EMPLOYMENT TRIBUNALS

Claimant: **Mr. L. Smedley**

Respondent: **Bondco 628 Limited**

Heard at: Leeds on 8,9,10 and 11 August 2022

Before: **Employment Judge Shepherd**

Appearances:
For the claimant: Mr. Rose, solicitor
For the respondent: Ms. Halsall, counsel

Judgment having been given on 11 August 2022 and the written judgment having been sent to the parties on 12 August 2022. Written reasons have been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was represented by Mr. Rose and the respondent was represented by Ms. Halsall. The Tribunal heard evidence from:

> Mark Hobson, the respondent's Managing Director;
> Rosemary De Ville, Former Director of the respondent and Mark Hobson's Mother ;
> Alexandra Gardner, Managing Director of Smile Business Support Limited;
> Liam Smedley, The claimant.

2. I had sight of a written statement from Deborah Barker, former Night Manager, she did not give oral evidence. On the second day I was informed that she also had a claim of unfair dismissal of her own before the Tribunal. Her case is part heard and against the same respondent as in this case. Her claim arises out of similar issues and the same witnesses will give evidence for the respondent. The

hearing has commenced in the Sheffield Tribunal but has been adjourned part heard and listed to return for the remainder of the hearing in October.

3. Ms. Barker then sought advice from her legal representatives and said that she had been advised not to give evidence at this hearing.

4. Mr. Rose, on behalf of the claimant, said that the claimant had indicated that he was considering making an application for an adjournment of this hearing until the conclusion of Deborah Barker's case in Sheffield in order that she could then give evidence in this case. However, Mr. Rose indicated that he would not make a request for an adjournment on behalf of the claimant if it would mean that his client would incur the costs of such an adjournment. Ms. Halsall, on behalf of the respondent, indicated that if the case was adjourned, she was likely to make an application for costs. I informed Mr. Rose that I could not let him know whether I would make a costs order before an application had been made and I had heard the grounds upon which it was made.

5. Ms. Halsall suggested that Mr. Rose could make an application for an adjournment, if it was granted, she would then take instructions and possibly make an application for costs and, if granted, she would agree that the claimant could then withdraw his application for an adjournment and proceed. Mr. Rose, on behalf of the claimant then said he was not making an application for an adjournment and the claimant was content for the case to proceed.

6. Witness statements were provided from Georgina Day, former Bar Tender and Elizabeth Hamer, former Cloak Room Attendant. Neither Georgina Day nor Elizabeth Hamer, attended to give evidence before this Tribunal. Written witness statements where the witness does not attend to give oral evidence carry much less weight than evidence given which can be challenged and the demeanour and credibility of the witness assessed.

7. I had sight of a bundle of documents, which together with documents added during the course of the hearing was numbered up to page 462. I considered those documents to which I was referred by parties.

The issues

8. The agreed list of issues was as follows:

Whistleblowing – Unfair Dismissal – Section 103A Employment Rights Act (ERA) 1996

1. Did the email dated 10.05.2021 [page 185] drafted by the Claimant and sent to the Respondent on 30.05.2021 [page 184] amount to a qualifying disclosure:

    a) Did the Claimant have a reasonable belief that the disclosure showed that one of the following failures had taken place:

        a. Under S43B(1)(A): That a criminal offence has been committed, is being committed, or likely to be committed; and/or

b. Under S43B(1)(B) That a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he or she is subject.

b) Did the Claimant have a reasonable belief of wrongdoing?

c) Did the Claimant have a reasonable belief that the disclosure was in the public interest?

Automatic Unfair Dismissal – Section 104 Employment Rights Act 1996

2. Did the Claimant assert a statutory right in the emails sent to the Respondent dated:

a) 30.05.2021 [pages 184-185] – alleged statutory right – section 1 ERA 1996.
b) 19.05.2021 [page 173] – alleged statutory right – section 1 ERA 1996

c) 13.11.2021 [pages 118-119] – alleged statutory right – section 8 and section 13 ERA 1996.

d) 10.12.2020 [page124] – alleged statutory right section 1 ERA 1996.

Unfair Dismissal – Section 98 Employment Rights Act 1996

3. What was the Respondent's reason, or principal reason, for dismissal:

a) Gross misconduct following the disciplinary process and outcome delivered on
26.07.2021 [pages 361-365]; or

b) Because the Claimant made a protected disclosure; or

c) Because the Claimant asserted a statutory right; or

d) Some other substantial reason; or

e) A reason that was not a fair reason but none of the above.

