EMPLOYMENT TRIBUNALS

Claimant: **Miss J Conway**

Respondent: **Royal Talens UK Limited**

Heard at: **Bury St Edmunds (CVP)** **On:** 15 & 16 August 2022
In chambers 1 September 2022

Before: **Employment Judge Laidler**
Ms S Allen
Ms J Hartland

Representation

Claimant: In person
Respondent: Mr J Cunningham, HR Consultant

RESERVED JUDGMENT

1. The claimant did make a protected disclosure to the respondent on 14 July 2020

2. The principal reason for the claimant's dismissal was the making of that protected disclosure and the dismissal was automatically unfair.

REASONS

1. The ET1 in this matter was received on 8 December 2020 the claimant claimed that she had been dismissed for the assertion of a statutory right but it was clarified that she was referring to a protected disclosure made by her. The proceedings were defended by the respondent in a response filed on 14 January 2021.

2. The tribunal heard from the claimant and from: –

Mr Colin Perkins, HR

Mr Yogesh Karia, responsible for UK and Ireland of the respondent.

The tribunal had a bundle of documents of approximately 240 pages. The references to page numbers are from the electronic version. From the evidence that the Tribunal finds the following facts

The facts

3. The claimant commenced employment on 15 April 2019 as a Territory Manager. Her six-month probation ended on 15 October 2019 when she was advised she had passed her probationary period and her employment had been made permanent.

4. The tribunal saw an email of 6 February 2020 (page 41 – 42) which confirmed that the claimant had received a £350 bonus in her February pay as "an acknowledgement of your efforts". Mr Karia may now tell the tribunal that he had some concerns even then about the claimant's performance, but it is satisfied he had not at this point shared those with her. The claimant also achieved her target once in her first year as evidenced on her October 2019 pay slip.

5. At paragraph 13 of her witness statement the claimant set out how she believed she had improved her sales in early 2020 (10 – 11 months after joining). In February 2020 she had attended with others a trade show in Frankfurt and one at the NEC Birmingham. The latter she felt had been particularly positive for her and she was following up leads generated from it.

6. At page 137 was an analysis of the claimant's sales figures against the figures from the previous year and against target. The shows that in February 2019 there had been £14,853 actual sales before claimant joined. In February 2020 the claimant had achieved £27,615 which was below the target of £32,200 but significantly up on the same month the previous year and an increase of 86%.

7. When the country went into lockdown in March 2020 the claimant and two others (Suzen Pope and Ashley Dodson) were put on full furlough. The claimant remained on furlough until 8 June 2020.

8. The tribunal saw at page 209 of the bundle the claimant's mileage for November 2019. It was 3814 miles with some journeys of over 400 miles. In December 2019 (page 225) it was 2229. To 19 March 2020 i.e. just before the lockdown she had carried out 2466 miles (page 214)

9. In an email of 29 June 2020 Mr Karia reiterated to the claimant and Ashley that if visiting clients then it was a minimum of two calls a day 'ideally three to commercially make it viable'.

10. In an email of the 29 June 2020 (page 58) Yogesh Karia raised with the claimant her June sales performance stating it was 'very disappointing' and that

was further exaggerated by the 'sterling performance from both Ashley's and Paul area'. The claimant replied on 30 June explaining how badly affected her region, the south, had been as a result of the pandemic and how although her territory was 25,050.75 Euros down on the previous year, she considered it fairly positive considering the unprecedented times. She also had some orders not invoiced in June and would start July on approximately £8,000. She stressed how difficult it was to make appointments with customers due to their health and safety concerns. Mr Karia replied on the same day confirming that although he did not want her to ask 'aggressively for appointments' they had to remember that they were sales people and the current climate was challenging for all.

11. In June and July after the country was released from the initial lockdown the claimant was driving again and the Tribunal saw she covered 623 miles in July (page 22)

12. From 6 July 2020 the claimant and two others were put on a part-time flexible furlough but on fixed hours as confirmed in a letter of 3 July 2020 (page 61). The claimant's hours would be Monday to Thursday 10 am to 4 pm and Friday 10 am to 3pm. The claimant pointed out that she could not do faraway calls in those shortened hours and suggested a 2 or 3 day week during which she worked full days instead but Mr Karia would not agree to that. The tribunal accepts the claimant's position that it was difficult to see how she could do so many miles in the fixed furlough hours after July. Contrary to what Mr Perkins said in his witness statement the way this letter was written was not that the staff 'worked for periods of the week according to the needs of the role'. The hours were fixed.

