EMPLOYMENT TRIBUNALS

Claimant: Mr G Hadfield

Respondent: Falconex Limited

Heard at: Liverpool ET (remotely, by CVP) **On:** 10 and 11 March 2022 and 24 March 2022 (in chambers)

Before: Employment Judge McCarthy

REPRESENTATION:

Claimant: Mr B Henry (of Counsel)
Respondent: Mr P Roux (lay representative)

RESERVED JUDGMENT

The claimant's claim of automatic unfair dismissal pursuant to the provisions of Section 152 of the Trade Union & Labour Relations (Consolidation) Act 1992 succeeds. The claimant was unfairly dismissed by the respondent on grounds related to union membership or activities.

The matter is listed for a hearing via CVP to determine remedy **on 21 July 2022** at 10am. Directions for the remedy hearing will be sent separately.

REASONS

Introduction

1. By a claim form presented on 11 September 2020 (having entered early conciliation and having received a certificate against the respondent dated 11 August

2020), the claimant complained of automatic unfair dismissal in relation to his dismissal on 29 May 2020.

2. By a response form dated 21 October 2020 the respondent resisted the complaint. It says that the claimant was fairly dismissed for redundancy.

Preliminary Issues

3. At the beginning of the hearing, before I heard any evidence, I had to deal with some preliminary issues.

Supplementary Witness Statement and document for Inclusion in the Hearing Bundle

4. The respondent had submitted a supplementary witness statement to the Employment Tribunal on 7 March 2022 for Mr Pascal Roux, Managing Director.

5. On 7 March 2022, solicitors for the claimant had written to the Tribunal informing it that paragraphs 15-17 of Mr Roux's supplementary witness statement related to settlement and a strike out application which had already been refused by Employment Judge Ainscough on 19 November 2021. The claimant's solicitors proposed that the Employment Judge conducting the final hearing should not read Mr Roux's supplementary statement until they had heard oral representations from both parties on whether it was to be added to the Hearing Bundle or not.

6. In their email of 7 March 2022, the claimant's solicitors also referred the Tribunal to their previous email of 17 September 2021, regarding a document that the respondent wanted to add to the Hearing Bundle. The claimant were objecting to its inclusion as it related to settlement. Again, they asked the Employment Judge who was to hear the final hearing to await oral representations from the parties at the hearing before reading this document.

7. At the outset of the hearing, I confirmed to the parties that I had seen the email of 7 March 2022 sent by the claimant's solicitor. I confirmed that I had not read Mr Roux's supplementary witness statement or any documents within the Hearing Bundle which were marked "without prejudice" prior to hearing any oral submissions the parties wished to make. I then heard submissions from both parties as to how best to proceed.

8. Mr Henry, Counsel for the Claimant, informed me that the claimant did not wish to make an application concerning the supplementary witness statement. The claimant did not object to it being entered into evidence other than with respect to paragraph 15 which referred to without prejudice settlement discussions. This paragraph was under the heading "*Resolving the Claim*"

9. Mr Henry said that he was, "making an observation" rather than any application and accepted that existence of settlement discussions was now known to me, but I would be aware that I should have no regard to this fact and that such without prejudice communications would, if appropriate, be relevant to remedy only, in relation to costs. It was proposed that I read Mr Roux's witness statement up to and including paragraph 14 and not to read below the heading "Resolving the Claim".

10. Mr Roux, representing the respondent, alleged that paragraph 15 in his supplemental witness statement and the document he wanted to include in the Hearing bundle were open offers of settlement. I asked Mr Roux to provide me with the Hearing Bundle reference for the document the respondent wanted to include in the Hearing Bundle, but the claimant had objected to. Mr Roux told me this document had not been included in the Hearing Bundle sent to the Tribunal by the claimant's solicitor. Mr Henry did not dispute this.

11. I discussed the "without prejudice" doctrine to Mr Roux and how this was a joint protection, and the claimant was clearly not waiving his rights to this protection. I also explained to Mr Roux that whilst many parties entered into some form of settlement negotiations prior to a final tribunal hearing, the fact and the details of those settlement negotiations were irrelevant to determining liability and may only become relevant if the claimant was successful in his claim and the case moved to the remedy stage.

12. It was agreed with the parties that the best way to proceed would be for me to read Mr Roux's supplementary witness statement up to and including paragraph 14 and not to read below the header "Resolving the Claim" and the respondent would not make any reference to settlement negotiations during the liability part of the hearing (including during Mr Roux's evidence and the respondent's submissions).

13. I asked the parties if they had a copy of Mr Roux's supplementary witness statement with the relevant paragraphs removed. The parties did not have a redacted copy and so it was agreed that I would use the full copy of Mr Roux's supplementary statement sent previously to the Tribunal, reading up to the end of paragraph 14 only. No objection was made to me continuing to adjudicate on the matter or any application made for me to recuse myself. I also did not consider, in all the circumstances (including the agreed approach), that I should recuse myself.

14. The respondent was concerned that the Hearing Bundle included irrelevant documents relating to the previously withdrawn claim for unauthorised deductions and it should be updated. I explained that I would only be considering documents in the Hearing Bundle which were relevant to the issues I was being asked to determine. The respondent confirmed that he did not wish to make an application for the Hearing Bundle to be updated or make any other application.

15. Following my time in chambers, reading the witness statements and relevant documents before evidence commenced, I confirmed to the parties that the last paragraph I had read in Mr Roux's supplementary statement was paragraph 14 and I had not read any of the paragraphs under the heading "Resolving the Claim". I confirmed that any settlement negotiations were totally irrelevant to the matters I needed to determine in terms of liability, and I had put the existence of such negotiations to the back of my mind. Although Mr Roux had said that the document the respondent wanted adding to Hearing Bundle (but to which the claimant had objected) had not been added, I still had not read any document marked *"without prejudice*" in the Hearing Bundle.

