Case Number: 3307497/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Valente Perez	**v**	Cambridge Glycoscience Ltd

Heard at: Bury St Edmunds **On:** 9-12 May 2022

Before: Employment Judge S Moore

Appearances
For the Claimant: In person
For the Respondent: Mr N Roberts, Counsel

JUDGMENT

The claim for automatic unfair dismissal pursuant to s. 103A Employment Rights Act 1996 is dismissed.

REASONS

Introduction

1. This is a claim for automatic unfair dismissal for making a protected disclosure pursuant to s.103A Employment Rights Act 1996 (ERA).

2. I heard evidence from the Claimant, Mr Steve Martin (SM), Chief Business Officer at Isomerase Therapeutics and, for the Respondent, from Dr Tom Simmons (TS) (Chief Executive Officer), Dr Jeremy Bartosiak-Jentys (JBJ) (Head of Research), Mr Tom Nicholson (TN) (Head of Clinical and Regulatory Affairs) and Mr Ruben Tadmor (RT) (Head of Business Development).

The Facts

3. The Respondent is a relatively new start-up food technology business that at the material time employed approximately 11 employees. The Claimant was employed by the Respondent as Head of Engineering between 10 December 2018 and 16 March 2020.

4. The Respondent manufactures a plant-based sugar replacement ("the Ingredient"). The process involves the use of a fungus which is used to produce enzymes. The enzymes react through a process of digestion with plant fibres, and the products of that process are then further processed and recombined to produce the Ingredient. The fungus used to produce the enzymes can be manipulated or genetically modified to ensure it produces the correct enzymes required to break down the plant fibre into the correct components for the Ingredient.

5. In order to sell the Ingredient in the USA, the Respondent was required to compile a Generally Recognised as Safe (GRAS) dossier for review by an expert panel. In such a dossier, companies explain their product in detail, their research, and the data they are relying on to demonstrate their product is safe. Once the dossier has been submitted, a panel of three experts review the dossier and, when satisfied the product is safe, sign an expert panel consensus statement which allows the company to sell the product that matches the specifications outlined in the dossier. To this end, the Respondent, particularly RT, worked with regulatory consultants, Ashely Roberts and Alastair Mak from Intertek Health Services, Inc.

6. In order to be able to manufacture at quantity in accordance with the specification approved in the GRAS dossier, the Respondent needed to have produced numerous prior batches and samples, each time learning about the product and how to improve the efficiency of manufacture.

7. In this respect R was taking a "rush to scale" approach, which it believed to be popular with investors on the West Coast of the USA. According to that approach, companies create ingredients using the biggest scale possible as proof of concept that their manufacturing process works and to provide enough material to send samples to potential customers and for internal work. The approach is high risk and expensive as it involves working with high degrees of uncertainty at a contract development organisation (CDO) that hires out large scale equipment by the day.

8. Towards the end of 2019 the Respondent was producing the fourth batch of the Ingredient; "Carduelis batch number 4", working with a CDO in Ghent, Belgium. This was the first batch the Respondent expected would produce an Ingredient that could be sold for commercial purposes. A "soft launch" of the product was planned to take place in February/March 2020 at a restaurant in California ("Boulevard") with celebratory chefs using the Ingredient in certain recipes and desserts.

9. The strain of fungus the Respondent was using in Carduelis batch number 4 had been named (by the Respondent) strain CGS008. The Respondent believed CGS008 to be a strain of Trichoderma Ressei ("TR") known as RUT-C30 that had been genetically modified. The genetic modification in question was the deletion of 2 genes.

10. For purposes of GRAS dossier R requested a company called Isomerise Therapeutics (Isomerase) to sequence both strain CGS008 and strain RUT-C30 by classical taxonomic identification (which is a non-genome identification).

11. On 3 December 2019 SM sent an email to JBJ stating "there is almost 100% identity between the RUT-C30 and CGS008 strains They also have 100% identity to published [TR] sequences – so they are both clearly [TR] strains…" However, SM stated he had been unable to evidence the sequence in the CGS008 strain across the region of the gene deletion.

12. The fact that Isomerase had been unable to sequence across the region of the gene deletion, together with the fact that the Respondent's manufacturing results were not as expected, led JBJ to query whether CGS008 was in fact a strain of TR. He therefore asked Isomerase for its sequencing data in order to conduct his own analysis. (At the same time the Respondent was also trying to source a full genome sequence from a different third party (the Earlham Institute) but was experiencing difficulty extracting sufficient DNA from CGS008 to do so.)

