerns Mr Abrate alleges he had about the Claimant's performance.

98. We note that the email of 22 December 2017 and the email conversation that follows it are between people who do not have English as their first language and are using English as a lingua franca. It is obvious to us from the whole conversation, even ignoring the evidence which Mr Abrate gave to us about it, that this was not some idle query about how Mr Abrate might go about dismissing the Claimant at some stage in the future if he wanted to do that. Instead, it was a request for information as to how to dismiss the Claimant in circumstances where a decision had been made that he should be dismissed. The issue being discussed in the emails was as to the timing of the dismissal; and the focus of discussions over the timing was the fact that the Claimant acquired 2 years' service and the right to bring an 'ordinary' unfair dismissal claim in April 2018. In other words, this email exchange is entirely consistent with the Respondent's case, which is that the Claimant was dismissed because, rightly or wrongly, Mr Abrate had performance concerns; and that he was dismissed when he was dismissed because the Respondent wanted to avoid him getting 2 years' service.

99. There is a related, overwhelming reason why the reason for dismissal was not the making of disclosures (protected disclosures or not): at the time Mr Abrate decided that the Claimant should be dismissed, he was completely unaware of any of the Claimant's disclosures, so they could not have been the reason for his decision; he was first aware of them on 20 February 2018. See paragraph 59.4 above.

100. So far as concerns whether performance issues were what was in the Respondent's and Mr Abrate's mind when deciding to dismiss the Claimant, we have already noted that that is what Mr Abrate told Mr Bertuzzo at the time and that we can think of no plausible reason why Mr Abrate would not have told the truth to Mr Bertuzzo at the time.

101. What the Claimant seems to be saying about this is two things.

102. First, he says that his sales were better than those of his peers and that therefore there were no grounds to be concerned about his sales performance. In relation to this, the Claimant is almost perversely missing the point. The point is that he had a sales target, which he had not complained about or objected to, and which he missed by a very substantial margin; in circumstances where, according to Mr Abrate's uncontradicted evidence, the Claimant's peers did not miss their sales targets.

103. The second thing the Claimant seems to be saying about this is that if Mr Abrate had been so concerned about the Claimant's sales performance that he was contemplating dismissal of the Claimant because of it, Mr Abrate should have flagged it up to the Claimant and given him a warning, or put him on a performance improvement plan, or something like that. Again, this rather misses the point. We are not concerned with the fairness of what Mr Abrate did, but with whether he genuinely did have concerns about the Claimant's performance which caused him to decide to dismiss the Claimant. It would be fair to say that the contemporaneous documentation, such as it is, would not have communicated to the Claimant that Mr Abrate had that level of concern about the Claimant's performance, but there are a number of emails and other documents, highlighted in the Respondent's evidence, which demonstrate that the Respondent did have concerns about the Claimant not meeting his target, concerns which were expressed to the Claimant to some extent. And there is nothing in that documentation to suggest that the Claimant missing his target was not of concern to the Respondent, let alone that the Respondent shared the view the Claimant expressed during this hearing, namely that bearing in mind the low base from which Kemin's sales performance in the UK started in 2017, the Claimant had done very well in terms of his sales performance on an objective measure, and that his sales targets were so unrealistic that they could effectively be ignored when assessing his performance.

104. It is obvious to us from the contemporaneous documentation – see in particular paragraphs 21 and 22 above – that, rightly or wrongly, Mr Abrate was genuinely concerned that the Claimant should hit his target and it would logically follow from this that he would be concerned when the Claimant failed to hit his target.

105. We accept that when the Claimant was told he was being dismissed, it would have come as a 'bolt from the blue' from his point of view, but the evidence is entirely consistent with the reason for dismissal being performance. More importantly, bearing in mind that the burden of proof in terms of the reason for dismissal is on the Claimant, there is literally nothing in the evidence even hinting that the Claimant making his disclosures, or any other ulterior motive, was any part of the reason for his dismissal.