4. Did the Respondent follow a fair procedure?

5. In the circumstances (including the size and administrative resources of the employer's undertaking), did the Respondent act reasonably or unreasonably in treating the reason as a sufficient reason for dismissal and did the Respondent's decision to dismiss the Claimant fall within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted?

6. Was the dismissal fair when considering matters of equity, and treatment of others?

Article 8

7. Has Article 8 of the Human Rights Act 1998 been engaged?

8. Is the test of reasonableness under section 98 ERA 1996 robust enough to consider any infringement of Article 8 as part of the test being applied?

Remedy

9. Did the Respondent follow a fair and reasonable procedure in reaching the decision to dismiss and/or did the Claimant and Respondent comply with the requirements of the Acas Code of practice, and accordingly should compensation be uplifted or reduced by up to 25%?

10. If the Tribunal finds that the dismissal was procedurally unfair, would the Claimant have been dismissed in any event or would there just have been a chance that he would have been dismissed if a fair procedure had been followed, and therefore, should any compensation awarded be reduced accordingly as per Polkey v A E Dayton Services [1987].

11. Did the Claimant conduct themselves in such a manner as to contribute to the dismissal. If so, to what extent would it be just and equitable to reduce any award by.

Findings of fact

9. Having considered all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that I made from which I drew my conclusions.

10. Where I heard evidence on matters for which I make no finding, or do not make a finding to the same level of detail as the evidence presented, that reflects the extent to which I consider that the particular matter assists in determining the issues. Some of my findings are also set out in the conclusions, to avoid unnecessary repetition and some of the conclusions are set out within the findings of fact. I have anonymised the identity of those mentioned who were not parties, did not appear before the Tribunal or provide a witness statement.

11. The claimant was employed by the respondent from 17 September 2012 until 26 July 2021. He was employed as a Door Supervisor.

12. The premises that are run by respondent company is a nightclub and grassroots live music venue. Mark Hobson is the Managing Director.

13. In March 2020 the Government ordered all hospitality venues to close. Staff were requested to use their annual leave during the furlough scheme.

14. In October 2020 the respondent informed all its employees that it was considering whether to make compulsory redundancies.

15. A Facebook messenger group was set up between the claimant and 13 colleagues on or around 15 October 2020. The claimant said that this was a private group chat, he said that had been set up to discuss many things ranging from the issues of the redundancy process, jokes, TV, films, and family life.

16. The claimant's case is that Mark Hobson obtained information from this private group chat and then secretly monitored it for many months.

17. Mark Hobson met with two employees, RT and NS. The meeting was to find out why staff were generally unhappy. RT and NS informed Mark Hobson on or around 2 March 2021 that there was a group chat which was starting to get toxic. Mark Hobson was told that there were threats being made against him and he asked to see the messages. He said that RT and NS only sent him the messages which contained the parts of the conversation they were uncomfortable with.

18. Mark Hobson said that threats had been made against the business. He feared for himself and his partner's safety they then moved out of the address known to the Facebook messenger group and did not return until 29 June 2021.

19. On 13 May 2021 Mark Hobson sent a letter to all employees with regard to plans to reopen the premises. It also stated:

> "Unfortunately, we have been made aware of a Facebook Messenger group which a number of employees joined during the lockdown period. Whilst we would encourage staff to support each other during these stressful and uncertain times, some of the comments made within this group been threatening, defamatory and contain an acceptable language in reference to myself and my mother. This type of behaviour will not be tolerated, and an investigation has now been launched. Individuals involved will be contacted directly. We accept that there will always be a certain level of banter within a workplace but the evidence which the company is in receipt of shows that the conversations have gone beyond what would be considered reasonable."

20. The respondent's policies and procedures included a social media, network and email security policy in which it was stated:

> "Staff should be aware that emails and any other use of Internet and social media sites – whether or not accessed for work purposes – may be monitored and where breaches of this policy are found action will be taken under the Companies disciplinary procedure…"

The respondent did not rely on this policy which it considered to cover emails etc during the course of working.

21. A collective grievance was raised by a group of 14 employees including the claimant in which it was alleged that employees had been approached to monitor a private group chat.