13. The claimant and Ashley were set new additional tasks in July whilst on flexible furlough. These were:

Checking debtors every week and chasing debt

To call each client (the claimant had 97) identifying any who sold through Amazon or eBay and reporting back to Mr Karia.

Cold calling new online resellers

To complete an online audit ('the audit task') of the customer base.

14. The Tribunal accepts the even though the hours were fixed Mr Karia did expect as the claimant states in evidence a "give-and-take" by the employees. It is accepted the claimant worked close to full time for part time wages. The tribunal found it a rather strange line of questioning put to the claimant in cross examination that she could have asked for hours 'back' later in the week if she had to do a long day. As the claimant explained in evidence, she had no reason to do that when her suggestion that they worked 2 or 3 longer days than the fixed hours each day had been rejected by Mr Karia.

15. On 2 July 2020 Suzen Pope emailed the claimant about the audit. All that email said was to 'fill out the following information for your customers' and attached an excel spreadsheet to be completed. She was asked to 'check websites that have our content and see if it is up to date'.

16. By email of 8 July 2020 (page 63) Suzen Pope wrote to the claimant about a meeting on 17 August 2020 for the database. The tribunal therefore accepts the claimant's evidence that she believed she had until then to complete this audit task. However, on 9 July 2020 (page 64) Suzen Pope was asking when the audit would be completed. The claimant replied that she had no idea as she was trying to complete her work into 4 hours but hopefully would have more time the next week. Suzen replied that it was needed by the following Thursday. Mr Karia made much in cross examination of the claimant not asking him for more time but the tribunal finds it understandable that the claimant would ask Suzen as she was the one who had sent the task.

14 July 2020 – claimant performance review.

17. The claimant's performance review had been scheduled for 14 July 2020 (page 133) between the hours of 3.30 to 5 pm. The information seen in the bundle demonstrates that this had been set up on 22 January 2020 i.e. before the lockdown. It was however still scheduled to run on after the claimant's hours were supposed to end under flexible furlough at 4 pm.

18. The claimant emailed Mr Karia on the day to ask whether 30 minutes would be sufficient time for the meeting (thereby reminding him that she was due to finish at 4 pm). Mr Karia has stated that he was on a conference call at the time of the claimant's email but the fact is he had not changed the meeting times despite the fixed part-time furlough hours.

19. The tribunal was taken to an Outlook calendar showing the meetings and this even records that the staff were on furlough hours. The tribunal cannot categorically say from the information it had when those meetings were set up. What does appear to be the case though is that no one at the respondent went through the calendar to check that meetings were still listed at such times even though the staff were on part-time furlough.

20. The tribunal accepts the claimant's evidence that her 6 month review on 14 July 2020 started positively with discussion about the Frankfurt and NEC exhibitions during February. When it became clear to the claimant at approximately 4.10 pm that they were not even halfway through the review and it was 10 minutes over her fixed finish time under the flexible furlough she asked if the meeting could continue another day in working hours. The tribunal accepts that Mr Karia became annoyed and angry at this suggestion. It further accepts that the claimant made it clear to him that she was not prepared to work over her set part – time furlough hours and that it would be wrong to do so. She reminded Mr Karia that she and her colleagues had been working over the agreed hours to get work done and that she considered it was unfair to continue to do so. She wanted him to understand that working during the time that he was claiming furlough money from the Government was wrong.

21. The tribunal accepts that Mr Karia became very annoyed asking the claimant what was more important to her than work and that he seemed to take offence that she might have something else to do. Mr Karia did reluctantly agree to reschedule the meeting for 16 July 2020 within the claimant's working hours.

22. In her grievance dated 12 August 2020 (page 109) the claimant made it clear that she and her colleagues had been required to work outside their set hours and that 'I wasn't prepared to jeopardise my integrity by flouting strict rules [of furlough]'. She referred to having to ask to bring her review meeting to a close as it was running on passed work time and that since Yogesh Karia's demeanor towards her had been 'aggressive, blunt and dismissive'.

23. In her appeal the claimant stated that she had been 'harassed by Yogesh, bullied treated unfairly and less favourably than my colleagues and put through disciplinary due to the fact that I was not willing to work for Royal Talens during the hours I was on furlough. I made a verbal whistleblowing disclosure to Yogesh during my review via Microsoft Teams video of 14 July in which I reminded Yogesh that it was illegal for him to pressure me to conduct any work for Royal Talens during the hours he was claiming furlough pay from the UK government…' She stated that since then he had become 'quite aggressive and angry' and she had been subject to unfair treatment and dismissal due to this disclosure.

