EMPLOYMENT TRIBUNALS

Claimant: Mr G Tyrell

Respondent: NDT Services Limited

Heard at: Nottingham Employment Tribunal

On: 20 to 23 September 2022

Before: Employment Judge K Welch
Mrs J Bonser
Ms L Lowe

Representation

Claimant: In person, supported by his son
Respondent: Mr D Van Heck, Counsel

JUDGMENT

The unanimous decision of the Tribunal is that:

The Claimant's claims for automatic unfair dismissal, detriment on the ground that the claimant had made protected disclosures and unfair dismissal are not well founded and fail.

REASONS

The Proceedings

1. Reasons having been given orally, the claimant made a request for written reasons at the end of the hearing.

2. The Claimant brought claims for unfair dismissal, automatic unfair dismissal for having made protected disclosures, detriment on the ground of having made protected disclosures and ordinary unfair dismissal.
3. The claim form was presented on 17 February 2021, following a period of early conciliation from 1 January 2021 to 18 January 2021.
4. The hearing was in person, with all parties attending.
5. The Tribunal was provided with an agreed bundle of documents and references within this Judgment to page numbers refer to page numbers within that bundle. The Tribunal was also provided with witness statements from six individuals, although two of these witnesses, appearing on behalf of the respondent, did not attend the Tribunal to give sworn evidence.
6. An application was made by the Respondent on the afternoon of the working day before the hearing to convert the hearing into a hybrid hearing, so that three of its witnesses could attend remotely via cloud video platform. The main reason for the application was that one of its witnesses was in Turkey and wished to give evidence from there. This request was rejected on the basis that no consent had been obtained for the witness to give evidence from Turkey and no adequate grounds were provided for the remaining witnesses to attend remotely, particularly as this case had been listed as an in person hearing since February 2021.
7. Following a discussion between the parties, the witness statement of Mr Oliver Cook was agreed by both parties, as the claimant accepted that it was factually correct. The remaining two witnesses were to attend the hearing, but the respondent could not get hold of one witness, namely Mr Neil Cook, even by telephone, as he was in the Isle of Skye. We therefore gave such weight to this untested, unsworn evidence as we considered appropriate in light of this. The remaining witness attended the Tribunal and we accommodated the respondent's requests for the timing of this evidence.
8. The Tribunal therefore heard from the following witnesses:

8.1. the claimant himself;

8.2. Ms D Hawkins, the former HR Business Partner for the respondent;

8.3. Mr D Danger, Managing Director of the respondent; and

8.4. Mr I Tomlinson, Laboratory Manager of the respondent.

9. Prior to the hearing, there had been three preliminary hearings, all before EJ Britton. The first on 6 October 2021 was a case management hearing, which in addition to ordering further particularisation of the claimant's whistleblowing complaints, listed an open preliminary hearing to consider if the Respondent had made an application to determine whether there was a Public Interest Disclosure. If so, as to whether the s43B ERA claim was out of time or formed part of a continuing act. If it was out of time, as to whether it should extend time and to make outstanding final directions.

10. The claimant provided further information concerning his whistleblowing complaint on 4 November 2021 [P46] and the respondent provided an amended grounds of resistance [P47].

11. On 10 March 2022, the first open preliminary hearing (OPH) was held by EJ Britton. At this hearing, the Judge confirmed that whilst the claimant had attempted to comply with the Case Management Order, nowhere near the particularisation of the complaints had been provided. He therefore made an unless order that the claimant provide further information in the form of a Scott schedule and listed a further OPH to "take the matter forward."

12. Further information was provided by the claimant on 26 April 2022 [P66-70] and the respondent again presented an amended grounds of resistance [P71-82].

13. The second OPH took place on 13 June 2022. The detriments complaint was struck out for non-compliance with the unless order, however, the hearing went on to consider whether it should be reinstated on reconsideration. Having heard both parties, this claim was reinstated, and therefore, the claims to be determined at this hearing were

automatic unfair dismissal, ordinary unfair dismissal and detriment on grounds of having made a protected disclosure.

14. The issues had not been agreed or finalised at the earlier case management hearings. Therefore, at the start of the hearing, we agreed the issues to be determined, as follows:

Issues

Time limits

15. Was the Detriment claim made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

15.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

15.2. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

15.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

15.4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Protected disclosure

16. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

16.1. What did the claimant say or write? When? To whom? The claimant says he made disclosures in or around early March 2019 when he told Mr Danger that the method of working was unsafe and had resulted in various defects being missed. That the company was committing fraud against its customers in charging for services not provided. That this should not be decided by a vote on the shop floor as this was a management obligation to ensure that testing was carried out correctly.

