EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Amanda Wing	**v**	**Kett Autopaints (Anglia) Ltd**

Heard at: Cambridge Employment Tribunal

On: 17, 18 June 2022 and 9th August 2022

Before: Employment Judge King

Members: Ms S Goding
Miss V Pratley

Appearances

For the Claimant: Ms Snocken (counsel)
For the Respondent: Ms Bewley (counsel)

RESERVED JUDGMENT

1. The claimant has no claims for detriment under s47B (1B) before the Tribunal and the application to amend to include them is refused.

2. The claimant's claim for automatic unfair dismissal contrary to s103A ERA 1996 is not well founded and is dismissed.

3. The claimant's claim for automatic unfair dismissal contrary to s105A ERA 1996 is not well founded and is dismissed.

REASONS

1. The claimant was represented by Ms Snocken (Counsel) and the respondent was represented by Ms Bewley (Counsel). We heard evidence from the Claimant. We heard evidence from Ms Emma Chenery, Mr Roy Gee and Mr Brian Kett on behalf of the Respondent. The Claimant and Respondent having exchanged witness statements in advance and

prepared an agreed bundle of documents which ran to page 214.
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2. At the outset the claims were identified as automatic unfair dismissal under s103A and s105A ERA 1996. This was not in dispute but an issue arose at the outset of the hearing over whether the claimant was bringing detriment claims against her employer. This was dealt with as a primary issue at the outset of the hearing.

3. We were unable to conclude the hearing within the allocated time listing (partly due to the preliminary issues outlined below) and the tribunal therefore reserved its decision and confirmed it would provide this in writing. By e-mail dated 20th June 2022 the Claimant's solicitor requested written reasons for the decision that there was no detriment claim under s47B (1B) ERA 1996. Since the Tribunal was providing written reasons for the substantive decision this Judgment with reasons covers both decisions.

4. We had the benefit of an opening submission on behalf of the respondent. A preliminary hearing had taken place on 3rd August 2021 before Employment Judge Kurrein in which the first respondent (the employer and now only respondent) was represented by the same counsel as in this hearing. The claimant's counsel did not appear at that preliminary hearing and at the time of the preliminary hearing there were two other defendants; the second respondent Mr Kett and the third respondent Mr Gee who were separately represented.

5. The preliminary hearing took place by telephone on 3rd August 2021. The case management order was not prepared until 27th of September 2021 by the Judge and sent to the parties on 11th of October 2021 along with a judgment with the same dates striking out the claims against the second and third respondents as being misconceived. This left the only respondent as being the first respondent and the employer in this matter. The claimant did not appeal that judgment.

6. In addition to the bundle, the tribunal had the benefit of Employment Judge Kurrein's note of the hearing which was short and typed but appeared on the Tribunal file and the contents of which were shared with the parties at the outset of the hearing. We also had the benefit of a note from counsel to instructing solicitor on behalf of the first respondent which confirmed that the claimant's representative stated that the claimant was only bringing a section 103 a claim and on that basis the second and third respondents applied for the claims to be struck out against them given that it can only be the employer who is liable for unfair dismissal and that was obviously granted. This part obviously tied with the judgment that had been issued.

7. However, a case management order was also prepared which set out the following claims and issues to be considered by the tribunal at the hearing and that no other claims are issues would be considered without the

permission of the tribunal. The issue being the inclusion of the detriment issue notwithstanding the judgment (bold below).

Public Interest Disclosures

1 The Claimant relies upon the following purported disclosures:

1.1 On 6 April 2020 during a telephone conversat ion with the Third Respondent, that she was concerned that the [First) Respondent had not been following the government's guidelines in relation to covid-19 health and safety in that no signs had been put around the premises in relation to covid-19 warnings.

1.2 On 6 April 2020 sending a letter to Emma Chenery, office manager, advising that the [First] Respondent had failed to undertake required steps in relation to Health and Safety of its employees by failing to provide hand sanitiser, not putting up signs asking those with symptoms not to come to work and to socially distance.

2 In respect of those purported disclosures, did the Claimant disclose information which she reasonably believed was in the public interest and which tended to show one or more the matters listed at 43B(1)(e)?

3 Were the disclosure(s) made to the Claimant's employer or some other responsible person, as defined by s43C ERA 1996?

4. Did the Claimant suffer detriment as a result of making the disclosures? The detriment relied upon is dismissal by letter dated 26 May 2020.

Automatically Unfair Dismissal s103A & s105 ERA 1996

5. What was the reason for the decision to dismiss the Claimant? In particular, was the dismissal for the reason of redundancy or was it because she had made a protected disclosure, such that the dismissal was automatically unfair pursuant to s103A ERA?

6. If the decision to dismiss was for the reason of redundancy, was the Claimant selected for redundancy due to her making a protected disclosure, such that the dismissal was automatically unfair pursuant to s105 ERA?

Remedy

7 If the Claimant was automatically unfairly dismissed, what financial or declaratory remedy is she entitled to?

8. The first respondent's counsel did not have sight of the case management order or judgment until closer to this hearing and the first respondent's instructing solicitor had not noted the inclusion of the issue in bold said to be in error. The respondent had however prepared its witness statements on the basis of a case of automatic unfair dismissal not for one that included detriments. The first and second respondent's counsel had no

further involvement in the hearing or its preparation and it was counsel for the claimant now relied on the inclusion of the issue in bold.

9. The Tribunal was told that it was made expressly clear by the claimant's representative at the primary hearing that she was only pursuing claim for automatic unfair dismissal. The case of *Timis v Osipov [2018]* was specifically raised by counsel for the second and third respondent as potentially allowing such a claim but after the claimant confirmed the case was automatic unfair dismissal, the claims struck out.