24. It is also relevant that Mr Karia set up other meetings after furlough hours. He denied this was the case but in cross examination the claimant took him to another Teams invite at page 135. This was difficult to read but the claimant was able to share her screen with the tribunal and Mr Karia and he had to then accept that this was for a meeting to start at 16.30 ie after the staff finished their part time furlough hours at 4pm.

25. The claimant took Mr Karia to another screenshot for a meeting set up on the 15/16 July for between 15.00 – 16.00 when they finished at 15.00 on a Friday. This showed that he was having meetings scheduled for outside the part time furlough hours. The tribunal saw a WhatsApp exchange of 17 July 2020 between the claimant and Ashley Dodson in which they discussed a meeting starting at 3pm on that day even though they were due to finish at 3 pm and that it was set for every week. The claimant is seen stating that she was going to ask for the meeting to be moved to inside furlough hours and Ashley was seen agreeing with her. The claimant asked at the end of that meeting if further meetings could be conducted in line with their part time furloughed hours.

26. Despite these screenshots Mr Karia continued to maintain that he was confident meetings did not take place outside the furlough hours and that no one was asked to work outside those hours. The tribunal did not find his evidence credible and is satisfied that such meetings did continue to be scheduled.

27. The claimants review meeting was concluded on 16 July 2020.

28. On the 22 July 2020 at 10:34 the claimant received an email from Suzen Pope asking if the claimant was available for a Teams meeting. The claimant checked and did not have an invite for one in her diary. Mr Karia telephoned the claimant asking her why she had not shown up to the meeting and she found his manner most angry and aggressive. She explained that she had not received an invite for a meeting. On checking Mr Karia found that to be correct and immediately sent a meeting request.

29. When the claimant joined the meeting having not been informed what it was about both Mr Karia and Suzen Pope were present. Mr Karia started

questioning the claimant about the work she had done on the audit task stating there were some inconsistencies between what he could see on the client company website and what the claimant had completed on her spreadsheet. The claimant assumed (having not been given any information about the meeting and what his concerns were prior to it) that he was referring to errors for just one company client and she suggested it was human error. Mr Karia then told her he had found errors on all her customers and asked for an explanation. The claimant explained she was surprised to hear this and that had she known prior to the meeting that the spreadsheet was wrong she would have looked back over her work and been able to offer more constructive feedback as to what had gone wrong. The claimant found Mr Karia to become more accusing and angrier accusing her of purposely submitting incorrect work knowingly to cause damage to the respondent.

30. The claimant became upset at that accusation and explained that she was trying to complete their work to the highest standard and would never knowingly submit work that was incorrect. She tried to explain that auditing client websites was not something she had ever done before, was not her usual job and that might explain whether why there had been some errors.

31. The claimant also explained that she had limited time in which to complete all required tasks and Mr Karia made reference to the review meeting which he stated she had had no problem bringing to a close. He brought up the claimant's alleged unwillingness to work outside of working hours stating the task needed to be done.

32. The claimant the Tribunal accepts felt intimidated and humiliated by Mr Karia's attitude towards her and asked him to stop twisting her words but he continued to berate her. The claimant became distressed and crying asking him to stop this. She then asked that the conversation continue without Suzen present. He ended the Teams meeting and called the claimant straight back on his mobile phone but continued to question her. He told her he would go away and decide what should happen next as he could not let the mistake go leaving her in fear for her job.

33. The claimant asserts that she made a disclosure at this meeting in front of Suzen to Mr Karia again about being made to work illegally while claiming furlough from the government. Whilst hours of working may have been discussed the tribunal is satisfied that the meeting was about the audit task and the spreadsheet and does not accept that the claimant made anything that could be described as a protected disclosure at this meeting.

34. The claimant explained to the tribunal that when the spreadsheet was initially presented to her there were approximately 17 columns to be completed with yes or no answers. These covered such questions as whether the client company had its own online store, was a retail store or charity. The last few were about social media platforms available to the client company. The claimant answered yes or no as she believed that was what was required. What she was supposed to have done however was to put the actual link/handle to the social media platform in the column. Further the columns had been sorted in Excel incorrectly and the claimant accepted that error. She rectified it all in her own time within the week that followed. To be sure that she was doing it correctly by

email of 3 August she asked Suzan Pope for more guidance on this was replied to by Suzen later that day.