16.2. Did he disclose information?

16.3. Did he believe the disclosure of information was made in the public interest?

16.4. Was that belief reasonable?

16.5. Did he believe it tended to show that:

16.5.1. a person had failed, was failing or was likely to fail to comply with any legal obligation;

16.5.2. the health or safety of any individual had been, was being or was likely to be endangered;

16.6. Was that belief reasonable?

16.7. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

Detriment (Employment Rights Act 1996 section 48)

17. Did the respondent do the following things:

17.1. Subject the claimant to a disciplinary investigation in September 2019;

17.2. Telling the claimant that he could only come back on nights on 24 April 2020;

17.3. Refusing to allow the claimant to be accompanied by a Trade Union representative on 13 October 2020.

18. By doing so, did it subject the claimant to detriment?

19. If so, was it done on the ground that he made a protected disclosure?

Unfair dismissal

20. What was the reason or principal reason for dismissal?

21. Was it a potentially fair reason? The respondent asserts that this was redundancy.

22. Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

23. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

24. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

    24.1. The respondent adequately warned and consulted the claimant;

    24.2. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

    24.3. The respondent took reasonable steps to find the claimant suitable alternative employment;

    24.4. Dismissal was within the range of reasonable responses.

Findings of fact

25. The claimant was employed by the respondent from 29 March 1999 to 31 October 2020, as an Ultrasonic Immersion Aerospace Inspector Level 2. His role involved the testing and inspecting of aerospace parts, including scanning and immersing them in a tank to test for hidden defects. The claimant was clearly an employee who was good at his job, although we accept that he was not skilled in working in other areas of the respondent's business.
26. The respondent is a private company, although since its takeover in 2015, forms part of a large group of companies, namely the Intertek group. The company appeared to us to continue to be run as a small employer despite being part of a large group.
27. The claimant worked in a department where testing was undertaken and was one of approximately 18 employees carrying out the same role. The laboratory included the claimant's department and another department, which totalled approximately 30 employees who were ultimately managed by Mr Tomlinson, the laboratory manager. The claimant's team had one supervisor, Mr Kevin Lock , who was the son in law of the claimant.
28. It was clear that the relationship between the claimant and Mr Lock was difficult, and this appeared to be well known within the company.

29. The inspectors within the claimant's department had a payment system which, even with our knowledge of piece work systems, would be described as unusual. The system referred to notional, historic timing parameters for testing parts, and included a basic salary which was invariably enhanced by a piecework bonus, such that if the inspectors each tested four '3-hour discs' within their 8 hour shift, they would be paid for 12 hours' work, despite only having worked for 8 hours.
30. It was accepted that the claimant had benefited, along with the other inspectors, from this enhanced, piecework pay for a number of years.
31. The notional, historic timings for the testing of parts, appeared to be used for ensuring reasonable pay for the inspectors, and incentivising them to work efficiently but it was confirmed, and we accept, that these timings did not form the basis for the contractual prices charged to customers of the respondent.
32. The claimant considered that the piecework element of the pay could have incentivised inspectors to cut corners in their testing of these safety critical parts which were for use in the aerospace industry.
33. We are satisfied that the respondent, and Mr Danger in particular, considered changing the piecework system in December 2018, as evidenced by the HR plan to be implemented during 2019 [P127] and the document showing when it was created [P128].
34. It was clear that the claimant raised this as an issue with Mr Danger in or around March 2019, although we find that this was initially raised by the claimant as a passing comment during one of Mr Danger's shop floor walk arounds. During this discussion, which was not in Mr Danger's office, there was a difference in evidence as to what had been specifically said by the claimant. The claimant said in his witness statement that the piecework system was an unsafe method of working and had already resulted in various defects being missed with different customers. Further, that the company were committing fraud against its customers as they were charging for services not being provided.

