EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR S IMAM	**AND**	**TRUDELL MEDICAL UK LTD (R1)** **MATTHEW LENNOX (R2)** **MARWA ABDULHAMID (R3)** **ANDREW VARGHESE (R4)** **SHARMAN CROCKETT (R5)** **CESAR LOPEZ MORENO (R6)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL **ON: 5TH / 6TH / 7TH / 8TH / 9TH / 12TH / 13TH / 14TH / 15TH SEPTEMBER 2022**

EMPLOYMENT JUDGE MR P CADNEY **MEMBERS: MR K GHOTBI-RAVANDI**

APPEARANCES:-

FOR THE CLAIMANT:- **MR R JOHNS (COUNSEL)**

FOR THE RESPONDENT:- **MR J WYNNE (COUNSEL)**

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claimant's claims against each of the respondents that he suffered detriments following the making of protected disclosures contrary to s47B Employment Rights Act 1996 are not well founded and are dismissed.

2. The claimant's claim against the first respondent that he was automatically unfairly dismissed pursuant to s103A Employments Right Act is not well founded and is dismissed.

3. The claimant's claim against the first respondent that he was unfairly dismissed is not well founded and is dismissed.

Reasons

1. By these claims the claimant brings claims of unfair dismissal, both on the basis that his dismissal was automatically unfair pursuant to s103A Employment Rights Act 1996, or on the basis of "ordinary" unfair dismissal pursuant to s98(4) ERA1996; and claims of suffering detriments for having made public interest disclosures.

2. Tribunal Composition – The tribunal would ordinarily have sat as a three person panel. Unfortunately there were no members of the employer panel available to sit, and prior to the hearing both parties agreed in writing for the hearing to proceed with the only the EJ and Mr Ghotbi-Ravandi (employee panel). The tribunal is grateful to both parties for their agreement which has allowed the hearing to proceed.

3. The tribunal has heard evidence from the claimant. He also obtained a witness order to secure the attendance of Mr Darush Attar-Zadeh, who declined to attend on the basis that he had not received form N20 and was therefore not obliged to attend (in which he is incorrect as form N20 is the form of witness summons used in the civil courts not the employment tribunal) and declined to attend voluntarily. The claimant had not obtained a witness statement from him, and at one point suggested that he might be called and an application made to declare him a hostile witness in the event that the evidence he gave did not support the claimant; however the claimant did not take any further steps to secure his attendance, and did not pursue the application further.

4. Each of the individual respondents gave evidence and the tribunal heard further evidence from Ms Debbie Uniac, Ms Kirsty Jones and Dr Sandeep Kaul.

5. The respondent (TMUK) is the UK subsidiary of Trudell Medical International a Canadian corporation (TMI) which designs, manufactures, and supplies respiratory medical devices. The claimant was employed by the first respondent from the 10th April 2017 until his dismissal on the 3rd December 2019. He was employed as one of six Territory Sales Specialists, covering the South East of England. Mr Lennox, the second respondent, was the National Sales Manager and was the line manager for all six Territory Sales Specialists. Mr Cesar Lopez Moreno was the Global Director of Sales and the line manager of Mr Lennox. Mr Andrew Varghese is Vice President and General Manager of TMI. Ms Marwa Abdulhamid and Ms Sharman Crockett were both employed by Trudell Medical Limited (TML) a separate affiliate company of TMI based in Ontario Canada.

6. At the time with which we are concerned the respondent sold a product Aerochamber Plus (AP), and was launching a product upgrade Aerochamber Plus Flow Vu (APFV).

Summary

7. As is set out in greater detail below the claimant's case in summary is that he made a number of protected disclosures, disclosing that Mr Lennox had attempted to bribe a representative of Barnet NHS Trust CCG (BCCG), Mr Darush Attar-Zadeh, at a meeting on the 12th of January 2018, and had subsequently paid the bribe offered, albeit not personally to Mr Attar-Zadeh, as Mr Attar-Zadeh had not accepted the offer of a payment into his personal bank account but did accept the offer of payment apparently as a contribution towards education/ training of £2500. The claimant contends that this was a disguised discount on the cost of an upgrade, and amounts to a bribe within the meaning of the Bribery Act 2010, and/or the first respondent's internal anti-bribery policies. Thereafter he was the subject of a campaign to force him from the company, primarily by Mr Lennox, which ultimately led to his dismissal in December 2019.

8. The respondent contends, in essence, that the allegations summarised above are a retrospective invention only raised a year after the transaction concerned, which was itself entirely legitimate, in order to attempt to avoid the claimant's dismissal for misconduct.

Bribery

9. At the time with which we are concerned the respondent had an Anti-Bribery and Corruption policy. Paragraph 4.1 defines a bribe as "… *where someone promises, offers, gives, asks for or receives a gift, a payment or some other benefit or anything of value, whether financial or not, in order to obtain or retain an improper advantage, or to obtain a contractual, regulatory, financial or other advantage, or to get someone to improperly perform a role or to influence them in their decision making process*.". At paragraph 5.2 it sets out that the Bribery Act 2010 criminalises acts of bribery with the consequence that both the company and the individual can be prosecuted for the offence. Paragraph 6 gives guidance as to acceptable and unacceptable behaviour. Paragraph 6.1 provides that "..*Company employees will not provide gifts, hospitality or entertainment either directly or through third parties to anyone in order to obtain or retain any improper business advantage; influence a business decision improperly; manipulate the judgement of the recipient; or create a sense of obligation to treat the company* favourably". Paragraph 6.4 provides that the provision of "…*grants, sponsorship or donations must not be used as an inducement to prescribe the company products nor as an attempt to influence the outcome of business activity*".