35. On the 29 and 30 July the claimant had email correspondence with Mr Karia including comments on her 2020 performance management review.

36. The claimant then received from Mr Karia on 30 July 2020 at 17:17 an email headed 'Six month review'. This followed the finishing of their meeting on 16 July 2020. It set out headings of performance management – objectives, sales to date and then a general section. He referred in this section to the meeting they had on 22 July when they discussed the claimant's spreadsheet connected to the audit task. He concluded that he had found the meeting extremely alarming and questioned the claimant's lack of application, denial that the task was not carried out as instructed, knowingly submitting important data with inaccurate facts and the accusation that the claimant had made that he had twisted her words he stated "this is not acceptable behaviour and cannot be tolerated" he continued: –

> 'This coupled with the lack of sales progression, new business development and following instructions causes me to question your suitability for the role and been part of the team. From you joining the business to now, you have had my complete support and confidence, however with the latest developments I am questioning the wisdom of this; in summary, I would like to advise this communique as a "counselling letter" and will be held on record. I need to see vast improvements in your application to delegated tasks and says development. Together we shall monitor this over coming 3 months.

37. The tribunal does not accept that the claimant said at the earlier meeting she had just "flicked through websites" and she dispute the words he had put in quotations marks when she raised her grievance. It does accept that she asked Mr Karia not to twist her words as she felt threatened and bullied by him. There is absolutely no evidence that she had knowingly submitted incorrect data. It was an error in the way the data was put into the spreadsheet and then organised which the claimant corrected.

38. The conclusion in the 'counselling letter' was that the claimant's progress would be monitored over 3 months. The final paragraph contained very emotive language which did not seem to be appropriate in the circumstances. The tribunal had never heard of a "counselling letter" before and as it was to be held on the claimant's record finds that it was more akin to a formal written warning. Counselling should be understanding and supportive and this letter was certainly not being that. The tribunal saw no disciplinary policy that might have been relevant to this letter. Mr Perkins who did not draft the letter said it was an 'informal statement of concerns' but that is not credible from the language that was used.

39. Within days of that letter being sent to the claimant she was sent a letter dated 5 August 2020 (page 88) headed "Disciplinary Investigation Hearing". This was to invite the claimant to an investigation meeting and it was stated in the first paragraph that should the findings along with the claimant's responses necessitate it a disciplinary hearing might follow "regarding the performance and conduct you have shown in completing your duties as a territory manager"

40. The letter went on to state that whilst the claimant had previously shown herself capable of developing the qualities that were recognised to be an asset to both the company and her role,

> "unfortunately, over the recent weeks, there are some aspects in which you appear to be failing to meet the standards that we would know may have hoped and expected from you. Furthermore, given your conduct over this recent period and following our review of some time ago, this has regrettably given me cause to further review your actual sales performance to date and to question your ability to reach the standards of performance required of the role"

41. Whilst Mr Karia had initially considered the use of the counselling letter "after reconsidering further your apparent efforts or lack of and your defensive and off-the-cuff comments during the discussions I genuinely find it difficult to understand your responses and find myself increasingly concerned". He found the claimant to have been negative and defensive in their recent discussions. He then set out over the following 4 ½ pages the matters that would be considered

42. Mr Karia listed two separate tasks the online audit and the social media handles and addresses. From the evidence it has heard the tribunal is satisfied that that was one not two distinct tasks. Approximately 2 pages of his letter was spent on this issue.

43. Mr Karia also made reference to the claimant "bringing the meeting to a close when you apparently had to be elsewhere" referring to her 6 monthly review on 14 July. He stated that given that was diarised well in advance and was an important meeting for them both and although appreciating that it overran the claimant's working hours "it was difficult to understand why you had made other arrangements knowing the importance of our review". He went onto state that the Territory Manager's role was not a rigid 9 to 5:30 role and even when they are in a normal environment "your seniority and role should require that you work well beyond the basic standard working hours". This had led him to be concerned about the claimant's apparent lack of application, her seemingly denial of the online audit task, the seemingly careless or negligent manner in which she had conducted it whereby the results were well below the standard that she was perfectly capable of reaching and that she had said he had been twisting her words.