35. Mr Danger's evidence was that the claimant raised concerns about the piecework pay system on a few occasions commencing in March 2019, although did not accept that the claimant had said what was contained within his witness statement. Mr Danger stated that the claimant said that the piecework system could incentivise people to work quickly in order to earn more money. The claimant referred to a former client, Leistritz, whose work had been lost by the respondent and the claimant indicated that this was because of quality issues. Whilst this was before his time, Mr Danger was able to correct the claimant and explain that Leistritz had themselves lost a contract and therefore had no work to offer the respondent. Mr Danger's evidence, which we accept, was that he asked the claimant whether there was anything going on which he should be aware of, to which the claimant replied, "no".
36. We accept the evidence of Mr Danger that the claimant only raised the possibility of corners being cut by this bonus system and gave no specificity of allegations as stated by him. We find this in part, because, despite being ordered to provide specific details of what exactly was said which formed his protected disclosure, the claimant only referred to voicing his "*concerns regarding the payment of piece work for testing aerospace parts*" in his original claim form [P8]. In the first of the further particulars, he referred to, "*express[ing his] opinion that piece work was not an appropriate method for testing aerospace parts and because our customers were paying us to carry out testing to the correct standard as set out by Rolls Royce, we were essentially defrauding them*" [P46]. Finally, in the Scott schedule and supporting document, he stated, that his disclosure was, "*concern of unsafe method used for testing, ie piecework*" [P66]. It was only in the claimant's witness statement that more detail was provided, however, we accept Mr Danger's evidence that the claimant did not state this to him.
37. Mr Danger did not consider that there was an immediate change necessary to the method of payment for testing work, as it was not in itself an unsafe practice, but could lead to problems should individuals test parts quickly in order to be paid more, and therefore needed to be changed in the long term.

38. Mr Danger sought approval to start consultations over changing the piecework pay system with his managers on 20 December 2019 as evidenced by emails [P177]. It was agreed that consultations would take place, and there was a meeting with the members of the claimant's department in early March 2020 at which changes to the payment method were discussed. There was no vote on whether to continue with the piecework pay method. An offer was made for a basic salary of £37,000 per annum, with overtime paid when properly worked, rather than based on the number of discs inspected.
39. The claimant and his colleagues sent a signed letter with a request for a salary of £43,000 on 9 March 2020 [P182]. After this letter, the claimant went to Mr Danger's office to suggest that if the respondent was able to increase the basic salary to £38,000, he would be able to get his colleagues to agree to this. We consider that the claimant mistakenly believes that the discussion with Mr Danger in his office was in March 2019, as opposed to March 2020, which is supported by the documentation we have seen in the bundle.
40. Written evidence within the bundle indicates that towards end of 2019, there was a clear and costed proposal being discussed between Mr Danger and his senior manager about a new pay and grading structure for the claimant's team and we accept that it was clearly the respondent's intention to discontinue piecework payments.
41. The claimant's evidence was that there was 'cheating' on testing being carried out, which could occur by running the tanks at ridiculously high speeds, leaving out some scans and ignoring the daily calibration requirements. We are satisfied that the claimant never stated those particular concerns to Mr Danger or the respondent prior to his dismissal. Rather, he raised general concerns that the then pay system which could have led to defects in parts remaining undetected.
42. Mr Danger did not interrogate the claimant about what his concerns were, other than asking the claimant specifically whether there was anything that he needed to know, to which, as stated above, the claimant replied no.

43. We believe that the claimant would have preferred an increased basic salary and raising the issues that he did was his attempt to achieve that end.

44. At some point prior to August 2019, Kevin Lock approached Mr Tomlinson complaining about the conduct of the claimant. Mr Tomlinson told Mr Lock to document his concerns, which resulted in Mr Lock sending an email to Mr Tomlinson on 15 August 2019 [p140]. This raised the following conduct issues:

"*George Tyrrell on the 08/03/2019 refused to start work 6 hours in to his shift after myself (Kevin Lock) instructed George to start testing a Fan Hub*

George also refused on the 14/08/2019 to follow supervisory instruction by refusing to operate a semi auto tank to help aid short term staff shortage.

George is also taking several smoking breaks per shift outside the signed agreement ALL staff members signed.

When operating the semi auto tanks George will also not complete the allotted planned work load. Sighting I had problems etc..."

45. Mr Tomlinson appeared to do nothing with this other than forwarding it to Mr Danger, who himself referred it to Ms Hawkins in HR, who advised on a disciplinary investigation. Andy Harrison, was asked to carry out an investigation, as Quality Manager. He started the investigation, [P143] and this was then handed to Neil Cook, Operations Manager, to finalise. A copy of his investigation report appeared at P161-3. This confirmed that no action would be taken against the claimant, and stated [P163]:

"*In conclusion GT is no saint and may push a few boundaries such as smoking breaks...etc but disciplining GT on any of the alleged issues would open a "can of worms". The "can of worms" needs to be "opened" but under a managed process and not via a disciplinary process. I would suggest that supervision / time keeping is revisited to ensure that all staff are adhering to the signed agreement (including some supervisors). I would also revisit the "piece work" situation as*

this appears to be causing several shop floor issues among which could be compromises of quality."