10. The respondents' witnesses, in particular Mr Lennox and Ms Jones, contend that it is however common practice for the respondent, as with other companies, to sponsor or contribute to the cost of training / education of CCGs and other bodies. Ms Jones evidence was that this was perfectly acceptable but that it had to be kept separate

from and could not be linked with, or made dependent upon the sale of the company's products. This is supported by number of internal emails of BCCG itself. By way of example on the 15th December 2017 Mr Attar-Zadeh in response to an internal e-mail asking whether CCG monies could be made available for a Barnet respiratory event replied, " *I've never asked the CCG for funds towards training. I usually get the training events sponsored, or do some in my CCG hours. Will ask though for a contingency and get back to you. I'm sure the sponsorships will come through. By the way we have another potential sponsor to approach* ..", and he gave the name of the respondent. Similarly the emails from Mr Daff (see below) are entirely open as to the acceptance of donations which will be used to defray the costs of future education /training events. This appears to confirm the respondents' understanding that sponsorship of training or educational events is regarded as acceptable, and is not in and of itself a breach of the policies set out above.

11. The claimant does not challenge this in principle, but asserts that in this case the payment was not a genuine contribution to the cost of training but was a bribe to secure sales.

Evidence / Credibility

12. As is set out in greater detail below there are innumerable disputes of fact between the claimant and each of the respondents and the respondents' witnesses. The claimant has made many separate allegations against them, and in summary contends that to greater or lesser extent most are lying in some aspects of their evidence or as to the underlying events. In respect of most of these disputes there is little or no contemporaneous evidence against which to judge them. However one of our fundamental tasks in this case, given the disputes of fact is to determine whose evidence we prefer on the balance of probabilities. Each party submits that we should prefer its evidence.

13. Having heard all of the respondent's and their witnesses we have concluded that they gave evidence carefully, thoughtfully and apparently honestly. There was certainly nothing about their evidence which would in and of itself cause us to doubt its accuracy.

14. There are a number of assertions made by the claimant which in our view are extremely improbable and are certainly not supported by any evidence, for example his assertion thar Ms Jones and Mr Varghese knew in advance that Mr Lennox planned to bribe Mr Attar-Zadeh; and it is unquestionably true in our judgment that the claimant is prepared to make serious allegations on the basis of little or no evidence.

15. In the final analysis we have concluded that we are not persuaded that the claimant's evidence is accurate or reliable. In support of this we do not propose to deal with every aspect of the evidence. The example given below is sufficient to explain our reasoning.

16. One of the witnesses is Dr Kaul, a lead respiratory consultant at Harefield Hospital. In his witness statement the claimant makes the following assertions about conversations with Dr Kaul:

i) Para 74 – "On 19th of April 2019 Dr Sunny Kaul was unusually (not like Sunny at all) asking a lot of probing question and trying to find out what was going on between Matt and me (not like Sunny at all). (Most likely at the request of Andrew Varghese). I tried to fog Sunny off from the probing by telling Sunny snippets of the Brighton issue where Matt was going to give a three years discount (which was not allowed). He continued to probe and when I told him about the bribery Sunny said something strange "That's the one". After we discussed the details of the bribery and that Matt wanted me to get the money back. Sunny said "Matt is a thief, is he mad, he's trying to turn black money that was turned white back into black money." (Our underlining)

ii) Para 76 - At this meeting held on 28th April 2019 Dr Sunny Kaul mentioned that he had spoken to Andrew Varghese and told him everything that was going on with me. Sunny said that Andrew said it's time to take out Matt, whilst the rod is hot. I was completely shocked by what Sunny had just said and I responded by saying, "He (Matt) has a daughter the same age as my daughter, what the hell is Andrew talking about, I don't want that." Sunny then goes on and says "I told you that you should phone Andrew and speak him speak to him directly," Sunny then went on to say, "That if he was the CEO and you didn't tell me what was going on, I would be very anger if I was not told about something like (i.e. the bribery) speak to him." I told Sunny "I think it is best I call the legal department in Canada and report it to them, I will call them after they finish the AGM conference."

17. Dr Kaul denies ever having had any such conversations with Mr Varghese, or of relating any such conversations to the claimant. In his witness statement he denies knowing who Mr Lennox was; denies any such conversations with Mr Varghese; denies using the words attributed to him saying that it didn't sound like him, and concludes saying that he would have remembered if the claimant had ever mentioned bribery and that "It simply didn't happen".

18. Equally Mr Varghese denies any such conversations. In our judgment the allegation that Mr Varghese, a senior employee of the respondent's Canadian parent company should have used Dr Kaul, an NHS consultant, to probe the claimant about the payment of a bribe to another NHS Trust of which Mr Varghese was apparently already aware, is a bizarrely improbable one on its face. Equally having heard the evidence of Dr Kaul we share his view that the form of expression ascribed to him (in particular that underlined above) does not sound like him, and we are sceptical that he would have said any such thing.

19. When the claimant was cross examined and it was put to him that Dr Kaul denied ever having had any such conversations, he did not shrink from asserting that Dr Kaul was lying; and he revealed that he had made a covert recording of a telephone call with Dr Kaul which until that point had not been disclosed to the respondent.

Following the conclusion of claimant's cross examination the audio recording of the telephone call and a transcript was disclosed. Despite the fact that in giving his evidence the claimant gave the impression that he was extremely anxious to be allowed to rely on the recording, he did not apply for it to be admitted in evidence. However the respondent did. Without repeating all of the contents of the telephone call the transcript is entirely consistent with Dr Kaul's evidence. When the claimant asks if he would be willing to be a witness "..*they just need to know when you told Andrew about the bribery. I think it was April March time, wasn't it* " Dr Kaul replies "*Me*" (which it is clear from the audio is said in a tone between surprise and bewilderment). He goes on to say that he had not had any conversations about bribery with Mr Varghese, and at the conclusion of the call the claimant says that he will revert to the police and inform them that that Dr Kaul cannot assist in giving any information.

20. It is notable in our view, not only that the conversation is entirely consistent with Dr Kaul's evidence, but also that at no point does the claimant make any mention of the conversations he allegedly had personally with Dr Kaul. The fact that there is a covert recording of Dr Kaul which is entirely consistent with his witness statement and his oral evidence is clearly highly supportive of the assertion but he is telling the truth. If he is telling the truth it follows automatically that the claimant is not, as in our view the claimant's detailed assertions as to the conversations he had with Dr Kaul are not explicable as mistaken, or as some form of mis-recollection. If we accept the evidence of Dr Kaul the inevitable conclusion is that the conversations allegedly had with him never took place and have been invented by the claimant.