10. The tribunal also had the benefit of a list of issues prepared by the claimant and second and third respondents in advance of that preliminary hearing which mirrored that of the list of issues included in the case management hearing. This was included in our bundle along with the agenda prepared by the same parties and the first respondent did not agree that list of issues. The first respondent's position was the issue highlighted above was on the original draft list of issues because when the preliminary hearing was being prepared for this included claims against the second and third respondent.

11. Unfortunately. the list of issues was not agreed with the parties at the hearing as Employment Judge Kurrein stated he would produce it but so far after the event had simply replicated the original list of issues before the claims against the second and third respondent had been struck out. It was not clear if this was his intention notwithstanding the strike out of claims against the second or third respondents or an error due to the passage of time.

12. We heard submissions from both sides on this issue and had regard to the ET1 and section 47B(1) and (2) of the Employment Rights Act before reaching our decision. The claimant was represented at the time when she presented her claim form. The claim form stated that "since making the disclosure, she suffered from the following detriments contrary to section 47B(1) in that:

    a. *The Second Respondent made the decision to terminate the Claimant's employment as he was responsible for Health and Safety at all branches*
    b. *The Third Respondent made the decision to terminate the Claimant's employment as he was responsible for Health and Safety at all branches.*

13. There was no reference to this claim being also against the first respondent, no reference to vicarious liability, no reference to section 47 (1B) or any other clue but this claim also applied to the first respondent as opposed to only the second and third respondents against whom the claims were subsequently struck out. This was particularly important given that the detriment claim was the only one of three claims that could be brought against the individual second and third respondents.

14. Claimant's counsel submitted that if we were to take this option that it was not pleaded and therefore not dealt with in the pleadings or at the preliminary hearing then an application was being made to apply to amend the proceedings against Mr Gee so that this included a claim for detriment, the detriment being dismissal. This application was being made on the first day of the hearing and the claim was submitted over 18 months earlier on 23rd October 2020.

15. Our review of the documents in the bundle also noted that the claimant's schedule of loss was calculated for only automatic unfair dismissal and there is no reference to an injury to feelings award or detriments claimed within that document. There was no reference in the claimant's witness statement to detriments or indeed in the documentation such as her detailed grievance. It was unhelpful that the respondent solicitor did not pick up the inclusion of detriment in the case management order so it could be dealt with at an earlier stage but it is clear both sides prepared the case without it being part of that case until the claimant's counsel picked this up. That is no criticism of the claimant's counsel for wanting to include all legal claims for her client but her predecessor at the preliminary hearing had made it quite clear that the only claims related to automatic unfair dismissal and those that instruct her had not made any such claim sufficiently clear in the professionally drafted pleadings, list of issues or other documents.

16. As per Osipov it was open to the claimant to bring both claims against Mr Gee and Mr Kett for subjecting her to the detriment of dismissal (as she did in this case) and also to bring a claim of vicarious liability for that act against the employer under s47 (1B) ERA 1996. However, unlike Osipov here the claimant did the first part against Mr Gee and Mr Kett but not the second against the employer (underlined). Further, the claims against Mr Gee and Mr Kett were dismissed by the Tribunal as misconceived. We accept the respondent's submission that the detriment claims have been the subject of judicial determination and as those claims were dismissed then the respondent cannot be held to be vicariously liable for claims which have been dismissed as misconceived. An issue of estoppel arises where the claimant was represented at the hearing (and throughout) it has not appealed the judgment nor any stage made it clear the claim includes one of vicarious liability. Having determined that there was no such claim before the employment tribunal in the first instance we considered the claimant's application to amend made at the final hearing to include it.

17. We considered that this claim was estopped but if we were wrong about that it was too late for such an amendment which added a different legal test. We have to consider the matter against the landscape of this claim. Time limits would be a consideration and this claim would be significantly out of time. The test for this claim would be the "reasonably practicable" test as it was well outside the time limit of three months and given the claimant was legally represented throughout in accordance with *Dedman v British Building and Engineering Appliances* [1973] it was reasonably

practicable for that claim to be presented in time. The error of the representative is the claimant's error.

18. We have considered the balance of prejudice and the fault of this issue arising now. If it was intended to bring such a claim that should have been made clearer so that this issue could have been avoided by making specific reference in the case to vicarious liability, the relevant section of s47 ERA 1996 or even that this claim was brought against the first respondent also. We already lost significant time which meant the case went part heard by having to determine this issue at the outset of the hearing. If we were to grant the amendment the substantive hearing would have to be postponed into well into 2023 and in due course be re listed for further substantive hearing and to allow all parties to amend their witness statements, ensure disclosure included this issue and other preparations. The case was ready to proceed following our determination. The dismissal was relied on in respect of the automatic unfair dismissal in any event and the dismissal itself took effect in June 2020 so over two years ago. It was in the interests of justice to hear the case as it was pleaded and not delay this further. The application to amend was simply too late in the day and it was refused.

19. Following the determination of this issue the following became the list of issues and it was agreed that given the time constraints we would only determine liability in the first instance and the case would be listed for a remedy in due course:

The issues

20. The issues to be determined remain as follows:

Public Interest Disclosures

1 The Claimant relies upon the following purported disclosures:

1.1 On 6 April 2020 during a telephone conversation with the Mr Gee, that she was concerned that the Respondent had not been following the government's guidelines in relation to covid-19 health and safety in that no signs had been put around the premises in relation to covid-19 warnings.

1.2 On 6 April 2020 sending a letter to Emma Chenery, office manager, advising that the Respondent had failed to undertake required steps in relation to Health and Safety of its employees by failing to provide hand sanitiser, not putting up signs asking those with symptoms not to come to work and to socially distance.