44. He then attached a chart about the claimant's sales performance stating that she had only reached target in one of the 15 months she had been with the business. Whilst recognising that during 2020 they had been affected by the pandemic he asserted her sales had remained static and in fact had fallen slightly in recent months. He compared the claimant to her newest colleague who joined the company just prior to her who had had a "phenomenal growth rate and is shortly to overtake you"

45. The letter then advised the claimant that in accordance with their procedures for disciplinary and performance management issues (which have not been seen by the tribunal) the claimant was entitled to have a witness to accompany her at the initial investigatory meeting and if appropriate any following disciplinary hearing. The letter then explained that during the investigatory phase:

> '… your responses will be carefully considered prior to any conclusion on the relative integrity of the facts and we will initially convene for me to consider whether the facts

warrant any action and to reconvene to confirm my initial conclusions. Upon being reconvened, I will either:

a) to confirm the decision that I believe that the case is unproven and that no action is appropriate: or
b) to confirm the decision, that I believe disciplinary action is appropriate and reconvened after a short break of 30 - 45 minutes to give you time to prepare.

46. If he concluded that the case was proven and that the available evidence proved that disciplinary action was justified he would reconvene to listen to and take into account any further comments or mitigating factors that the claimant wished him to consider. He would then review the facts and confirm his final conclusions as to what disciplinary action is deemed relevant in the circumstances. If he concluded his decision on the day he would advise the claimant of it and confirm it in writing.

47. Towards the end of that letter Mr Karia then referred to the investigation and disciplinary hearing being held at 14:00 hours on Tuesday 11 August via Microsoft Teams with a member of the HR advisor's being present together with Mr Karia who would make the ultimate decision.

48. The tribunal finds that the letter read much more as relevant to a misconduct disciplinary than issues about performance.

49. The claimant gave evidence which the Tribunal accepts that she then contacted Colin Perkins of PSM HR Outsourcing who was to chair the meeting. It is not clear how she obtained his details. She states that he told her to "come to the hearing with your tail between your legs" and hope that she was forgiven by Mr Karia. He emphasised that she needed to accept the accusations, apologise and hope that Yogesh had the decency to give her another chance. She also states that at the outset of the hearing he confirmed that he knew that Mr Karia would act fairly. The tribunal finds the claimant's evidence on this point consistent with Mr Perkins witness statement in which he confirms working for Mr Karia before and 'genuinely found him to be a fair and balanced manager.' That Mr Perkins would also say at the outset of the disciplinary hearing that he knew Mr Karia would be fair indicated how he was there to support that Mr Karia rather than being an independent presence

50. Mr Perkins explained to this tribunal that he had not seen any policy, that Mr Karia was the decision maker and that he Mr Perkins was not there to prove or disprove the facts but that he trusted Mr Karia's judgment to be "fair and balanced". He did not independently check the figures that Mr Karia was relying upon.

51. At the investigation hearing Mr Karia was comparing the claimant with an employee Paul Murphy who was an office based sales administrator who had not been furloughed. It was only during the course of these proceedings that the claimant had access to Ashley Dobson's figures. Her performance was not unreasonable compared to the previous year bearing in mind the pandemic.

52. No decision was given to the claimant at the meeting. Contrary to the suggestion made in the letter inviting her to it there was no adjournment before Mr Karia decided whether to hold a disciplinary meeting. Rather he considered the matter and wrote to the claimant on 20 August 2020 dismissing her. She was

entitled to her contractual notice. And any outstanding holiday pay. He stated in this letter that the "tipping points" for him were the manner in which the claimant appeared to have been at least careless if not seriously negligent in the completion of the small number of tasks set for her such as the online audit and social media project. Again, he makes it sound as if there were two matters where as this was one task. Secondly the fact that having taken the time to further review the claimant sale sales performance he genuinely gained the impression that she was "coasting" and not really making much effort. He was also more than surprised to note what appeared to be at least "an excessively defensive if not aggressive manner in which you reacted to my request for the hearing". He said finally that after listening to the claimant's responses and comments at the investigation hearing:

> "I could only consider there were no signs of acceptance or apology as to either the conduct shown or your performance both in terms of the projects set and the standards applied. You seemed to just provide even more of what could only be described as excuses as opposed to legitimate reasons. None of which stood the test of anything like reasonable scrutiny and to use modern parlance you gave a clear appearance of being in total denial as to the circumstances, your conduct and what I could only conclude to be the unacceptable sales performance"

53. The claimant wrote to Mr Karia's line manager on 21 August (page 118) and also submitted an appeal. The appeal was seen at page 120. This was acknowledged but the tribunal did not hear whether it had ever been heard.