21. We do accept the evidence of Dr Kaul, and it follows that where there was a contradiction between his evidence and the claimant that we reject the claimant's account. It does not follow automatically that having rejected the claimants account of his conversations with Dr Kaul that all of his evidence must necessarily be rejected. It is possible that the claimant has invented evidence to support an account which is fundamentally accurate. However as we have reached the conclusion that at least part of his evidence must simply have been invented it follows equally automatically that in our view we must be extremely cautious about accepting evidence from him unless it is supported by contemporaneous documentation.

Facts

Public Interest Disclosures

22. We will deal first with the facts in relation to the four alleged public interest disclosures.

First Disclosure

Background

23. On 13th November 2017 the claimant attended a meeting with Mr Darush Attar-Zadeh, whom the claimant describes as the respiratory lead pharmacist for Barnet CCG. At that time BCCG was using the AP product and the respondent was seeking to persuade BCCG of the benefits of upgrading to APFV. On the same day Mr Attar-Zadeh e-mailed the claimant indicating his view that APFV had important advantages over AP, and asking whether it would be possible to offer BCCG a discount on the new device in the form of a rebate," *Ideally if it comes in 10-20p less expensive than the Aerochamber Plus then we would be keen to pursue and involve our nearly 200 advanced inhaler trained specialists across the CCG*". The claimant then emailed, amongst others, Mr Lennox asking whether offering a discount would be something the respondent could do.

24. It is not entirely clear why, but the respondent did not agree to offer BCCG a discount on the upgrade to APFV. In evidence at Mr Lennox stated that AAH, its suppliers, were not happy with offering discounts to CCGs. Whether for this reason or some other, a decision had clearly been made at some point prior to the meeting on the 12th January 2018 that a discount would not be offered.

25. The claimant and Mr Lennox met Mr Attar-Zadeh on the 12th January 2018 in the course of which a presentation was made to him. The claimant's evidence that is that Mr Lennox had done an assessment of the cost of an upgrading with the annual cost being some £2,500 pounds, and that Mr Lennox offered to pay Mr Attar-Zadeh £2,500 into his personal account.

26. Mr Lennox disputes this account. He contends that the meeting was a perfectly ordinary presentation at which he sought to persuade Mr Attar-Zadeh of the benefits of upgrading. The claimant is incorrect in asserting that the annual cost of doing so would be some £2,500, and in particular incorrect in asserting that Mr Lennox offered to pay that amount into Mr Attar-Zadeh's at personal account. He has never and would never make any such offer, which would in any event be pointless given the fact that it would not be Mr Attar-Zadeh's decision personally to upgrade in any event.

27. The resolution of this factual issue is at the heart of this case. Whilst in a claim for public interest disclosure the tribunal is not required to conclude that the information disclosed was true or correct, merely that the individual had a reasonable belief that the information disclosed tended to show a relevant breach; in this case if the claimant could not reasonably have concluded from what Mr Lennox said to Mr Attar-Zadeh that a bribe had been offered then no subsequent disclosure of that allegation could have been made in the reasonable belief of the claimant.

28. We have no specific evidence as to events after the 12th January 2018 before the 1st March 2018. On the 1st March Mr Attar-Zadeh emailed Mr Colin Daff of BCCG copying in the claimant saying, "*Hi Saeed, can you send Colin details of where to send the invoice towards training.*" The claimant replied asking if it could be forwarded to him and he would then check and forward it to finance in Canada. On 2nd March Mr Daff emailed asking for details, and the claimant replied setting out

the respondents details for the invoice, and later the same day confirming that it should be an invoice for £2,500. Mr Daff replied asking whether it was possible for it to be invoiced in April so that the money would not need to be spent in that financial year and asking if the money could go into his staffing budget from where it would be spent. The claimant replied saying that was absolutely fine, which resulted in Mr Sandip Patel the Finance Manager for BCCG replying that he had sent a calendar invitation as a reminder for him to raise the invoice.

29. On 4th June 2018 the claimant copied the invoice which he had received to Mr Lennox. On the 6th of June Mr Lennox sent a copy to TMUK asking for the invoice to be processed for payment, saying the invoice relates to training support provided to a specific Healthcare Trust, the invoice can be aligned to June 2018. The invoice itself is dated at the 25th May of 2018 and is for £2,500, expressed to be for training FAO Saeed Imam.

30. As set out above the claimant's case is that following the initial attempt to bribe Mr Attar-Zadeh, that the amount that was actually paid to Mr Daff was a disguised discount and was in fact a bribe to induce BCCG to purchase and commit to the more expensive APFV product. The respondent contends that as the e-mail chains show that this was an entirely above board and ordinary transaction in which the respondent made a perfectly lawful and legitimate contribution to the future training costs of BCCG.

Protected Disclosure

31. The first protected disclosure was allegedly made on 12th January 2018 to Kirsty Jones. The respondent does not accept that any such disclosure was made (see below). Even if a disclosure was made they contend that the claimant cannot have had any reasonable belief at that the disclosure was a disclosure of information of a bribe or attempted bribe.

32. The respondent contends that, as the sequence of events set out above shows, that the claimant was an integral part of the events which led to the payment of £2,500. They contend that his involvement is entirely inconsistent with any belief at the time that the payment was in anyway unlawful or in breach of the respondent's internal policy. They contend that if he had held any such belief it is implausible, to say the least, that he would have involved himself in the payment to the extent set out above; and would not have disclosed to anyone his belief that a bribe was being paid, or at least queried with Mr Lennox whether the payment was appropriate. If he had already made a disclosure of an attempted bribe to Ms Jones it is equally inconceivable that he would not have informed her that the bribe was being paid. Moreover they point to the fact that there is no evidence that, and the claimant does not assert that, at any stage between January and June 2018 that BCCG had made any commitment to switch to the APFV product. There is therefore demonstrably no link between the payment towards training costs and any contractual commitment on the part of BCCG.

33. The claimant relies on a covert recording of a conversation between himself and Mr Lennox from the 16th March 2018. The particular passage relied on by the claimant involves the following exchange:

Claimant: - I was on the phone with Darush last night. It's nearly done now. They're going to be sending over the invoice. I said send over the invoice once it's done you know.