2 In respect of those purported disclosures, did the Claimant disclose information which she reasonably believed was in the public interest and which tended to show one or more the matters listed at 43B(1)(d)?

3 Were the disclosure(s) made to the Claimant's employer or some other responsible person, as defined by s43C ERA 1996?

Automatically Unfair Dismissal s103A & s105 ERA 1996

4. What was the reason for the decision to dismiss the Claimant? In particular, was the dismissal for the reason of redundancy or was it because she had made a protected disclosure, such that the dismissal was automatically unfair pursuant to s103A ERA?

5. If the decision to dismiss was for the reason of redundancy, was the Claimant selected for redundancy due to her making a protected disclosure, such that the dismissal was automatically unfair pursuant to s105 ERA?

The Law

21. The law as relevant to this case is set out in s43 ERA which states as follows:

s43A Meaning of "protected disclosure".

In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

s43B Disclosures qualifying for protection.

(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

s43C 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, or

(b)……

22. The right not to be dismissed is found in s103A Employment Rights Act 1996 as follows:

s103A Protected disclosure.

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

23. The right not to be selected for redundancy on the grounds of having made a protected disclosure is found in s105 Employment Rights Act 1996 as follows:

s105 Redundancy.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,

(b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) it is shown that any of subsections (2A) to (7N) applies.

(2). . . . . .

(6A) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A.

…….

24. The parties referred to the following case law authorities (not already referred to in this judgment) to which we have had regard. On behalf of the Claimant in her written skeleton argument as follows:

Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT/0195/09
Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436
Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979
Babula v Waltham Forest College [2007] ICR 1026
Dobbie v Felton (t/a Feltons Solicitors) [2021] IRLR 679
Bombardier Aerospace/Short Brothers Plc v Mc Connell [2007] NICA 27
Fecitt v NHS Manchester [2011] EWCA Civ 1190

25. On behalf of the Respondent (not referred to by the claimant in her submissions) in its written submissions as follows:

Williams v Michelle Brown AM UKEAT/0024/19
Abernethy v Mott, Hay and Anderson [1974] ICR 323
Smith v Hayle Town Council [1978] ICR 996
Kurzel v Roche Products Ltd [2008] ICR 799
Ross v Eddie Stobart Ltd UKEAT/0068/13
Eiger Securities LLP v Korshunova [2017] IRLR 115
Jhuti v Royal Mail Ltd [2020] ICR 731

Findings of fact

26. The claimant was employed by the respondent on 17th June 2019 as an Accounts Administrator on a part-time basis 3 days a week. Her salary was £9,120 per annum or £760 per calendar month for her part time role.

27. There was an office manager Emma Chenery who supervised the Wisbech branch and considered herself as a friend of the Claimant. There were additional branches at Norwich and Peterborough. Peterborough did not have an accounts function and Emma Chenery had overall responsibility. The Claimant was an accounts administrator but also carried out general admin and the accounts at Wisbech.

28. In addition, there were two other members of staff at Wisbech Chloe Stott who worked 2 days a week and 14 years service and Rachel Pruden who worked 5 days a week since 2017 less hours but she did more of a pa role. The claimant did not want to work full time when she was taken on as she had over business interests and this is something she made clear to the respondent.

29. In Norwich there was Debbie Hall office manager and Julie Gee was an assistant and her role mirrored that of the Claimant but she was based out of Norwich. Julie Gee had less than two years employment. She was married to Roy Gee a Director of the respondent and was herself a shareholder of the respondent. In addition, Sophie Gee covered promotions but she did this remotely from Australia and had less than two years service. She was the daughter of Roy Gee. There was nobody in admin at Peterborough.

30. There were three directors Roy Gee, Brian Kett (originally respondents personally to the claim) and a third director Morris Stafford. They are a small business and the admin tasks are undertaken by others across the board.

31. There were other members of staff but with more specialist skills such as store staff who also mixed paint and there were also drivers. The respondent outsourced both their HR support and their health and safety to a third party consultancy.

32. The business supplied automotive paints and parts.

33. On 30th September 2019 Mr Gee wrote a letter to all staff advising that there had been some issues with employees double booking holiday. His proposal was that all employees must book 75% of their holiday including Christmas by 28 February 2020. Employees would not be able to change these dates without authorisation and exceptional circumstances. Mr Gee said that full days had to be taken and no half days would be permitted. The staff considered the proposal to be unreasonable so the claimant wrote to Mr Gee on 11th November 2019 on their behalf saying that the proposal had negatively impacted staff morale, would be too restrictive and she believed the changes would be a breach of contract if it imposed.

34. It was not in dispute that the respondent took on board the points raised by the claimant and subsequently wrote to employees to offer a compromise in that staff would only be required to book 60% of the holiday including Christmas by 31st March 2020 but that half day holidays would still not be allowed.

35. The pandemic hit in March 2020. Mr Gee was in Thailand but he returned to the UK at the end of March around the 28th March 2020. Chloe Stott and Rachel Purden were both isolating initially which led to the claimant doing additional hours. 50.5 hours in the period 20th March – 3rd April 2020.

36. A Government announcement was made on 23rd March 2020 that from 26th March 2020 only essential businesses were to stay open. The respondent we are told fell within the category so that they could remain open with covid measures in place.

37. The claimant was in the office on 3rd April 2020 when Mr Gee made an announcement that the claimant could go on furlough leave or continue working. The claimant was given that election but she asked for some time to consider her decision.