46. As part of the disciplinary investigation, the claimant raised further concerns over the piece work system, but again this was about the possibility of the system leading to corners being cut and was not specific in providing any detail on what, if anything, had gone wrong. In any event it is not relied upon as a protected disclosure.
47. It was clear that the claimant had no written confirmation of the outcome of the investigation into his conduct. However, we are satisfied that there was a verbal discussion between the claimant, Mr Andy Harrison and Mr Tomlinson at which the claimant was informed that no disciplinary action was to be taken against him. This was confirmed by the claimant in one of the consultation meetings about his redundancy referred to below.
48. The respondent had identified that it required more flexibility within its workforce, in terms of both skills and qualifications, in order to be able to flex for future demands. The respondent recruited individuals with more qualifications and broader skills, who were therefore paid a higher rate of pay than the claimant.
49. The claimant, having become aware that these other, newer recruits in the department, were being paid more than him for what ostensibly appeared to be the same role, asked Ms Hawkins, the new HR business partner, for further training in order to increase his pay. However, if the claimant had had the training and certificates he had asked for, they would have been relevant to his current role and would not have given him greater flexibility to move to other roles or activities within the respondent's business.
50. Ms Hawkins confirmed the claimant's request for additional training to Mr Tomlinson, who, for business needs, did not consider the training to be appropriate at that time, due to it being a busy department at that time. It was clear that this was not discussed further with the claimant.

51. In February 2020, the Covid-19 pandemic hit. The claimant had 2 weeks' sick pay, 2 weeks' holiday and one week of agreed paid leave in order to establish whether his COPD condition was sufficiently serious for shielding to be mandatory.
52. In the event, COPD at level 2 did not result in compulsory shielding, and the claimant therefore returned to work. There were discussions between the claimant and the respondent about furlough, but the claimant, on finding out the terms of the furlough scheme declined to participate, as was his right.
53. We accept that the respondent wanted individuals to agree to furlough, in light of the significant downturn in work as a result of the pandemic. We accept that the claimant did initially request night shifts, to reduce his potential exposure to Covid, but confirmed in an email that he was happy to agree to working nights on 24 April 2020 [P350] providing that this was reviewed in June/ July 2020.
54. The claimant's certification for carrying out work for Pratt & Whitney had expired. We accept that two other employees had had their certificates for this customer renewed, but we accept that this may have been whilst the claimant was off, and in any event, the reason for the renewal was to carry out speculative testing on new products, which did not ultimately result in any new contracts being awarded, or more work.
55. It was clear that the respondent suffered a huge reduction in its workload in 2020, due to the pandemic. We are satisfied that a number of employees across the respondent's business were made redundant at that time, including the claimant.
56. We are satisfied that this was, sadly, a genuine redundancy situation, as a result of a significant reduction in work from more than one customer. The respondent therefore thoroughly reviewed its operation and made a decision to reduce the number of inspectors within the claimant's department, and also to make further redundancies across its wider business. It decided to retain more people than the drop in work actually justified, as it was hoping for an upturn in work following some form of recovery after the pandemic.

57. The respondent commenced collective consultation with elected representatives in September 2020. There was a collective consultation meeting on 30 September 2020 [minutes P216-220]. The claimant was not an elected representative, but we accept the claimant's evidence that he discussed the redundancy process with his elected representative, Mr McCracken.
58. The claimant was not clear about which documents he received as part of the redundancy process, which we understand, particularly due to the lapse of time since his redundancy took place. It was clear that there was an email sent to a number of employees, including the claimant, on 30 September 2020 [P223], which attached that consultation pack, and included information on the selection process and a copy of the redundancy scoring matrix. The claimant did not have access to his work email account or the intranet and confirmed this to the respondent. A copy of the email was therefore sent to the claimant's personal email address on the same day (30 September 2020), which he acknowledged on 2 October 2020, and confirmed that he had read the selection criteria, which he viewed as a "*convoluted and concocted plan to allow management to deliver drumhead redundancies to selected individuals*."
59. The selection criteria was set out in a matrix [P212], which included various ratings for the following criterion:

    Behaviours 10X, Initiative/Pro-active, Problem solving, Team working, Technical application, Qualification, Commercial skills, Customer skills, Leadership.
60. There was confirmation within the matrix of what would justify a higher or lower score (each having a maximum of 10 possible points), and what weighting should be applied. All of the criterion had equal weighting save for the technical application and qualification criterion, which each had double the weighting of the other criterion.
61. The scoring was carried out for the whole of the claimant's department by Mr Tomlinson, Mr Lock, and Mr Ward. They scored the individuals together and agreed the points to be awarded to each of the individuals with commentary to go on the scoring sheet. The claimant ranked 14th out of 18 employees within his department as shown by the anonymised table of

employees [P269]. Nine employees were ultimately made redundant (two being saved by voluntary redundancies) and one was redeployed elsewhere within the respondent's business.