Mr Lennox - What was the invoice for?

Claimant - The one that we discussed you know with Darush.

Mr Lennox - For the education?

Claimant - Yeah so yeah yeah, for you know the education, the one that you presented to him at the meeting.

Mr Lennox - Okay right so that everyone understands that he's got to, we've got to start seeing some sales before we're going to give him a big load of cash for no reason right. (Our underlining)

Claimant - Matt I've held it off until the script switch is done. So he's going to, what they're going to do at the moment and I spoke to some of the directors, is that they are holding it back until it's actually done itself. So they'll send over the script switch as well and then the invoice together with it.(Our underlining)

Mr Lennox OK and is he relating the invoice to support?

Claimant - No no, it's like you said isn't it we can't give it to him for scripts but we're going to give it to him for training isn't it.

Mr Lennox – Yes, yes so it'll say something like that on the invoice. It's really important it does right.

Claimant – yes.

34. The claimant essentially relies on the passage from Mr Lennox underlined above as demonstrating that Mr Lennox was linking the payment of the £2,500 to the "script switch", and that he therefore necessarily understood that it was a bribe. The respondent relies on all the other parts of the conversation as demonstrating that Mr Lennox was anxious to ensure that it was in fact correctly described. In addition they point to the fact that if Mr Lennox's understanding was that it was a bribe, that the passage of the claimant underlined above demonstrates that the claimant must have believed the same thing and had been personally negotiating with the directors of BCCG in order to facilitate the payment of a bribe. Put simply, either both understood it to be a bribe, or neither.

35. In addition the claimant relies on a further covert recording of Mr Attar-Zadeh. In the bundle index it is given a date of the 21st of March of 2021. If this is correct that would be significantly after the claimant had left the respondents employment. The document itself is not dated. The claimant relies specifically on passages where he is recorded as saying:

    Claimant: He completely shocked me when he said look we can't give you the rebate but we can why don't we put it in your account. I mean that's not right I'll be honest with you it's not right.

    Mr Attar Zadeh - yeah no it wasn't a clever idea in hindsight because even if the rebate was there it would have probably ended up in you know I could have pushed the guys just to say look these are the reasons why we should recommend it and blah blah blah..

    Later the claimant says:

    Claimant - What we can do is to give you the 2500 and put it into your account. When he said that I said mate you trying to put everyone into trouble or something do you know what I mean

    Mr Attar Zadeh - yeah

    Claimant - Because that's a bribery you know that in real terms he's trying to bribe you to do this scripts which I would have preferred that you just matched the costs.

    Mr Attar Zadeh -Yeah exactly, exactly..

36. One of the difficulties in assessing this is in knowing when the recording was made, and the absence of any evidence from Mr Attar Zadeh. If it was in fact in March 2021 after the claimant had been dismissed, and after both claims had been lodged it would appear on the face of it to be a covert attempt to obtain evidence from Mr Attar Zadeh supporting the claimant. It is telling that effectively the passages relied upon by the claimant as indicating that an attempt to bribe Mr Attar Zadeh had been made by Mr Lennox come at the prompting of the claimant.

37. In the consolidated claim form the claimant sets out at paragraph 12 an account of the meeting at which he makes the explicit allegation at that Mr Lennox offered to make a payment into Mr Attar-Zadeh's personal bank account. At paragraph 14 he asserts that he reported by phone to Miss Jones the events of the meeting earlier that day, and specifically that Mr Lennox had offered Mr Attar-Zadeh a bribe. Miss Jones thanked the claimant for informing her, and stated that she would take care of it. At paragraph 20 of his witness statement he simply states that during a telephone call he also reported the bribery incident. When asked in evidence what precisely he had said to Miss Jones about the meeting he said "*I said it went really well. Matt Lennox offered £2,500. She said thanks for letting me know I will take care of it*.".

38. The claimants account in evidence it is clearly different to that set out in the claim form. The oddest feature is his assertion that it had been a good meeting after which he stated that Mr Lennox had offered £2,500 pounds. Clearly that is not in and of itself a disclosure of or an explicit allegation of an attempt at bribery.

39. Our conclusions as to the dispute between the parties as to what was understood by Mr Lennox and the claimant at the time are as follows. In our view it is inconceivable that if on the 12th January 2018 the claimant had believed that he had witnessed an attempt to bribe Mr Attar-Zadeh which was sufficiently serious that he reported it to Ms Jones, that he would subsequently have involved himself in the payment of the bribe. His description of what he told Miss Jones ("It went really well"), and his subsequent involvement entirely openly in negotiating and securing the payment is in our judgement only explicable if he believed that the payment was permissible and entirely above board. These events demonstrably show, in our judgement, that the claimant himself must have believed at the time that the payment was entirely appropriate and legal; and that there was nothing in the events of March to June 2018 in relation the actual payment that constituted a bribe. We are not persuaded on the balance of probabilities that the evidence contained in the covert telephone recordings is sufficient to displace that conclusion.

40. Ms Jones recollection of the telephone call is very different. She entirely rejects any suggestion that the claimant had disclosed or expressed any concern that Mr Lennox had offered a bribe to Mr Attar Zadeh. Indeed her recollection is that Mr Imam's primary concern was that Mr Lennox was attempting to claim credit for any update entered into by BCCG from AP at to APFV.

41. Both for the general reasons as to credibility (see above) and for the specific reasons as to these allegations we prefer the evidence of Ms Jones, and do not find on the balance of probabilities that the claimant made any disclosure to her on 12th January 2018 that Mr Lennox had attempted to bribe Mr Attar Zadeh.

42. Moreover we accept Miss Jones evidence that she certainly did not perceive or understand the claimant to have made any disclosure of an attempt at bribery, and did not report any such disclosure to anyone else and in particular not to Mr Lennox.

<u>Disclosure 2</u>

43. The second alleged disclosure is a disclosure to Ms Crockett on 8th May 2019 . There is no dispute that the claimant called Ms Crockett on that day. Her note of the conversation, which the claimant accepted was broadly accurate, was that:

i) The claimant had been in contact with his union and Acas and that last year "attempt of bribery/coercion by someone within organisation. Witness union/HCP – threatened with job.

ii) Acas / lawyer advised did not need to follow co..procedures- could be dealt with differently;

iii) HCP witnessed it – recently recorded conversation with HCP- doesn't want to get HCP involved;

iv) Advised of complaint process- submit form – will fill out form

44. It is not in dispute that the claimant did not following that telephone call fill out any form or supply at that point any further information to Ms Crockett as she had requested.