38. The claimant had a 1-2-1 meeting with Mr Gee first as she then had to cover the phones whilst there was a wider meeting with the staff at Wisbech. The claimant was not present for that wider meeting but the respondent's witnesses were clear that many of the staff were concerned. It was a time of concern. Mr Kett had to attend site after the meeting with Mr Gee and the staff did not go well. Mr Kett was frustrated about the number of people electing to go on furlough and the need to maintain a skeleton staff at that time. He told staff that if they elected to be furloughed there was a good chance they would be made redundant and finding another role elsewhere would be grim. Staff more widely raised concerns with the directors about health and safety. A decision was taken to close Peterborough and furlough those staff and one employee a driver was to transfer to Wisbech. The staff were concerned about this as they felt he did not have good hygiene habits. There were issues over masks, signs and hand sanitiser.

39. There was a telephone call on 6th April 2020 when the claimant spoke with Mr Gee to express her concerns about the lack of health and safety that had been implemented by the Directors and Mr Gee asked her to put this in writing. The claimant told him that the Company had not followed Government guidelines and that signs and information had not ben placed at the premises. The claimant asked Mr Gee whether the directors had consulted with the H&S consultancy and he told her they had. It was clear from Ms Chenery's evidence that the Claimant had taken it upon herself to read up about the Government guidelines and that there was a general consensus amongst the staff that this was helpful and that she had a good knowledge of the "rules".

40. Mr Gee honestly confirmed that he could recall little about the conversation but these points were not in dispute as he accepted she mentioned that signs had not been put up and that with regards to the information not being seen by staff he could not be sure but honestly answered that "if that what she said she said she did". It was clear that Mr Gee respected the claimant's opinion on such matters. The claimant relies on this conversation as the first of her two protected disclosures.

41. On the 6th-8th April 2020 the claimant was on a week's paid leave. All staff were given alternate weeks as paid leave as a thank you for working through a difficult March. The claimant was off work on 6/7/8 April 2020.

42. Following the call with Mr Gee, the claimant drafted a letter setting out her concerns. She emailed Emma Chenery the draft letter from her personal email address at 15.33 on 6th April 2020 stating:

"Can you have a look and see if this looks alright. Anything you or James wishes to add. Have I missed anything? Got to tweak it."

43. Emma Chenery did not reply. Her evidence was she was helping out in the stores that day and did not recall even seeing this first email with the letter.

44. At 9.10pm the claimant sent Emma Chenery a revised draft letter. Again this was sent from the claimant's personal email address with the message as "ignore previous email" and "now finished" as the email title.

45. The letter read as follows:

Dear Roy

With reference to our telephone conversation of today, I am concerned for the lack of health and safety that has been implemented by the Directors of Kett Autopaints (Anglia) Ltd. to protect their employees, despite the fact that you told me you that you have consulted with Alcumus.

Therefore, as requested, I have outlined my concerns in writing.

As I am sure you are aware employers have a duty of care to their employees. This means, as an employer, you MUST do all you reasonably can to support our health, safety and well being.

The below items have all been implemented by staff of the Wisbech branch in the absence of any written or oral guidelines from the company to protect the staff and customers from Covid 19:-

> *Closed the shop and put notices on the doors and windows informing customers to place orders by telephone.*
>
> *Encouraged cash customers to pay by card over the phone rather than cash or cheques.*
>
> *We have pallets down at the back of the building to encourage social distancing. Put notices up asking customers and delivery drivers not to come past the pallets. We have an area for delivery drivers to place goods.*

Other things that should have been implemented and have not:-

> *Signs should be visible in the workplace to remind employees not to attend work if they have a fever and/or cough, avoid touching their eyes, noses and mouth with unwashed hands.*
>
> *Signs should be in toilets reminding staff to wash their hands for 20 seconds and to wash more frequently.*
>
> *Employees should be provided with hand sanitiser for frequent use and regular breaks to allow them to wash their hands. Coughs and sneezes should be caught in tissues provided by*

the employer.

Employees from defined vulnerable groups should be strongly advised and supported to stay at home.

Frequently clean and disinfect objects and surfaces that are touched regularly. Encourage staff to not share phones, computers or printers without first cleaning them.

Ensure employees are following social distancing in the workplace. Keep everyone updated on actions being taken to reduce risks of exposure in the workplace.

Make sure everyone's contact numbers and emergency contact details are up to date.

Make sure Managers know how to spot symptoms of coronavirus and are clear of any relevant processes.

Keep up to date with the latest government coronavirus advice.

All of this information is on the government, ACAS and HSE websites. You also employ the services of Alcumus to keep you aware of the health and safety aspects of the business. Under the Health and Safety at Work Act 1974 every employer has a duty to ensure that, so far as reasonably practicable, the health, safety and welfare of employees are protected. There are no clear guidelines from the government regarding your return from Thailand, but your staff did voice their concerns about returning to work before seven days of self isolating. You returned to work after four days causing your staff a great deal of unnecessary stress and anxiety.

On Friday the staff at Wisbech branch were told by Brian that they needed to have a skeleton staff and because we were working whilst others were self isolating, we had the choice whether we wanted to work or be furloughed. We were then told that if we chose to furlough, there was a good chance that we would be made redundant and a lot of businesses would go under making the chance of us finding work in the future grim.

This was seen by all staff present to be totally unprofessional and a cause for great concern as this has left the staff who have been actively keeping the business afloat for the last two weeks feeling extremely stressed, disappointed and unhappy in an already worrying time. We have been working long hours without a break and this has left us feeling unappreciated and undervalued.

I trust you will take our concerns seriously and act accordingly.

Yours sincerely

Amanda Wing

cc: Brian Kett, Maurice Stafford, Emma Chenery

46. Emma Chenery replied to the claimant at 9.42am on 7th April 2020 as follows:

"Hi Mandy

Roy has now sent information from Alcumus about health and safety. Looks like you obviously helped prompt them already.

Letter looks ok to me.