22. Bhayani HR and Employment Law was instructed to investigate the grievance.

23. Phoebe Davies of Bhayani HR and Employment Law produced a decision on the collective grievance. Part of the conclusion was that she did not think that Mark Hobson had done anything wrong legally and that she did not think that NS or RT handed over the screenshots under duress.

24. There was an appeal against the outcome of the collective grievance, but this did not appeal against the monitoring point and it was determined that the disciplinary hearing against the claimant should continue.

25. The claimant did not attend the disciplinary hearing or make any written representations although he had been invited to do so. He raised objections to Ms. De Ville dealing with the disciplinary procedures and raised issues with regard to a conflict of interest.

26. I gave careful consideration to the fact that Ms. De Ville carried out the investigation and made the decision that the claimant should be dismissed when the disciplinary issue was in respect of the messages about Mr. Hobson, her son and about her. I was told she regularly dealt with HR issues and it was clear from the content of messages that the claimant and the other employees were aware of this.

27. There had been a number of questions within the collective grievance about pressure being placed on RT and NS.

28. The viewing of messages raised in the grievance was investigated and the conclusion was that neither NS nor RT handed over the screenshots under duress.

29. An appeal against the collective grievance decision was made on 20 June 2021.

30. The claimant was invited to a disciplinary meeting on 29 June 2021.

31. Rosemary De Ville dealt with HR and staff management for the respondent and had done since she set up the respondent company with Mark Hobson, her son, 23 years previously. She carried out the disciplinary hearing accompanied by Kathryn Gilbert from Bhayani HR and Employment Law.

32. The appeal against the collective grievance decision was dealt with by Ellie Hand from Bhayani HR and Employment Law and the outcome was provided on 17 August 2021. The appeal was not upheld.

33. The claimant was summarily dismissed on 26 July 2021 for gross misconduct.

34. The claimant appealed, and the appeal was handled by Alexandra Gardner the Managing Director of Smile Business Support Ltd. She was appointed by Kathryn Gilbert from Bhayani HR and Employment Law. Alexandra Gardner was clear that she had had no previous contact with the respondent.

35. The claimant attended the hearing on 11 August 2021.

36. The claimant's grounds of appeal were not upheld.

The law

Protected Disclosure Claim

37. Section 43B(1) of the Employment Rights Act 1996

> "(1) In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) obligation to which he is subject;
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
>
> (d) that the health or safety of an individual has been, is being or is likely to be endangered;
>
> (e) that the environment has been, is being or is likely to be damaged;
>
> or
>
> (f) that information tending to show any matter falling within any one the preceding paragraphs has been or is likely to be deliberately concealed".

Section 103A

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

39. The definition of a qualifying disclosure breaks down into several elements which the Tribunal must consider in turn.

Disclosure

40. In **Cavendish Munro Professional Risks Management Limited – Geduld 2010 IRLR 37** Slade J stated:

> "That the Employment Rights Act 1996 recognises a distinction between "information" and an "allegation" is illustrated by the reference to both of these terms in S43F……It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different meanings……the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been

> cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43 … The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However, s43L(3) provides that "disclosure" for the purpose of s 43 has the effect so that "bringing information to a person's attention" albeit that he is aware of it already is a disclosure of that information. There would be no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication".

Simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information. The Tribunal notes that a communication – whether written or oral – which conveys facts and makes an allegation can amount to a qualifying disclosure.

42. In **Kilraine –v- London Borough of Wandsworth UKEAT/0260/15** Langstaff J stated:

> "I would caution some care in the application of the principle arising out of **Cavendish Munro**. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point".

Public interest

43. In **Chesterton Global Ltd -v- Nurmohamed [2015] IRLR** Supperstone J stated:

> "I accept Ms Mayhew's submission that applying the **Babula** approach to section 43B(1) as amended, the public interest test can be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable. In my view the Tribunal properly asked itself the question