13. The Claimant says he was unaware that JBJ had asked Isomerase for the sequencing data, and this may well be true. It is notable that in December 2019 the Claimant was working remotely in Mexico in order to be with his father who was critically ill and that he returned to the UK around 6 January 2020. However, it is clear JBJ did not seek to conceal what he was doing from the Claimant because various emails between JBJ and Mr Martin dated between 6-8 January 2020, requesting raw data and commenting on the different behaviour of the two strains, are copied to the Claimant.

14. On 7 January 2020, at the Claimant's request, a meeting was scheduled to mark his return from Mexico, between himself, TS, JBJ, TN and RT. However, the Claimant overslept and arrived at the office 4 hours late. TS considered the Claimant did not apologise properly for the inconvenience to which he had put his colleagues. The Claimant considered TS should have accepted his explanation that he had overslept and resented the criticism.

15. The following day, 8 January 2020, there was a meeting between the Claimant, TS and JBJ. According to the Claimant's evidence in cross-examination the meeting was an angry one and as a result he became stressed and confused during the meeting. The background to the meeting was that the manufacturing run for Carduelis batch number 4 had commenced on 30 December 2019 and in the build-up to that run JBJ and TS had been concerned about limited visibility of the data – the Claimant was responsible for orchestrating the run and he was the contact to whom the external

partners performing the work sent the data. While the Claimant maintained that the requests made of him with regard to the provision of that data had been unreasonable, he agreed that around December 2019 JBJ and TS had become more aggressive in their demands and complained that he was not analysing the data or providing written reports.

16. On 9 January 2020 TS travelled to the US. He drafted an email which he planned to send to the Claimant, but in the event didn't. The text of that unsent email included the following:

> "In the meeting on Wed I was annoyed because it felt like you were being deceptive/dishonest/content to waste time/not on top of the data. I believe you when you said you weren't intentionally planning to be deceptive and I think on reflection you were just flustered under pressure – but you were being deceptive because you were flustered and trying to come up with answers.
> The below is a whole load of things that I think we need to improve on. But in summary I think you need to get into the habit of assembling and analysing data, getting better at presenting and explaining data, not panicking when you feel like you're under pressure, being a more constantly positive influence in the office…."

17. That draft email also referred to the Claimant not producing a "working deck". This was reference to a technoeconomic analysis and presentation (TEP). A TEP models the effects of changing parameters on yields and efficiencies, etc, and the presentation is a means of communicating the conclusions, methods and rationale yielded and used in the model. The evidence in the bundle shows that the TEP had been stressed as being important on the Claimant's first day of employment and also included in his job specification in March 2019. By October 2019, TS had been pushing the Claimant to work on the TEP, but the Claimant had since only made trivial changes to sections of the TEP that TS himself had done. The draft email refers to the TEP being "the one thing you never wanted to do and no surprise 6 months later there's a load of confusion about where we are with the data".

18. The Claimant accepts that after the meeting on 8 January 2020 he told RT he thought he was going to get fired. Further when it was put to him in cross-examination that he knew his employment was coming to an end, the Claimant said "It was a possibility. It crossed my mind. I could see what was happening."

19. Meanwhile, by mid-January 2020, on the basis of his own analysis of the data, JBJ was coming to the view that Isomerase were mistaken and that CGS008 was not a strain of TR, but a strain of a very closely related, but different, species of fungus called Trichoderma Longibrachiatum ("TL").

20. On 13 January 2020, at the weekly Monday company-wide meeting of the Respondent, JBJ says he informed the Respondent that it was likely CGS008 was in fact a strain of TL. The Claimant says he was at the meeting but cannot recall any mention of the problem. TS, JBJ, TN and RT all gave

evidence that JBJ raised the matter at the meeting and in his informal notes TS records "We found out on the Mon after [going to US] that the science team were confident the bug was not the bug we thought it was".

21. In any event, by 15 January 2020, JBJ had formed the firm view that CGS008 was in fact a strain of TL (not TR) and that Isomerase had indeed been mistaken. He sent the Claimant a WhatsAPP message of the same date to this effect and he also sent an email to TS attaching his report of the results of the sequencing he had carried out on CGS008 and RUT-C30. The email to TS stated that "In concert [with essentially the poor manufacturing results] I believe this justifies us abandoning work with GCS008".