106. The Claimant seems to place considerable weight on the contents of his 2017 annual performance review, which was prepared in January 2018. The main thing we note about that is that at the time it was prepared, Mr Abrate had already decided that the Claimant should be dismissed for poor performance. In the circumstances, we can understand why Mr Abrate might not have paid particular heed to what he said in that document. Although we might have expected Mr Abrate to be rather more robust in his criticisms of the Claimant's performance than he in fact was, it is not as if the Claimant is praised in it. In short, the document does not assist the Claimant's case.

107. In looking at whether the reason for dismissal was, or might have been, the Claimant making disclosures, one thing we have looked at is the inherent probability of someone in Mr Abrate's position wanting to do the Claimant down because of the Claimant making these particular disclosures at the particular times he allegedly made them.

108. The fact that somebody has made a protected disclosure does not mean that the employer has a plausible motive for dismissing them or subjecting them to a detriment of any kind at all. Where a whistleblower is persecuted, there is a reason behind it; and the reason is not that the employer has undertaken a detailed legal analysis and decided that the test for making protected disclosures in the Employment Rights Act 1996 has been satisfied. The reasons are usually that: the whistleblower has been making a nuisance of themselves and they are being persecuted to shut them up; and/or that the employer is worried about them making their disclosures to others and wishes to undermine their credibility, or something like that – for example, a middle manager who is concerned that their subordinate will go over their head with their concerns and get them into trouble, or the employer as a whole is worried that a whistleblowing employee will take their concerns to a client or to a regulator, embarrassing them, doing them commercial damage, and/or getting them into trouble. Entirely absent from the Claimant's case is a sensible answer to the question: why would Mr Abrate be so concerned about the Claimant making these disclosures that he decided the Claimant should be dismissed for making them?

109. We asked the Claimant about this a number of times during the hearing. At one point, not directly in answer to our questions about this, he spoke of a "*cover-up*". We have no idea what the Claimant is referring to here. Who is said to have been covering up what? The Claimant's disclosures, such as they were, consisted of repeating concerns which had been raised by a particular client. They were not the Claimant's concerns; they were the client's concerns. There was no possibility of Kemin covering them up because they were not in the Claimant's or Kemin's hands. Moreover, the documentary evidence before us shows that they were escalated to a senior level and were ultimately resolved to the client's satisfaction. And the uncontradicted evidence of Dr Yersin is that although the Respondent changed its practice in relation to the particular client who had raised the concerns, in order to keep them happy, nothing else was changed, because nothing needed to be, from a regulatory point of view.

110. The other thing the Claimant said in relation to this issue of why Mr Abrate might want to persecute him for making these disclosures was something along these lines: Mr Abrate had an ulterior motive and was looking for a scapegoat as he would be responsible for "*misinformation*" to customers. That allegation leads us to ask: a scapegoat for what? The Claimant presumably cannot – at least not consistently with his whistleblowing claims – mean that he was being made a scapegoat for financial losses sustained as a result of the client being lost because of these issues (the potential loss of this client being something very much in the Claimant's mind when he sent his email of 20 February 2018 – see above). If that was the reason for dismissal, then the reason for dismissal was not the making of protected disclosures.

111. In accordance with the case that the Claimant is putting forward on paper, he can only mean that he was being made a scapegoat for the Company's alleged regulatory

breaches. That allegation would make no sense at all. Neither the Claimant nor Mr Abrate was responsible for what was written on invoices or in shipping documents and the like. Neither of them was on the regulatory side of the business. Both of them were concerned with sales. Moreover, there was never any suggestion from anyone that someone was going to get into trouble with regulatory authorities, or with senior management. No one had made any threat to go to the authorities; the customer was not threatening to go to the authorities, and neither was the Claimant. What comes through the contemporaneous paperwork very strongly is that the only concern was to keep the customer happy.