> whether the Respondent made the disclosures in the reasonable belief that they were in the public interest…… The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see **ALM Medical Services Ltd v Bladon** at paragraph 16 above). It is clear from the parliamentary materials to which reference can be made pursuant to **Pepper (Inspector of Taxes) v Hart** [1993] AC 593 that the sole purpose of the amendment to section 43B(1) of the **1996 Act** by section 17 of the 2013 Act was to reverse the effect of **Parkins v Sodexho Ltd.** The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: "the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest" (see paragraph 19 above)…… I reject Mr Palmer's submission that the fact that a group of affected workers, in this case the 100 senior managers, may have a common characteristic of mutuality of obligations is relevant when considering the public interest test under section 43B(1). The words of the section provide no support for this contention……. In the present case the protected disclosures made by the Respondent concerned manipulation of the accounts by the First Appellant's management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person the Respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. He referred to the central London area and suggested to Ms Farley that she should be looking at other central London office accounts (paragraph 151). He believed that the First Appellant, a well-known firm of estate agents, was deliberately mis-stating £2-3million of actual costs and liabilities throughout the entire office and department network. All this led the Tribunal to conclude that a section of the public would be affected and the public interest test was satisfied*".*

Reasonable Belief

44. In **Darnton v University of Surrey** and **Babula v Waltham Forest College 2007 ICR 1026** it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In **Babula** Wall LJ said:-

> "… I agree with the EAT in **Darnton** that a belief may be reasonably held and yet be wrong… if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong – nor (ii) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is in my judgment sufficient of itself to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute… An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section

> 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith".

Legal Obligation

45. A disclosure which in the reasonable belief of the employee making it tends to show that a breach of legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. It is necessary for the employee to identify the particular legal obligation which is alleged to have been breached. In **Fincham v HM Prison Service** EAT0925/01 and 0991/01 Elias J observed: *"There must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the worker is relying."* In this regard the EAT was clearly referring to the provisions of section 43B(1)b of the 1996 Act.

46. The Tribunal has noted the criticism by the EAT in **Fincham** of the decision of the Employment Tribunal in that case that a statement made by the claimant to the effect "*I am under pressure and stress"* did not amount to a statement that the claimant's health and safety was being or at least was likely to be endangered.

47. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J stated:

"The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgement the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached."

48. In **Goode –v- Marks and Spencer plc UKEAT/0042/09** Wilkie J stated the judgment of the EAT at paragraph 38 to be:

> "…the Tribunal was entitled to conclude that an expression of opinion about that proposal could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."

Method of Disclosure

49. The claimant in this case seeks to rely upon disclosure to the respondent and section 43C of the 1996 Act provides:-

> "A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith –
>
> (a) to his employer…..".

50. It is, in some cases, appropriate to distinguish between the disclosure of information and the manner of its disclosure but in so doing the Tribunal must be aware not to dilute the protection to be afforded to whistleblowers by the statutory

provisions: **Panayiotou –v- Kernaghan 2014 IRLR 500.**

Claim for Automatic Unfair Dismissal Section 103A 1996 Act

51.Section 103A

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

52. The burden of proof lies with the respondent to establish the reason for dismissal. If the reason is established it will normally be for the employee who argues that the real reason for dismissal was an automatically unfair reason to establish some evidence to require that matter to be investigated. Once that has been done the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

53. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J referred to the distinction between automatically unfair dismissal by reason of making a protected disclosure and detriment on the ground of making a protected disclosure as follows

> "The Claimant's claim for "ordinary" unfair dismissal under ERA section 98 had been struck out as she did not have the necessary qualifying period of employment to bring such a claim. A claim for unfair dismissal for making a protected disclosure requires no qualifying period of employment and is brought under ERA section 103A. Section 103A provides:
>
> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure claim.

Dismissal for asserting a statutory right

54. Under section 104 of the Employment Rights Act 1996, and employee's dismissal is automatically unfair if the reason or principal reason for dismissal is that the employee:

> (a) brought proceedings against the employer to enforce a right of his which is a relevant right, or
>
> (b) alleged that the employer had infringed right of his which is relevant statutory right.

55. In a claim brought under section 104 there are three main requirements, the employee must have asserted a statutory right, that assertion was to be made in good faith and the assertion must have been the reason or principal reason for the dismissal.

Unfair dismissal

56. Where an employee brings an unfair dismissal claim before an Employment tribunal, it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons in section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason the Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Conduct is a potentially fair reason for dismissal under section 98(2).