22. The Claimant relies on the text of the WhatsAPP which is as follows: "Just been through Isomerases sequencing raw data. They suffered from confirmation bias - wanting to give us the expected result. The data shows …strain CGS008 is not same species as RUT-C30. Coupled with enzyme assays results…and phenotypic analysis…it supports abandoning the strain! Essentially we've wasted a year and probably £500k-£1M!' Then 'Have sent my report to Tom S and obviously you don't know yet…but thought you'd like to know'. The Claimant says he was the one who broke this news to RT and TN, rather than them finding out at the meeting on 13 January 2020.

23. For the reasons below little turns on whether, or to what extent, JBJ articulated his concerns about CGS008 at the meeting on 13 January 2020 or whether the news was not properly communicated until 15 January 2020. It is clear that by or on 15 January 2020 the Respondent's Heads of Department all knew what had happened and the evidence shows they all had to work quickly to adapt to the new situation, which was abandoning work with CGS008.

24. In this respect, when, towards the end of January 2020, the Respondent began working on the next manufacturing run of the Ingredient (Carduelis batch number 5) it used the fungal strain RUT-C30, instead of CGS008. The switch from CGS008 to RUT-C30 meant that the Respondent had to do additional tests and obtain more data before it could launch the new Ingredient commercially. In particular, the GRAS dossier had to be updated so that the specification contained within in it, and subsequently approved, correlated with a manufacturing process now utilising RUT-C30 rather than CGS008.

25. Nevertheless, the Respondent also continued the manufacturing process for Carduelis batch number 4. TS and JBJ gave evidence that although the Respondent had decided not to proceed with Carduelis batch number 4 for commercial purposes it continued with the manufacturing process because of the learning that could be gained from that process and the possibility Carduelis batch number 4 might be used for purposes other than commercial ones.

26. The Claimant disputed this evidence. He said the Respondent intended to use Carduelis batch number 4 for commercial purposes, notwithstanding the

discovery the fungus was a strain of TL and the process no longer correlated with the existing specification in the GRAS dossier.

27. The evidence in the bundle does not support this contention.

28. First, JBJ's WhatsApp message to the Claimant and his email to TS of 15 January 2020 both refer to "abandoning the strain" and the reference to the waste of "£500k to £1M" implies an assumption the Respondent would take a heavy commercial hit in consequence.

29. Secondly, an email from TS to JBJ, TN, RT and the Claimant dated 28 January 2020 states:

> "Tom and I spoke to Ashley [of Intertek] and he says using RUT-C30 parent should not be an issue. We will have to get some more data, though much more basic than before, and will not have to go through the whole panel process again. We're waiting on a complete response from him now…
>
> Proposed plan
> - Perform relatively small batch run(s) to create 10s kg ingredient with RUT-C30
> - Collect data from run and submit to regulation
> - Soft launch at Boulevard before summer with the 10kgs
>
> …"

30. Thirdly, a further email to TS to JBJ, TN, RT and the Claimant dated 31 January 2020 refers to getting "data on process for Ashley" and getting the "final product in May time, so earliest we could soft launch in Boulevard would be June".

31. When shown these two emails of 28 and 31 January 2020 in cross-examination, the Claimant changed his evidence and said that in fact he was concerned about the Respondent sending Carduelis batch number 4 to the chefs involved in the soft launch. However, he was then shown an email from RT dated 18 February 2020 to one of the chefs, which similarly refers to the soft launch being moved to late May/June in view of the new timeline.

32. I therefore find that the Respondent had decided by the end of January 2020 not to use Carduelis batch number 4 for commercial purposes and that the Claimant knew this.

33. The Respondent accepts, however that during January 2020 it was considering using Carduelis batch number 4 for clinical trials. Since clinical trials are not commercial there was no requirement to inform the expert panel, but it would have been necessary to inform the relevant clinical trial provider and Ethics Committee that Carduelis batch number 4 did not have self-affirmed GRAS status.