112. In conclusion, the claimant making the disclosures he made, whether they were protected disclosures or not, had nothing to do with his dismissal. His unfair dismissal complaint therefore fails.

Right to be accompanied

113. The next issue relates to the right to be accompanied. It is, in short, did the Claimant have that right?

114. That question can be answered very simply: no, he did not; that right only arises in relation to grievances and disciplinaries; this was not a disciplinary, it was a meeting to dismiss the Claimant for allegedly poor performance. There was and is no suggestion that the Claimant was guilty of misconduct, or anything of that kind. The Claimant apparently believes that every dismissal where the employee is being to some extent criticised is necessarily a disciplinary in accordance with the Employment Relations Act 1999. He is simply wrong about that.

115. In any event, on our reading of it, there is no claim made in the Claim Form (including the particulars of claim) for breach of the right to be accompanied and therefore even if the Respondent had breached that right, no such claim would be before the Tribunal.

Whistleblowing detriment

116. We now turn to the alleged detriments. We are examining these complaints in the same way that we looked at the unfair dismissal complaint, as if we have found that the Claimant's alleged disclosures, such as they were, were qualifying and protected disclosures.

117. In relation to each and every complaint of detriment for making protected disclosures, the same point arises (and we shan't mention it each time): there is no basis whatsoever in the evidence for thinking that there was or might be a causal connection between the disclosures and the alleged detriments. We asked the Claimant about this a number of times during the hearing. The Claimant appeared not to understand the question. It seemed to us that the Claimant thought that if he proved that he had made protected disclosures and if something which was not to his liking happened afterwards, his claim for whistleblowing detriment was complete. If that is indeed what he thought, he was mistaken. As we explained when discussing the law earlier in these Reasons, it is incumbent on a claimant making a detriment claim to put forward enough evidence to establish a prima facie case on causation;

and this evidential burden on the claimant exists notwithstanding the fact that the legal burden is on the respondent in accordance with ERA section 48(2).

118. A related issue is the Claimant's inability to explain to us, in relation to all or most of the detriments, who – which individual or individuals – he was accusing of having done or deliberately omitted to do something on the grounds that he made a protected disclosure. We first became concerned about this at the end of Miss Dewil's cross-examination, when the Claimant had not put to her any allegation that she had acted as she had because of the Claimant's disclosures. The Employment Judge asked the Claimant to confirm that he was not making any such allegation against her and the Claimant did so. At the time, the Claimant said all such allegations were being made against Mr Creemers.

119. However, when Mr Creemers was being cross-examined, the Claimant did not put such a case to him either. The Employment Judge then had a very similar conversation with the Claimant to the conversation had when Miss Dewil was finishing her evidence about what his case was. The Claimant initially suggested, before the implications of doing so were explained to him, that he was not making allegations against Mr Creemers either. Only when it was explained to him that if this was so, it was difficult to see the basis of any detriment claim at all that the Claimant changed his tune and put his case to Mr Creemers, to some extent and in a rather half-hearted way.

120. We were left at the end of the hearing unsure as to whether the Claimant really was alleging that anyone – other than Mr Abrate, in relation to dismissal – had in fact acted against him because he made protected disclosures and, if he was, as to who had allegedly done so.

121. Amongst the many reasons why it was important to establish what the Claimant's case was in this respect, we wanted to investigate whether the individual or individuals who were said to have subjected the Claimant to detriments because of his disclosures had any knowledge of the disclosures. Given the Claimant's inability to provide us with a remotely clear case in this respect, we are not satisfied that anyone who was responsible for the things the Claimant alleges were detriments he was subjected to did have such knowledge. For that reason alone, the detriment claim would fail even if it faced no other problems.

122. A further general point that can be made in relation to each of these alleged detriments is similar to the point made earlier about the inherent unlikelihood of Mr Abrate wanting to do the Claimant down because of the Claimant's alleged protected disclosures. We repeat those points in relation to the detriments; but in relation to the detriments there is an additional related point, which is: even if someone at the Respondent or at an associated company wanted to do the Claimant down because he made protected disclosures, why on earth would they choose to do this by doing the things that he alleges were detriments?