Disclosure 3

45. The third disclosure was made to the police on the 26th May 2019. It is not clear precisely what was disclosed. The claimant has not called any evidence from the police and the only documentary evidence is a transcript of a voicemail from the 26th May 2019, clearly after the original call, saying that the officer was going to have to cancel the claimant's appointment "because the bribery happened in Heathrow I'm going to have to crime it as a fraud and because it's based on a fraudulent invoice then the Met will have to look into the bribery so I'll send that over to them". It goes on "you're going to have to take this up further with your company as well" and "I have to cancel that appointment with our offices but I will be sending to the Met who will then do their enquiries."

46. In his witness statement the claimant states that he informed the police about Mr Lennox's bribery and the threats he had received from Mr Lennox, although he does not give any further details of precisely what was disclosed. It is again notable that he was advised by the police to raise these allegations at that time with the respondent; and there is no suggestion that doing so would interfere with any police investigation.

Disclosure 4

47. On 27th May 2019 the claimant lodged a grievance with the respondent stating:

"*I wish to register a grievance against Matthew Lennox (National Sales Manager).*

The grievance is on the grounds of bullying, harassment, and unfavourable treatment due to my racial and religious background. The details of my grievance are as follows but not limited to:

I believe that on the 12th January 2018 Matthew Lennox committed an act of bribery and then subsequently threatened me on a number of occasions if I ever revealed this to anyone.

On a number of occasions Matthew Lennox has asked me to falsify or lie about information that would be provided to Head Office in Canada. Matthew Lennox has through various means conspired to remove me from the company and isolate me from other team members both in the UK and Canada.

I intend to go through all the issues when the grievance hearing investigation is held."

48. The claimant has not pursued any allegation of race or religious discrimination; and relies only on the contention contained in the grievance that Mr Lennox had committed an act of bribery.

Grievance Investigation

49. As set out above it is not in dispute that the claimant had not supplied any further detail of his allegations to Ms Crockett following the telephone call of the 8th May 2019. He had also not provided any further information prior to the grievance investigation. The grievance investigation was conducted by Ms Liz Jewer, an external HR consultant. The claimant contends that in the introduction to the investigation meeting Ms Jewer stated that she was not investigating the bribery allegation. In Ms Jewer's report she states "the investigation considered whether there was evidence of discrimination on the grounds of race and religion", which, as set out above, was the specific grievance alleged. In addition Ms Jewer records the claimant as saying that he declined to provide any information or evidence of the whistle blowing claim of bribery as the police were investigating and that to discuss them could jeopardise the police investigation; and he stated that he was under advice not to discuss them (although there is no evidence before us that any such advice was ever received, and it appears to contradict the advice set out at paragraph 46 above). In consequence no further details of the allegation were provided during the grievance investigation post.

50. There is no allegation in this case arising from the grievance investigation and we have not heard from Ms Jewer. For completeness sake the grievance was not upheld.

Bribery Investigation

51. The respondents subsequently instructed Ms Louise Chudleigh, a barrister in private practice, to investigate the allegation of bribery. Her report which is dated 28th February 2020 records that the claimant and his union representative failed to respond to invitations to assist with the investigation. Again no allegation arises out of this the investigation. However, for completeness sake Ms Chudleigh did not find any evidence of bribery but did recommend a number of learning points.

Disciplinary Allegations

52. On 23rd May 2019 the claimant was invited to a disciplinary hearing to be held on the 28th May 2019. The two broad allegations are that the claimant had failed to

comply with clause 4.1 of his contract of employment and had failed to meet the standards required by it in that he had:

i) Committ(ed) a number of driving offences whilst on work business and/or driving your company vehicle and/or being responsible for numerous incidents of damage to your company vehicle as detailed in the enclosed spreadsheet;

ii) Engaging in a number of acts of insubordination with respect to your supervisor Matt Lennox as summarised in the enclosed spreadsheet;

53. Attached to the letter were two spreadsheets setting out the basis of the allegations.

54. Mr Lennox's evidence is that from the end of 2017 he became increasingly concerned about the claimant's driving, in that he had by then received notices of intended prosecution related to speeding offences, two parking fines and two other penalty charge notices. Further notices of intended prosecution were received in March 2018 and a further penalty charge notice in relation to a bus lane contravention. His evidence is that by that point he was beginning to get seriously concerned that the claimant would be disqualified from driving which would prevent him from doing his job.

55. He also sets out details of complaints from Kirsty Jones and Amanda Bracey about communications they had received from claimant and states that from early May 2018 that it was becoming apparent that the claimant was choosing to distance himself from the rest of the team. He states that there was a noticeable deterioration of the claimant's behaviour from January 2019 and sets out a chronology of events from January 2019 which is not necessary to detail in this decision.

56. Mr Moreno's evidence that is that from the beginning of 2019 concerns were raised with him as to the claimant's conduct and behaviour. Mr Moreno was a participant in a telephone call between the claimant and Mr Lennox on the 28th March 2019 during which he observed that the claimant's tone was very disrespectful, that Mr Lennox asked for respect as a manager; and that the claimant talked about not recognising Mr Lennox's authority, leading Mr Moreno to stop the conversation. On 16th April 2019 Mr Moreno wrote to Ms Abdulhamid and Mr Varghese stating, "*I really think that the situation with Saeed has gone to a level that is not acceptable from any point of view. We don't need this kind of profiles in our teams, and although he is good in business perspective he is not the right person for a critical area like London and he is not the right person to represent our company. Now is the time to move the legal details to leave him out from TMUK . It is very obvious that he is not living TMI values and this is something that I am not going to accept as a professional and I'm not going to accept as an individual.*"

57. Ms Abdulhamid's evidence is that during March and April 2019 she received a number of emails from Mr Lennox and Mr Moreno detailing issues with the claimant's behaviour, and that on the 29th April 2019 she was sent by Mr Lennox a list of documents and key issues relating to his behaviour, including incidents of

insubordination and driving violations. She discussed the allegations with Mr Varghese, and it was determined that there was no choice but to invite the claimant to a disciplinary hearing. In particular insubordination is a serious conduct issue which could result in immediate termination, and there were a number examples of this from Mr Lennox that Mr Moreno and from her own first-hand account of the claimant being insubordinate. In addition the numerous driving incidents were regarded as extremely serious. In consequence she sent him the disciplinary invitation letter referred to above.