57. In determining the reasonableness of the dismissal with regard to section 98(4) a Tribunal should have regard to the three-part test set out by the Employment Appeals Tribunal in **British Home Stores Limited v Burchell [1978] IRLR379**. That provides that an employer, before dismissing an employee, by reason of misconduct, should hold a genuine belief in the employee's guilt, held on reasonable grounds after a reasonable investigation. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in **Iceland Foods Limited v Jones [1982] IRLR439**. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether the dismissal had been within "the band of reasonable responses" available to the employer. In the case of **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23** the Court of Appeal confirmed that the "band of reasonable responses" approach applies to the conduct of investigations as much as to other procedural and substantive decisions to dismiss. Providing an employer carries out an appropriate investigation and gives the employee a fair opportunity to explain his conduct, it would be wrong for the Employment Tribunal to suggest that further investigation should have been carried out. For, by doing so, they are substituting their own standards as to what was an adequate investigation for the standard that could be objectively expected from a reasonable employer. In **Ucatt v Brain [1981] IRLR225** Sir John Donaldson stated:

> "Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, 'Would a reasonable employer in those circumstances dismiss', seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question 'Would we dismiss', because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, 'Well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing', because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances".

Stephenson L J stated in **Weddel v Tepper [1980] IRLR 96**:

> "Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the

> circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, 'carried out as much investigation into the matter as was reasonable in all the circumstances of the case'. That means that they must act reasonably in all the circumstances and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably".

58. In the employment context the term "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Exactly what type of conduct amounts to gross misconduct will depend on the facts of the individual case. Generally, to be gross misconduct, the misconduct should so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) of the 1996 Act it is for the Tribunal to consider:

> (a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct and
>
> (b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

59. I had the benefit of detailed written and oral submissions provided by Mr. Rose on behalf of the claimant and Ms. Halsall on behalf of the respondent.These submissions were helpful. They are not set out in detail but both parties can be assured I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

60. I have considered the identified issues and reached my conclusions on those as follows:

> Did the email dated 10.05.2021 [page 185] drafted by the Claimant and sent to the Respondent on 30.05.2021 [page 184] amount to a qualifying disclosure:

61. In the email the claimant stated to Mr. Hobson that it appeared that holiday days had been unlawfully put through the respondent's payroll. Information had

not been provided on how holidays had been calculated and the claimant made a data Protection Subject Access request in respect of information.

Did the Claimant have a reasonable belief that the disclosure showed that one of the following failures had taken place:

Under S43B(1)(A): That a criminal offence has been committed, is being committed, or likely to be committed; and/or

Under S43B(1)(B) That a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he or she is subject.

Did the Claimant have a reasonable belief of wrongdoing?

62.. I am satisfied that the claimant had a reasonable belief that the respondent was failing to comply with a legal obligation in respect of the treatment of holidays by the respondent during the pandemic and the furlough period.

Did the Claimant have a reasonable belief that the disclosure was in the public interest?

63. The claimant made the disclosure in respect of his own holidays but there was concern in respect of issues relating to other employees. I am satisfied that the claimant had a reasonable belief that the disclosure was in the public interest. The protected disclosure was made to the respondent after the letter was sent to all staff indicating that Mr. Hobson had been made aware of threatening, defamatory and unacceptable language in the Facebook messenger group and an investigation had been launched.

64. Rosemary De Ville made the decision to dismiss the claimant. She was unaware of the email sent to Mark Hobson and it played no part in the decision to dismiss the claimant.

65. The reason for dismissal was entirely clear. The termination was for gross misconduct. It was set out in the letter of dismissal as serious insubordination, serious breach of trust and confidence, serious breach of the duty of fidelity, and obscene language or other offensive behaviour.

Automatic Unfair Dismissal – Section 104 Employment Rights Act 1996

Did the Claimant assert a statutory right in the emails sent to the Respondent dated:30.05.2021 [pages 184-185] – alleged statutory right – section 1 ERA 1996.

66. A question had been asked about particulars of employment but that was not an assertion of a statutory right.

19.05.2021 [page 173] – alleged statutory right – section 1 ERA 1996.

67. Once again, it was indicated that the claimant wanted to make a Subject Access Request for the original written contract of employment. There was no assertion of a statutory right.

> 13.11.2021 [pages 118-119] – alleged statutory right – section 8 and section 13 ERA 1996.

68. There is an assertion of the required notice periods for holidays. There was also an allegation of Failure to provide details on pay slips. I am satisfied that this was an assertion of statutory rights.

> 10.12.2020 [page124] – alleged statutory right section 1 ERA 1996.