Claims and Issues

16. The issues to be determined by the Tribunal were discussed and agreed at the outset of the hearing. A list of Issues had previously been agreed at a preliminary hearing on 28 January 2021 with Employment Judge Porter (42-50). Mr Henry

confirmed that the complaints of unlawful deduction from wages/breach of contract and breach of contract- pension contributions, had subsequently been withdrawn and were no longer issues for the Tribunal to determine. These claims were dismissed upon withdrawal by Employment Judge McDonald on 16 June 2021.

17. It was agreed that the only claim to be determined was that of automatic unfair dismissal, and the relevant issues were those set out under the heading "Unfair Dismissal" of Employment Judge Porter's list of issues plus an additional issue at the end- *"if the claimant was unfairly dismissed what is the appropriate remedy?"*

18. The issues to be determined by the Tribunal were therefore:

UNFAIR DISMISSAL

Section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992

1. Was the reason (or if more than one the principal reason) for the claimant's dismissal that he had made use of trade union services at an appropriate time?

If not,

Section 153 of the Trade Union and Labour Relations (Consolidation) Act 1992:

2. Was the reason or principal reason for the dismissal of the claimant was that he was redundant?

3. Did the circumstances constituting the redundancy apply equally to one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the respondent and if so

4. Was the reason the claimant was selected for redundancy one of those specified in s152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, namely that the claimant had made use of trade union services at an appropriate time.

If not,

Section 103A Employment Rights Act 1996

4. Did the claimant raise a concern with being asked to work whilst furloughed with Pascal Roux on 22 May 2020?

If so,

5. Did the claimant make a qualifying disclosure under s43B(1)(b) that a person has failed, is failing or is likely to fail to comply with a legal obligation?

If so,

6. Was the reason (or if more than one the principal reason) for the claimant's dismissal that he made the protected disclosure?

7. If the claimant was unfairly dismissed, what is the appropriate remedy?

It was noted that there was a typographical error in the numbering in the original list of issues, but the parties used the original numbering during the final hearing, so it is replicated above.

Procedure/Documents and evidence heard

19. This was a hearing where the claimant's representative, Mr Henry (of Counsel), the claimant's witness and the respondent participated remotely via CVP.

20. I heard oral evidence from the claimant, Mr Hadfield, on his own behalf and from Mr David Roberts (a Regional Officer with Unite the Union), who had been the claimant's union representative. The respondent was represented by its Managing Director, Mr Pascal Roux, who also gave evidence on its behalf.

21. During the hearing I was referred to documents within an agreed Hearing Bundle which contained 144 pages. Within the Hearing Bundle was a witness statement for the claimant and Mr Roberts (both for the claimant) and a witness statement for Mr Roux for the respondent. I was also provided with a supplementary witness statement for Mr Roux (for the respondent). As referred to above, only paragraphs up to and including paragraph 14 of Mr Roux's supplementary witness statement were read by me and entered into evidence.

22. At the conclusion of the evidence each party made oral submissions. Mr Henry agreed to provide them first. The respondent was not legally represented and mindful of the overriding objective, I also provided the respondent's representative with a break at the end of the claimant's closing submissions to allow him an opportunity to read the relevant statutory provisions and finalise his closing submissions. During the cross examination of the claimant, I also reminded the respondent's representative of the questions that I needed to determine by referring him back to the list of issues.

Factfinding

23. The relevant facts are as follows. Where I have had to resolve any conflict of relevant evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Hearing Bundle.

24. As Mr Henry stated in his submissions, there was not a "*great deal of clash*" between the parties in evidence. Mr Roux accepted most of the actual matters put to him in cross examination.

25. The claimant, Mr Hadfield, was employed by the respondent, Falconex Limited, from 6 May 2019 until his dismissal on 29 May 2020. There had previously been a dispute regarding the claimant's effective date of termination, but this was resolved prior to the hearing.

26. The respondent admitted that it dismissed the claimant but submitted that it had fairly dismissed the claimant by reason of redundancy. The claimant disputed this.

27. The claimant was employed by the respondent as a Project Electrical Engineer. At the time of his appointment, he was the only Project Electrical Engineer in his department. It was accepted by the respondent that the claimant worked in Research and Development and did not work in the production side of the business. I was

provided with an unsigned copy of the claimant's "Statement of Main Terms and Conditions" (70-72). This statement refers to a Company Handbook which included various policies and procedures, including a "*Capability Procedure*" and "Whistle-Blowing". There was no reference to a specific redundancy policy and Mr Roux confirmed there was no redundancy policy. I was not provided with a copy of the Company Handbook, or any polices/procedures contained within it. The Statement states that the claimant's normal hours of work were forty hours per week (Monday to Friday) and that his annual gross salary was £28,000. At the time of the claimant's dismissal, Mr Roux confirmed that the claimant was not subject to any formal performance management procedures.

28. Around November 2019, one of the respondent's former directors, Robert Jevans, re-joined the company after a year away. Mr Roux explained in evidence that Mr Jevans originally left the respondent to join a competitor. Therefore, he originally re-employed Mr Jevans in a lower-level role as he was unsure of his loyalty to the respondent. In evidence to me, Mr Roux confirmed that Mr Jevans initially had the same job title as the claimant. However, around Christmas time, Mr Jevans' became Engineering Manager and started managing the claimant.

29. The claimant said he did not object to the promotion of Mr Jevans as he knew he had previously held the position of Engineering Director and was more experienced than him. Mr Roux explained that Mr Jevans was always considered more senior than the claimant and he had a wider skill set. The claimant's skill set was purely electronics, but Mr Jevans was also skilled in programming and could work the machines the company made (which very few people could) and brought managerial and administrative skills. Mr Roux denied that the roles of Engineering Manager and Project Electrical Engineer were interchangeable, and the claimant accepted that after Mr Jevans' promotion, he and Mr Jevans' roles were not interchangeable.

30. The respondent is a small manufacturing company with approximately 25 employees. The company had no dedicated Human Resources function. Mr Roux said he dealt with human resources matters.