34. In the meantime, tension with respect to the Claimant's employment continued. On 14 January 2020 TS told the Claimant that the TEP was now an absolute priority and the Claimant agreed he would develop the presentation that TS had begun assembling by the next weekly meeting on 22 January 2020. However, by that meeting the Claimant had only added data to one slide and resized images on two of the slides. TS asked the Claimant to attend a further meeting with him on 27 January 2020 to progress the TEP. TS's evidence is that at the meeting he spent two hours amending the TEP while the Claimant simply watched. The Claimant accepts this is what happened but said that TS was putting "random numbers" into the presentation. In any event, TS's informal notes record the Claimant saying at that meeting that "he could have the techno-economics completed by 2 weeks after the completion of the next batch, which should be 2 weeks". The notes continue, "But he said he could get the ballpark numbers before then. I don't know why I have to ask him when he will do it by – he should be asking me when it needs to be done by".

35. It is clear the Claimant was aware his employment with the Respondent was vulnerable. An email of 30 January 2020 to the Claimant from LegenDiary Foods GmbH thanks him for his application for a position as a Senior Bioprocess Engineer and asks if he would be available for a first chat via video conference on 3 February at 10am. The Claimant says that he was approached by LegenDiary Foods GmbH, however, even if this is true, it is clear the Claimant responded to that approach by making a job application.

36. On 5 February 2020 there was an email exchange between the Claimant and SM.

37. SM sent an email to the Claimant at 12.19 saying "Here's my private address – how can I help?". The Claimant replied, "Thanks for sharing your email address with me. I was wondering if you knew if there is a risk of producing toxic compounds from [TL]? Or had any useful references I can look into? I want to understand if using this fungus poses a risk to human health."

38. SM replied at 12.44 "Some info in the attachment – I haven't done an exhaustive investigation just a quick look-see on the internet. I've included links to the references. Clear from that short search that [TL] is an emerging human pathogen and likely responsible for much of the harm caused by mould in damp buildings. Whilst it produces a variety of bioactive compounds, one group of toxins – the trilongins – is particularly notable. Hope that helps – let me know if you need more detailed info or you want me to look into a specific issue".

39. On 6 February 2020 the Claimant sent the following email to TS, JBJ, TN and RT:

    "I have been doing a bit of digging over the past couple of days, based on what we know and what we think we know. We know we didn't use [TR] for our enzymes production after the fact, and we are assuming that the strain we used was [TL] and there are zero chances of it being something else. I have

done a bit of research to try to understand the risks of anything toxic being produced by this strain and end up in our final product.
I don't know if any of you is aware of this or has looked into this, should we discuss to make sure this is safe for human consumption? This is what I found."

40. The email then lists the references (about 15) to the academic articles and Wikipedia entries which SM had sent the Claimant. One entry states, "TL is not thought to pose a risk to human health although it has been isolated as an indoor contaminant with high allergenic potential". Another states, "Trilongins offer insight into mould toxicity: Combined set of toxins work synergistically on the cells ion channels. [TL] regarded as "an emerging human pathogen implicated in allergic sinusitis, lung and skin infections, and fatal postoperative infections in immunocompromised patients".

41. The Claimant said in cross-examination that by this date he regarded himself as a whistle-blower and that the reason he sent the 6 February 2020 email was to have "some sort of evidence recording his concerns".

42. Given that the Respondent was considering whether and how it could use Carduelis batch number 4 for non-commercial purposes, RT looked at the resources the Claimant had referred to, and in particular the paper referring to "trilongins" being a potential mycotoxin. RT contacted the food testing department at Intertek to see if they could test Carduelis batch number four for trilongins. Intertek said they could not perform any test for trilongins and the laboratory stated they had not heard of them. Other providers responded in the same way. RT took the view that if Intertek, a very large and respected food testing provider, had not heard of trilongins, that was likely to be because there was nothing to worry about as regards food use.

43. RT further said that he discussed his findings in subsequent meetings which Claimant attended, and in the course of other general discussions around the office. The Claimant accepted this evidence, and said he saw it as RT feeding back on what he, the Claimant, had asked him to do.

44. On 10 February 2020 there was a meeting between TS, JBJ and the Claimant to discuss the Claimant's proposals for the approach to manufacturing Carduelis batch number 5. The first phase of the process involved arranging a number of trials with the research and development partner to perform a series of replicate experiments to grow the fungus and produce enzymes. JBJ did not agree with the Claimant's decision to experiment at scale during this trial stage and thought the Claimant should instead conduct smaller scale trials. The Claimant accepts in the course of that meeting he said something along the lines of TS needing to trust him again.