123. Turning to the individual detriments, detriment a is an allegation that the Respondent delayed payment of the Claimant's bonus payment from February to March 2018. The Respondent's case, which we accept because it is entirely supported by the contemporaneous documentation (which documentation does not support the

Claimant's case to any extent), is that the bonus was in fact paid in two tranches. The first tranche was paid on time, in December 2017, and the second tranche was paid in March 2018 once the figures had been finalised and once payment – not just to the Claimant but to others too – had been authorised internally, something that happened around 19 March 2018. Emails passing between Mr Bertuzzo and others of 23 March 2018 show that there was a slight confusion between 19 and 23 March as to whether payment had been authorised, which caused a few days' delay. 23 March 2018 was a Friday and the Claimant was paid early the following week. The Claimant's case on paper was that he should have been paid in February. However, during his cross-examination he suggested that he had heard that some UK colleagues had been paid on 20 March 2018. (We should say that he produced no evidence beyond his say-so that some UK colleagues were paid on 20 March). His case therefore appears to be that the Respondent delayed paying his bonus by less than a week. If we were satisfied that he had received his bonus five or six days after UK colleagues, and we are not, we think that in the particular circumstances, such a short delay would be de minimis and that if he genuinely considered that short delay to be to his detriment, he would not have done so reasonably and there would therefore be no detriment in law.

124. Detriment b consists of three subsidiary allegations. The first is an allegation that the Claimant had not received a reply from Mr Creemers to the email the Claimant sent on 23 March 2018 for over a month. The second subsidiary allegation is that Mr May, who was tasked with looking into the Claimant's allegations that eventually formed the subject matter of these proceedings, did not get back to him. The third is that he was not permitted to appeal.

125. Taking each of those allegations in turn:

125.1 The Claimant's email of 23 March 2018 was replied to. Mr Bertuzzo replied on 6 April 2018. The Claimant may not have liked what Mr Bertuzzo wrote, but it was a response and a reasonably quick one. The fact that it did not come from Mr Creemers is not a legitimate source of complaint. We do not accept that the Claimant was subjected to any detriment in this respect.

125.2 The allegation that Mr May did not reply to the Claimant turned out to be based on the Claimant misremembering the contents of the email that Mr May had sent him on 27 April 2018. The relevant part of Mr May's email is: "*The allegation that you raised in your letter will be looked into and evaluated based on the background of the situation.*" That very carefully worded phrase gives no express or implied promise that Mr May will revert to the Claimant. The Claimant could have no legitimate expectation that Mr May would get back to him; he had no right to have Mr May get back to him; and in all the circumstances we would not have expected Mr May to have got back to him. Given the lack of any legitimate expectation of a response, we do not accept that this was a detriment as a matter of law.

125.3 So far as concerns the denial of a right of appeal, the Claimant had no such right; the Respondent had evidently decided when it dismissed him that it would do so summarily without offering him that right; an HR decision was evidently made not to offer him that right; and, as with the reply or lack of reply from Mr

May, the Claimant had no legitimate expectation that he would be offered an appeal; and in the absence of a legitimate expectation we do not accept that he was subjected to a detriment.

126. Detriment c is an allegation that the Claimant was deliberately not paid correct pension payments in April 2018. This allegation too fails on the facts. In her evidence, Miss Dewil carefully took us through the documents and the figures, proving to our satisfaction that the Claimant was paid all that he was entitled to be paid. In summary, the Claimant was entitled to be paid 6.66 percent pension contributions on his base salary, including on his pay in lieu of notice. A calculation has been done looking at the total the Claimant was paid for his entire employment. That calculation shows that he was in fact overpaid pension. The Claimant appeared unable to understand that the Respondent's calculation had in fact been done on the basis of his pay for the entire period of his employment; the Claimant appeared fixated on what he had been paid during 2018 and was unable to get over his belief that he had been underpaid in 2018. And even if we were only looking at 2018, he would have been overpaid. But in any event, as we have just explained, and as we attempted a number of times to explain to him, the calculation that has been done is over the entire period of his employment and it proves he was paid very slightly more than 6.66 percent of his total base salary, including pay in lieu of notice.