31. Around the start of 2020, the claimant became a member of Unite the Union, an independent trade union ("Unite"). The claimant explained that he had decided to join Unite to "*give him some protection*", after observing the treatment of one of his colleagues. This colleague had left after a dispute, and he believed she had been treated poorly by the respondent. He said he was concerned that, in the future, he could also face problems. The claimant said, *"if it happened to her it could happen to me*".

32. In March 2020, due to the COVID-19 pandemic, the claimant began doing some work at home and some work at the respondent's premises. On or around 22 April 2020 the claimant received a phone call from Mr Roux telling him that he was being placed on 'furlough' under the Government's Coronavirus Job Retention Scheme (the "Furlough Scheme").

33. Under the Furlough Scheme, in place during the claimant's employment, employees on furlough were entitled to 80% of their salary (subject to a salary cap). Employers of furloughed employees could claim a grant to cover 80% of the wages (up to the salary cap) paid to furloughed employees. However, employers could

choose to "top up" employee's salaries to their normal salary whilst they were on furlough.

34. The claimant was not provided with any furlough agreement confirming that he had been furloughed but Mr Roux accepted that he had telephoned the claimant to tell him he was being placed on furlough and that the claimant was furloughed around 22 April 2020. The claimant accepted that he was on furlough from Monday 27 April 2020 (when he was due to return from annual leave). He believed that he remained on furlough until the termination of his employment on 29 May 2020. In evidence, Mr Roux confirmed that the claimant was never informed by the respondent, at any time before his dismissal, that he was no longer on furlough.

35. The UK government published guidance on the Furlough Scheme at various points during the COVID -19 pandemic. The guidance, which applied during the period the claimant was furloughed, stated that employees were not allowed to undertake any work whilst on furlough, other than voluntary work. There was no provision under the Furlough Scheme to place employees on 'flexible furlough' whilst the claimant was employed by the respondent. Mr Henry submitted that voluntary work was a reference to working for no pay with organisations such as charities, it was not a reference to voluntarily deciding to undertake work for their existing employer.

36. It was not in dispute that, when placing the claimant on furlough, Mr Roux informed the claimant that he would be paid a 20% top-up on his wages during furlough (taking his wages to 100% of his normal basic pay) as an incentive to take on voluntary work whilst at work. Mr Roux accepted during cross examination that the claimant was not required to work, under his contract of employment, during the time he was on furlough. Mr Roux also confirmed that it was his understanding that employees placed on furlough could not work, but he believed there were exceptions to this especially if employees were paid a 20% top up to their wages. Mr Roux said that the respondent left it up to employees on furlough to decide how much work they did. Mr Roux said, "*he strongly believed [the respondent] was right in asking employees to work the 20% [it] was paying outside the Furlough Scheme*". Mr Roux felt it was operating within the spirit of the scheme to save the business by paying people to do some work in the form of the 20% top up on wages.

37. On 29 April 2020, the claimant spoke with Mr Jevans about what was expected of him during furlough. He referred to this conversation in an email to Mr Roux of later that day (84). In this email the claimant records that he was told "*he could do as much or as little work as [he] want[ed] during furlough but there may be redundancies after furlough.*" However, in evidence, the claimant said that it was apparent he was expected to carry out work whilst furloughed. He said that Mr Jevans warned him that "*if he was not a team player he was at risk of redundancy*". This was not disputed by the respondent and another line in his email to Mr Roux appears to reference such a warning – "*I obviously do not want to be made redundant and I want to help you and the rest of the company. Without get you or myself in trouble with the Government".*

38. The claimant explained that it was this warning that had made him feel "*pressured*" to go into work whilst on furlough, even after receiving advice from his union representative that he could not work during furlough. He said "*he wanted to keep his job*".

39. After speaking with Mr Jevans, the claimant was concerned about the legality of doing work whilst on furlough and so sent the email at page 84 in the Hearing Bundle to Mr Roux (copied to Mr Jevans) seeking confirmation that he was on furlough, whether there were any plans to make him redundant and what was expected of him. Mr Jevans responded to the claimant's email first, saying *"I did not say there maybe redundancy after furlough what I actually said is we are furloughed to reduce the possibility of redundancy".* (84) Mr Roux confirmed in evidence that what Mr Jevans had told the Claimant was correct and that the respondent was using furlough to avoid the need to make redundancies.

40. Later that night, Mr Roux responded to the claimant's email (84) –

> *During furlough we are not supposed to ask you to work and generate revenue.*
>
> *Research and development does not generate revenue anyway.*
>
> *So you are free to do as much (or little) work as you want;*
>
> *Also training is strongly advised during furlough and everyone would/ should gladly consider that any PCB layout design/ programming and any other engineering activity is good practising and enhancing of your recently acquired skillsets.*
>
> *Our 20% topping- up is a way to encourage the voluntary sentiment..."*

41. The claimant said he did undertake some work from home during this period because he felt pressured into doing so.

42. On 4 May 2020, Mr Roux sent an update to all employees about various issues including how the company was performing during the pandemic. He explained that April 2020 had been the worst months' turnover for three years but was higher than the company had expected. He said that this was the first time the company "*was really feeling the pinch*". He stated

> "*many of our customers (see details below) were closed in early April and most of them are re-opening gradually this month, some with a proper production start in June.*
>
> *In May, we already got nearly £90k booked – in June £60K at this point in time. Both months look promising to a path back to a steady viable situation. July should be the end of the tunnel even if it is not too bright then. For info, we are still in crisis situation at Falconex but we are managing it; a few of you are on furlough, we have postponed……. and we will apply for government loans to cover any hick-ups.*
>
> *I am sharing this so that you know more about the situation: do not worry about it, it is painful but so far we are taking care of it."*

In evidence, Mr Roux confirmed that, due to the pandemic, there had been a downturn in work, but this had primarily affected production staff and some staff have been placed on furlough. (89-90)

43. On Wednesday 20 May 2020 the claimant said he was contacted by Mr Jevans by telephone and told that Mr Roux was upset with him because he had not been working. The claimant was told to come into work the next day. Mr Roux accepted in evidence that it was possible this conversation had taken place as the respondent needed a project finishing.