62. Following the initial scoring, a review meeting was held between Mr Danger, the scorers and Ms Hawkins, which was referred to as a 'wash up' session. At this meeting, the parties attending considered any anomalies/ and provided checks and balances to test the scoring which had been given. Two individuals who were on the margin of being selected for redundancy were retained, although this did not affect the claimant's selection for redundancy, since he had scored lower than these individuals.

63. The claimant considered that he had been unfairly scored in the process, as a result of his believed protected disclosure, the disciplinary investigation and his failure to obtain further qualifications. He also felt that he should not have been scored by Mr Lock or Mr Tomlinson because of his relationships with them, although had no complaints about the scoring by Mr Ward.

64. The claimant was invited to attend an individual meeting with Mr Tomlinson to start off the consultation process. The claimant's evidence was that there was no such first individual meeting as he had merely been handed a letter at his workstation. However, we accept Mr Tomlinson's evidence that the claimant attended the boardroom, a script was read out by Mr Tomlinson to the claimant, and he was handed a letter confirming that he was at risk of redundancy which provided him with his individual scores [P242-244]. No minutes were provided for the first 1-2-1 meetings as the respondent's evidence was that these were all the same. It would have been helpful for the respondent to have prepared minutes for all of the consultation meetings, as evidence of the fact that they had taken place, and what was discussed.

65. At the second 1-2-1 consultation meeting, the claimant requested to be accompanied by his Trade Union representative, which was declined and the claimant therefore refused to attend the consultation meeting. Following the claimant's grievance dated 22 October 2020 about the

company's refusal [P257], it was agreed that the claimant could be supported by a Trade Union representative, and the second 1-2-1 individual consultation was therefore rescheduled for 27 October 2020 [minutes at P259 -261]. In this meeting, the reasons for the redundancy and the claimant's scores were discussed.

66. There was a final consultation meeting with the claimant on 27 October 2020 [minutes P264-267] incorrectly dated 27 November 2020, at which the claimant was accompanied by his trade union representative. During this meeting, the claimant's scores were again discussed. Mr Tomlinson is noted as saying in the meeting, "*…if I am honest George, since I have known you the 20 odd years you operate like a lone wolf, feedback from peers, supervisors has not changed. You do not interact, you don't go out of your way to help others and generally you do not socialise with anyone. When trainees come to you for help or a second opinion, they have feedback to me that you have stated "you are a level 2 now, as qualified as any other" and don't offer them a second view. These are recently qualified people who are seeking help*."

67. Also, during the meeting, Ms Hawkins asked what lessons had been learnt by the claimant from the disciplinary investigation. It was unclear to us why this was asked.

68. The claimant was made redundant on 27 October 2020 to take effect on 31 October 2020. A letter confirming his dismissal was sent on 27 October 2020 [P266]. The claimant was given the right to appeal the decision, which he did on 5 November 2020 [P270]. His email stated that his grounds of appeal were:

"*1. My scores were skewed by the personal intervention of Kevin Lock who is my son in law and has family issues with me and should have recused himself from the process from the start. The other is Ian Tomlinson who by his own admission has had an issue with me for 21 years.*

2. Whistleblowing, I raised a quality issue with David Danger approximately a year and eight months ago regarding the use of piecework in a quality controlled environment. Subsequently my line management have raised spurious allegations against me and ultimately used the selection for redundancy criteria to dismiss me."

69. The claimant was invited to an appeal hearing with Oliver Cook on 12 November 2020 [minutes P279-291]. Following the appeal meeting, Mr Cook carried out further investigations before coming to his decision. He contacted Mr Neil Cook and Mr Andy Harrison, who the claimant had identified as possible individuals who could have scored him, and confirmed that both had no concerns on technical ability, but did "*flag a general perception within NDT of concerns around attitude and ability to work within a team*." He also contacted Ms Hawkins HR business partner to understand the process followed. The claimant's appeal was not upheld, and the outcome was sent to him on 3 December 2020 [P294-296].

Submissions

70. The respondent provided written submissions and both parties addressed us orally on the case. In brief, the Respondent contended that the claimant's recollections of oral conversations were insufficiently clear and consistent to prove a case of whistleblowing in the face of opposing evidence. The claimant had made no qualifying disclosure in this case. The respondent referred to the helpful guidance provided by the EAT in Blackbay Ventures Ltd v Gahir [2014] IRLR 416 at paragraph 98. The Tribunal should identify the legal obligation by reference to its source (eg statute or regulations) and failure to do so is an error of law. There was no causation between the alleged detriments and the alleged protected disclosure. The principal reason for dismissal was redundancy, and the respondent acted reasonably in treating that as a sufficient reason to dismiss the claimant.