127. Detriment d relates to reimbursement of expenses incurred in the course of employment. It appears that the Claimant has not been, or at least may not have been, paid everything. There is clear contemporaneous correspondence about this. By the end of it, he was corresponding with the Respondent's lawyers. Essentially, things seemed to have broken down because he would not accept a proposal put forward that the amount by which he had been overpaid in pension should be deducted from the amount of expenses claimed and only the balance paid to him. Clearly, what the Respondent ought to have done was to pay him the amount it thought it owed him, leaving him to make a claim for any more he thought he was entitled to. However, it is regrettably commonplace for employers not to take that kind of pragmatic approach. And any suggestion that this large multinational group of companies would short-change the Claimant to the tune of less than £1,000 because of his disclosures, such as they were, is so very unlikely as to be almost ridiculous.

128. Allegation e is an allegation that the Respondent failed to put the Claimant through a full disciplinary process prior to dismissal because he had made protected disclosures. The Respondent failed to put the Claimant through a full disciplinary process because the Respondent did not discipline the Claimant; it dismissed him for performance concerns. There is nothing odd or suspicious about the Respondent choosing not to follow a procedure anything like that in the ACAS Code in relation to someone with less than 2 years' service about whom there were genuine performance concerns (whether it was reasonable to have such concerns or not). It is not good industrial relations practice for an employer to act like this, but it is very far from unusual, and there is nothing unlawful about it.

129. The claimant's complaints of detriment for making protected disclosures therefore all fail for a number of reasons, including:

129.1 there were no protected disclosures;

129.2 there was no link between the claimant's [non-protected] disclosures and the alleged detriments;

129.3 no one who was responsible for the things the Claimant is alleging were detriments was aware of his disclosures at the relevant times;

129.4 in a number of instances, there was no detriment.

Breach of contract

130. The Claimant's final complaint is one of breach of contract. The complaint stems from an allegation that there was a contractual disciplinary procedure which the Respondent was obliged to follow. The entire claim is based on the words "*The disciplinary rules applicable to your employment are set out in our Disciplinary Rules and Procedures Document …*" in the Claimant's contract of employment.

131. The first point to be made in relation to this claim is one we have already made a number of times: the Claimant was not disciplined and the Respondent never had any intention of disciplining him and therefore even if there had been a contractual disciplinary procedure it would not have applied.

132. The second point is that the uncontradicted evidence we have from the Respondent is that there were in fact no particular written disciplinary rules and procedures in existence at any relevant time that were applicable to the Claimant's employment and that the reference to a *Disciplinary Rules and Procedures Document* in his contract was a mistake.

133. Thirdly, the fact that a contract of employment refers to policies and procedures does not make those policies and procedures terms of that contract of employment. The great majority of employment policies and procedures declare themselves to be non-contractual.

134. Fourthly, the contract itself has provisions governing termination. They are the usual provisions to the effect that the contract can be terminated on notice and/or with pay in lieu of notice. For the Respondent not to be entitled to do that and to be contractually obliged to go through a procedure of some kind before giving notice or paying in lieu (which is what the Claimant has to be alleging as part of this breach of contract claim), we would have to read into the contract of employment something to the effect that not only was there a disciplinary procedure to be followed, but that that disciplinary procedure – which no one, including the Claimant, claims to have seen – was written in such a way that it should be read as overriding the express contractual terms for termination of employment.

135. The breach of contract claim therefore fails too.

EMPLOYMENT JUDGE CAMP

08 March 2022

Sent to the parties on:

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For the Tribunal:

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