44. Mr Roux accepted that the respondent wanted the claimant to attend work whilst he was on furlough, so he could undertake a test on a project which needed finishing. Mr Roux said, "*we asked him to come in for an hour maximum: a storm in a thimble!!"*

45. The claimant said that he reluctantly attended work on Thursday, 21 May 2020 for a period, but Mr Roux could not recall him attending work that day. The claimant remained concerned about the legality of being on furlough and carrying out work and, on 21 May 2020, whilst at home, he sought initial advice from his trade union, Unite. He spoke with Mr David Roberts, a Regional Officer at Unite on the phone. In evidence, Mr Roberts confirmed he had spoken with the claimant on 21 May 2020 and that the claimant wanted advice due to his company instructing him to work whilst on furlough. Mr Roberts said he advised the claimant that "*it was illegal to work whilst on furlough and the government scheme was there to protect staff whose companies had no work or income to pay them*".

46. On Friday, 22 May 2020, it is accepted that the claimant came into the office to undertake a test of equipment. The test was unsuccessful. It is not disputed that after the claimant returned home, and whilst at home, he telephoned Mr Roux. In evidence, Mr Roux accepted that, during this call, the claimant informed him that he was concerned about being asked to work whilst on furlough as it was tax fraud. Mr Roux accepted that his response was, "*you are annoying me now, fuck off*". When asked whether he accepted the claimant was whistleblowing about furlough, Mr Roux said that the claimant was "*possibly hinting at it".*

47. The claimant said he was very stressed by this conversation with Mr Roux and so, on the same day and whilst at home, he rang Mr Roberts at Unite again. The claimant did not feel that Mr Roux was listening to him and informed Mr Roberts that the respondent was paying all staff 100% pay on furlough but thought that this gave it a right to ask staff to work. The claimant asked Mr Roberts to speak with Mr Roux, hoping it would change his position on working during furlough. The claimant did not return to work that day.

48. On Friday, 22 May 2020, Mr Roberts attempted to call Mr Roux and left a message for him to call back. Mr Roux called Mr Roberts back later that day. The contents of that telephone call are largely agreed. Mr Roberts asked Mr Roux about the claimant being asked to work whilst on furlough and Mr Roux said that he just needed something to be closed off and an email sent. Mr Roux told Mr Roberts that he had looked after his staff all the way through the situation. Mr Roberts reminded Mr Roux about the legalities around furlough and that staff shouldn't be doing any work on furlough, no matter how small. The only part of the call which is in dispute was whether the respondent said that it would have to consider reducing the claimant's salary to 80%, but I agree with Mr Henry's submission that whether this was said or not is not is irrelevant to the issues to be determined in this case.

49. At paragraph 16 of his main witness statement (13-14), Mr Roux stated:

> "During *the weekend [he] concluded that [the claimant] was no longer fit to work for Falconex Ltd and instead had become an obstacle".*

He then went on to detail why he believed the claimant was *"no longer fit"* to work for the respondent and "*an obstacle*" making comments about the claimant's performance and behaviour and the claimant contacting Unite. In relation to Unite, Mr Roux stated:

> "*his turning to a union showed he could not cope with the responsibility and was seeking refuge behind a third party. It could have been his parents and relatives, a colleague, a certification body or another technical issue,..; (sic) the result was blatantly obvious, [the claimant] no longer wanted to work for the team and Falconex Ltd, and was possibly looking for a way out. – I deemed that he was therefore untrustworthy: he was in effect ready to divulge key and critical information on key projects to external third parties to cover his incompetence in executing said projects. – Even worse he had become unreliable, even for a minor input, when it mattered most".*

50. The only reference to redundancy was at the end of paragraph 16:

> *"beyond this project, it was necessary to concentrate on our existing products and resources. At the strategy review, [the claimant's] role was no longer indispensable medium and long terms. The reflection on his redundancy would have happened anyway, but these events quickened the process. Despite the time, energy and cost spent in hiring an engineer, the claimant had to be let go".*

51. In evidence, Mr Roux said "*Can't hide fact so frustrating what happening (sic) on Friday. At weekend thought no point in carrying on – breakdown of relationship. Felt [redundancy] will definitely happen, make it now rather than drag on. [The Claimant] is emotional, in conflict with MD, bitterness still there, rotten at core, job no longer viable and [claimant] not making it viable."*

52. The next working day was Tuesday, 26 May 2020, due to a bank holiday. Despite being on furlough, the claimant went into the office. At the end of the day, the claimant was called to a meeting with Mr Roux. Mr Roux informed the claimant that he was being made redundant and handed him a letter dismissing him with notice (91). Mr Roux did not dispute that he then asked the claimant why he had decided to join a union. The dismissal letter (91) stated:

> "*It is with regret that we have decided to make you redundant.*
>
> *Unfortunately, the financial situation is not looking like recovering to last year's level for quite some time, jeopardising our investment in engineering and research of which you form part.*
>
> *The recent breakdown in trust puts you on top of the list of any redundancy we ought to implement to protect the business.*
>
> *For that reason, we would also never consider re-hiring you, whatever the circumstances, and we cannot furlough you as it would unfairly put a strain on the government resources.*

We will expect you to further or finalise your current projects and hand over to [Mr Jevans] during the 2 weeks notice you are entitled to."

53. When asked in cross examination whether he agreed with Mr Henry's understanding that the "*breakdown in trust*" was the claimant taking advice from a trade union, Mr Roux confirmed that he agreed. A "*break of trust between [the claimant] and Falconex"* was also referred to by Mr Roux in the staff memo dated 31 May 2020 referred to below (100-101).

