CASE NUMBER: 2302444/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr L Franco de Godoy**

Respondent: **H & L Trading Ltd**

Heard at: **London South via CVP** **On:** **4 August 2022**
In Chambers via CVP **13 October 2022**

Before: **Employment Judge Beckett**
Ms S Khawaja
Ms A Rodney

Representation

Claimant: In person
Respondents: Mr C Edwards (counsel)

JUDGMENT

1. The unanimous decision of the Tribunal is that the claims in respect of automatic unfair dismissal through protected disclsoure, notice pay and failure to provide the claimant with written particulars of employment are well-founded.

CASE SUMMARY

2. The claimant was employed by the respondent, a printing company, as an assistant (graphic design) from March 2020 to 11 May 2020. Early conciliation started on 20 May 2020 and ended on 20 June 2020. The claim was presented on 20 June 2020.

3. The claim is automatic unfair dismissal through protected disclosure, (whistleblowing), notice pay and failure to provide the claimant with written particulars of employment. The claimant's case was that he was dismissed for raising health and safety concerns, namely that he was suffering back pain caused by the tables at the factory being too low.

4. The respondent denies liabilty. The respondent's case is that the end of employment came about by mutual agreement and the claimant was not dismissed. The respondent accepts that the claimant raised the issue of his back pain, but state that they made reasonable adjustments by assigning the claimant with lighter tasks, and by allowing the claimant to have days off.

5. The respondent states that the claimant agreed to leave his employment upon reasonable notice once a replacement member of staff was found. The claimant was invited to discuss that further but failed to do so.

The case

6. The list of issues (pages 26 onwards of the Bundle) was agreed between the parties.

7. The issues to be determined were set out in the Case Management Order at paragraph 37:

1. Protected disclosure

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

1.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

1.1.1.1 The claimant raised his concern with Mr Jin Han, the respondent's director on 19 April 2020. The claimant told him that he was suffering from back pain because he was bending over a table which was too low for him. He raised his concern by email on 19 April 2020. The email was to the general company email. There were subsequent emails.
1.1.1.2 Did he disclose information?
1.1.1.3 Did he believe the disclosure of information was made in the public interest?
1.1.1.4 Was that belief reasonable?
1.1.1.5 Did he believe that it tended to show that:
1. 1.1.5.1 the health or safety of any individual had been, was being or was likely to be endangered;
1.1.1.6 Was that belief reasonable?
1.2. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

2. Unfair dismissal

2.1. Was the claimant dismissed? The respondent says that the claimant was not dismissed.

2.2. If the claimant was dismissed, was the reason or principal reason for dismissal that the claimant made a protected disclosure etc?

3. Remedy – omitted for purpose of this judgment.

4. Wrongful dismissal/ Notice pay

4.1 what was the claimant's notice period?
4.2 Was the claimant paid for that period?
4.3 If not, was the claimant guilty of gross misconduct/ did the claimant do something so serious that the respondent was entitled to dismiss without notice?

5. Schedule 5 Employment Act 2002 cases

5.1 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

The law

8. Not all disclosures are protected under the Employment Rights Act 1996 (ERA).

9. The disclosure must be a protected disclosure to be covered by the ERA. Three conditions must be satisfied to constitute a protected disclosure:
   - it must be a 'disclosure of information'
   - it must be a 'qualifying disclosure'; that is one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of the six 'relevant failures' has occurred or is likely to occur
   - it must be made in accordance with one of the six specified methods of disclosure.

10. Section 43A provides that a protected disclosure means a 'qualifying disclosure' as is defined by section 43B which is made by a worker in accordance with sections 43C to 43H Employment Rights Act 1996.

11. Section 43B (1) provides that "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 or is likely to be deliberately concealed".

12. The definition of a qualifying disclosure has both a subjective and objective element. The subjective element is that the worker must believe that the information disclosed tends to show one or more of the six relevant failures.

13. The objective element is that the belief must be reasonable. The worker must also have a (subjective) belief that the disclosure is in the public interest which must (objectively) be reasonable. This requires the tribunal to gauge what the worker considered to be in the public interest, whether the worker believed that the disclosure served that interest and whether the belief was reasonably held.

14. In *Chesterton Global Ltd v Nurmohamed* 2018 ICR 731 CA, the Court of Appeal confirmed that the public interest as well as the personal interest of the worker requirement can be satisfied where the basis of the belief is wrong and/or there is no public interest in the disclosure being made, provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable.

15. The Court identified some of factors the Tribunal could consider in deciding whether it might be reasonable to regard the disclosure as being in the public as well as in the private interest of the worker:
(1) The numbers in the group whose interests the disclosure served,
(2) The nature to which they are affected and the extent to which they are affected by the wrongdoing disclosed,
(3) The nature of the wrongdoing concerned and,
(4) The Identity of the alleged wrongdoer.

16. The issue as to whether matters raised by employees amount to an 'allegation' or 'disclosure of information' was considered in the case of *Kilraine v The London Borough of Wandsworth* [2018] ECWA CIV 1436, in which the Court of Appeal provided the following helpful guidance on this issue: "The concept of information as used in section 43B (1) is capable of covering statements which might also be characterised as allegations. Section 43B (1) should not be glossed to introduce a rigid dichotomy between information on the one hand and allegations on the other.

17. In Cav*endish Munro* the EAT was not seeking to introduce such a rigid dichotomy. All it was seeking to say was that a statement which merely took the form "you are not complying with health and safety requirements" would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B (1) so as to constitute a qualifying disclosure.

18. The question in each case in relation to section 43B (1) as it stood prior to the amendment in 2013 is whether a particular statement or disclosure is a "disclosure of information which in the reasonable belief of the worker making the disclosure tends to show one or more [of the matters set out in paragraphs (a)to(f)]". Grammatically, the word "information" has to be read with the qualifying phrase "which tends to show [etc]". In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).

19. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirements set out in section 43B (1) namely that the worker making the disclosure should have a reasonable belief that the information he discloses does tend to show one of the listed matters.

20. As explained in *Chesterton Global Limited v Nurmohamed* this has both a subjective and objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that its capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.

21. Whether a particular disclosure satisfies the test in section 43B (1) should be assessed in the light of the particular context in which it is made. If to adapt the example given in the *Cavendish Munro* case the worker brings his manager down to a particular ward in a hospital gestures to sharps left lying around and says "you are not complying with health and safety requirements" the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time it was made. If such a disclosure was to be relied upon for the purpose of a whistleblowing claim the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner".

22. In these reasons we used that guidance to find the necessary facts to evaluate the evidence to decide whether the information provided by the claimant to the respondent was in and of itself a qualifying disclosure. Was it sufficient in its factual content specificity and context for it to be capable of tending to show a relevant failure under section 43B(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered, so that it is likely that the claimant's subjective belief was reasonable. Did the claimant subjectively believe it was made in the public interest and was his subjective belief objectively reasonable?

The hearing

23. The hearing was listed for 1 day, on 4 August 2022. The hearing was conducted over CVP (video hearing).

24. The Tribunal read the papers, and then the claimant gave evidence at 11.10am.

25. His evidence concluded at 1.10pm. The case resumed at 2pm when the claimant answered two short questions from Tribunal member Ms Khawaja.

26. Mr J Han then confirmed the contents of his witness statement as his evidence on behalf of the respondent. He was cross-examined by the claimant. Finally, Ms Wang confirmed the contents of her witness statement as her evidence in chief, and she was then cross-examined by the claimant.

27. Both parties made submissions. The hearing ended at around 4.30pm, and the Tribunal postponed deliberations to 13 October 2022, which was the first available date for the panel.

Brief overview

28. The Claimant was employed by the respondent, a printing company, as a printing assistant (graphic design), from 3 March 2020 until 11 May 2020.

29. The claimant's role involved dealing with customer requests and making printable artwork for the customer.

30. After the UK entered lockdown on 26 March 2020 the respondent's orders for printable artwork declined. At the same time, a number of the respondent's employees who worked in the packing sector had to self-isolate. The respondent contacted the claimant on 28 March 2020 to ask if he would be willing to carry out dispatching and packing duties instead of his substantive role.

31. The claimant agreed to carry out the alternative duties and started work on 30 March 2020.

32. Thereafter the claimant stated that he suffered from back pain relating to the packing role, and he raised those concerns with the respondent.

33. The claimant sent detailed emails regarding the issues on 19 and 29 April 2020. After further advice from his GP, he sent another email on 11 May 2020.

34. The respondent replied stating that he no longer needed to work [for them] and that the rest of his pay and P45 would follow.

35. There is a dispute between the parties as to whether the claimant had resigned, or whether the respondent had dismissed him. The claimant did reply to the email.

36. It is accepted by both parties that the claimant did not return to work after that date. The claimant subsequently obtained legal advice, and then contacted ACAS, before commencing proceedings with the Tribunal.

Findings of Fact

37. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims were well-founded.

38. We have not sought to determine all issues disputed between the parties, simply those that we regard as relevant to determining the claims. When determining certain findings of fact, where we consider this appropriate, we have set out the reasons for those findings.

39. In making findings of fact, we placed particular reliance upon contemporaneous documents within the bundle, such as emails, as an accurate version of events, when assessing the evidence. Witness statements and the evidence of each witness were considered alongside the caveat that memories fade and that the statements were drafted sometime after the events in question. They were also drafted to advance or defend the claim. We considered all these issues when assessing the weight of the evidence.

40. The claimant and respondent disagree as to when the claimant's back pain started, and when the respondent was first told of the pain.

41. It is accepted by the Tribunal that the claimant started to experience back pain on 30 March 2020. On that date he contacted his wife stating that he was folding boxes, packing orders and rolling up banners. He stated "it's not boring. But it really hurts my back! The table is low you know. I have to keep bending over. Not only standing but also bending over". This message was recorded as a voice message, and it was transcribed for the hearing.

42. The claimant stated in evidence that Mr Han had asked him how he was feeling and he mentioned back pain at that time. It was not asserted on behalf of the claimant that this was a lengthy or detailed discussion at this stage. Mr Han's evidence was that no such conversation took place. We find as a fact that there was a short exchange at that time, but nothing that would have caused the respondent any concern as to the claimants undertaking off his alternative role.

43. Further, the Tribunal accepts the evidence of the claimant that he started to take painkillers after his shift on 31 March 2020.

44. The claimant continued to work although he had a day off on 6 April 2020, due to a toner supply shortage. That day off was at the request of Mr Han who sent him a message the previous day (Sunday 5 April at 14.11):

"hi. some problem with small banner printer. cant print, so plz have some days off. once it is sorted, will call you" (page 80 of the bundle). Mr Han later stated that it was likely that the issue would be sorted by Tuesday. He sent the claimant a message at 20.56 on Monday 6 April stating "plz come tmrw 1p".

45. The claimant worked his shifts on 7 and 8 April 2020.

46. The claimant was due to be paid on 9 April 2020. His first payment had been two days late and the claimant had complained about it directly. He was then paid, but no pay slip was provided to him.

47. We find as a fact that the claimant's back pain continued and on 14 April 2020, he sought advice from NHS online, having been unable to obtain an appointment during the pandemic.

48. The claimant's back pain had reached such a level that he sent a detailed e-mail to the respondents on 19 April 2020 at 15.53. This e-mail appears at page 81 of the bundle.

"Hello Jim & Lynn,
I'm writing you to ask some advice as I'm not feeling too much productive as I think I could be.
The main reason is because I'm still waiting for my body to get use to the new role on packing. This is causing me a lot of pain on my back and it seems to not be healing properly. I'm not a person that complain about any problem or pain unless it's extremely relevant and necessary.
I really like doing packing and see how I have improved but I definitely don't like this pain. I never had back problems before.
I've worked nearly 3 years on my previous job lifting washing machine, fridge, heavy sofas, doing carpet cleaning, even cleaning. It was a very active position, I felt tired but after weeks the muscle got used to it and the pain was gone.
But that's not what seems to be happening doing packing.
This is what I'm trying to do:
Painkillers: aren't taking effect anymore.
Stretching: I'm trying to do some before start the job.
Drinking more water and changing my lunch for something stronger and healthier.
I'm using the unfolded boxes as a support to make the workspace higher so I won't bend my spine and posture too much.
Having lunch earlier: it had some little effect.
I've reduced my freelancer activity so I can have more rest.

Unfortunately those things aren't being really effective. And to get worst like a snowball effect, the pain won't leave me alone during the night, harming the sleep needed to heal.
Friday I was forced to stop 1pm for lunch as I couldn't carry on with pain. I sat down outside where I could rest my back and that gave me some relief. I've recovered only today (Sunday).
So, I'd like to ask you some advice, how staff usually deal with that?
I wonder if the problem is the table, maybe is too low for me, even though I'm not that tall.
I don't wanted to give you such a headache and I don't want to let you down if I get worst and possibly can't work.
I'm a responsible person with strong comercial awareness, I do worry with the company and I'm getting upset and frustrated that I'm not being as productive as expected.
I hate not being able to help working extra hours on these times when we are really busy and packed but I'm truly having no choice.
I'm not attached to my position, I'm happy to anything that the company may need, even cleaning or sweeping the floor etc.
When we first discussed my role that was very different times, I understand. I think it could be interesting if we sit again in the future and discuss what we could do to solve this issue.
I'm hoping you may have any advice I haven't tried or a best solution. Please feel free to tell me anything. I'm an easy going and reasonable person and I understand that on these days there could be a chance that my position can't be restored.
I'm open to any suggestions, I'm not sure what can work well for me, less hours or 1 day less a week. I don't mind if my salary can be reduced as long as this problem won't ruin my back.
As I don't have contract, we can assign something temporary and you can state anything you need so you are covered and secure that you won't have any problems.
I'm just giving you examples. Take your time to think. I express myself much better writing than speaking. But you don't need to reply this email. We can talk when you're free.
Once again, I'm sorry about that and thanks for reading.
Lucas"

49. Of note within the e-mail the claimant told the respondent that he was using unfolded boxes as a support to make the workspace higher. In evidence the claimant said that both Mr Han and Miss Wang had seen him working in such a position. The Tribunal accepts that evidence on the balance of probabilities. The inference from that evidence is that the respondents were aware that the claimant was adapting the workspace, and that the adaption was due to his ongoing back pain.

50. Following the detailed e-mail sent on the on 19 April 2020 the respondent could have had no doubt that the claimant was experiencing serious back pain and that he was doing all he could to change the workspace, manage the pain by taking painkillers and adjusting his diet, and was seeking assistance. It is clear from that e-mail that one of the key issues raised was the height of the worktable.

51. Such an issue involves a potential health and safety breach, as the working conditions were causing the claimant pain. He raised the height of the table as the issue a number of times with the respondents, who did not discuss any potential resolutions with him.

52. It was accepted by the respondent, both in the statements of Mr Han and Ms Wang, and in their evidence before the Tribunal, that they did not respond to that e-mail.

53. The evidence of Mr Han was that he thought the e-mail was “weird”. And that the claimant could have spoken to him face to face rather than sending an e-mail, and that he took action rather than replying to the message itself. Ms Wang’s evidence was that she did not respond as they were very busy.

54. In a witness statement the respondent stated that they were not at fault in causing the claimant’s back pain. The respondent stated that they were concerned and agreed to assign the claimant to lighter duties. Their evidence was that the claimant was moved to printing.

55. The evidence given by the claimant was that he had been undertaking printing tasks previously even when he was assigned to his packing role. He told the Tribunal that the printing tasks work not taking him away from the packing work, as they were not tasks that took all day and he would go between the two.

56. During the course of their evidence both witnesses for the respondent stated that they had made adjustments to assist the claimant with his back pain by allowing him time off work. That evidence is not accepted by the Tribunal. It is clear from the documentary evidence provided that in fact the only reason that the claimant took days off was either at the request of the respondent when there was no work for him due to toner issues, or when he himself was unable to work due to pain.

57. Counsel for the respondent took the claimant through the work records (page 71 of the Bundle) at some length. The claimant agreed that there were dates where he was not at work, such as Thursday 23 April 2020. He also agreed

when asked that he had worked 6 hours rather than the usual 8 hours on 24 April 2020, and then had the weekend off work. It was suggested that he had been given a day off to assist with his back condition. The claimant stated that the days off were simply because there was no toner, and that when he had asked for days off, they had not been agreed.

58. The claimant produced the text messages relating to 23 April 2020 (at page 82 of the Bundle). Mr Han had sent a message at 20.06 on Wednesday 22 April stating "Hi lucas, we dont have toner, can you off tomo? I will let you know about friday. Thanks".

59. It was put to the claimant that having a day off would improve his back, and the claimant agreed that any rest improved the pain, but it was short term relief from the pain. He stated that once back at work, the pain would start after lunch on the first day, and that by the second day the pain would be almost unbearable.

60. Mr Han stated that they could not have given the claimant one day off a week. Miss Wang stated that if the claimant needed every Wednesday off work then the respondent would have to hire someone to undertake his role that day. It was therefore not something that the respondent was prepared to do.

61. Mr Han said that between 19 April and 11 May 2020 the claimant had one or two days off every week. It was suggested on behalf of the respondent that this was to assist the claimant, presumably by way of a reasonable adjustment. However, as outlined above the days which the claimant was not working during that period were as a result of no work being available.

62. By 29 April 2020 the claimant's back pain had worsened. He therefore sent a further e-mail, and indeed a message on WhatsApp advising the respondent that he had sent an e-mail. Again, he asked if the respondent had any suggestions that would assist him such as Wednesdays off work.

63. The email was sent at 20.24 and read as follows (page 85 of the Bundle):

"Hi Jim and Lynn,
I'm afraid I won't be able to work tomorrow. My back is burning in pain. I tried to contact the GP to get an appointment but they are really busy at the moment and prioritising emergencies. My case is classified as severe
pain.
They suggested to rest for at least 3 days. But I don't wanted to let you down. I can try to work at least Friday.
Tomorrow I'll rest and try to get a last minute appointment on a chiropractor next to me as I can't expect nothing soon for the gp.
I can't afford a complete chiropractor treatment, only a consultation.
I wanted to help the company until this pandemic is over but I fear that I can't hold on carrying on as it is. As I said, I'm trying taking more rest, last night I went to bed 21:30.
Today I think the pain got worst while turning and twisting and bending even lower on the wallpaper cutting section.

I'd like to suggest to have a day off every Wednesday, while I'm doing packing and printing. This way I won't stress my back for too many days in a row. I believe that's the best thing we could try. I'm happy to have my salary recalculated.
For me the best thing would be comeback to my initial position, but I haven't heard from you about the possibility. I'm happy to do packing and help on busy times but I can't see myself doing that every single day for too long.
As I said before, I like doing everything related to the process of our work, but I don't like this pain, it has changed my daily routines and my quality of life, specially having a baby and not being able to support my wife anymore.
Moreover, I'd like to reinforce that I have been waiting and searching for 5 years a place where I could work full time on my field of work, but I'm afraid if we can't agree a solution unfortunately I won't be able to continue working together.
I'm sorry about that, I'm open to any suggestion.
Many thanks,
Lucas Godoy"

64. The respondent pointed out in submissions that the email did not mention the table. However, in our view, it was clearly relating to the claimant's back pain, and the claimant stated that it had worsened "while turning and twisting and bending even lower". This email, when taken together with the email of 19 April, clearly relate to the height of the working table as causing the back pain. We find that the claimant was raising a genuine concern that the method of work was causing pain, which was continuing and indeed worsening. The claimant offered various options, including taking Wednesdays off unpaid, and clearly stated that he was "open to any suggestion".

65. However, the respondent did not make any suggestions as, again, the respondent did not reply to that e-mail. In evidence Mr Han stated that he had not responded as he had taken action, rather than sending an e-mail. Mr Han said that he had done what he could to reduce the claimant's workload, by giving him one day off a week. He stated that they had taken action to reduce his pain. He also repeated that he thought that it was "weird" that every time the claimant "wanted to say something, he did not talk, did email me, which was weird".

66. On 30 April and on 1 May 2020 the claimant was unable to attend work due to his back pain. He had sent a message on 30 April saying that he felt his back was getting better, but that he had hoped to see a doctor before "ignoring the recommended 3 days rest" (message at page 86 of the Bundle). He confirmed this in an email, and again stated that the respondent could call him anytime or text him "to discuss if you have any suggestions like I mentioned about Wednesdays".

67. On 1 May Ms Wang sent the claimant an e-mail which stated that she "will get back to [him] this weekend".

68. In evidence Ms Wang stated that she had sent the claimant a message stating that she would try to get back to him over the weekend, but that she had been unable to do so as she had worked all weekend, including working late.

69. The claimant attended work on 4 May 2020. We accept the evidence of the claimant that upon his return to work, Mr Han asked him how he was feeling and the claimant responded that after resting for four days the pain was better. There was no further discussion after that comment as Mr Han walked away to continue working.

70. The claimant was due to work the following day. However, he received a text in the early hours of the morning on 5 May 2020 from Mr Han telling him not to work the following day as there were toner issues.

71. In the message Mr Han said “can you come to work till we find someone else? You won't do mural. We don't have toner tomorrow. So can I call you to come once the toner is ready?”. The Tribunal finds that this message is clear; there was no work available to the claimant due to the lack of toner. The respondent was not giving the claimant time away from work to alleviate his pain.

72. The claimant responded saying that he was hoping to hear about the other points he had raised by e-mail. He stated “I don’t want to let you down. But that pain isn’t normal and I’m worried and I don’t want to come to a point where I have to take sick leave” (page 91 of the Bundle).

73. He also stated that he would wish to return to his initial position of graphic designer. The claimant advised the respondent that if that was not possible, he would give reasonable notice to the company as he could not continue working in pain. He ended the message saying “That’s why we need to sort this ASAP”.

74. The respondent did not reply to that message. When the claimant asked Mr Han in cross-examination why he had not replied, Mr Han initially answered “our suggestion was he cannot carry on job, so he should find another job, until we could find someone else”. The claimant’s question was repeated, and Mr Han said “between you and I already concluded”. That answer was repeated back to Mr Han, who confirmed that he had said those words. It appears to the Tribunal that the respondent had already, by this stage, decided that they should replace the claimant.

75. By this stage the respondent had been in contact with other potential employees (as shown in the messages at pages 83, 84 and 90 of the Bundle). Those discussions were on 28, 29 and 30 April and 2 May and involved at least three potential candidates. In one response, Ms Wang had given the address of the workplace and had asked the candidate to let her know if they wanted to “take a trial”.

76. The claimant and respondent agree that there was a conversation on 8 May 2020 regarding the claimant’s work.

77. The claimant stated that he had approached Ms Wang to ask about his pay being late. He also challenged her about not calling him the previous weekend about his concerns set out in his emails. The claimant said that Ms Wang told him that she thought Mr Han had already spoken to him. In evidence before the Tribunal the claimant confirmed that it was Ms Wang who told him to start looking for another job as he would not be able to return to his original post. When the claimant asked about adjusting the table or having a mid-week day off work, Ms Wang said that that would not work for the respondent as they would then need cover for that day.

78. The claimant's evidence was that it was a heated discussion. When challenged by counsel for the respondent, who maintained that it was a calm discussion, the claimant said stated that it was heated as Ms Wang asked him to "look for another job without speaking to [him] or taking any action for the back pain".

79. The claimant also stated that he had mentioned the email regarding trying to adjust the tables to Ms Wang.

80. Ms Wang's evidence was that it was the claimant who had asked for Wednesdays off work, and that he had been told that was not possible.

81. When asked if they had spoken about the table, Ms Wang said yes, but added that before the claimant had started working there, they had been doing business since 2016 and no one had had a problem with the table. She added that as no one had had a problem they "couldn't really change the table as it was not really for [them] to do". When asked to clarify that answer, Ms Wang said that the working table was "huge" as they did printing, so it was 3m by 4m80, and that the size was not common so they had joined four tables. She said that the height of the table was common, but that it was not easy to change the table, so she had asked him to do printing rather than packing.

82. In respect of the conversation on 8 May 2020, the Tribunal prefers the evidence of the claimant to that of Ms Wang.

83. We find that the e-mail sent by Ms Wang to the claimant stating that they would look for someone else confirms that the suggestion was made by the respondent rather than the claimant. The claimant continued to offer options which would enable him to keep his job, such as adjusting the table and taking Wednesdays off work. The respondent offered no solution to the claimant save for him to leave.

84. The claimant had a telephone appointment with his General Practitioner and on 11 May 2020. He explained to his GP that his backpain was worsening and that his employer was not listening to his concerns. He therefore asked if the GP could send a message to the respondent with advice. She agreed to send a message to the claimant which he could then forward to the respondent.

85. The claimant did receive and then relay the advice from his GP to the respondent. He did this by way of e-mail which he sent at 14.40. The General

practitioner had advised him to speak to his employer about safe working and adjustments.

86. The email sent read as follows (page 94 of the Bundle):

> "Hi Jim and Lynn,
> This morning had a following doctor call appointment and she advised:
> "Sorry to hear about your back pain. I would advise you to talk to your employer regarding safe working and adjustments to your work space to prevent muscular strain. You may benefit from rest breaks and having a rest day mid week.
> Thanks, Nadine Lawrence
> Burnt Ash Surgery"
> Previously she asked what I think is causing the pain and I said mainly bending over the table. She suggested to check the heath and safety and see if the table is too low.
> We need to take action ASAP as I don't know how long I will be able to work.
> I haven't heard from you yet.
> Thanks
> Lucas Godoy"

87. Within four hours, at 18.38, the respondent sent an e-mail to the claimant in the following terms:

> "Hi lucas,
> We have discussed, and can see this role is not helping you.
> We think it is better to end the job now.
> You don't need to work here from now on.
> We will forward the rest of payment and p45 shortly.
> Thanks and all the best".

88. The email was not signed, but Ms Wang accepted that she had drafted it. In evidence, she stated that when she stated, "we have discussed", she was referring to a conversation that she had had with Mr Han.

89. The Tribunal finds as a fact that the purpose of that e-mail was to dismiss the claimant. In our view it clearly amounts to a dismissal.

90. The claimant responded at 20.29 saying that he had been fired without notice. He did state within his e-mail that he was open to a friendly agreement or deal. He remained at this time loyal to the company and was we find, trying to work out a way in which he could continue his employment, without his back pain increasing.

91. There was there were messages sent between the claimant and respondent on 11 and 12 May 2020 in which they discussed arranging to speak about the issues. However, such a conversation never took place and the claimant saw a solicitor for legal advice on 14 May 2020.

92. On 18 May 2020 the claimant contacted ACAS. On 20 May 2020 the claimant filed his ET/1.

93. We note that within the Bundle there are documents relating to discussions that occurred after the claimant had lodged his claims. Such documents ought not to have been placed within the Bundle, and the Tribunal has disregarded them.

Findings in respect of list of issues

Protected Disclosure

94. The claimant made disclosures in writing to both Mr Han and Ms Wang in emails dated 19 April 2020, 29 April 2020 and 11 May 2020. He disclosed information, namely that the low table used in the factory was causing him back pain. We find that he did believe that the disclosure was made in the public interest, as well as his own personal interest as he was in pain. In his initial email he asked the respondent how other staff dealt with the issues, and queried whether the table was too low.

95. We find that the claimant's belief that the disclosure was made in the public interest was reasonable. As referred to above, the claimant did ask about other workers. He cited previous physical work that he had undertaken without issue, and the actions he was taking to try to reduce the pain. However, as set out above, his muscles had not adapted to the role and he was experiencing significant pain. The key concern was the height of the table at which he and other employees had to work. The Tribunal finds that his belief that the disclosure was made in the public interest was reasonable.

96. The Tribunal finds that the claimant did believe that the information tended to show that the health or safety of any individual had been, was being or was likely to be endangered. The claimant had told his employers about his back pain, which had resulted from the low table used in the factory. His health and safety had been endangered and the situation was worsening. By 29 April 2020, the claimant advised the respondent that his back was "burning in pain".

97. The claimant spoke to his GP about the pain and the table, and on 11 May 2020 he specifically referred to health and safety concerns. He copied the advice from his doctor into the email, where she had advised him to talk to his employer regarding safe working and adjustments to his workplace to prevent muscular strain. She also raised potential reasonable adjustments to be discussed including rest breaks and having a rest day mid-week.

98. As a result of that advice, the claimant added that he thought the pain was caused by bending over the table and that the doctor said to check "the health and safety to see if the table is too low". He urged the respondent to take action as soon as possible.

99. The Tribunal further finds that the claimant's belief that the information showed that the health or safety of any individual had been, was being or was likely to

be endangered was reasonable. He had taken advice from his GP and had relayed that advice to the respondent.

100. The claimant subjectively believed that the information he disclosed did tend to show a health and safety breach, and he provided sufficient factual content and specificity in his emails such that it was capable of tending to show that listed matter. The Tribunal finds that the beliefs held as set out above were reasonable. The subjective and objective elements of the test are made out.

101. As the claimant made the protected disclosure to his employer it was a protected disclosure.

102. As set out above the Tribunal finds that the claimant was dismissed by the respondent. The words “we think it is better to end the job now” and “you don’t need to work here from now on” are clearly expressed and amount to a dismissal.

103. Further the Tribunal finds that the reason for dismissal was that the claimant had made a protected disclosure. The respondent dismissed the claimant hours after the claimant had asked them to take action relating to the low table, which was causing him back pain. He specifically cited health and safety concerns.

104. The claimant had only worked for the respondent for some two months. His notice period would therefore be one week. The claimant was not paid such a notice period. The claimant was not guilty of any gross misconduct nor did he do anything so serious that the respondent was entitled to dismiss him without notice. The respondent should therefore pay the claimant the relevant notice.

105. The Tribunal finds that when these proceedings were begun the respondent was in breach of its duty to give the claimant a written statement of employment particulars. The claimant had requested written particulars and had specifically referred to the fact that he did not have a contract in his e-mail dated the 19th of April 2020.

106. The Tribunal has provisionally listed the remedy hearing in this case for 1 December 2020.

.....
Employment Judge Beckett
London South ET
Dated: 15 November 2022

Notes:

Reasons for the Judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to Employment Tribunal Judgments

All judgments and written reasons for the judgments are published online shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case. They can be found at: www.gov.uk/employment-tribunal-decisions.

CASE NUMBER: 2302444/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr L Franco de Godoy**

Respondent: **H & L Trading Ltd**

Heard at: **London South via CVP** **On:** **4 August 2022**
In Chambers via CVP **13 October 2022**

Before: **Employment Judge Beckett**
Ms S Khawaja
Ms A Rodney

Representation

Claimant: In person
Respondents: Mr C Edwards (counsel)

JUDGMENT

1. The unanimous decision of the Tribunal is that the claims in respect of automatic unfair dismissal through protected disclsoure, notice pay and failure to provide the claimant with written particulars of employment are well-founded.

CASE SUMMARY

2. The claimant was employed by the respondent, a printing company, as an assistant (graphic design) from March 2020 to 11 May 2020. Early conciliation started on 20 May 2020 and ended on 20 June 2020. The claim was presented on 20 June 2020.

3. The claim is automatic unfair dismissal through protected disclosure, (whistleblowing), notice pay and failure to provide the claimant with written particulars of employment. The claimant's case was that he was dismissed for raising health and safety concerns, namely that he was suffering back pain caused by the tables at the factory being too low.

4. The respondent denies liabilty. The respondent's case is that the end of employment came about by mutual agreement and the claimant was not dismissed. The respondent accepts that the claimant raised the issue of his back pain, but state that they made reasonable adjustments by assigning the claimant with lighter tasks, and by allowing the claimant to have days off.

5. The respondent states that the claimant agreed to leave his employment upon reasonable notice once a replacement member of staff was found. The claimant was invited to discuss that further but failed to do so.

The case

6. The list of issues (pages 26 onwards of the Bundle) was agreed between the parties.

7. The issues to be determined were set out in the Case Management Order at paragraph 37:

1. Protected disclosure

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

1.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

1.1.1.1 The claimant raised his concern with Mr Jin Han, the respondent's director on 19 April 2020. The claimant told him that he was suffering from back pain because he was bending over a table which was too low for him. He raised his concern by email on 19 April 2020. The email was to the general company email. There were subsequent emails.
1.1.1.2 Did he disclose information?
1.1.1.3 Did he believe the disclosure of information was made in the public interest?
1.1.1.4 Was that belief reasonable?
1.1.1.5 Did he believe that it tended to show that:
1. 1.1.5.1 the health or safety of any individual had been, was being or was likely to be endangered;
1.1.1.6 Was that belief reasonable?
1.2. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

2. Unfair dismissal

2.1. Was the claimant dismissed? The respondent says that the claimant was not dismissed.

2.2. If the claimant was dismissed, was the reason or principal reason for dismissal that the claimant made a protected disclosure etc?

3. Remedy – omitted for purpose of this judgment.

4. Wrongful dismissal/ Notice pay

4.1 what was the claimant's notice period?
4.2 Was the claimant paid for that period?
4.3 If not, was the claimant guilty of gross misconduct/ did the claimant do something so serious that the respondent was entitled to dismiss without notice?

5. Schedule 5 Employment Act 2002 cases

5.1 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

The law

8. Not all disclosures are protected under the Employment Rights Act 1996 (ERA).

9. The disclosure must be a protected disclosure to be covered by the ERA. Three conditions must be satisfied to constitute a protected disclosure:
   - it must be a 'disclosure of information'
   - it must be a 'qualifying disclosure'; that is one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of the six 'relevant failures' has occurred or is likely to occur
   - it must be made in accordance with one of the six specified methods of disclosure.

10. Section 43A provides that a protected disclosure means a 'qualifying disclosure' as is defined by section 43B which is made by a worker in accordance with sections 43C to 43H Employment Rights Act 1996.

11. Section 43B (1) provides that "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 or is likely to be deliberately concealed".

12. The definition of a qualifying disclosure has both a subjective and objective element. The subjective element is that the worker must believe that the information disclosed tends to show one or more of the six relevant failures.

13. The objective element is that the belief must be reasonable. The worker must also have a (subjective) belief that the disclosure is in the public interest which must (objectively) be reasonable. This requires the tribunal to gauge what the worker considered to be in the public interest, whether the worker believed that the disclosure served that interest and whether the belief was reasonably held.

14. In *Chesterton Global Ltd v Nurmohamed* 2018 ICR 731 CA, the Court of Appeal confirmed that the public interest as well as the personal interest of the worker requirement can be satisfied where the basis of the belief is wrong and/or there is no public interest in the disclosure being made, provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable.

15. The Court identified some of factors the Tribunal could consider in deciding whether it might be reasonable to regard the disclosure as being in the public as well as in the private interest of the worker:
(1) The numbers in the group whose interests the disclosure served,
(2) The nature to which they are affected and the extent to which they are affected by the wrongdoing disclosed,
(3) The nature of the wrongdoing concerned and,
(4) The Identity of the alleged wrongdoer.

16. The issue as to whether matters raised by employees amount to an 'allegation' or 'disclosure of information' was considered in the case of *Kilraine v The London Borough of Wandsworth* [2018] ECWA CIV 1436, in which the Court of Appeal provided the following helpful guidance on this issue: "The concept of information as used in section 43B (1) is capable of covering statements which might also be characterised as allegations. Section 43B (1) should not be glossed to introduce a rigid dichotomy between information on the one hand and allegations on the other.

17. In Cav*endish Munro* the EAT was not seeking to introduce such a rigid dichotomy. All it was seeking to say was that a statement which merely took the form "you are not complying with health and safety requirements" would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B (1) so as to constitute a qualifying disclosure.

18. The question in each case in relation to section 43B (1) as it stood prior to the amendment in 2013 is whether a particular statement or disclosure is a "disclosure of information which in the reasonable belief of the worker making the disclosure tends to show one or more [of the matters set out in paragraphs (a)to(f)]". Grammatically, the word "information" has to be read with the qualifying phrase "which tends to show [etc]". In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).

19. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirements set out in section 43B (1) namely that the worker making the disclosure should have a reasonable belief that the information he discloses does tend to show one of the listed matters.

20. As explained in *Chesterton Global Limited v Nurmohamed* this has both a subjective and objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that its capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.

21. Whether a particular disclosure satisfies the test in section 43B (1) should be assessed in the light of the particular context in which it is made. If to adapt the example given in the *Cavendish Munro* case the worker brings his manager down to a particular ward in a hospital gestures to sharps left lying around and says "you are not complying with health and safety requirements" the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time it was made. If such a disclosure was to be relied upon for the purpose of a whistleblowing claim the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner".

22. In these reasons we used that guidance to find the necessary facts to evaluate the evidence to decide whether the information provided by the claimant to the respondent was in and of itself a qualifying disclosure. Was it sufficient in its factual content specificity and context for it to be capable of tending to show a relevant failure under section 43B(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered, so that it is likely that the claimant's subjective belief was reasonable. Did the claimant subjectively believe it was made in the public interest and was his subjective belief objectively reasonable?

The hearing

23. The hearing was listed for 1 day, on 4 August 2022. The hearing was conducted over CVP (video hearing).

24. The Tribunal read the papers, and then the claimant gave evidence at 11.10am.

25. His evidence concluded at 1.10pm. The case resumed at 2pm when the claimant answered two short questions from Tribunal member Ms Khawaja.

26. Mr J Han then confirmed the contents of his witness statement as his evidence on behalf of the respondent. He was cross-examined by the claimant. Finally, Ms Wang confirmed the contents of her witness statement as her evidence in chief, and she was then cross-examined by the claimant.

27. Both parties made submissions. The hearing ended at around 4.30pm, and the Tribunal postponed deliberations to 13 October 2022, which was the first available date for the panel.

Brief overview

28. The Claimant was employed by the respondent, a printing company, as a printing assistant (graphic design), from 3 March 2020 until 11 May 2020.

29. The claimant's role involved dealing with customer requests and making printable artwork for the customer.

30. After the UK entered lockdown on 26 March 2020 the respondent's orders for printable artwork declined. At the same time, a number of the respondent's employees who worked in the packing sector had to self-isolate. The respondent contacted the claimant on 28 March 2020 to ask if he would be willing to carry out dispatching and packing duties instead of his substantive role.

31. The claimant agreed to carry out the alternative duties and started work on 30 March 2020.

32. Thereafter the claimant stated that he suffered from back pain relating to the packing role, and he raised those concerns with the respondent.

33. The claimant sent detailed emails regarding the issues on 19 and 29 April 2020. After further advice from his GP, he sent another email on 11 May 2020.

34. The respondent replied stating that he no longer needed to work [for them] and that the rest of his pay and P45 would follow.

35. There is a dispute between the parties as to whether the claimant had resigned, or whether the respondent had dismissed him. The claimant did reply to the email.

36. It is accepted by both parties that the claimant did not return to work after that date. The claimant subsequently obtained legal advice, and then contacted ACAS, before commencing proceedings with the Tribunal.

Findings of Fact

37. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims were well-founded.

38. We have not sought to determine all issues disputed between the parties, simply those that we regard as relevant to determining the claims. When determining certain findings of fact, where we consider this appropriate, we have set out the reasons for those findings.

39. In making findings of fact, we placed particular reliance upon contemporaneous documents within the bundle, such as emails, as an accurate version of events, when assessing the evidence. Witness statements and the evidence of each witness were considered alongside the caveat that memories fade and that the statements were drafted sometime after the events in question. They were also drafted to advance or defend the claim. We considered all these issues when assessing the weight of the evidence.

40. The claimant and respondent disagree as to when the claimant's back pain started, and when the respondent was first told of the pain.

41. It is accepted by the Tribunal that the claimant started to experience back pain on 30 March 2020. On that date he contacted his wife stating that he was folding boxes, packing orders and rolling up banners. He stated "it's not boring. But it really hurts my back! The table is low you know. I have to keep bending over. Not only standing but also bending over". This message was recorded as a voice message, and it was transcribed for the hearing.

42. The claimant stated in evidence that Mr Han had asked him how he was feeling and he mentioned back pain at that time. It was not asserted on behalf of the claimant that this was a lengthy or detailed discussion at this stage. Mr Han's evidence was that no such conversation took place. We find as a fact that there was a short exchange at that time, but nothing that would have caused the respondent any concern as to the claimants undertaking off his alternative role.

43. Further, the Tribunal accepts the evidence of the claimant that he started to take painkillers after his shift on 31 March 2020.

44. The claimant continued to work although he had a day off on 6 April 2020, due to a toner supply shortage. That day off was at the request of Mr Han who sent him a message the previous day (Sunday 5 April at 14.11):

"hi. some problem with small banner printer. cant print, so plz have some days off. once it is sorted, will call you" (page 80 of the bundle). Mr Han later stated that it was likely that the issue would be sorted by Tuesday. He sent the claimant a message at 20.56 on Monday 6 April stating "plz come tmrw 1p".

45. The claimant worked his shifts on 7 and 8 April 2020.

46. The claimant was due to be paid on 9 April 2020. His first payment had been two days late and the claimant had complained about it directly. He was then paid, but no pay slip was provided to him.

47. We find as a fact that the claimant's back pain continued and on 14 April 2020, he sought advice from NHS online, having been unable to obtain an appointment during the pandemic.

48. The claimant's back pain had reached such a level that he sent a detailed e-mail to the respondents on 19 April 2020 at 15.53. This e-mail appears at page 81 of the bundle.

"Hello Jim & Lynn,
I'm writing you to ask some advice as I'm not feeling too much productive as I think I could be.
The main reason is because I'm still waiting for my body to get use to the new role on packing. This is causing me a lot of pain on my back and it seems to not be healing properly. I'm not a person that complain about any problem or pain unless it's extremely relevant and necessary.
I really like doing packing and see how I have improved but I definitely don't like this pain. I never had back problems before.
I've worked nearly 3 years on my previous job lifting washing machine, fridge, heavy sofas, doing carpet cleaning, even cleaning. It was a very active position, I felt tired but after weeks the muscle got used to it and the pain was gone.
But that's not what seems to be happening doing packing.
This is what I'm trying to do:
Painkillers: aren't taking effect anymore.
Stretching: I'm trying to do some before start the job.
Drinking more water and changing my lunch for something stronger and healthier.
I'm using the unfolded boxes as a support to make the workspace higher so I won't bend my spine and posture too much.
Having lunch earlier: it had some little effect.
I've reduced my freelancer activity so I can have more rest.

Unfortunately those things aren't being really effective. And to get worst like a snowball effect, the pain won't leave me alone during the night, harming the sleep needed to heal.
Friday I was forced to stop 1pm for lunch as I couldn't carry on with pain. I sat down outside where I could rest my back and that gave me some relief. I've recovered only today (Sunday).
So, I'd like to ask you some advice, how staff usually deal with that?
I wonder if the problem is the table, maybe is too low for me, even though I'm not that tall.
I don't wanted to give you such a headache and I don't want to let you down if I get worst and possibly can't work.
I'm a responsible person with strong comercial awareness, I do worry with the company and I'm getting upset and frustrated that I'm not being as productive as expected.
I hate not being able to help working extra hours on these times when we are really busy and packed but I'm truly having no choice.
I'm not attached to my position, I'm happy to anything that the company may need, even cleaning or sweeping the floor etc.
When we first discussed my role that was very different times, I understand. I think it could be interesting if we sit again in the future and discuss what we could do to solve this issue.
I'm hoping you may have any advice I haven't tried or a best solution. Please feel free to tell me anything. I'm an easy going and reasonable person and I understand that on these days there could be a chance that my position can't be restored.
I'm open to any suggestions, I'm not sure what can work well for me, less hours or 1 day less a week. I don't mind if my salary can be reduced as long as this problem won't ruin my back.
As I don't have contract, we can assign something temporary and you can state anything you need so you are covered and secure that you won't have any problems.
I'm just giving you examples. Take your time to think. I express myself much better writing than speaking. But you don't need to reply this email. We can talk when you're free.
Once again, I'm sorry about that and thanks for reading.
Lucas"

49. Of note within the e-mail the claimant told the respondent that he was using unfolded boxes as a support to make the workspace higher. In evidence the claimant said that both Mr Han and Miss Wang had seen him working in such a position. The Tribunal accepts that evidence on the balance of probabilities. The inference from that evidence is that the respondents were aware that the claimant was adapting the workspace, and that the adaption was due to his ongoing back pain.

50. Following the detailed e-mail sent on the on 19 April 2020 the respondent could have had no doubt that the claimant was experiencing serious back pain and that he was doing all he could to change the workspace, manage the pain by taking painkillers and adjusting his diet, and was seeking assistance. It is clear from that e-mail that one of the key issues raised was the height of the worktable.

51. Such an issue involves a potential health and safety breach, as the working conditions were causing the claimant pain. He raised the height of the table as the issue a number of times with the respondents, who did not discuss any potential resolutions with him.

52. It was accepted by the respondent, both in the statements of Mr Han and Ms Wang, and in their evidence before the Tribunal, that they did not respond to that e-mail.

53. The evidence of Mr Han was that he thought the e-mail was “weird”. And that the claimant could have spoken to him face to face rather than sending an e-mail, and that he took action rather than replying to the message itself. Ms Wang’s evidence was that she did not respond as they were very busy.

54. In a witness statement the respondent stated that they were not at fault in causing the claimant’s back pain. The respondent stated that they were concerned and agreed to assign the claimant to lighter duties. Their evidence was that the claimant was moved to printing.

55. The evidence given by the claimant was that he had been undertaking printing tasks previously even when he was assigned to his packing role. He told the Tribunal that the printing tasks work not taking him away from the packing work, as they were not tasks that took all day and he would go between the two.

56. During the course of their evidence both witnesses for the respondent stated that they had made adjustments to assist the claimant with his back pain by allowing him time off work. That evidence is not accepted by the Tribunal. It is clear from the documentary evidence provided that in fact the only reason that the claimant took days off was either at the request of the respondent when there was no work for him due to toner issues, or when he himself was unable to work due to pain.

57. Counsel for the respondent took the claimant through the work records (page 71 of the Bundle) at some length. The claimant agreed that there were dates where he was not at work, such as Thursday 23 April 2020. He also agreed

when asked that he had worked 6 hours rather than the usual 8 hours on 24 April 2020, and then had the weekend off work. It was suggested that he had been given a day off to assist with his back condition. The claimant stated that the days off were simply because there was no toner, and that when he had asked for days off, they had not been agreed.

58. The claimant produced the text messages relating to 23 April 2020 (at page 82 of the Bundle). Mr Han had sent a message at 20.06 on Wednesday 22 April stating "Hi lucas, we dont have toner, can you off tomo? I will let you know about friday. Thanks".

59. It was put to the claimant that having a day off would improve his back, and the claimant agreed that any rest improved the pain, but it was short term relief from the pain. He stated that once back at work, the pain would start after lunch on the first day, and that by the second day the pain would be almost unbearable.

60. Mr Han stated that they could not have given the claimant one day off a week. Miss Wang stated that if the claimant needed every Wednesday off work then the respondent would have to hire someone to undertake his role that day. It was therefore not something that the respondent was prepared to do.

61. Mr Han said that between 19 April and 11 May 2020 the claimant had one or two days off every week. It was suggested on behalf of the respondent that this was to assist the claimant, presumably by way of a reasonable adjustment. However, as outlined above the days which the claimant was not working during that period were as a result of no work being available.

62. By 29 April 2020 the claimant's back pain had worsened. He therefore sent a further e-mail, and indeed a message on WhatsApp advising the respondent that he had sent an e-mail. Again, he asked if the respondent had any suggestions that would assist him such as Wednesdays off work.

63. The email was sent at 20.24 and read as follows (page 85 of the Bundle):

"Hi Jim and Lynn,
I'm afraid I won't be able to work tomorrow. My back is burning in pain. I tried to contact the GP to get an appointment but they are really busy at the moment and prioritising emergencies. My case is classified as severe
pain.
They suggested to rest for at least 3 days. But I don't wanted to let you down. I can try to work at least Friday.
Tomorrow I'll rest and try to get a last minute appointment on a chiropractor next to me as I can't expect nothing soon for the gp.
I can't afford a complete chiropractor treatment, only a consultation.
I wanted to help the company until this pandemic is over but I fear that I can't hold on carrying on as it is. As I said, I'm trying taking more rest, last night I went to bed 21:30.
Today I think the pain got worst while turning and twisting and bending even lower on the wallpaper cutting section.

I'd like to suggest to have a day off every Wednesday, while I'm doing packing and printing. This way I won't stress my back for too many days in a row. I believe that's the best thing we could try. I'm happy to have my salary recalculated.
For me the best thing would be comeback to my initial position, but I haven't heard from you about the possibility. I'm happy to do packing and help on busy times but I can't see myself doing that every single day for too long.
As I said before, I like doing everything related to the process of our work, but I don't like this pain, it has changed my daily routines and my quality of life, specially having a baby and not being able to support my wife anymore.
Moreover, I'd like to reinforce that I have been waiting and searching for 5 years a place where I could work full time on my field of work, but I'm afraid if we can't agree a solution unfortunately I won't be able to continue working together.
I'm sorry about that, I'm open to any suggestion.
Many thanks,
Lucas Godoy"

64. The respondent pointed out in submissions that the email did not mention the table. However, in our view, it was clearly relating to the claimant's back pain, and the claimant stated that it had worsened "while turning and twisting and bending even lower". This email, when taken together with the email of 19 April, clearly relate to the height of the working table as causing the back pain. We find that the claimant was raising a genuine concern that the method of work was causing pain, which was continuing and indeed worsening. The claimant offered various options, including taking Wednesdays off unpaid, and clearly stated that he was "open to any suggestion".

65. However, the respondent did not make any suggestions as, again, the respondent did not reply to that e-mail. In evidence Mr Han stated that he had not responded as he had taken action, rather than sending an e-mail. Mr Han said that he had done what he could to reduce the claimant's workload, by giving him one day off a week. He stated that they had taken action to reduce his pain. He also repeated that he thought that it was "weird" that every time the claimant "wanted to say something, he did not talk, did email me, which was weird".

66. On 30 April and on 1 May 2020 the claimant was unable to attend work due to his back pain. He had sent a message on 30 April saying that he felt his back was getting better, but that he had hoped to see a doctor before "ignoring the recommended 3 days rest" (message at page 86 of the Bundle). He confirmed this in an email, and again stated that the respondent could call him anytime or text him "to discuss if you have any suggestions like I mentioned about Wednesdays".

67. On 1 May Ms Wang sent the claimant an e-mail which stated that she "will get back to [him] this weekend".

68. In evidence Ms Wang stated that she had sent the claimant a message stating that she would try to get back to him over the weekend, but that she had been unable to do so as she had worked all weekend, including working late.

69. The claimant attended work on 4 May 2020. We accept the evidence of the claimant that upon his return to work, Mr Han asked him how he was feeling and the claimant responded that after resting for four days the pain was better. There was no further discussion after that comment as Mr Han walked away to continue working.

70. The claimant was due to work the following day. However, he received a text in the early hours of the morning on 5 May 2020 from Mr Han telling him not to work the following day as there were toner issues.

71. In the message Mr Han said “can you come to work till we find someone else? You won't do mural. We don't have toner tomorrow. So can I call you to come once the toner is ready?”. The Tribunal finds that this message is clear; there was no work available to the claimant due to the lack of toner. The respondent was not giving the claimant time away from work to alleviate his pain.

72. The claimant responded saying that he was hoping to hear about the other points he had raised by e-mail. He stated “I don’t want to let you down. But that pain isn’t normal and I’m worried and I don’t want to come to a point where I have to take sick leave” (page 91 of the Bundle).

73. He also stated that he would wish to return to his initial position of graphic designer. The claimant advised the respondent that if that was not possible, he would give reasonable notice to the company as he could not continue working in pain. He ended the message saying “That’s why we need to sort this ASAP”.

74. The respondent did not reply to that message. When the claimant asked Mr Han in cross-examination why he had not replied, Mr Han initially answered “our suggestion was he cannot carry on job, so he should find another job, until we could find someone else”. The claimant’s question was repeated, and Mr Han said “between you and I already concluded”. That answer was repeated back to Mr Han, who confirmed that he had said those words. It appears to the Tribunal that the respondent had already, by this stage, decided that they should replace the claimant.

75. By this stage the respondent had been in contact with other potential employees (as shown in the messages at pages 83, 84 and 90 of the Bundle). Those discussions were on 28, 29 and 30 April and 2 May and involved at least three potential candidates. In one response, Ms Wang had given the address of the workplace and had asked the candidate to let her know if they wanted to “take a trial”.

76. The claimant and respondent agree that there was a conversation on 8 May 2020 regarding the claimant’s work.

77. The claimant stated that he had approached Ms Wang to ask about his pay being late. He also challenged her about not calling him the previous weekend about his concerns set out in his emails. The claimant said that Ms Wang told him that she thought Mr Han had already spoken to him. In evidence before the Tribunal the claimant confirmed that it was Ms Wang who told him to start looking for another job as he would not be able to return to his original post. When the claimant asked about adjusting the table or having a mid-week day off work, Ms Wang said that that would not work for the respondent as they would then need cover for that day.

78. The claimant's evidence was that it was a heated discussion. When challenged by counsel for the respondent, who maintained that it was a calm discussion, the claimant said stated that it was heated as Ms Wang asked him to "look for another job without speaking to [him] or taking any action for the back pain".

79. The claimant also stated that he had mentioned the email regarding trying to adjust the tables to Ms Wang.

80. Ms Wang's evidence was that it was the claimant who had asked for Wednesdays off work, and that he had been told that was not possible.

81. When asked if they had spoken about the table, Ms Wang said yes, but added that before the claimant had started working there, they had been doing business since 2016 and no one had had a problem with the table. She added that as no one had had a problem they "couldn't really change the table as it was not really for [them] to do". When asked to clarify that answer, Ms Wang said that the working table was "huge" as they did printing, so it was 3m by 4m80, and that the size was not common so they had joined four tables. She said that the height of the table was common, but that it was not easy to change the table, so she had asked him to do printing rather than packing.

82. In respect of the conversation on 8 May 2020, the Tribunal prefers the evidence of the claimant to that of Ms Wang.

83. We find that the e-mail sent by Ms Wang to the claimant stating that they would look for someone else confirms that the suggestion was made by the respondent rather than the claimant. The claimant continued to offer options which would enable him to keep his job, such as adjusting the table and taking Wednesdays off work. The respondent offered no solution to the claimant save for him to leave.

84. The claimant had a telephone appointment with his General Practitioner and on 11 May 2020. He explained to his GP that his backpain was worsening and that his employer was not listening to his concerns. He therefore asked if the GP could send a message to the respondent with advice. She agreed to send a message to the claimant which he could then forward to the respondent.

85. The claimant did receive and then relay the advice from his GP to the respondent. He did this by way of e-mail which he sent at 14.40. The General

practitioner had advised him to speak to his employer about safe working and adjustments.

86. The email sent read as follows (page 94 of the Bundle):

> "Hi Jim and Lynn,
> This morning had a following doctor call appointment and she advised:
> "Sorry to hear about your back pain. I would advise you to talk to your employer regarding safe working and adjustments to your work space to prevent muscular strain. You may benefit from rest breaks and having a rest day mid week.
> Thanks, Nadine Lawrence
> Burnt Ash Surgery"
> Previously she asked what I think is causing the pain and I said mainly bending over the table. She suggested to check the heath and safety and see if the table is too low.
> We need to take action ASAP as I don't know how long I will be able to work.
> I haven't heard from you yet.
> Thanks
> Lucas Godoy"

87. Within four hours, at 18.38, the respondent sent an e-mail to the claimant in the following terms:

> "Hi lucas,
> We have discussed, and can see this role is not helping you.
> We think it is better to end the job now.
> You don't need to work here from now on.
> We will forward the rest of payment and p45 shortly.
> Thanks and all the best".

88. The email was not signed, but Ms Wang accepted that she had drafted it. In evidence, she stated that when she stated, "we have discussed", she was referring to a conversation that she had had with Mr Han.

89. The Tribunal finds as a fact that the purpose of that e-mail was to dismiss the claimant. In our view it clearly amounts to a dismissal.

90. The claimant responded at 20.29 saying that he had been fired without notice. He did state within his e-mail that he was open to a friendly agreement or deal. He remained at this time loyal to the company and was we find, trying to work out a way in which he could continue his employment, without his back pain increasing.

91. There was there were messages sent between the claimant and respondent on 11 and 12 May 2020 in which they discussed arranging to speak about the issues. However, such a conversation never took place and the claimant saw a solicitor for legal advice on 14 May 2020.

92. On 18 May 2020 the claimant contacted ACAS. On 20 May 2020 the claimant filed his ET/1.

93. We note that within the Bundle there are documents relating to discussions that occurred after the claimant had lodged his claims. Such documents ought not to have been placed within the Bundle, and the Tribunal has disregarded them.

Findings in respect of list of issues

Protected Disclosure

94. The claimant made disclosures in writing to both Mr Han and Ms Wang in emails dated 19 April 2020, 29 April 2020 and 11 May 2020. He disclosed information, namely that the low table used in the factory was causing him back pain. We find that he did believe that the disclosure was made in the public interest, as well as his own personal interest as he was in pain. In his initial email he asked the respondent how other staff dealt with the issues, and queried whether the table was too low.

95. We find that the claimant's belief that the disclosure was made in the public interest was reasonable. As referred to above, the claimant did ask about other workers. He cited previous physical work that he had undertaken without issue, and the actions he was taking to try to reduce the pain. However, as set out above, his muscles had not adapted to the role and he was experiencing significant pain. The key concern was the height of the table at which he and other employees had to work. The Tribunal finds that his belief that the disclosure was made in the public interest was reasonable.

96. The Tribunal finds that the claimant did believe that the information tended to show that the health or safety of any individual had been, was being or was likely to be endangered. The claimant had told his employers about his back pain, which had resulted from the low table used in the factory. His health and safety had been endangered and the situation was worsening. By 29 April 2020, the claimant advised the respondent that his back was "burning in pain".

97. The claimant spoke to his GP about the pain and the table, and on 11 May 2020 he specifically referred to health and safety concerns. He copied the advice from his doctor into the email, where she had advised him to talk to his employer regarding safe working and adjustments to his workplace to prevent muscular strain. She also raised potential reasonable adjustments to be discussed including rest breaks and having a rest day mid-week.

98. As a result of that advice, the claimant added that he thought the pain was caused by bending over the table and that the doctor said to check "the health and safety to see if the table is too low". He urged the respondent to take action as soon as possible.

99. The Tribunal further finds that the claimant's belief that the information showed that the health or safety of any individual had been, was being or was likely to

be endangered was reasonable. He had taken advice from his GP and had relayed that advice to the respondent.

100. The claimant subjectively believed that the information he disclosed did tend to show a health and safety breach, and he provided sufficient factual content and specificity in his emails such that it was capable of tending to show that listed matter. The Tribunal finds that the beliefs held as set out above were reasonable. The subjective and objective elements of the test are made out.

101. As the claimant made the protected disclosure to his employer it was a protected disclosure.

102. As set out above the Tribunal finds that the claimant was dismissed by the respondent. The words “we think it is better to end the job now” and “you don’t need to work here from now on” are clearly expressed and amount to a dismissal.

103. Further the Tribunal finds that the reason for dismissal was that the claimant had made a protected disclosure. The respondent dismissed the claimant hours after the claimant had asked them to take action relating to the low table, which was causing him back pain. He specifically cited health and safety concerns.

104. The claimant had only worked for the respondent for some two months. His notice period would therefore be one week. The claimant was not paid such a notice period. The claimant was not guilty of any gross misconduct nor did he do anything so serious that the respondent was entitled to dismiss him without notice. The respondent should therefore pay the claimant the relevant notice.

105. The Tribunal finds that when these proceedings were begun the respondent was in breach of its duty to give the claimant a written statement of employment particulars. The claimant had requested written particulars and had specifically referred to the fact that he did not have a contract in his e-mail dated the 19th of April 2020.

106. The Tribunal has provisionally listed the remedy hearing in this case for 1 December 2020.

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Employment Judge Beckett
London South ET
Dated: 15 November 2022

Notes:

Reasons for the Judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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All judgments and written reasons for the judgments are published online shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case. They can be found at: www.gov.uk/employment-tribunal-decisions.