71. The claimant's submissions were that from the evidence it could be seen how the respondent's business was run. The claimant had been singled out and picked on for making protected disclosures. The only argument is where this may have happened. The respondent tried to blacken the claimant's character at every chance they could get following the disclosure. The allegation was clear, and you could plainly see a causal link between the protected disclosure to Mr Danger and the detriments/ the claimant's redundancy. This caused the claimant continuous

detriment and caused him illness. The scoring was flawed. The claimant had been unfairly dismissed and suffered injury to feeling.

LAW

Public Interest Disclosure

72. Section 43A of the Employment Rights Act 1996 ("the ERA") defines a protected disclosure as "a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

73. Section 43B of the ERA ("Disclosures qualifying for protection") provides as follows:

"(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…"

74. Under section 43C of the ERA ("Disclosure to employer or other responsible person"):

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure (a) To his employer…

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."

75. In Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 the EAT considered what amounts to a 'disclosure of information' and held that there is a distinction between disclosing information, which means 'conveying facts' and making allegations or expressing dissatisfaction. It gave, as an example of disclosure of information, a hospital employee saying 'wards have not been cleaned for two weeks' or 'sharps were left lying around'. In contrast, the EAT held, a statement that 'you are not complying with health and safety obligations' is a mere allegation.
76. The Court of Appeal, in Kilraine v London Borough of Wandsworth [2018] ICR 1850, established that 'information' and 'allegation' are not mutually exclusive. There must, however, be sufficient factual content tending to show one of the matters in subsection 43B(1) of the ERA in order for there to be a qualifying disclosure.
77. The information disclosed by the worker does not have to be true, but rather, the worker must reasonably believe that it tends to show one of the matters falling withing section 43(B)(1). The employee must also reasonably believe that the disclosure is in the public interest. When deciding whether the worker had the relevant 'reasonable belief' the test to be applied is both subjective (ie did the individual worker have the reasonable belief) and objective (ie was it objectively reasonable for the worker to hold that belief). Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, which was endorsed in Phoenix House Ltd v Stockman [2017] ICR 84, in which the EAT held that, on the facts believed to exist by an employee, a judgment must be made, first, as to whether the worker held the belief and, secondly, as to whether objectively, on the basis of the facts, there was a reasonable belief in the truth of the complaints.
78. When considering whether a disclosure is in the public interest, the Tribunal must decide what the worker considered to be in the public interest, whether the worker believed that the disclosure served that interest and whether that belief was held reasonably.

79. In Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed [2018] ICR 731 the EAT held that it is not for the Tribunal to consider for itself whether a disclosure was in the public interest, but rather the questions are (1) whether the worker making the disclosure in fact believes it to be in the public interest and (2) whether that belief was reasonable.
80. Tribunals should be careful not to substitute their views of whether disclosures are in the public interest for that of the worker.
81. Following Chesterton, there are four questions for the Tribunal to consider when deciding whether a disclosure is made in the public interest:

    a. the numbers in the group whose interests the disclosure served;

    b. the nature of the interests affected and the extent to which they are affected by the matters disclosed;

    c. The nature of the wrongdoing disclosed, and in particular whether it was deliberate or inadvertent; and

    d. The identity of the employer.

    Detriment for making a protected disclosure

82. Section 47B of the Employment Rights Act says that: "*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.*"
83. The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower. This is a different test to the test for automatic unfair dismissal because of a protected disclosure (referred to below), where the focus is on the reason or the principal reason for dismissal.
84. In a complaint of detriment, section 48(2) provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Where the claimant can show that there was a protected disclosure, and a detriment to which he was subjected by the

respondent, the burden will shift to the respondent to show that the detriment was not done on the ground that the claimant had made a protected disclosure.

85. A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL.

Automatic unfair dismissal for making a protected disclosure (section 103A ERA)

86. A dismissal is 'automatically' unfair if the reason or principal reason is that the person dismissed has made a protected disclosure (s103A).

87. Section 103A of the ERA provides that "*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*."

88. In a complaint under section 103A of the ERA an employee does not need to have two years' continuous employment. Where an employee does not have two years' service however, the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair one lies with the employee (Smith v Hayle Town Council 1978 ICR 996).

89. A Tribunal can draw an inference as to the real reason for the dismissal in coming to its decision.

Unfair dismissal

90. Assuming there has been a dismissal, under s98(1) of the Employment Rights Act 1996 ('ERA') it is for the employer to show the reason for the dismissal and that it is either for a reason falling with section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee. The respondent asserts that the claimant was dismissed for reason of redundancy.

91. Redundancy is a potentially fair reason falling within section 98(2) ERA. Section 139(1)(b)(i) ERA provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of

the employer's business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

92. In Murray v Foyle Meats Ltd [1999] ICR 827, Lord Irvine approved of the ruling in Safeway Stores plc v Burrell [1997] ICR 523 and held that section 139 of the Employment Rights Act 1996 asks two questions of fact. The first is whether there exists one or more of the various states of affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have diminished or ceased. The second question is of causation: whether the dismissal is wholly or mainly attributable to that state of affairs.

93. The requirement for employees to do work of a particular kind is what is significant when considering redundancy. The fact that work is constant or even increasing is irrelevant. If fewer employees are needed to do work of a particular kind, there is a redundancy situation. A redundancy situation will therefore arise where an employer reorganises and redistributes the work so that it can be done by fewer employees. There is also no requirement for an employer to show an economic justification for the decision to make redundancies

94. Where the employer has shown a potentially fair reason for the dismissal, section 98(4) ERA states that the determination of the question whether the dismissal was fair or unfair depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and must be determined in accordance with the equity and substantial merits of the case.

95. In Williams v Compair Maxam Ltd [1982] ICR 156, the Employment Appeal Tribunal laid down matters which a reasonable employer might be expected to consider in making redundancy dismissals:

95.1. Whether the selection criteria were objectively chosen and fairly applied;

95.2. Whether employees were given as much warning as possible and consulted about the redundancy;

95.3. Whether, if there was a union, the union's view was sought;

95.4. Whether any alternative work was available.

96. However, when determining the employer's reasonableness, the Tribunal should not impose its own standards and decide whether the employer should have behaved differently. Instead, the question is whether the decision of the employer to dismiss lay within the range of conduct which a reasonable employer could have adopted. The Tribunal should also keep in mind that the matters outlined in Compair Maxam are not a strict checklist and that a failure of the employer to act in accordance with one or more of these principles does not necessarily lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

97. Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. Employers need only show that they have applied their minds to the problem and acted from genuine motives. Provided the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it. Where the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, they believe was available and give evidence to the effect that he would have taken such a job as this is something that is within their primary knowledge (Virgin Media Ltd v Seddington and Eland [2009] UKEAT/539/08).

Conclusion

98. In reaching our conclusions we have considered carefully the evidence before us, the legal principles set out above, and the written and oral submissions made by the parties. The following conclusions are made unanimously.

99. For both the automatic unfair dismissal and detriment claims, we need to consider whether the claimant made a protected disclosure. The claimant made a disclosure in very general terms in an informal setting about the piecework pay system, and there was no real specificity about the matters he was raising. It is therefore not possible to clearly identify the legal obligation or health & safety matter relied upon by the claimant in raising his concerns about the piecework system, which could lead inspectors to cut corners. There was no mention of quality problems arising in the parts from shortened testing times, nor any refence to defrauding customers (as the claimant claimed, but we found not to have been stated at the time).

100. On the basis of our findings of fact and from the authorities referred to above, we do not consider that the claimant's concerns over the piecework pay system, gave anywhere near sufficient detail to satisfy section 43B ERA, in that it did not tend to show that health & safety was likely to be endangered and/or that a legal obligation was not being complied with.

101. In our view, there was insufficient factual content tending to show one of the matters in subsection 43B(1) of the ERA in the allegation made by the claimant, for this to be a qualifying disclosure.

102. We accept that had we found there to be a qualifying disclosure, then it would be a protected disclosure as it had been made to his employer and the claimant believed it to be in the public interest, which was a reasonable belief to hold.

103. Therefore, as we find that there has been no public interest disclosure, the claimant's claims for detriment on the ground of having made such a disclosure, and automatic unfair dismissal have to fail.

104. However, for completeness, even had we found that there was a protected disclosure, the claim for detriment would still fail, since we find that the reason for the disciplinary investigation was the claimant's conduct as evidenced by the email from Kevin Lock.

105. No disciplinary action was taken against the claimant following the investigation, and whilst we accept that a disciplinary investigation is still a detriment, we do not consider that

there was any causal link between the alleged protected disclosure to Mr Danger and the disciplinary investigation undertaken by Mr Harrison and Mr Neil Cook.

106. We are satisfied that it was correct for the claimant to have no formal disciplinary action taken against him for conduct which was also being done by others within the department, and which should have been raised with him prior to the disciplinary investigation. We accept that the claimant was told that no action would be taken, and this was something that the claimant himself referred to in the appeal hearing. However, it is not best practice for no outcome letter to have been sent.