54. In evidence to me, when asked why he had included *"we would also never consider re-hiring you"* in the termination letter, Mr Roux explained that *"the element of trust was prominent in my mind when making the redundancy and I made the decision to make [the claimant] redundant as soon as I felt a breakdown in trust. Once breakdown in trust, [he] wouldn't have made it at that point."*

55. The Claimant was not given a right of appeal against the decision to make him redundant.

56. Mr Roux stated in evidence that he had "*followed due process in making the decision to make [the claimant] redundant for economic reasons.*" However, it was not in dispute that the claimant had not been informed, at any point prior to 26 May 2020, that his role had been placed at risk of redundancy or why his role had been selected. It was also not in dispute that there had been no redundancy consultation process prior to 26 May 2020.

57. The only written reference to redundancy had been on 29 April 2020 shortly after the claimant was furloughed (84). The Claimant had asked directly "*are there any plans to make myself redundant*". He received only the following response from his line manager "*I did not say there maybe redundancy after furlough what I actually said is we are furloughed to reduce the possibility of redundancy*". (84) The claimant received no further communications about potential redundancy of his role (either in writing or verbally) until he was given his dismissal letter on 26 May 2020.

58. The Hearing Bundle did not contain any documents relating to a redundancy process, other than the dismissal letter. There were no documents relating to any management discussions (such as the strategy review Mr Roux referred to) regarding potential or actual redundancies or any staff announcements warning that the company was contemplating or needed to make redundancies. Whilst staff were updated on the financial health of the company and its prospects for May and June on 4 May 2020 (89-90), there was no reference in this communication to the company contemplating or needing to make any redundancies in the near future. The claimant was notified of his redundancy only 22 days after this memo.

59. On 29 May 2020, the claimant was provided with a breakdown of his pay for May 2020, by the respondent's accounts department (94). It stated that he had been paid the first three weeks in May 2020 (up to 24 May 2020) at 80% of gross pay and one week (commencing on 25 May 2020) at 100% full pay. The Claimant responded to this email on 29 May 2020 (95) saying "*the attached email says that you would pay me the 20% top up for furlough. Why has this changed?*" The account's department replied to the claimant's email stating that they had "*made an error*" and that they would calculate the difference and pay the claimant the difference that day (96). I find this

demonstrates that both the Claimant and the respondent believed that the claimant was on furlough on 21 and 22 May 2020.

60. On 30 May 2020, the claimant sent an email to Mr Roux asking to be put on statutory notice rather than contractual notice. The parties agree that the claimant's employment terminated on 29 May 2020.

61. On 31 May 2020 Mr Roux sent a staff memo by email at 12:49pm entitled "Memo- End of May" (100-101). In this memo he gave an update on the financial health of the business. In terms of turnover he said, "*with everyone working efficiently and as a team we finished at just under £105K. Bravo! This is as good as we could expect it*". He stated, "*We made a loss this month and last month and it is eating into the profits of last year. We can endure this situation but only for so long"*. June is looking as good as May for the moment". Towards the end of the memo Mr Roux stated:

> *"Recently, George has shown a very poor judgment in challenging simple decisions made by Falconex, regarding furloughing, by involving Unite the Union, of which he is a new member. This was clearly a break of trust between George and Falconex and it could only lead to a quick -during these tough times- parting of the ways."*

Mr Roux also said in the memo:

> *"I will bend over backwards to be fair and sympathetic… until a line is crossed. Using a third party such as a union or a solicitor to enter a dialogue, is seen as a direct threat to the business, and simply put, if you're not working for Falconex then you're working against it."*

62. When asked in cross examination whether he agreed with Mr Henry's reading of this paragraph to mean that "parting of the ways was because of a breach of trust by involving the unions", Mr Roux agreed. Mr Henry put to Mr Roux that the memo was evidence of Mr Roux's reasoning for dismissing the claimant. The respondent denied this but then said that "*this was a case for him to explain his decision to staff*". He was trying to reassure them that he was in control of the situation. He said that "*some of the points he made were skewed towards using the memo to "express [his] personal views of unions".* Mr Roux expanded on this in paragraph 13 of his supplementary statement:

> "*I can use this opportunity to express my anti-unionism, in private, (it is a private and confidential email addressed to the current staff). The point made has more to do with asking, pleading even, staff to communicate internally whenever one feels aggrieved….. We felt betrayed and the sentiment is expressed firmly there."*

63. *In evidence, Mr Roux said that*

> *"essentially, we were baffled frustrated and eventually very disappointed: In choosing to address internal matters by way of a third party, be it union or other, instead of seeking to communicate directly with his peers, we felt he showed even more immaturity, a poor judgement as to his responsible role and essentially broke the trust between him and the company which is*

absolutely necessary and critical in his function of project engineer and in dealing with important confidential designs.

In other words he was no longer capable to carry on in his current role normally never mind properly." (16)

64. Mr Roux said that the claimant belonging to and/or using the services of a union had no direct bearing to the respondent's decision to make him redundant. He said that there was no detriment to the claimant being a union member, the respondent had no policy against unions as there was no history of interaction with them at all. (15) Mr Roux said that contracting a third party was the issue, it being a union was irrelevant, it could have been his parents. However, Mr Hugh pointed out that as a matter of fact the third party was Mr Roberts, a trade union representative, Mr Roux said the claimant no longer had his own mind – he was a "instrument."

65. In evidence, Mr Roux clearly expressed the beliefs he held regarding unions. In paragraph 19 of his witness statement Mr Roux stated:

"I fucking hate unions too. I do not think them to be constructive, not in this country and not in my birth's…. Their points are better made by a socialist government into new laws and regulations. Unions may have a purpose in hammering the walls of larger corporations- the recent case against Uber is a typical landmark- but are the curse of small - medium companies as they can hamper progress and a company's survival to fulfill their principles... etc (sic).

But my opinion does not matter. I have to accept their existence and what matters is that I express my opinion freely and at any time I can and feel like it. And so did in a memo to all staff because it was topical."