45. There was also further reference to the fact the Claimant had still not completed the techno-economics presentation or provided ballpark numbers. TS's informal notes record:

> "When [the Claimant] says he'll do something, but doesn't, it is infinitely worse than if he just said he wouldn't do it. 1) we have to realise he's lying; 2) we have to step in last minute to save the situation, 3) it distracts us from the jobs that we're all supposed to be doing. That he can be so cavalier with something so important is proof he's not right for the role."

46. In cross-examination the Claimant gave various explanations as to why he had not produced the TEP, namely that it was too early in the process to have the right figures, that he was too busy and over-worked and the TEP was extremely time-consuming, and that TS had told him it was no longer a priority. In respect of the note referred to above, the Claimant said he had in fact said that he would produce the TEP when he didn't have any other work to do. However, it is clear from the above that the Claimant was being told the TEP was a priority and in the light of this, and the fact the Respondent was gearing up for manufacturing run Carduelis batch number 5, the Claimant's evidence that he told TS he would produce it when he didn't have any other work to do is simply not credible.

47. On 27 February 2020, the Respondent received a letter from the expert panel confirming the safety for use of RUT-C30 in the production Carduelis batch number 5.

48. As regards the trials for Carduelis batch number 5, despite the meeting on 10 February 2020, the Claimant maintained his approach of experimenting at scheme, however he instructed the manufacturer (EWB) not to add the inducer that makes the fungus produce enzyme, which meant the fungus grew but failed to produce any enzyme. TS's notes of 3 March 2020 record:

> "It transpired today that [the Claimant] had got EWB to scale up the growth of the bug and not to actually express any enzyme. So we managed to rush to get the space at EWB ahead of our large scale up and he has advised them to do the wrong thing. Again, the worst aspect is that he has a million excuses for why he's done it and none make sense and all are contradictory to each other…"

49. Furthermore, by the end of February 2020 it had become apparent that (aside from the issue with respect to fungus strain) Carduelis batch number four did not meet the specification in the GRAS dossier as it was too high in monosaccharides and too low in fibre. Although the Respondent had already decided not to use Carduelis batch number 4 for commercial purposes the fact it didn't meet the specification meant that finding another use for it was more difficult, and the evidence at the date of the hearing was that it had not been used for anything.

50. Arising out of the fact Carduelis batch number 4 didn't comply with the GRAS specification, on 12 March 2020 the Claimant had another disagreement with TS. The Claimant agreed in cross-examination that the disagreement was not about the fact the fungus was a strain of TL or TS (or any alleged health and safety or regulatory implications of this) but maintained that TS's criticisms were unfair because the problems with respect to the monosaccharide and

fibre content arose from the fact of having a different strain of fungus from the one expected. TS said his issue was not that the Claimant was unable to produce Carduelis batch number 4 on specification, but rather that the Claimant was unable to assess the problem or offer alternative solutions. In any event it is common ground that the argument became very heated, and TS's evidence is that he considered this to be the last straw.

51. On 15 March 2020 TS emailed the Claimant to invite him to a dismissal meeting. He told the Claimant he was being dismissed due to an amalgamation of various issues, including large gaps in his technical understanding, his inability to troubleshoot, which meant discussions often turned into arguments, and his failure to deliver written communications, including written monthly reports and the TEP.

52. The meeting took place on 16 March 2020 and was brief. The Claimant did not at that time suggest the real reason for his dismissal was that he had made a whistleblowing disclosure.

CONCLUSIONS

53. The list of agreed issues (agreed prior to the hearing) state the following:

"Did the Claimant make one or more protected disclosures to the effect the Respondent was using the wrong microorganism in the manufacture of a new food ingredient that was not fit for human consumption? In the case of the alleged disclosure to JBJ below, the information originally came to the Claimant from JBJ, his alleged disclosure to him is that the microorganism was not what the Respondent thought it was.

The Claimant will say that he made his disclosures:

a) After 15 January 2020 in numerous daily conversations with RT, TN, JBJ and TS;
b) During a trip to Belgium on 24 January 2020 verbally to TN; and
c) In an email dated 6 February 2020 to TS, RT, TN and JBJ."