69. This was an email from another member of staff asking that all employees were to be provided with information including contracts of employment, holiday information, details of deductions and a request for correspondence regarding the redundancy process. This was not an assertion of a statutory right by the claimant.

Unfair Dismissal – Section 98 Employment Rights Act 1996

> What was the Respondent's reason, or principal reason, for dismissal:
>
> Gross misconduct following the disciplinary process and outcome delivered on 26.07.2021 [pages 361-365]; or
>
> Because the Claimant made a protected disclosure; or
>
> Because the Claimant asserted a statutory right; or
>
> Some other substantial reason; or
>
> A reason that was not a fair reason but none of the above.

70. I am satisfied that the reason for the claimant's dismissal was his conduct in the messages on the Facebook Messenger group.

The entries made by the claimant stated:

> "Can we have a sign that says no electric scooters or dreadlocks."
>
> "you dreadlocked, fraudulent, tight-arsed, cunt face. Kind regards and best wishes for the holidays. Employees of Bondco 628 Ltd"
>
> "The cunt STILL didn't correct my pay – even after acknowledging the 'mistake' and informing me it would be corrected"
>
> "What's your grievance?"

"Your son's a nob!"

"He's very good at human Tetris"

71. I am satisfied that this was the reason for the claimant's dismissal. It was not because the claimant asserted a statutory right or made a protected disclosure. Rosemary DeVille was clear that she had no specific knowledge of the assertions.

Did the Respondent follow a fair procedure?

72. I have given careful consideration to the fact that Rosemary De Ville dealt with the disciplinary hearing and dismissed the claimant. She is the mother of Mark Hobson and there had been reference to her in some of the messages. Although not those by the claimant.

73. However, Ms. De Ville had set up the respondent company with her son around 23 years ago and dealt with many of the HR issues over the years. This was a family run business. Bhayani HR and Employment Law had been instructed in respect of the collective grievance raised on behalf of 14 of the employees. Ms. De Ville was accompanied by a representative of Bhayani HR and Employment Law who took the notes at the disciplinary hearing.

74. It had been necessary to carry out seven disciplinary investigations or hearings and there was a need for some level of consistency. The person handling the disciplinary process had to be someone of appropriate seniority. The respondent would have to give the claimant the opportunity to appeal, and that would be to an external source. The respondent had already incurred considerable resources dealing with various employment issues.

75. The claimant had raised a grievance in relation to the invitation to the disciplinary hearing and that Ms. De Ville had a conflict of interest. Bhayani Law dealt with that grievance and the appeal.

76. The claimant appealed against the decision to dismiss him and the appeal was heard by Alex Gardner of Smile Business Support, who was introduced to the respondent by Bhayani Law. The claimant said that this financial relationship indicated that Ms. Gardner was not independent. Also, Kathryn Gilbert had sent an email introducing Alex Gardner to the respondent indicating that it was important that 'this is seen to be independent and neutral'. I am not satisfied that this wording demonstrates a lack of impartiality.

77. The claimant's appeal was not upheld. I am satisfied that the procedure for dealing with the appeal was appropriate and within the band of reasonable responses.

78. If there had any defect with regard to Ms. De Ville carrying out the disciplinary hearing then I have considered the overall procedure and I am satisfied it was not an unfair procedure or dismissal.

> In the circumstances (including the size and administrative resources of the employer's undertaking), did the Respondent act reasonably or unreasonably in treating the reason as a sufficient reason for dismissal and did the Respondent's decision to dismiss the Claimant fall within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted?
>
> Was the dismissal fair when considering matters of equity, and treatment of others?

79. Ms. De Ville heard seven Disciplinary hearings in respect of the messages in the group chat. The claimant did not attend his disciplinary hearing or provide any written submission despite being invited to do so. The claimant did attend the appeal hearing with Alexandra Gardner.

80. The claimant accused Alexandra Gardner of not being independent, but she gave clear and credible evidence that she had been appointed through Bhayani Law and did not know the owners of the respondent personally or professionally. She considered all the points raised by the claimant in the appeal and gave a thorough and detailed outcome.

81. The claimant was concerned that no consideration was given to his eight years' service and unblemished record with the respondent. These issues had been considered in the case of another employee, Deborah Barker. However, she had also been dismissed, albeit with notice.