66. After the claimant and Mr Roberts raised concerns on 21 and/or 22 May 2020, about the claimant working whilst on furlough, the respondent subsequently decided that they would not list the claimant on HMRC forms for the furlough scheme for the week which included 21 and 22 May 2020 or during his last week of employment. Mr Roux said his accounts department "*saw a case happening there*" so decided not to declare the claimant as a furloughed worker to the HMRC or claim a grant for 80% of his wages for these two weeks. However, Mr Roux confirmed that the claimant was never informed he was being taken off furlough or that the respondent had decided not to apply for a grant for his wages in those two weeks.

67. The claimant raised a grievance on 3 June 2020 making the following complaints:

(1) What have I done to justify the accusation of myself threatening yourself and the company?

(2) What have I done to justify the accusations of being untrustworthy?

(3) On 30 June 2020, will I be paid for my outstanding holidays of 3.5 days?

(4) Unacceptable verbal abuse.

68. The respondent replied to the claimant's grievance letter on 4 June 2020 commenting on each of his complaints. In terms of grievance complaints one and two, Mr Roux responded:

> *"Asking you to work during your furlough time, to help finish a project you had been involved with, is hardly a crime worth whistle blowing. But in thinking so and starting to act on it, showed that you were not prepared to help save the company…(sic) and a total lack of commitment, never a potential threat to the company and its employees. Wrong allegiance. There was no other route then on but to part."*

69. In cross examination, Mr Henry put to Mr Roux that the phrase "*There was no other route then but to part*" meant that once the claimant had connected with the trade union there was no other way forward but to dismiss him. *Mr Roux response to this question was "yes, I supposed- I would say yes."*

70. The respondent said there were no grounds to justify taking the grievance procedure any further and the claimant said that he did not continue with the grievance as his points had been answered. There was a further grievance concerning pension contributions which was dealt with in September 2020. Mr Roberts represented the claimant at this grievance hearing and confirmed that the grievance had been dealt with properly. This grievance did not deal with the claimant's dismissal.

The Law

71. Section 94 of the Employment Rights Act 1996 (ERA) confers on employees the right not to be unfairly dismissed. The employee must show that he was dismissed by the respondent under section 95 ERA but in this case the respondent admits that it dismissed the Claimant (within section 95(1)(a) ERA) on 29 May 2020.

72. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: **Abernethy v, Mott, Hay and Anderson [1974] ICR 323, CA.**

73. Section 152(1) of the Trade Union & Labour Relations (Consolidation) Act 1992 (TULR(C)A) provides that:

> **(1) For the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee –**
>
> **(a) …..**
> **(b) ……**
> **(ba) had made use, or proposed to make use, of trade union services at an appropriate time,**
> **(bb) ……..**

74. Section 152(2) of TULR(C)A defines "appropriate time" as:

> **"(a) a time outside the employee's working hours, or**
> **(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;**

and for this purpose "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.

75. In the case of **The Post Office v Union of Post Office Workers and another** *[1974] IRLR*, Lord Reid considered the meaning of "appropriate time":

Para 9

It appears to me that the definition of appropriate time in s-s.(5) makes it quite clear that as well as including time when the worker is not on his employer's premises 'appropriate time' also includes periods when the worker is and is entitled to be on his employer's premises. The definition includes all time outside the worker's working hours and 'working hours' is defined as meaning time when in accordance with his contract with his employer he is required to be at work. I do not think that it was or can be disputed that 'at work' means actually at work and does not include periods when in accordance with this contract of employment the worker is on his employer's premises but not actually working. …So in my judgment the Act entitles a worker who is a member of a trade union to take part in the activities of his union while he is on his employer's premises but is not actually working.

76. Section 152(2A) of TULR(C)A states that-

"In this section –

(a) "trade union services" means services made available to the employee by an independent trade union by virtue of his membership of the union, and

(b) references to an employee's "making use" of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

77. Section 152(2B) of TULR(C)A states that-

"where the reason or one of the reasons for the dismissal was that an independent trade union (with or without the employee's consent) raised a matter on behalf of the employee as one of its members, the reason shall be treated as falling within subsection (1)(ba)"

78. Section 153 of TULR(C)A provides:

Where the reason or principal reason for the dismissal of an employee was that he was redundant, but it is shown-

(a) that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the employer; and

(b) that the reason (or, if more than one, the principal reason) why he was selected for dismissal was one of those specified in section 152(1),

the dismissal shall be regarded as unfair for the purposes of Part X of the ERA 1996 (unfair dismissal).

79. Section 154 of TULR(C)A provides that the qualifying period for unfair dismissal protection under section 108(1) of the ERA does not apply to a dismissal which by virtue of section 152 or 153 is regarded as unfair for the purposes of Part X of the ERA:

80. The Definition for redundancy is found at Section 139 ERA

> (1) "**for the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –**
>
> **(c) The fact that his employer has ceased or intends to cease –**
> **i. To carry on the business for the purposes of which the employee was employed by him, or**
> **ii. To carry on that business in the place where the employee was so employed, or**
> **(d) the fact that the requirements of that business –**
> **i. for employees to carry out work of a particular kind, or**
> **ii. for employees to carry out work of a particular kind in the place where the employee was employed by the employer,**
>
> **have ceased or diminished or are expected to cease or diminish.**

81. Under section 103A ERA, an employee will be regarded as unfairly dismissed if the reason, or principal reason, for the dismissal is that the employee made a "protected disclosure". An employee may bring a claim under S103A whatever his length of service as the normal qualifying period for bringing an unfair dismissal claim does not apply. A "protected disclosure" is defined in Section 43A as meaning

> "**a qualifying disclosure (as defined by 43B) which is made by a worker in accordance with any of sections 43C to 43H"**

Conclusions

82. Mr Henry and Mr Roux provided me with oral submissions on the reason for the claimant's dismissal which I have considered and refer to where necessary in reaching my conclusions.

83. The respondent submitted that the reason for the claimant's dismissal on 29 May 2020 was redundancy. Mr Roux said in his submissions that Section 152 of TULR(C)A was not even a minor reason for the claimant's dismissal. The evidence does not support this proposition. I find that the principal reason for the claimant's dismissal was that he had made use of trade union services at an appropriate time pursuant to Section 152(1)(ba) of TULR(C)A.

84. As Mr Henry said in submissions there were "*four runners and riders*" for principal reason for the claimant's dismissal.

(a) That the Claimant made use of trade union services at an appropriate time pursuant to Section 152 of TULR(C)A;

(b) That the Claimant made a qualifying disclosure;

(c) That the claimant was redundant but had been selected because he had made use of trade union services at an appropriate time pursuant to Section 153 of TULR(C)A; and

(d) Redundancy.

85. I find that the principal reason for the claimant's dismissal is evidenced in two documents, the dismissal letter (91) and the staff memo dated 31 May 2020 (100-101).

86. The respondent submitted that the first and second paragraph of the dismissal letter (91) explained the reason for the claimant's dismissal – "*we have decided to make you redundant. Unfortunately, the financial situation is not looking like recovering to last year's level for some time…*". However, I find that it is the third and fourth paragraph of the claimant's dismissal letter that provide the true reasoning for the claimant's dismissal, Mr Roux writes

> *"the recent breakdown in trust puts you on top of the list of any redundancy we ought to implement to protect the business.*
>
> *For that reason, we would never consider re-hiring you, whatever the circumstance and we cannot furlough you as it would unfairly put a strain on government resources"*

87. In cross examination Mr Roux agreed that the "*breakdown in trust*" at paragraph three of the dismissal letter was the claimant taking advice from a trade union.

88. In the staff memo dated 31 May 2020, there is another reference to a break in trust and how this could "only lead to a quick-*during these tough times-parting of the ways*";

> "*Recently, George has shown a very poor judgment in challenging simple decisions made by Falconex, regarding furloughing, by involving Unite the Union, of which he is a new member. This was clearly a break of trust between George and Falconex and it could only lead to a quick -during these tough times-parting of the ways."*

89. In cross examination Mr Roux agreed that the "*parting of the ways*" with the claimant was because of a "*break of trust*" by the claimant and that this "break in trust" was the claimant involving the unions. There

90. I find that the Claimant was dismissed because the claimant took advice from his union representative regarding working on furlough and involved the unions in the issue by asking Mr Roberts to raise the matter of working on furlough, on his behalf, with his employer. The respondent considered these actions a break or breakdown of trust.

91. Section 152(2B) of TULR(C)A states that-

> **"where the reason or one of the reasons for the dismissal was that an independent trade union (with or without the employee's consent) raised a matter on behalf of the employee as one of its members, the reason shall be treated as falling within subsection (1)(ba)"**

92. The respondent submitted that it was irrelevant that the third party, who the claimant had contacted and involved, was a union.

> *"**"**his turning to a union showed he could not cope with the responsibility and was seeking refuge behind a third party. It could have been his parents and relatives, a colleague, a certification body or another technical issue,..; (sic) the result was blatantly obvious, [the claimant] no longer wanted to work for the team and Falconex Ltd, and was possibly looking for a way out. – I deemed that he was therefore untrustworthy: he was in effect ready to divulge key and critical information on key projects to external third parties"*

I do not find this credible. The reference to the "break of trust" does not reference "third party", it specifically refers to the claimant involving a union and names the claimant's union. As referred to above the claimant also accepted that the breakdown in trust/break of trust was the claimant taking advice **from a trade union** and/or **involving the unions.** There is also a reference in the staff memo of 31 May 2020 to **"**u*sing a third party such as a union or a solicitor to enter a dialogue",* being *"seen as a direct threat to the business".* I agree with Mr Henry's submission that this shows that the claimant contacting a union was an important part of the respondent's reasoning for dismissing him. As set out in my findings of fact, the claimant was very clear in expressing his strong beliefs concerning unions and I find that the beliefs he held about unions were an important part of his reasoning for dismissing the claimant. In submissions, Mr Roux referred to the staff memo of 31 May 2020 and how "the claimant's redundancy had "created an excuse for [him] to talk down the unions – one likely to cause dispute" and "to warn staff to keep away from them".

Made use of Trade Union Services

93. I find that the claimant made use of trade union services. The claimant was a member of Unite and requested advice from his union representative, Mr Roberts, on 21 and 22 May 2020. On 22 May 2020, he also asked Mr Roberts to raise a matter with his employer, on his behalf, regarding working whilst on furlough. Mr Roberts duly raised this matter with the claimant's employer, the respondent, on 22 May 2020. I find such activities fall within the definition at section 152(2A) of TULR(C)A.

Appropriate Time

94. A "time outside of the employee's working hours" is included within the definition of "appropriate time" pursuant to section 152(2)(a) of TULR(C)A. I find that the claimant did make use of trade union services at an "appropriate time". At the time he contacted his union representative, Mr Roberts, for advice on both 21 and 22 May 2020, he was at home- he was not on his employers' premises. In addition, he contacted Mr Roberts at a time when he was not required to be at work. (**The Post Office v Union of Post Office workers and another** *[1974] IRLR)*

95. As Mr Henry noted, when the relevant legislative provisions were drafted there was no concept of furlough, but I agree with Mr Henry's submission that whilst the claimant was furloughed this time would not be considered "working hours" because the Furlough Scheme itself required furloughed employees not to work. I find that the claimant was on furlough on the relevant dates of 21 and 22 May 2020 and/or genuinely believed he was on furlough on these dates.

96. There was no dispute that the respondent placed the claimant on furlough on or around 22 April 2020 and it commenced when he returned from annual leave. The respondent admitted that at no time before the termination of his employment was the claimant told he was no longer furloughed. Whilst the respondent may have subsequently chosen not to claim for a grant for the claimant's wages for the period after 17 May 2020 this decision was not made in advance of the week commencing 18 May 2020, but made after 22 May 2020. The respondent stated that this decision was in response to events on 21 and 22 May 2020. The respondent admitted that the claimant had been asked to work during furlough, but only to finish off a project and for a short amount of time. It was accepted that this work took place on 22 May 2020. In addition, the claimant's wage slip for May 2020 recorded that he was on furlough during the week commencing 18 May 2020, as he was originally paid 80% of his basic salary for this week.