58. The claimant does not accept these allegations and contends that the insubordination allegations have been invented by Mr Lennox and Mr Moreno. For the reasons given above we prefer the evidence of Mr Lennox and Moreno and accept that the factual allegations summarised above are accurate.

59. The original disciplinary meeting was set for the 28th May 2019, however there was difficulty with arranging a time which was convenient for the claimant his union representative and Ms Abdulhamid. As set out above on the 27th May 2019 the claimant lodged his grievance. The claimant had been on sickness absence from the 24th May 2019 and it was determined that the his disciplinary hearing would be postponed until he had recovered and the grievance had been investigated.

60. Following the claimant's return to work, on the 6th of November 2019 the claimant was sent a letter recommencing the disciplinary process. The meeting was rescheduled on a number of occasions, and finally for the 19th November 2019. On the 18th November 2019 the claimant emailed to inform Ms Abdulhamid that his union representative would not be able to attend the meeting and requesting that it be postponed. Ms Abdulhamid determined that the meeting would go ahead in his absence and the decision would be made on the evidence available, and that the claimant could submit representations in writing. The claimant did submit representations in writing. He made the following submissions:

    i) That he had received the spreadsheets setting out the allegations but no further information in the form of emails or witness statements;

    ii) The majority of the driving offenses occurred in a short period of time and some related to his wife;

    iii) Some of the performance issues are true, but some are part true part lies, and some are "outright lies";

    iv) Collectively the allegations are an attempt to get him dismissed because of false allegations made by Mr Lennox and Mr Moreno.

    v) He made further detailed refutations of some of the allegations.

61. The meeting proceeded on 19th November 2019 in his absence. The conclusion was sent to the claimant on the 3rd December 2019. Five of the six allegations were

upheld and Ms Abdulhamid determined that the claimant's employment should be terminated with immediate effect. The letter sets out in considerable detail the basis of Ms Abdulhamid's conclusions which are in summary :

i) In respect of the driving matters she concluded whilst it was not possible to establish the precise facts in relation to each incident, the number and frequency of the offences indicated that he was failing to demonstrate the level of care the respondent expected;

ii) She did not accept that the allegations of insubordination had been fabricated;

iii) That he had failed to return his car and did not accept his explanation that he had never been asked to do so;

iv) That she did not accept that there was a reasonable excuse for failure to attend six mandatory training sessions and concluded that he chose not to attend without any good reason;

v) In addition she concluded that given his inability to accept that he had done anything wrong that it would be impossible to continue with his role;

vi) She concluded that his actions amounted to gross misconduct and dismissed him with immediate effect.

62. The claimant appealed and the appeal was heard by Ms Uniac (TML- Director of People and Culture). It was to be heard in person on 14th January 2020. Ms Uniac asked for any documents to be provided prior to the hearing. Initially the claimant declined, but subsequently confirmed that the documents he relied on were those supplied for the disciplinary hearing. In the light of that the appeal hearing was retained for 14th January 2020 but converted to a Skype hearing. The claimant and his trade union representative Mags Wacha asked for an in person hearing, and there followed a number of email exchanges in which Ms Wacha insisted on an in person hearing. Ms Uniac decided in the circumstances that as the claimant was declining to attend a Skype hearing the appeal would proceed and subsequently rejected his appeal in writing.

63. As with Ms Abdulhamid the appeal outcome letter sets out in detail the reasoning which includes:

i) That he had been given a reasonable opportunity to attend the disciplinary hearing;

ii) That no evidence was provided to prove that the allegations made by Mr Lennox and Mr Moreno was false;

iii) That the evidence did not support the allegation that Mr Lennox had re-arranged and cancelled calls or meetings so that the claimant could not attend them;

iv) That the respondent acted in good faith and in a timely manner to obtain details of the bribery allegation;

v) That the respondent had provided him with the opportunity to raise his grievance of 19th November 2018.

vi) That there was no evidence to disprove the allegations of Mr Moreno or Mr Lennox;

vii) That he failed to comply with the terms of his employment contract in failing to return company property.

viii) That there was no evidence to support the allegation of "rude and disgusting behaviour" against Mr Lennox;

ix) Whilst there may have been some mitigation in relation to some of the car issues there was sufficient evidence to conclude that he had not complied with the company's policies.

x) That there was no evidence to support the allegation that Ms Abdulhamid should not have been involved in the disciplinary meeting.

Conclusions

Protected Disclosures

64. The claimant contends that he has made four protected disclosures as set out above.

65. The first question is whether the Claimant was an individual (employee or worker of the respondent) who is capable of being protected under the PIDA provisions. This is not in dispute and it is not therefore necessary to set out the law.

66. The second is whether there was a qualifying disclosure within the meaning of S.43B ERA. This requires a) a disclosure of information that b) in the reasonable belief of the worker making it is c) in the public interest and d) tends to show that one or more of the six relevant failures has occurred or is likely to occur. The relevant failures relied on in relation to each disclosure in this case are the commission of a criminal offence (s43B (1)(a) ERA 1996; a breach of a legal obligation (s43B (1)(b) ERA 1996); and/or a disclosure of information tending to show that any of these things had been was being or was likely to be deliberately concealed.

67. The following is a summary of the relevant law::

Qualifying / Protected Disclosure

68. Firstly there must be a disclosure of information (*Cavendish Munro Professional Risks Management Ltd v Geguld [2010] IRLR 38; Goode v Marks and Spencer plc UKEAT/0442/09*). The question of whether here has been a disclosure of "information" will always be fact-sensitive and tribunals should not be too "easily seduced" to discern distinctions between information and allegations (*Kilraine v London Borough of Wandsworth [2018]*): *"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 be 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 it nothing to the point"* – per Langstaff J, para 30, as upheld by the Court of Appeal.