54. Section 43A ERA provides that a "protected disclosure" means a qualifying disclosure which is made by a worker in accordance with sections 43C to 43H.

55. Section 43B(1) provides that a "…"qualifying disclosure" "means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more" [of the relevant matters listed below].

56. Of the relevant matters listed in section 43B(1), the Claimant relies on the following:

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

(b) That the health or safety of any individual has been, is being or is likely to be endangered;
(c) That information tending to show any matter falling within any one of the proceeding paragraphs has been, or is likely to be, concealed."

57. I note at the outset that in respect of matter (a) Claimant did not identify any legal obligation with which it is said his alleged disclosures tended to show the Respondent was likely to fail to comply.

58. As regards the alleged disclosure that the Respondent was using the wrong microorganism in Carduelis batch number 4, the Claimant says he was the one who made this disclosure to TN and RT on 15 January 2020, and that it was not communicated by JBJ at the meeting on 13 January 2020. However, even if this were true, such a disclosure was plainly not a qualifying disclosure for the purposes of section 43B(1) ERA since the Claimant could not have had a reasonable belief that the provision of that information to either TN or RT tended to show any of the relevant matters relied on. In that respect, at that point in time, far from indicating that the Respondent was likely to fail to comply with a legal obligation, or endanger the health and safety of any individual, or conceal information, the evidence in fact shows (i) that it had been JBJ who had made his own analysis of the data in order to identify the microorganism correctly, (ii) that he had informed the Claimant of the situation as soon as he was sure of his conclusions, (iii) that he was immediately also informing TS of the situation, and (iv) that his expectation was that the Respondent would abandon the strain and take a heavy commercial hit as a result.

59. As regards the alleged disclosure that the Respondent was using the wrong microorganism in the manufacture of a new food ingredient that was not fit for human consumption, the Claimant relies on three categories of occasion when the alleged disclosures were made:

(a) To TN, RT, JBJ, and TS after 15 January 2020 in numerous daily conversations;
(b) To TN on 24 January 2020 in a taxi in Belgium;
(c) In the email of 6 February 2020.

Alleged qualifying disclosures (a) and (b)

60. The Claimant's evidence was that soon after being told on 15 January 2020 that CGS008 was a strain of TL he became concerned about the health and safety implications of this and that he did his own research into TL and found out about the existence of trilongins. However, since he didn't understand much about trilongins he approached SM for further information prior 5 February 2020, that he had SM's private email address prior to 5 February 2020, and further, that because of his concerns, he told TN and JBJ that CGS008 was not fit for human consumption in January 2020.

61. I do not accept the Claimant's evidence in this respect.

62. First, SM couldn't remember the Claimant being in contact with him regarding his concerns about TL prior to 5 February 2020.

63. Secondly, the email exchanges of 5 and 6 February 2020 are inconsistent with the Claimant's version of events.

64. In this respect, SM's first email to the Claimant of 5 February 2020, says "Here's my private address – how can I help?", which implies the Claimant did not previously have SM's private email address and that not only had the Claimant just requested it, but that SM didn't know what the Claimant wanted to discuss with him.

65. Next, the Claimant's reply, "Thanks for sharing your email address with me. I was wondering if you knew if there is a risk of producing toxic compounds from [TL]? Or had any useful references I can look into? I want to understand if using this fungus poses a risk to human health," also implies the Claimant didn't previously have SM's private email address and that he (the Claimant) hadn't as yet conducted any research into the health and safety implications of TL.

66. Next, SM's second email: "…Whilst [TL] produces a variety of bioactive compounds, one group of toxins – the trilongins – is particularly notable..." implies that it was SM, and not the Claimant, who found out about the existence of trilongins, and further that he found out about them on 5 February 2020.

67. Finally, the Claimant's email dated to 6 February 2020, begins, "I have been doing a bit of digging over the past couple of days, based on what we know and what we think we know… I don't know if any of you is aware of this or has looked into this, should we discuss to make sure this is safe for human consumption?..." This wording implies that the Claimant had not been doing any research on the matter prior to a couple days before sending the email, and further, since he asks if any of the senior team were aware of the issue, that, contrary to his evidence, he had not discussed the matter with them before.

68. It follows I am not satisfied the Claimant made the alleged qualifying disclosures (a) and (b).

Alleged qualifying disclosure (c)

69. I am also not satisfied that the Claimant's email of 6 February 2020 makes a qualifying disclosure in respect of the fitness of CGS008 for human consumption.