Redundancy

97. The respondent submitted that the claimant was dismissed by reason of redundancy, and it was not a "*surprise*" for the claimant. Mr Roux submitted that the claimant was made redundant for economic reasons, that he was a "*cost which was hampering the business when it was in survival mode".* He submitted that the company could not afford him anymore. He submitted that the respondent had reflected on whether to prolong furlough or not but, under the claimant, the role had become non-viable. They decided that rather than happening later, they should make him redundant now. Mr Roux submitted that the emails at pages 77- 81 showed uncertainty and submitted that the company had decided "*it was time to get rid of research and development and concentrate on production*".

98. The evidence does not support the respondent's proposition that the claimant was dismissed by reason of redundancy as defined in Section 139 ERA. There are no documents evidencing a redundancy process or any management discussions regarding the need to make redundancies and/or selecting the claimant's role for redundancy. There were no staff announcements in May 2020 warning that the company needed to make or were contemplating making redundancies. Instead, the respondent detailed in an All employee memo on 4 May 2020 (89-90) how they were "*taking care*" of the situation in other ways (such as furlough, postponing VAT payments and government loans). The claimant was not warned that his role had been placed at risk of redundancy in advance of the meeting on 26 May 2020 and there was no consultation process. The claimant was on furlough and the respondent accepted that the company was using furlough to avoid making redundancies. The respondent also accepted that the claimant was not working in the area impacted by a fall in sales.

99. The respondent admitted that the decision to make the claimant redundant was made at the weekend following his call with the Mr Roberts from Unite on the Friday. In submissions Mr Roux accepted that the "*timing looked horrendous*" but felt delaying would be "*unhealthy and bring a bad atmosphere into the company*". He said there was no need to "*procrastinate*". I find that the timing was not coincidental and that it is telling that Mr Roux talks about how delay would be unhealthy and bring a bad atmosphere- which would be unusual in the case of a genuine redundancy.

100. In evidence, Mr Roux said:

> "*Can't hide fact so frustrating what happening (sic) on Friday. At weekend thought no point in carrying on – breakdown of relationship. Felt [redundancy] will definitely happen, make it now rather than drag on".*

Mr Roux also said:

> *"the element of trust was prominent in my mind when making the redundancy and I made the decision to make [the claimant] redundant as soon as I felt a breakdown in trust. Once breakdown in trust, [he] wouldn't have made it at that point."*

I find this to be further evidence that the reason for dismissal was what the respondent considered to be a breakdown in trust in their relationship–which the respondent admitted was the claimant seeking advice from his union and involving the union (by asking Mr Roberts to call his employer on his behalf).

101. In evidence, the respondent raised issues about the claimant's performance and behaviour and suggested that it was the claimant's performance in the role that had made it non- viable. In submissions, Mr Roux said the "*viability of the claimant's role was endangered by his inability*." However, Mr Roux accepted that the claimant was not on a formal capability procedure and capability was not referred to in the claimant's dismissal letter.

102. It is clear from the evidence, that the dismissal was not wholly or mainly attributable to the matters set out in Section 139 ERA. A breakdown in trust or issues regarding capability do not fall within the definition of redundancy.

103. Whilst I accept that the claimant may have been made redundant in the future, the evidence does not corroborate that the reason for the claimant's sudden redundancy was wholly or mainly attributable to the matters set out in Section 139 ERA. As Mr Roux said in evidence,

> *"beyond this project, it was necessary to concentrate on our existing products and resources. At the strategy review, [the claimant's] role was no longer indispensable medium and long terms. The reflection on his redundancy would have happened anyway, but these events quickened the process. Despite the time, energy and cost spent in hiring an engineer, the claimant had to be let go".*

104. I find that the "events" Mr Roux is referring to, that quickened the process, were the events of 21 and 22 May 2020 (the claimant seeking advice from his union representative, Mr Roberts and asking Mr Roberts, to raise, on his behalf, the matter of working on furlough with Mr Roux and the telephone call that Mr Roberts subsequently had with Mr Roux).

Qualifying Disclosure

105. Mr Roux admitted that on 22 May 2020, the claimant informed him, on a call, that "*he was concerned about being asked to work whilst on furlough as it was tax fraud".* Whilst I am satisfied that this disclosure was a qualifying disclosure pursuant to 43B of the ERA, I do not find that the principal reason for the dismissal was that the

claimant had made a "protected disclosure" on 22 May 2020. There was evidence that the claimant had previously raised a similar concern (about working during furlough) with Mr Roux on 29 April 2020. His email of 29 April 2020 does not refer to "tax fraud" but talks about not wanting him or the company to "*get into trouble*" with the government. After sending this email he continued to be employed. Whilst Mr Roux clearly found the conversation with the Claimant annoying (and tells him so) I find that the principal reason for the claimant's dismissal was because, after this telephone call, the claimant sought advice from his union and asked his union representative, Mr Roberts to raise the matter of working on furlough with Mr Roux on his behalf. It was this act that I find "crossed the line" as Mr Roux sets out in his All staff Memo of 31 May 2020 (100-101):

> *"I will bend over backwards to be fair and sympathetic… until a line is crossed. Using a third party such as a union or a solicitor to enter a dialogue, is seen as a direct threat to the business, and simply put, if you're not working for Falconex then you're working against it."*

Final Conclusion

106. I find, therefore, that the claimant was unfairly dismissed by the respondent within section 152(1)(ba) of TULR(C)A.

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Employment Judge McCarthy

Date: 7 June 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
Date: 7 June 2022

FOR THE TRIBUNAL OFFICE