Reasonable Belief

69. It is not necessary for a Claimant to show that his belief that the information tended to show one of the relevant categories of failure was, in fact, correct (*Darnton v University of Surrey [2003] IRLR 133)*. The key questions are (a) whether he held such a belief at all, and (b) whether such belief was reasonable. The genuineness of the alleged belief (ie whether the employee had such a belief at the relevant time), is a question of fact for the tribunal. The reasonableness of the belief is to be assessed on a subjective basis (it is the reasonable belief of *the worker* which is relevant), taking into account the characteristics of and any particular knowledge or experience the particular claimant may possess *(Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4).*

70. One or more of the six categories of failure, each set out in s.43B(1) ERA, must be established by a claimant seeking to rely on the PID provisions. A disclosure can be a qualifying disclosure even if the employer is already aware of the information (s.43L).

71. Where there are multiple disclosures, some care needs to be taken as to whether they may properly be aggregated and considered as forming a single rather than separate disclosures. In *Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540,* three emails were aggregated to form one disclosure, even though at least one of them would not have qualified in isolation. According to Slade J:*"An earlier communication can be read together with a later one as "embedded" in it, rendering the later communication a protected disclosure, even if taken on their own, they would not fall within s.43B(1)(d)……. Accordingly, two communications can, taken together, amount to a protected disclosure…..Whether they do so, is a question of fact."*

72. There are disputes in relation to some or all of the disclosures as to whether there was a disclosure of information and/or whether the claimant genuinely held, and if so

whether that belief was reasonable, any belief that the disclosure disclosed any breach or likely breach as set out above.

73. The respondent contends that none of the disclosures is a protected disclosure within the meaning s43B of the Employment Rights Act 1996. The central point in dispute is whether the claimant held any genuine belief in the matters alleged, as, if he did not, the belief cannot have been reasonable

Disclosure 1

74. For the reasons set out above we accept Ms Jones evidence that the claimant did not make any allegation of an attempt of bribery to her on 12th January 2018. This allegation must therefore fail factually.

Disclosure 2

75. As set out above there is no factual dispute as to what was said by the claimant to Ms Crockett on 8th May 2019. The respondent contends that there was insufficient ”information” to amount to a protected disclosure.

76. In our judgement the respondent’s submissions elide two questions, whether there was a disclosure of information, and whether the information was sufficient to allow the respondent to investigate. In relation to the second there was clearly not. In relation to the first in our judgement there is just sufficient for the disclosure to be a disclosure of information.

77. Of greater difficulty for the claimant is the question of whether he had a reasonable belief that the information disclosed tended to show a breach of one of the categories of section 43B, that of the commission of a criminal offence. For the reasons given above we have concluded that we do not accept that the claimant considered that the payment of £2,500 to BCCG in June 2018 was anything other than a genuine payment for or towards training costs for the reasons set out above.

78. That raises the question of whether, if he did not believe at the time that the offer or the payment was or at least could be construed as a bribe, why by May 2019 had he drawn that conclusion. Put simply in relation to the payment itself nothing had changed following it, and there was no new information available to him that he did not already know. The respondent contends that the reason for the disclosure is that the claimant was fully aware that his employment was at risk and that these allegations were made to distract, confuse and muddy the water. In our judgement whether that is correct or incorrect there was no new information available to the claimant as at May 2019 which had not been available to him in the early part of 2018; and there was no basis for the conclusion that the payment constituted a bribe. It follows that we are not satisfied that the claimant had a genuine or reasonable belief that the information disclosed tended to show the breach alleged.

Disclosures 3 and 4.

79. In respect of disclosures three and four they fail for the same reason as at that in respect of disclosure 2 above. Even if they can be considered disclosures of information, which in our judgement at least disclosure 4 can, be they suffer precisely the same difficulty as to how the claimant reached a reasonable belief that that the information disclosed tended to show the breach alleged.

80. In addition in relation to disclosure 3 there are further issues raised by the respondent which in the light of our conclusions as to reasonable belief it is not necessary to address.

Detriment

81. The claimant relies on twenty eight separate detriments. As we have concluded that he has not make any protected disclosures it follows automatically that these must fail.

82. However for completeness sake the claims of automatic and "ordinary "unfair dismissal lie against the first respondent. The detriment claims are made against the individual respondents.

83. In summary, the claims against Mr Lennox and Mr Moreno are that they falsified disciplinary allegations as a result of the disclosures in order to secure his dismissal. In respect of the other individual respondents his case is that they were all aware of the disclosures and did nothing to investigate them.

84. However, in fairness to the respondents we should set out our factual findings, albeit briefly.

85. Mr Lennox (R2) – The majority of the detriment allegations are made against Mr Lennox (paras 21,23,24,32,34,36,37,40,42,45,46,51,53,55,60) are allegations prior to the disciplinary hearing, In our judgement Mr Lennox was a reliable and honest witness, and for the reasons set out below we have concluded that we accept the concerns expressed by Mr Lennox which formed the basis of the disciplinary allegations were entirely genuine; and that it follows we do not accept that the allegations were false.

86. Mr Moreno (R6) - The only specific detriment which mentions Mr Moreno is that on 16th May 2019 the claimant was informed by Mr Lennox that Mr Moreno was not authorising client meetings for the claimant. Whilst this is not factually in dispute we do not accept that it was in consequence of any allegation made by the claimant, whether amounting to a protected disclosure or not. Mr Moreno was also subject to the broader allegation that he falsified allegations against the claimant which we do not accept. Again for the reasons set out below in our judgment Mr Moreno was a

reliable and honest witness and his views as to the claimant's misconduct were held entirely genuinely.

87. Ms Abdulhamid (R3) – The allegations in the list of detriments against Ms Abdulhamid (not all of which were in any event put to her in cross-examination) are that from 14th January 2019 she kept a log of Mr Lennox's complaints against the claimant; that the claimant had made her aware of his complaints against Mr Lennox; and that she had determined the disciplinary allegations against him. Whilst all of these allegations are factually correct, we accept Ms Abdulhamid's evidence and would not have held that any were the consequence of him making any public interest disclosure.

88. Ms Crockett (R5) – There is in essence one allegation against Ms Crockett that she swept the claimant's bribery allegations under the carpet by failing to pursue him for further detail after the conversation on 8th May 2019 and her chasing email of 13th May 2019. We confess to being slightly mystified by the contention that the claimant's failure to supply further information, despite being specifically invited to do so, can be laid at Ms Crockett's door. As with the other witnesses we in any event accept Ms Crockett's evidence and would not have held that any of her actions constituted a detriment in any event.

89. Mr Varghese (R4) – As set out above the claimant's case is that Mr Varghese was aware that a bribe was to be paid to M Attar-Zadeh before it had been offered and was instrumental in securing the claimant's dismissal. The allegations against Mr Varghese are in our judgment a paradigm example of allegations for which there is simply no evidential basis. In any event we accept entirely Mr Varghese's evidence.

90. For all those reasons the claimant's claims against the individual respondents are dismissed.

Automatic Unfair Dismissal

91. It follows that as we have not held that any of the disclosures are protected disclosures that the claim for automatically unfair dismissal must fail in any event. However in the event that we may be wrong in those conclusions we have considered the claim for automatically unfair dismissal on the assumption that one or more is in fact a protected disclosure.

92. A dismissal will be automatically unfair if the reason the reason or principal reason for dismissal is a protected disclosure or disclosures. It is for the employer to show the reason for dismissal, and an evidential burden lies on the claimant to show that there is an issue as to the true reason which warrants investigation and is capable of establishing the automatically unfair reason. If the claimant does satisfy that evidential burden, the burden shifts back to the employer to establish the true reason.

93. In this case for the reasons set out above we accept at that prior to at the alleged disclosures 2,3,4 that Mr Lennox and Mr Moreno had entirely genuine concerns as to the claimant's conduct and performance. Equally we accept that Ms Jones had not communicated to Mr Lennox or Mr Moreno any protected disclosure allegedly made on 12th January 2018 . It follows that we accept the disciplinary concerns raised by Mr Lennox and Mr Moreno were not themselves causally linked to any disclosure; and that the decision to commence disciplinary proceedings was made prior to any of the individuals involved being aware that any disclosure had been made.

94. In fact the only disclosure which predates the formal notification of the disciplinary process commencing is that to Ms Crockett. However at no details had at that stage being received from the claimant as to the allegations or against whom they were made. The evidence of Ms Crockett which we accept was that in those circumstances they could not either investigate the concerns raised or even disseminate them as they did not know against whom the allegations were made, and they might inadvertently alert an individual involved. Accordingly we accept that the decision to commence disciplinary proceedings was made in the absence of any knowledge of any protected disclosure.

95. Clearly by the time of the decision to dismiss and the dismissal of the appeal it was known that the claimant that was alleging an act of bribery against Mr Lennox. However we accept the evidence of Ms Abdulhamid and Ms Uniac that the decisions they reached were based on the information as to the alleged misconduct.

Unfair Dismissal

96. In addition to the claim for automatic unfair dismissal the claimant brings a claim of "ordinary" unfair dismissal.

97. Misconduct is a potentially fair reason for dismissal and we are satisfied for the reasons given above that the genuine reason for dismissal was a belief that the claimant had committed the misconduct alleged.

98. The next questions are the well-known Burchell questions. Did the respondent conduct a reasonable investigation; did it draw reasonable conclusions from that investigation as to the misconduct; and was dismissal a reasonable sanction. The range of reasonable responses test applies to each of those questions.

99. The claimant essentially challenges all three. Firstly he contends that there was no reasonable investigation as there was no investigatory meeting and/or no opportunity in a disciplinary hearing for him to give a detailed refutation of the allegations against him. He submits that it follows that the respondent was not able to draw reasonable conclusions as to the misconduct; or alternatively that even of it reasonably concluded that there was misconduct that it was not sufficiently serious to be categorised as gross misconduct. For the same reason he submits the sanction is necessarily excessively harsh.

100. In particular he contends that had there been a proper investigation in respect of the driving allegations that it would have been discovered either that he was not blameworthy and/or that they were minor events not justifying any finding of misconduct and certainly not serious misconduct.

101. The respondent submits that the information supplied was sufficiently detailed to allow the claimant to know the allegations he had to meet as is demonstrated by the fact that he was able to submit his written submissions in response. The detailed conclusions drawn at the disciplinary and appeal stage are clearly rational and based on the information before both Ms Abdulhamid and Ms Uniac. The information in relation to the driving offences was straightforwardly factually correct and had occurred whilst the vehicle was in the claimant's custody and being used by him. Their conclusions are necessarily ones that were rationally and reasonably open to them both as to the fact of the misconduct, its seriousness and the sanction. The respondent accordingly submits that all of the Burchell questions should be answered in its favour.

102. In principle we accept the respondent's submissions. In our judgement it was clearly open to the decision makers to accept the allegations, in particular of Mr Lennox and Mr Moreno as to the claimant's conduct; and to conclude that that was gross misconduct, for which the appropriate sanction was dismissal. Those conclusions fall squarely within the range reasonable open to them.

103. The question which has given us most pause for thought is whether looked at overall, the absence of an oral hearing at any stage has caused the claimant such significant procedural unfairness that the dismissal itself should be held to be unfair. However, in our judgement the decision of Ms Abdulhamid to proceed in the claimant's absence was in the circumstances one reasonably open to her (see paragraphs 59 and 60 above). Similarly given that the claimant was offered an oral appeal hearing via Skype, and the decision not to participate in it was the claimants, the decision of Ms Uniac to determine the appeal on the papers was one reasonably open to her. Fundamentally, and in the final analysis we have concluded that the claimant did have sufficient opportunity to participate in the process and that looked at overall the decision to dismiss was one that was reasonably open to the respondent substantively, and that there was no procedural failure sufficient to render the dismissal unfair. .

104. Accordingly the claimant's claim for unfair dismissal is also dismissed.

Employment Judge Cadney
Date: 10 October 2022

Reasons sent to the Parties: 19 October 2022
FOR THE TRIBUNAL OFFICE