70. In *Kilrane v London Borough of Wandsworth* [2018] ICR 1850 it was held at [35]:

> "The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker

making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). I don't know if any of you is aware of this or has looked into this, should we discuss to make sure this is safe for human consumption? This is what I found."

71. The Claimant's email of 6 February 2020 doesn't convey any information or contain any factual content as regards the fitness or otherwise of CGS008 for human consumption. He merely poses the question as to whether that is a matter that ought to be discussed within the Respondent. The only factual content the email conveys is the fact of the existence of a number of academic articles that appear to discuss the potential toxicity of TL as an indoor contaminant in the context of mould or damp.

72. In my judgment, the Claimant cannot reasonably have believed that the mere existence of such academic articles tended to show the likelihood of any of the relevant matters listed above occurring. First, there is nothing on the face of the descriptions of the articles indicating that TL is not fit for human consumption. Indeed, the description of one the articles specifically states that TL "*is not thought to pose a risk to human health* although it has been isolated as an indoor contaminant with high allergenic potential" (my italics). Secondly, and in any event, contrary to the Claimant's assertions, I have found that the Claimant knew by the end of January 2020 that the Respondent was not going to use Carduelis batch number 4 for commercial purposes. Thirdly the Claimant knew the Respondent was in the process of getting fresh data to Ashley of Intertek to update the GRAS dossier to correlate with the change of fungus strain to RUT-C30 for the purposes of Carduelis batch number 5. Fourthly, the Claimant had no reason to believe, and led no evidence to support such a belief, that if the Respondent were to end up using Carduelis batch number 4 for clinical trials that it would not inform the clinical trial provider and Ethics Committee that Carduelis batch number 4 did not have self-affirmed GRAS status.

73. At various points during the hearing the Claimant also asserted he had made disclosures to the effect the Respondent was under a legal obligation to inform its manufacturing partners and/or the GRAS panel of the fact that CGS008 was a species of TL and not TR.

74. First, however, these alleged disclosures are not contained within the list of agreed issues.

75. Secondly, and in any event, the Claimant did not identify any legal obligation with which, by not informing the manufacturing partners and/or the GRAS panel that CGS008 was a strain of TL and not TR, the Respondent was likely

to fail to comply. As I have found above, by the end of January 2020 the Respondent had come to the view it could not use Carduelis batch number 4 commercially and that it would have to update the data in the GRAS dossier in order to obtain an approved specification for the manufacturing process for Carduelis Batch number 5.

76. It follows from the above that the Claimant did not make any qualifying disclosures and it necessarily follows from this that he did not make any protected disclosures.

77. Further, and in any event, I am satisfied that the principal reason the Claimant was dismissed was because the Respondent was unhappy with his performance.

78. In this respect it is clear from the findings of fact above that the Respondent had substantial criticisms of the Claimant before the TR/TL problem came to light and well before the Claimant's email of 6 February 2020; furthermore, that the Claimant was aware of this and fearing for his position in January 2020. Although the Claimant took issue with the informal notes kept by TS and suggested they had been manufactured after the event to support the Respondent's case, the fact is that during cross-examination the Claimant frequently broadly agreed with the content of those notes and also agreed that the criticisms recorded in them had been made of him at the meetings to which the notes correlate. Further the notes are written in an unpolished, natural style that has the ring of truth and there is no reason to believe they were manufactured for the purposes of this litigation.

79. In addition, the Claimant was not dismissed until 16 March 2020 and following the discovery of two further substantial problems: first that the Claimant had instructed the manufacturer (EWB) not to add the inducer that makes the fungus produce enzyme in the trials for manufacturing Carduelis batch number 5 and, secondly, that (aside from the fungus strain issue) the Ingredient in Carduelis batch number 4 had failed meet the GRAS specification in terms of monosaccharide and fibre content. It is also notable that between 6 February 2020 and 16 March 2020 the Claimant didn't raise - or has no evidence of raising - any further concerns regarding CGS008.

80. In the light of all the above it follows that the claim for automatic unfair dismissal pursuant to section 103A ERA is dismissed.

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Employment Judge S Moore

Date: 18 May 2022

Sent to the parties on:

13 June 2022

For the Tribunal Office