82. Ms. De Ville said that she was aware of his length of service, but the claimant did not engage with the process, he would not attend or provide any written submissions. He showed no remorse, and the respondent could have no trust in the claimant if he continued to be employed.

83. The claimant's length of service and clean disciplinary record was not raised as a ground of appeal.

84. I am satisfied that the overall procedure was within the band of reasonable responses available to the respondent.

Article 8

> Has Article 8 of the Human Rights Act 1998 been engaged?
>
> Is the test of reasonableness under section 98 ERA 1996 robust enough to consider any infringement of Article 8 as part of the test being applied?

85. This was a private chat group. It commenced as a redundancy support group, but its name changed to Rebel Alliance and the nature of the messages had changed.

86. All the members at the time were employees of the respondent. I accept that the claimant anticipated that his remarks or comments would remain private. However, this was not a reasonable expectation of privacy. It is clear that, in such a group consisting of a substantial proportion of the respondent's employees, it could well occur that someone within the group would inform the respondent of such inappropriate comments.

87. Two of the members of the group were concerned that the contents were becoming 'toxic' and that there were threats to Mr. Hobson and the business. They told Mr. Hobson about the messages and he asked them to send him copies.

88. There was no breach of the claimant's Article 8 rights by the respondent. Mark Hobson did not monitor the messages and they were provided to him voluntarily by two other employees who were concerned about the contents of the messages.

89. The contents of the messages came to the respondent's notice as a result of Mark Hobson being made aware of the concerns of two employees who were also members of the chat group and I am satisfied that the decision to dismiss on grounds of conduct was within the band of reasonable responses.

90. An issue was raised during the hearing with regard to one of the employees who had brought the messages to Mark Hobson's attention. She had also provided a message in the chat group in which she had stated "I'm fed up of the cunt now". That message was included in the addendum to the investigation report in respect of the collective grievance by Phoebe Davies. That employee had not been disciplined and had actually been promoted. It was said that her message must have come to Mark Hobson's attention. However, Mark Hobson gave clear and credible evidence that he was not aware of that message at time of the claimant's dismissal. I accept that he was not aware of the message from NS.

91. It was not put to Rosemary De Ville during the Tribunal hearing that she was aware of this at the time of the claimant's dismissal. She had not considered any allegation of disparate treatment and that issue had not been raised in the appeal heard by Alexandra Gardner. This was not identified as an issue for the Tribunal to determine and was only raised during the evidence at this hearing. I am satisfied that it was not in the mind of the dismissing officer at the time of the claimant's dismissal.

92. The respondent reached the view that it was no longer able to put trust in the claimant. The claimant said these messages were between friends. At the material time they were all employees or former employees of the respondent. The point was made by the claimant that employees may have strong views about their employers, and these could be discussed in a pub. I understand that point but. if discussion in such graphic terms demonstrating such insulting and disrespectful language was proven to have been made in any circumstances, then a reasonable employer could conclude that disciplinary action should the taken.

93. It must be appreciated that I cannot substitute my views for those of the respondent. It is not a question of whether I would dismiss the claimant in the circumstances. I must be satisfied that a reasonable employer could dismiss in the circumstances. Sometimes there will be a situation in which one reasonable employer would dismiss and another reasonable employer would not. The statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances.

94. The decision to dismiss was not materially influenced by any protected disclosure or assertion of a statutory right.

95. I am satisfied that the dismissal was not procedurally or substantively unfair and the claimant's unfair dismissal claims, and automatic unfair dismissal claims are not well-founded and are dismissed.

96. If there had been any procedural defect which have not been rectified at the appeal, I am satisfied that this a case in which the claimant's compensation would be reduced to zero as, following the House of Lords decision in the case of **Polkey v AE Dayton**, the claimant would have been fairly dismissed at the same time.

97. Also, if I were to go on to consider the claimant's contributory conduct, I am satisfied that it was culpable and led to his dismissal and it would be just and equitable to reduce the amount of the basic and compensatory award by 100%. The claimant's conduct was wholly responsible for his dismissal.

98. The judgment of the Tribunal is that the Claims of automatic unfair dismissal by reason of making a protected disclosure or asserting a statutory right are not well-founded and are dismissed.

99. The claim of unfair dismissal pursuant to section 98(4) of the Employment Rights Act 1996 is not well-founded and is dismissed.

Employment Judge Shepherd
7 September 2022