Hope you are both well and doing ok.
Take care

Emma"

47. It was not in dispute that at the time of sending the email on 6th April 2020 enclosing the letter that this was not circulated to Mr Gee or Mr Kett at the same time. The claimant indicated she was sending it to Emma Chenery to review but this was the only person the claimant sent it to. The claimant relies on this letter as her second protected disclosure.

48. At 11.58am on 7th April 2020, the claimant sent a text to Emma Chenery stating:

"He oblivious listen to me yesterday. He told me he had already spoken to Alcumus. Knew he hadn't. No point in sending letter now.

I've sent him a text message thanking him for listening to me."

49. At 12.50pm Emma Chenery replied to the claimant saying:

"I agree. He has bought over a thermometer gun and advice etc. Thanks hun. Hope you are enjoying the sunshine. We have Callum back now so hopefully get back up to date xx"

50. The claimant also sent a text message to Mr Gee at 18.56 stating:

"Thanks for taking my comments on board yesterday! No letter required now. Amanda"

51. There is a dispute between the parties as to whether the letter had gone into wider circulation than just to Emma Chenery. The claimant relied upon the contents of the letter as a protected disclosure which the respondent accepted. The issue was who had seen that protected

disclosure or knew about it. This was whether the letter went beyond Emma Chenery. Emma Chenery's evidence was that she did not action it or forward it on, on 7th April 2020. The evidence of Mr Kett and Mr Gee was that they did not see the letter at the time until the proceedings. The claimant asserted that it must have been passed on due to its nature and that Emma Chenery was as office manager in essence the respondent.

52. We accept the respondent's unequivocal evidence that the letter was not only just sent by the claimant to Emma which the claimant does not challenge but that Emma took no action on that letter and that she did not forward it on to Mr Gee or Mr Kett. The chronology was that shortly after it was sent it not required. As far as the claimant was concerned the respondent had listened to her concerns on the telephone the day before and had actioned them to her satisfaction. She was grateful that her comments were taken on board by the respondent and did not feel the need to put this in writing to Mr Gee or Mr Kett once those steps were taken. Mr Gee was clear that he considered that there was much to learn as COVID was new and he welcomed the claimant's concerns.

53. Around this time the respondent received a health and safety checklist from the H&S consultants. This was sent by Mr Kett to the other two directors at 23.33 on 6th April 2022

"Could we send this to Debbie Hall and Emma Chenery for completion to cover ourselves?"

54. This was after the call with Mr Gee but before Emma Chenery had seen the letter. The following morning this checklist was sent to Emma Chenery and Debbie Hall to be completed to see if anything needed implementing and Mr Gee also asked that the posters being used at Norwich be copied and sent to Wisbech.

55. On 20th April 2020 the claimant was placed on furlough. Given the choice, she decided to go on furlough as her partner was vulnerable. The claimant took her time to consider this notwithstanding Mr Kett's threat of potential redundancy. Emma Chenery did not get furloughed given her more senior role but the claimant, Rachel Pruden and Chloe Stott did.

56. The claimant remained off work during that period on furlough. By letter dated 15th May 2020 the claimant was told that her role would be made redundant and was issued with notice so that her employment terminated on 30th June 2020. As she had less than two years service, she was not entitled to a redundancy payment. It is not in dispute that there was no prior discussion with the claimant about this, no consultation process or formal meetings.

57. The respondent had a non-contractual section in its handbook entitled redundancy policy. This stated that first the respondent would reduce overtime and restrict recruitment. It would follow a fair and meaningful consultation process and consideration would be given to volunteers in the

first instance. In the case of selection, then appropriate factors would be considered and only if the final weighted score was equal would the last in and first out principle apply. It stated that at all times the overriding consideration would be the future needs and viability of the business. It is not in dispute that the respondent did not follow this policy. It did not call for volunteers, did not select using criteria other than length of service but it did consider the future needs by reviewing the departments and where savings could be made.

58. The respondent's evidence was that the turnover in April 2020 was 52% down from the previous year. Mr Gee gave detailed evidence about the financial situation and his concerns. In May 2020 the month started off really badly and they had a bad first week. Things improved a little by the end of the month but that month was still 40% down. He was looking at the figures on a daily and weekly basis. He was very concerned about saving costs as other overheads were increasing.

59. The claimant asserted others had done overtime to cover her role but the respondent denied this. There was no evidence this was the case. The claimant relied on her own overtime to cover others but the respondent explained this was at the outset when covid first hit and before the respondent's workload dropped. The Tribunal found Mr Gee to be an honest and credible witness and accepted his evidence of the level of the business concern at that unprecedented time.

60. The claimant said she could have been on furlough longer but Mr Gee gave evidence that he felt the furlough scheme should not be used in that way to cover for people who were genuinely redundant. At that time the claimant was not costing the respondent her salary as it was covered by the furlough scheme but the future was uncertain. We accept that evidence.

61. The claimant set out that after her dismissal the respondent advertised for delivery drivers and she had experience of driving elsewhere. This was not in dispute. In July 2020 when Peterborough reopened two drivers resigned and they recruited and replaced one of the roles on a full time basis. The claimant had done driving work but she had also made it clear but she did not wish to work full time. The recruitment of the drivers occurred after dismissal had taken effect in any event.

62. Mr Gee's oral evidence was that they considered office staff first, then they were due to review the drivers in June 2020 as possible roles to be made redundant but the resignations meant that this was not required. The respondent only recruited for one of the two drivers so there was a reduction there. Mr Gee's written statement contained significantly less detail on the departments and personnel considered other than Ms Stott but the evidence was forthcoming when asked about it and Mr Gee recognised it was not included in the written statement and this was not helpful. He also gave evidence of other cost cutting measures not referred to in his statement.

63. The claimant's role was not filled after her dismissal and she was not replaced as the workload was absorbed elsewhere. The respondent did not consider stores as they were essential to the business effectively shop front with multiple skills and if they were made redundant then the business would not have been able to have functioned. We accept that evidence it was a very different role to that the claimant fulfilled and was skilled function.

64. The respondent's evidence was that in terms of the redundancy, it was the accounts department where a role could be lost. The respondent's evidence was that it considered Chloe Stott for a redundancy but she had been with them since she left school and had long service of 14 years. She would have a cost to the business of the redundancy payment and the ability to claim unfair dismissal. Rachel Pruden was also considered but Mr Gee felt that she did a different role and as she was in 5 days a week she was asked to carry out tasks that were not asked of Chloe Stott or the claimant akin to a PA to the directors. She also had longer service than the claimant.

65. The only other employee in an administrative role with less than two years service was Julie Gee. As set out above Julie Gee was married to a director and was also a shareholder so these were the reasons she was not considered. The claimant was not considered to bump Rachel Pruden as she had made it clear she was not interested in a full time role and the respondent considered the role Rachel Pruden did to be different and more senior.

66. The claimant raised a grievance on 11th June 2020 as she was not given a right of appeal against her dismissal. She raised that she felt she had been selected and dismissed for redundancy because she raised protected disclosures. In this regard she relied on her three protected disclosures, the letter concerning changes to the holiday policy referred to above, the matters relied on made on 6th April 2020 and the fact she had challenged the furlough terms on 8th April 2020.

67. The claimant in her grievance outlined that she felt:

"Given the speed of my being made redundant, the lack of transparency regarding objective criteria, the fact you have terminated my employment in a cold, brutal way without any compassion and consideration and the closeness in time to my above concerns to the directors, it is possible that the real reason for being made redundant was due to my protected disclosures."

68. By the time of these proceedings she relied solely on the middle disclosure as a protected disclosure.

69. The claimant commenced ACAS early conciliation on 29th July 2020 and her ACAS EC certificate was issued on 26th August 2020.

70. The claimant submitted her claim on 23rd October 2020 which was accepted and the matter came before us following the preliminary hearing referred to above.

Conclusions

71. We turn now to our conclusions in this matter considering the list of issues in this case.

Public Interest Disclosures

72. The claimant relied on two protected disclosures which we take in turn:

On 6 April 2020 during a telephone conversation with the Mr Gee, that she was concerned that the Respondent had not been following the government's guidelines in relation to covid-19 health and safety in that no signs had been put around the premises in relation to covid-19 warnings – was this a protected disclosure i.e. Did the Claimant disclose information which she reasonably believed was in the public interest and which tended to show one or more the matters listed at s43B(1)(d)?

73. As a matter of fact, it is not in dispute that there was a telephone conversation on 6th April 2020 between the claimant and Mr Gee. What was in dispute was the contents of that call. Mr Gee quite honestly could not recall the conversation save that he accepted that if the claimant says she said that she would have done.

74. We accept that the claimant disclosed information, we accepted the claimant's evidence that she told Mr Gee that the Company had not followed Government guidelines and that signs and information had not been placed at the premises. The claimant asked Mr Gee whether the directors had consulted with the H&S consultancy and he told her they had. In accordance with *Cavendish Munro* the claimant informed Mr Gee that signs and information had not being placed at the premises and that the company was not following government guidelines and made reference to health and safety by reference to an external consultancy. We are satisfied that the information given was more than a simple allegation in accordance with *Kilraine* it had sufficient factual content and specificity to identify the relevant failure that was causing the claimant concern and that of her colleagues.

75. One must also consider the context in which the discussion were had. This was a challenging and unusual time in the height of the pandemic. The rules were fluid and evolving and the position unprecedented and unfamiliar.

76. We are also satisfied that the information the claimant disclosed in her reasonable belief tended to show a breach of health and safety. Given the evidence the claimant believed that to be the case and had researched the guidelines and looked into finding sources of information as to what steps the respondent should have been taking to protected workers in their place of work and the public at large. The disclosure affected more than just her and indeed when she came to put this in writing she made it clear that it was not just her concern but that of the workforce more generally. The respondent's evidence was that indeed others shared the concerns as it was a very worrying time.

77. In accordance with *Chesteron Global* there are a number of factors for the tribunal to consider for determining whether the disclosure was in the public interest. It was clear that the claimant believed at the time she was making it, that the disclosure was in the public interest and we believe that belief was reasonable given that the claimant had extensively researched the position and was raising matters on behalf of not only herself but her colleagues. Disclosure could reasonably be believed to be in the public interest. It clearly served a wider interest than the private or personal interest of the worker making the disclosure. The issues raised impacted not only the working colleagues but the public at large when visiting the site and not just the claimant.

78. At the time of a pandemic, the nature of the interests affected and the concerns about health and safety thus catching the virus, at the early stage of the pandemic makes it more likely to be in the public interest. Whilst given the fluid nature of the advice at that time and the unprecedented pandemic the respondent faced, we do not believe that there was a deliberate wrongdoing on their part but inadvertent wrongdoing as they were not up to speed with the guidance at that particular point. The concerns were taken to the top by raising these with the director and we are satisfied that at the outset of a pandemic raising concerns that the respondent was not following government guidance and providing information as to why the claimant believed this was the case and that this was a health and safety issue meets the test of a protected disclosure in this case.

79. As per *Dobbie* this was a disclosure which served a wider interest than merely the private or personal interests of the claimant. The Government guidelines were aimed at reducing the risk of contracting Covid-19 so it is clear that if the claimant believed that the respondent was breaching those guidelines she reasonable believed that this tended to show that the health and safety of any individual was likely to be endangered.

Were the disclosure(s) made to the Claimant's employer or some other responsible person, as defined by s43C ERA 1996?

80. The phone call was with Mr Gee a director and this clearly meets the definition of being with the employer. It was not suggested otherwise.

81. We accept that during the call on the 6th April 2020 the claimant made a protected disclosure.

On 6 April 2020 sending a letter to Emma Chenery, office manager, advising that the Respondent had failed to undertake required steps in relation to Health and Safety of its employees by failing to provide hand sanitiser, not putting up signs asking those with symptoms not to come to work and to socially distance – was this a protected disclosure i.e. Did the Claimant disclose information which she reasonably believed was in the public interest and which tended to show one or more the matters listed at s43B(1)(d)?

82. As a matter of fact, it is not in dispute that the claimant sent the letter to Emma Chenery. The respondent concedes quite properly that the letter constitutes a protected disclosure. We concur with that view. The content of the letter is quite clear.

83. The letter gives even more specific examples and gives more information. For all the reasons stated above by reference to the *Chesteron Global* factors the claimant reasonably believed that this disclosure of information was in the public interest. We consider that these matters apply even more so to the letter so we do not repeat these here but have considered they also apply to this information which not only repeated the contents of the call but expanded it.

Were the disclosure(s) made to the Claimant's employer or some other responsible person, as defined by s43C ERA 1996?

84. This issue occupied a little more of the Tribunal's time. Emma Chenery we have accepted was the only recipient of that letter. it is not in dispute that she was the only person the claimant sent it to and we have accepted the respondent's evidence that Mr Kett and Mr Gee had not seen the letter prior to the proceedings. The claimant's line manager was Emma Chenery which for us was a deciding factor and accepting that this disclosure was made to the respondent as employer. Whilst the e-mail came from the claimant personal e-mail address, it was sent to Emma Chenery's work e-mail address.

85. At the time, we do not believe that the claimant thought she was making a protected disclosure to her employer but merely seeking Emma Chenery's guidance on the contents of that letter before it was sent. Had she simply been a colleague of the claimant's we may not have found that this was a disclosure to the employer but given that she was the claimant's line manager, in a management role and had overall office responsibility for the Wisbech site we believe that sending it to her was making a protected disclosure to her employer. However, very shortly after sending this letter the claimant considered the matter resolved and that she need not send it further to the directors as she had planned to do.

86. Given that we have found that the claimant made a protected disclosure on 6th April 2020 in her telephone call with Mr Gee, it may not be material that a second protected disclosure was made to Emma Chenery about a similar matter as she was not the decision maker in connection with the dismissal. We have accepted the respondent's position that neither Mr Gee nor Mr Kett were aware of the letter or its contents.

S103A unfair dismissal

What was the reason for the decision to dismiss the Claimant? In particular, was the dismissal for the reason of redundancy or was it because she had made a protected disclosure, such that the dismissal was automatically unfair pursuant to s103A ERA?

87. The first matter to consider is whether the claimant was dismissed for having made a protected disclosure as she asserts or because of redundancy as the respondent asserts.

88. In accordance with *Fecitt* the test for dismissal cases is that the disclosure must be the principal reason not just a reason if the dismissal is found to be automatically unfair.

89. In accordance with *Kuzel* where the employee does not have the qualifying service necessary to bring a claim for ordinary unfair dismissal as in this case, the burden is on the employee to show the reason for dismissal so the burden is on the claimant in this case.

90. The respondent did not replace the claimant, it reduced the number of employees within the business. The Tribunal spent some time considering this issue as on paper the Tribunal had concerns about the claimant being dismissed 6 weeks after she made a protected disclosure. The tribunal considered that the savings made by the claimant's dismissal in terms of a wage bill were small and the furlough scheme was in operation so her salary would have had little cost to the business.

91. We did however hear Mr Gee's evidence which was measured. He highlighted that there had been a downturn in sales and that since the claim was on furlough and the work was being covered her role was identified as one well where a costs saving could be made. The evidence was she was not needed and that the business considered cutting costs and redundancies. The respondent gave the impression from the evidence that every penny counted. The evidence was that they were monitoring the situation daily and they were running a business in unprecedented conditions.

92. It is not the Tribunal's place to criticise the respondent's business decisions, it matters not whether that was a decision we would take when faced with those circumstances. This was a pandemic and we considered the respondent's evidence on the reason why it was the claimant, why

furlough could not be used and scrutinised both the business decision and the evidence of Mr Gee. The savings may have only be £9,000 but the claimant had less than two years service and the respondent considered this to be less risk because they did not want to be in a Tribunal situation. The only other employee with less than two year's service was Mrs Gee but she was married to Mr Gee, the director and she was also a shareholder in the business so the respondent is not going to select her over the claimant despite having similar service.

93. We also considered Mr Gee's evidence that the points the claimant raised were helpful. He took actions as a direct result of the points claimant raised. Other employees raised concerns and they were not dismissed. Indeed, the claimant challenged the directors the previous year in respect of the holiday decision and was not dismissed. The claimant felt that the respondent had taken on board her comments on the 6th April 2020 and she thanked them for having done so. She felt thought they had taken on the comments to such an extent but she no longer needed to send the letter she had asked Emma Chenery to proof read. Mr Gee's evidence was that he couldn't even remember the contents of the call, it was unmemorable as there was lots going on at the time, other staff were raising matters. This lack of memory of the call goes in the claimant's favour as to it being a protected disclosure but against the claimant in that what she said was not of such a concern it could be remembered. The letter of course Mr Gee was unaware of so it was simply the contents of that call.

94. The claimant was in a way forewarned that her role may be at risk of redundancy as she chose furlough and in this case rather unusually respondent allowed the employees to elect one way or another unless they were in business critical roles such as Emma Chenery. The respondent made it clear that furlough may result in redundancies. The fact that the claimant was given the choice to furlough or not indicated to the tribunal her role could be covered by others and unfortunately for the claimant it transpired that by making this election, the respondent could see how her role could be covered by others in the longer term.

95. We do not accept the claimant's submission that by accepting there was a redundancy in the sense that the respondent decided they could do without the claimants position, this was the type of situation referred to in *Bombardier* where the respondent has decided they wish to dismiss the claimant for having made a protected disclosure and for that reason created a redundancy situation to bring the matter within s103A ERA 1996. There was a genuine redundancy situation and only two employees with less than two year's service. We have considered whether the claimant's selection for redundancy was because she made a protected disclosure.

96. The claimant relied on the respondent's failure to undertake a fair redundancy and dismissal process. The Tribunal knows from its experience as an industrial tribunal this is not uncommon for those with less than two years service, it is often why short service employees are

removed because there is less risk and less need to follow a standard process as they cannot claim unfair dismissal.

97. The respondent did not follow their redundancy policy and it was not expressed to only apply to those with two year's service. The policy was however written for a standard redundancy process and not one following a pandemic that was unprecedented and unforeseen. The initial steps of restricting overtime and restricting recruitment would not have applied because by the time the redundancy was being considered no overtime was being worked and the respondent was not recruiting in any event given the situation.

98. Had this been an ordinary unfair dismissal and the claimant had two year's service it would have been unfair due to the lack of process. The criticisms of the process and selection are relevant to an ordinary unfair dismissal process but we have considered all of the claimant's arguments. She does not have service and instead she must prove that the principal reason for her dismissal was that protected disclosure. The claimant herself when she raised her grievance did not attribute the decision to dismiss to the disclosure itself of the phone call, she considered it was one of three matter she raised and they collectively were the reason for her dismissal. At that time she believed the respondent had seen the letter and it had not but even taking this as being the call on the 6th April 2020 the claimant at the time considered it to be potentially part of the reason and not certainly the principle reason.

99. On balance, we are satisfied that this was a redundancy situation and the protected disclosure was not the real reason for the claimant's dismissal. It was not an excuse that was manufactured to dismiss the claimant as a result of that protected disclosure, the real reason was redundancy. As per *Abernethy* the reason for the dismissal of an employee is a set of facts known to the employer or beliefs held by him, which cause him to dismiss the employee. Here the employer welcomed the information and made changes because of it but was concerned about the fall in turnover that was drastic and it required drastic cost cutting measures.

100. The claimant has not satisfied the burden of proof. Her counsel questioned Mr Gee at length and was very thorough in challenging on the claimant's behalf, his thought processes and testing that evidence he gave. The protected disclosure would have to have been the principal reason and more than a material influence. Having heard all the evidence we are satisfied that this was a genuine redundancy situation.

S105 selection for redundancy

If the decision to dismiss was for the reason of redundancy, was the Claimant selected for redundancy due to her making a protected disclosure, such that the dismissal was automatically unfair pursuant to s105 ERA?

101. Having considered that there was a redundancy situation we have gone on to consider whether the claimant was selected due to her making a protected disclosure.

102. As set out above we are satisfied that this was a redundancy situation. The claimant was not replaced and there was a reduction in staff. Fewer employees were required to carry out the work the claimant did.

103. Counsel for the claimant challenged Mr Gee on these thought processes. The admin department was seen as one department where they could make the savings. The evidence of Mr Gee was that he was intending to next review the drivers but that they resigned in June 2020 and only one driver of the two was replaced after that time. They decided to wait a further period and then there was no longer a need to make redundancies in this department as the exits were voluntary and thus there was no need for the respondent to make redundancy payments at a time when costs were under review. Again this was a reduction in the number of staff.

104. As we heard, there was one other member of the admin department that had less than two years service but that was Julie Gee, Mr Gee's wife. We consider that the claimant would always have been selected over her irrespective of the protected disclosure. There was no pool applied with competitive selection criteria as the claimant was the only member of staff other than Mrs Gee with less than two year's service in the admin department.

105. We accepted the respondent's evidence that it did not select Ms Stott who was also part time and on furlough as she has significant service and they wanted to retain her as she had worked there since she left school and also this would have required the respondent to make a redundancy payment to her whereas the claimant did not. Had it not been the claimant the nature of her work was so similar that Ms Stott could have been made redundant but she had long service and would have been entitled to that payment. Length of service is an important distinction between the two employees and it makes it even more likely that the claimant would have been selected had criteria been adopted as the claimant had far less experience than Ms Stott.

106. Given the respondent's desire to quickly save costs and that they were worried about money, the criteria as to short service makes sense. We accept that the respondent excluded the stores staff as they had additional skills that would be difficult to replace as they also mixed the paint. We found the respondent's evidence on this point credible.

107. There was a short period of time after the disclosure and the decision to select the claimant for redundancy but not to the extent that it was a knee jerk reaction to the disclosure. That said the claimant had raised other matters in the past and not been dismissed or selected for redundancy then.

108. Given the respondent's credible evidence on this point we do not accept that they selected the claimant because she had made a protected disclosure. This was not a case whereby the respondent was concerned about the matters raised, it took the claimant's comments on board, thanked her for them and she at the time agreed that they had taken them on board and made changes. It was all very amicable and we do not accept that the respondent festered some resentment to the claimant to motive it to select the claimant on those grounds or that it dismissed her because of those matters she raised. It considered the matter resolved as the claimant herself at that time and we find that the letter and call of the 6th April 2020 did not factor into the decision to dismiss as it was a genuine redundancy.

109. Having considered all the matters, the Tribunal finds that the claimant's claims are not well founded and are dismissed.

_____
Employment Judge King

Date: ……08.11.2022……..

Sent to the parties on: 9 November 2022

For the Tribunal Office