107. As far as the claim for detriment for forcing the claimant to work nights on 24 April 2020 is concerned, we do not find that the claimant was forced to work nights, as has been alleged. We accept the evidence that the claimant requested to work nights initially and only afterwards raised concerns about making sure others did their share of night shift work.

108. Finally, we find that the reason the claimant was initially refused the right to be accompanied by a trade union representative to the individual redundancy consultation meeting, was that this was the respondent's usual practice. We do not accept that this was linked in any way to any alleged protected disclosure. The respondent did not allow other employees to be accompanied by their trade union representative in accordance with their usual policy, and their failure to allow the claimant initially to be accompanied was to do with this and not any disclosure.

109. Turning to the automatic unfair dismissal complaint. Even had we found there to have been a protected disclosure, we find that the genuine reason for the claimant's dismissal was his redundancy. It was clear that the respondent was going through major reduction in work/ orders as a result of the pandemic, and there was clearly a need to reduce staff within the claimant's team, and across its business.

110. We do not consider that the reason or principal reason for the claimant's dismissal was the fact that he had made protected disclosures.

111. Mr Danger was already in the process of endeavouring to change the piecework pay system, and it was clear that this was going to be done in the foreseeable future. He had, in fact, had this on his radar since earlier in 2018, as evidence within the bundle showed. We do not consider that the claimant's complaint about the piecework pay system had any bearing on his dismissal.

112. Finally, turning to the claimant's claim for ordinary unfair dismissal, we have to consider whether the respondent has shown a potentially fair reason for dismissal. We find that it did, and that the reason for the claimant's dismissal was redundancy, as provided by section 98(2)(c) ERA. The dismissal fell squarely within the definition of redundancy contained within section 139 ERA, and we find that to be the true reason for the claimant's dismissal.

113. We then must consider whether the respondent acted reasonably in accordance with section 98(4) ERA in treating it as a sufficient reason for dismissing the claimant.

114. We consider that the respondent did adequately inform and consult on the proposed redundancies, initially with elected employee representatives. We accept that, in addition, there were 3 individual consultation meetings, based around a previously issued pack. We understand that the first one appeared to do little more than read a script and provide a copy of the claimant's scores. The claimant had all 3 meetings, and there was evidence of collective consultation in addition to this.

115. We accept that all of the inspectors within the claimant's team were placed in the pool for selection and that they were all scored (other than the supervisors).

116. We considered that the selection matrix is within the range of reasonable selection criteria open to an employer in a redundancy situation. We considered that it reflected the requirements of the business now and in the future. The majority of the scoring matrix was objective, and whilst there were some subjective elements, there was objective criteria to assist in the scoring process. It is not for us to draw up what we consider to be an appropriate scoring matrix, but instead have to consider whether the respondent took a reasonable approach to the

selection pools and the scoring of all individuals within the pool, which, on the whole, we accept that it did.

117. The scoring by the claimant's son in law, whilst not ideal, did not, in our view, affect the fairness of the dismissal. He was the only supervisor within the department at that time and scored with the quality person (Mr Ward) and Mr Tomlinson (the laboratory manager). We consider that Mr Tomlinson's comments in the consultation meeting, supported his scoring of the claimant. We consider that the claimant was clearly good at his particular role of inspecting, as is reflected by the scores. The claimant did not suggest that he could work in other areas and we considered that there was some rationale provided for the scoring given to him. We also note that Mr Ward, who was also involved with the scoring and agreed with it, was not objected to by the claimant. Additionally, the employees who the claimant considered could have scored him also raised concerns about his teamworking, when questioned by Mr Oliver Cook as part of the appeal process.

118. We do not consider that the failure to provide training to the claimant, which he mentioned to Ms Hawkins in order to get paid more, affected the fairness of the claimant's dismissal. We accept the respondent's evidence that the training was not needed, and that the department was busy at the time of his request. In any event, this training would not have, in our view, affected the scoring such as to save the claimant from selection. Therefore, whilst it is unfortunate that the claimant was not provided with additional training, we do not consider this renders the dismissal unfair.

119. We, therefore, consider that the respondent's approach to the redundancy process, whilst not perfect, was within the range of reasonable approaches open to an employer in these circumstances.

120. There is reference in the bundle to alternative employment in the letters to the claimant, and no allegations were raised concerning any failure by the respondent to consider

this. We accept that there may have been limited opportunities due to redundancies being made across the respondent's business.

121. We therefore consider that the employer acted reasonably in dismissing the claimant for redundancy in these circumstances. Therefore, the unfair dismissal claim also fails and all claims are dismissed.

Employment Judge Welch
Date: 3 October 2022