Relevant Law

54. The following are the relevant provisions of the Employment Rights Act 1996 (ERA) that the tribunal must apply:

> **43B Disclosures qualifying for protection.**
>
> (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) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any 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 of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
>
> **47B Protected disclosures.**
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

103A Protected disclosure.

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.

55. In determining whether the claimant made a protected disclosure it is the reasonableness of the belief which is important and not whether the claimant was right about the matter being disclosed. There must however be a disclosure of information and not merely an allegation. In Karen Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436, the Court of Appeal made it clear that that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. In the EAT Langstaff J (as he then was) had said:

> 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.

56. Lord Justice Sales made it clear in the Court of Appeal that

> 'although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1) , not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.

57. The tribunal must bear in mind the difference in wording between the detriment provisions and those dealing with unfair dismissal. The detriment must be 'done on the ground that' the claimant made a protected disclosure. For dismissal the protected disclosure must be the reason 'or if more than one the principal reason'.

58. In Salisbury NHS Foundation Trust v Wyeth UKEAT/0061/15 the EAT referred to the distinction between the detriment provisions and s103A and Elias LJ statement of the correct approach in Fecitt and Ors v NHS Manchester [2012] IRLR 64. He stated that:

> 'Liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act…'

He accepted there was an anomaly with the situation of unfair dismissal where the protected disclosure must be the sole or principal reason but cited Mummery LJ in Kuzel v Roche Products Ltd [2008] IRLR 530 in which he emphasised that unfair dismissal and discrimination were different causes of action and that

> '…the better view is that s47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower…'

59. In the case before this tribunal the claimant did not have two years qualifying service to enable her to bring a complaint of ordinary unfair dismissal. The burden therefore falls on the claimant to show that the tribunal has jurisdiction to hear her complaint and that the circumstances fell within the automatically unfair grounds set out above which she relies upon. (Kuzel v. Roche Products Ltd [2008] IRLR 530)

60. The tribunal must also bear in mind the wording of section 103A that the reason 'or if more than one the principal reason' was the making of the protected disclosure(s). That acknowledges there may be more than one reason.

Conclusions

61. The tribunal has accepted that the claimant did say at the meeting on 14 July that to carry on with their meeting past her fixed furlough hours would be a breach of the furlough regulations. Following the Court of Appeal guidance in Kilraine the tribunal is satisfied that the claimant did disclose information. She may not have used the word illegal but in the context of what was occurring she said enough for Mr Karia to know that she was making it clear that in conducting the meeting passed her fixed furlough hours he was in breach of the rules about furlough. That was showing that she believed there was a breach of a legal obligation. The case law is clear that the tribunal should have regard to the context in which something is said and Mr Karia had all the information he needed to know what the claimant was saying and consequently disclosing.

62. The tribunal is further satisfied that it is that disclosure that led to the claimant's dismissal. The disclosure was made to Mr Karia and it was he who decided on the 'Counselling Letter', the investigatory meeting and then dismissal.

63. The claimant had received bonuses and there had been no formal performance management procedure commenced.

64. The so-called "counselling letter" was in effect a disciplinary sanction in itself leading very quickly to the investigatory meeting and then dismissal. There is no doubt that this would have been an ordinary unfair dismissal had the claimant had two years service. Mr Perkins eventually accepted in answering a question from the judge that might have been the case even though he said it was 'nuanced.'

65. In the invite the investigatory meeting and then the decision to dismiss great emphasis is put on the claimant not completing the spreadsheet correctly. It has been wrongly made into two tasks when it was one and blown up out of all proportion. The claimant when it was explained to her corrected the error that she had made.

66. Whilst not denying that there may have been performance concerns in the claimant sales role it was the protected disclosure that was the principal reason why the claimant was dismissed in the manner that she was. The statute acknowledges that there might have been other reasons but the principal one was the making of the protected disclosure and Mr Karia's annoyance and anger that she had challenged him on the issue of working past their fixed furlough hours and indeed expecting the staff to do that.

67. It follows that the dismissal was automatically unfair.

68. Case Management orders for a remedy hearing will be set out in a separate document

Employment Judge Laidler

09 September 2022

Sent to the parties on:

23 September 2022

For the Tribunal: