EMPLOYMENT TRIBUNALS

Claimant: Mr. Alan Rogan

Respondent: (1) Whyte Bikes Limited
(2) Mr. Guy Farrant

Heard at: London South via CVP On: 3/4/5/6 January 2023

Before: Employment Judge Mclaren
Members: Mr. J Bendall
Mr. S Huggins

Representation
Claimant: In Person
Respondent: Mr. D Matovu, Counsel

JUDGMENT

The unanimous decision of the employment tribunal is as follows: –

1.Neither the first or second respondent contravened section 13 of the Equality Act 2010. This means that the claim for disability discrimination does not succeed.
2.The claimant made a number of qualifying protected disclosures relying upon ss 43B (1) (b) and 43 B (1) (d) of the Employment Rights Act 1996. These were (a) i,(b) i, ii and iii as set out in the agreed issues list.
3. The sole or principal reason for the claimant's dismissal was that he had made these protected disclosure so that his dismissal by the first respondent is automatically unfair by reason of section 103A of the Employment Rights Act 1996.

REASONS

Evidence

1. We heard evidence from the claimant and from 2 witnesses for the respondent, Mr Farrant, the second respondent and former Managing Director of the first respondent and Mr Patterson, the Sales Director. We

were provided with a bundle of 1384 pages. The claimant had sent the tribunal some further documents which were identified as sections 27, 28 and 29. We agreed that they should be added to the bundle. We were also assisted by helpful submissions from both parties which they provided in writing and, in the case of the respondent's counsel expanded upon in oral submissions.

2. The findings of fact set out below were reached by the tribunal, on a balance of probabilities, having considered all the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the tribunal's assessment of the witness evidence.
3. Only findings of fact relevant to the issues, and those necessary for the tribunal to determine, have been referred to in this judgement. It would not be necessary, and neither would it be proportionate, to determine each and every fact in dispute. If the tribunal has not referred to every document it has read and/or was taken to in the findings below, that does not mean it was not considered if it was referred to in the witness statements/evidence.

<u>Credibility</u>

4. We found Mr Patterson to be a reliable and straightforward witness and, save where we expressly address this, accept his evidence. We found the claimant to be equally straightforward and credible. He gave very full answers to questions that were asked of him. His evidence has been consistent throughout.
5. We found Mr Farrant's evidence to be less credible. He often did not answer a question that was asked of him. When he did give evidence, this was at times inconsistent with his written witness statement, with the documents in the bundle and with Mr Patterson's evidence. For example, he gave different reasons for the redundancy, disputed the dates the claimant paid visits despite the documentation in the bundle showing he was incorrect, and disputed the similarity of the job roles between Ms Elliott and the claimant which Mr Patterson, the line manager, accepted were the same.
6. His witness statement expressed a degree of contrition about the language and expressions used in some emails which he did not accept in answer to questions. When he was asked why his account differed from that set out in his statement, he told us that these were the words of his solicitor. He had no access to information from the first respondent since he sold the business, and the statement was largely made up of information given to his solicitors by the first respondent. Both parties were, however represented by the same legal team. He had not seen the bundle until after Christmas and had no opportunity to go through the bundle until very recently. He had not therefore read the documents which are referred to his statement before he signed it.
7. He could not remember all the events as they were some 2 ½ years ago and he had not been involved in the business since he sold it. While oral evidence is, because of the passage of time, often less reliable than a written statement, in these circumstances we prefer this witness' oral answers where they differ from his written statement as he told us that the statement did not reflect his own words. For all of these reasons we

generally prefer the evidence of the claimant to that of Mr Farrant where there is a conflict.

Issues

8. The issues had been agreed at a preliminary hearing and in discussion on the first day of the hearing the respondent confirmed that it was withdrawing issues under section 13, that is the respondent's contention that it dismissed the claimant fairly for misconduct and/or capability.
9. One additional correction was made to the issues as agreed at the preliminary hearing, namely at 6C the word "redundancy" was replaced with the word "dismissal".
10. The agreed issues as amended are set out below

Protected Disclosures

1. Did the Claimant make the following qualifying disclosures to the Second Respondent for the purposes of s. 43B Employment Rights Act 1996, where in each case he relies upon ss.43B(1)(b) and 43B(1)(d) ERA 1996 and where the legal obligation relied upon is the COVID rules:

	Date	Words said	Form (e.g. email, oral)
(a)	4 - 6.11.20	i. It is illegal to go and visit dealers in both England and Scotland ii. I'm standing here with the paramedics, I am carrying for my uncle who is dying.	Oral, by mobile telephone.
(b)	9.11.20	i. Scotland has a "Level Three" Covid policy right now which has a travel restriction, that allows travel to work, but only if that work cannot be carried-out at home. ii. Scotland has gone a little further at a local level on this issue and have stated that you cannot travel to another ward out with your current home ward. iii. England's lockdown on November 5, 2000 follows the same rule as Scotland in that it allows travel to work, but only if that work cannot be carried-out at home. My	email
		store visits are fact-finding, bike unit and brand reviewing, competitor information etc. all of which can currently be gleaned from phone calls, emails, Whatsapp, text messages etc. This means that driving from Scotland to England is not essential and ultimately, not safe! iv. Finally, I am living with and looking after a terminally ill family member who was diagnosed with cancer last week. He is extremely ill and is currently receiving assessment for his cancer care plan which I personally overseeing as I am the only family member able to do this.	

(c)	10.11.20	I am sorry about our apparent disagreement over my return to work. In fact, I desperately want to get back on the road as fast as possible. If you can drop me a line outlining how you believe this can happen within the system, I will take this to the police and council and the second they sign off on it I will be on the road as fast as possible.	Email

2. At material times (29 October 2020 – 25 November 2020), did the Claimant's uncle suffer cancer such that he was deemed to be disabled by para 6(1) of Sch 1 to the Equality Act 2010?

3. By dismissing the Claimant on 11 December 2020, did the Respondents treat the Claimant less favourably than they treated or would have treated another employee whose uncle was not disabled, and if so, was this because of the Claimant's uncle's disability?

4. Who is an appropriate comparator?

Automatic Unfair Dismissal (s. 103A Employment Rights Act 1996) – R1

5. Was the reason (or if there was more than one reason, the principal reason) for the Claimant's dismissal that he had made a protected disclosure such that his dismissal is automatically unfair by reason of s. 103A Employment Rights Act 1996?

Unfair Dismissal (s. 94 Employment Rights Act 1996) – R1

6. Was the reason (or if there was more than one reason, the principal reason) for the Claimant's dismissal redundancy for the purposes of s. 139(1)(b)(ii) Employment Rights Act 1996? In particular, at 11 December 2021:

(a) Had the requirements of the First Respondent's business for employees to carry out physical sales visits in Scotland ceased or diminished?

(b) Alternatively, were the requirements of the First Respondent's business for employees to carry out physical sales visits in Scotland expected to cease or diminish?

(c) In either case, was the Claimant's dismissal wholly or mainly attributable to that fact?

7. Was the Claimant's dismissal fair by reference to s. 98 (4) Employment Rights Act 1996. Specifically:

(a) Had the Second Respondent pre-determined the Claimant's redundancy?

(b) Did the First Respondent act within a range of reasonable responses in deciding to place the Claimant in a pool of one, or alternatively was it incumbent upon the First Respondent to place the Claimant in a pool with Niki Elliott and Neil Halcrow?

(c) Did the First Respondent warn and consult with the Claimant in accordance

with a range of reasonable responses?
(d) Did the Respondent consider suitable alternative employment?

Unfair Selection (s. 105 Employment Rights Act 1996) – R1

8. Assuming that the reason (or if there was more than one reason, the principal reason) for the Claimant's dismissal was redundancy, did the circumstances constituting the Claimant's redundancy apply equally to Niki Elliott and/or Neil Halcrow? In particular, were the sales territories allocated to Niki Elliott and/or Neil Halcrow affected equally by

   (a) The proportion of retailers whose premises were closed; and/or

   (b) the Protection Levels system applicable in Scotland; and/or
   (c) the receptivity of Scottish customers to remote selling.

9. If so, was the reason (or if there was more than one reason, the principal reason) for which the Claimant was selected for dismissal that he had made a protected disclosure, such as to render his dismissal unfair by reference to ss. 105(1) and (6A) Employment Rights Act 1996?

Remedy

10. What remedy, if any, should the Tribunal award to the Claimant?

11. Has the Respondent failed to take reasonable steps to mitigate his loss?

12. Should the Tribunal reduce any Compensatory Award (any award for financial loss) by reference to *Polkey v AE Dayton Services Ltd [1987] UKHL 8* on account of the Respondents' contention that they could have dismissed the Claimant fairly by reason of redundancy.

14. Insofar as the Tribunal upholds a claim based on protected disclosures:

   (a) Does it appear to the Tribunal that the Claimant did not make the disclosure in good faith?

   (b) Should the Tribunal reduce any Compensatory Award by 25%?

Finding of Facts

Job Role

11. The claimant was employed as a Sales Manager on 1 February 1999. He began his employment with the company known as ATB Sales Ltd but this was renamed as Whyte Bikes Ltd in December 2019. The first respondent designs, manufactures, and sells high-end bicycles across

the United Kingdom, internationally and online.

12. The claimant lived in Scotland but in his role as Sales Manager he was responsible not just for the accounts in Scotland, but also Northern England, from the Scottish English border as far as Derbyshire, Northern Ireland, and the Isle of Man. It was agreed that the territory outside Scotland was 70% of his area.
13. During his employment the claimant's direct line manager was the Sales Director who oversaw the sales function of the business. In his witness statement Mr Patterson explained the roles of all 3 staff who reported to him. He set out that Mr Halcrow had a joint role of sales and training/ Demo manager. Mr Halcrow's sales role covered bike retailers in Wales and the Midlands, but his training and demo role took him all around England and Scotland and Wales. He told us that Ms Elliott covered the same role as the claimant, but she covered the south of England including London and as far north as Lincolnshire. She also sometimes helped out in head office. The head office staff were also part of the sales team, with an internal sales manager, sales logistics manager and a south-east sales manager. The latter was a Mr Rudd. The head office was in the Hastings/St Leonards on Sea area in East Sussex.
14. Mr Farrant told us that the claimant's job was different from that of Ms Elliott. This contradicts Mr Patterson's evidence. Mr Farrant told us that Ms Elliott supported head office when cover was required and was also responsible for opening new accounts and did some demos. This is not something that he had set out in his witness statement. The claimant disputed this.
15. We prefer the evidence of Mr Patterson who managed the individuals and therefore had direct knowledge of the job roles. We find that all three, the claimant, Mr Halcrow and Ms Elliott were primarily sales managers and carried out the same function in different territories. We find that Mr Halcrow had some additional duties as training/demo manager, and this distinguishes his role from that of the claimant. We find that Ms Elliott's role was the same in all material respects as the claimant, as Mr Patterson says in his statement.
16. Prior to the pandemic Sales Managers were expected to visit retailers to promote the product, offer advice and recommendations and generate sales. Such visits were expected to gather useful information about the retailers buying trends which would allow the respondent to better understand the market, maintain relationships and maximise sales. All agreed that face to face contact was the best way to build relationships and to achieve this intelligence. The claimant's caveat that it could be achieved in a different way on a temporary basis when it was unlawful/unsafe to make in person visits.
17. Each week the Sales Managers would email the head office sales teams with the visits they planned to make for the days ahead. These schedules were copied to all of the sales staff who could therefore see where their colleagues were planning to go. Mr Patterson kept up to date with what each of his salesforce were doing in this way.

The start of the Covid pandemic and staff arrangements

18. On the 23 March 2020 the first national lockdown began in the United Kingdom. Bicycle shops were within the list of exceptions which were permitted to remain open. The announcement generated some discussion and the bundle contained at page 310 – 311 an email from Mr Farrant to the sales staff explaining that his business had high stock levels and therefore he did not want to put sales staff on furlough but suggested there were few opportunities for normal sales work for the next few weeks

    and asked for other suggestions. Some of the sales staff, including the claimant, responded to this and made other suggestions.
19. It was agreed that the sales staff would work from home during the first lockdown and would make phone calls. Mr Patterson gave evidence that, while he understood that the Covid rules required staff to work from home, this was not the case in all circumstances. As the respondent business was supporting an essential retailer, he believed it was within the rules to make some visits where work could not be carried out remotely. Nonetheless, he told us that until late June 2020 all staff operated remotely most of the time and were communicating with their retail partners that way, but there were some visits carried out. The claimant was unaware of that and carried out no face-to-face visits during this period.
20. Mr Farrant confirmed that the whole country had performed equally in terms of increased sales during the period of remote working. The extra sales were a result of the pandemic with retailers being desperate for stock while there were simply not enough bikes to go round. We find therefore that all of the sales staff were predominantly working in the same way and that moving the business to a remote model did not impact the business during the first lockdown.
21. The first UK lockdown eased over time and on 23 June the UK Prime Minister announced that the national hibernation was coming to an end. We find that the respondent's staff, including the claimant, began field trips once restrictions eased.

The claimant's field trips during the summer .

22. In his witness statement Mr Farrant appeared to suggest that the claimant had not made any in-person visits from December 2019. The bundle contained evidence via expense claims that show the claimant was making visits during 2020. When it was put to him Mr Farrant did accept that the claimant was visiting customers in August, September, and October, despite his witness statement suggesting the contrary.
23. Mr Patterson also suggested in his witness statement that the claimant spent the first half of September working from home. We accept the claimant's evidence, supported by his expense claims, that both Mr Farrant and Mr Patterson's oral evidence was incorrect.
24. We find that the claimant began visiting customers again around 12 August 2020, once restrictions had eased and he did so until 2 October 2020. The claimant was on holiday between the 12 and 23 October 2020 and thereafter worked entirely from home. We accept the claimant's evidence that hotels did not open until around 12 August, and he was not

therefore able to visit his territories before that happened. Once he was able to do so he went back on the road.

The second national lockdown

25. On 31 October 2020 the UK Prime Minister announced that there would be a circuit breaker lockdown on 5 November which would remain in place until 2 December 2020. The announcement, a copy of which is at page 291-293 specified that from 5 November everyone should stay at home and could leave only for a limited set of reasons. That included for work if an individual could not work from home. Essential businesses would remain open. Workplaces should stay open where people cannot work from home.
26. The second lockdown in Scotland began slightly earlier on 1 November. It introduced a five-tier local lockdown level system. At that time most of Scotland was put into tier 3. Everyone living in a level 3 or level 4 local authority areas was required by law to remain within their own council boundaries unless they had a "reasonable excuse" for not doing so.
27. People in level 4 also had to keep journeys within their own area to an absolute minimum. Meanwhile, people in level 1 or level 2 areas were required to avoid any unnecessary travel to areas that were under level 3 or 4 restrictions and were required to minimise unnecessary journeys between areas in different levels. Travel to and from work was permitted if work could not be done from home. Restrictions also meant the travel between Scotland England and Wales was not permitted unless it was essential.
28. Mr Farrant gave us a clear explanation of his attitude to lockdown rules in the second lockdown period. He confirmed his attitude had changed in the second period. He had lost confidence in the way that the Covid restrictions were being run. He considered that the second lockdown should never have happened, and he had been proved right by the consequences to business in terms of the number of closures that were now occurring. We find that he was frustrated by restrictions and did not believe they were necessary and this influenced the way he determined his staff should act in the second lockdown.
29. Mr Farrant told us that he believed the situation was the same as in March 2020 as far as bike shops were concerned, which meant that he believed retail bike shops could stay open as could his business. He also told us he believed that the rules permitted his employees to visit retailers as gathering feedback and intelligence products required face-to-face interaction. He took no steps to check this.

Sales visits in this period

30. At some point in early November, after the announcement of the circuit breaker lockdown, Mr Farrant explained in his written witness statement that he asked Mr Patterson about what visits sales managers were undertaking. He was told that the claimant had not notified of any visits, although his colleagues were undertaking visits. In his oral evidence Mr Farrant said that he obtained the report from the internal sales manager. However he obtained the information, he concluded that the claimant was not visiting customers in the same way as his colleagues.

31. We find that the staff based in England and Wales, Mr Halcrow and Ms Elliott did indeed continue to visit retailers, the former until 4 December and the latter until 7 December. We were taken to page 527 which shows that Mr Halcrow travelled from Wales to England between the 25 and 27 of November. On the 25 November he visited customers in the north of England who were the claimant's primary contact. On the 26 November he travelled from England into Scotland to collect a bike and then travelled back into England and then back into Wales. We find that staff in England and Wales therefore acted differently during the second lockdown period to the first.
32. We find that from the reports within the bundle both of the other sales managers were, with the exception of Mr Halcrow delivering a bike on one occasion which could not be done face-to-face, visiting retailers largely in order to obtain information. Mr Patterson confirmed the claimant's evidence that before the start of the second lockdown all existing stock had been sold, that there was up to 2-year lead time on the factory delivering new stock and therefore stock for the next 18 months ahead had been presold before the start of the second lockdown.
33. When the respondent's witnesses were asked why staff were not working from home, as Mr Patterson had accepted was the requirement unless tasks could not be carried out in that way, they both told us that gathering intelligence was important and it was difficult to do that via video. The claimant took a different view, that all the tasks that could be carried out, given the stock been sold and future stock presold, could be carried out very effectively remotely.
34. We make no finding as to whether the respondent was correct in that colleagues in England and Wales were free to travel in the way that they did during the second lockdown as this is not relevant to the issues. We accept that the claimant had a genuine and reasonable belief that this was not the case for any staff under the rules in England, and that he was unable to carry out field visits under the rules in Scotland.

<u>Protected disclosures</u>

35. It is agreed that Mr Farrant telephoned the claimant to ask him about his lack of visits, the claimant believes it was on Friday, 6 November. In his written witness statement Mr Farrant recollected that he asked the claimant why he was not planning any visits and was told that he could not do so because of the restrictions. His response was to remind him that bike retailers were an essential business and could remain open at that time, but the claimant replied saying he was actually outside his uncle's flat waiting for paramedics.
36. Mr Farrant recalls that the call ended quickly because the claimant was dealing with some kind of emergency but does not recall being told that the uncle was suffering from cancer or was dying. He believes that there was a subsequent call another day but could not recall one. In his oral evidence Mr Farrant did not recall the claimant making a comment about it being illegal for him to make visits and did not appear to recall that the conversation had covered the subject of visits because of the health emergency. In answer to a question, Mr Farrant did accept that on a subsequent call the claimant had told him that it would be illegal for him to travel.

37. The claimant's recollection differs. He says that Mr Farrant attempted to discuss visits for the coming week, but the claimant had just witnessed his uncle having a stroke and had to inform the emergency services and take instructions from them. The claimant was outside with the paramedics helping to stabilise his uncle and he told Mr Farrant this. Despite this, Mr Farrant ignored the situation and continued asking questions about visits for the following week. The claimant believes that he informed Mr Farrant the whole country was in lockdown, and it was illegal to visit retailers simply to share pictures of and discuss future products. He also believed he told him he was caring for his uncle but that he could easily continue his work as before. He would contact him as soon as possible to explain the situation in full. The claimant says there was no other telephone call and he decided that he needed to put matters in writing only.
38. On the balance of probabilities, we prefer the evidence of the claimant on this. We do so because Mr Farrant's recollection is unclear. His oral evidence and witness statement are not consistent. We also find that, because of the nature of the circumstances it is more likely that the claimant would have a clear recollection of what happened, and we find that the conversation occurred as the claimant said, that he did inform his employer that he was standing with paramedics caring for his uncle who was dying and that it was illegal to go visit dealers in both England and Scotland. We also find that there was no further telephone conversation. Mr Farrant has accepted that the latter comment was made to him, and we find that it was made on this telephone call. We also find that the uncle had cancer.
39. On 9 November Mr Farrant sent the claimant an email which is at page 546/7 of the bundle stating that he had heard the claimant was not planning visits that week, even though work travel was permitted. He asked the claimant to give him his concerns and reasons for not wishing to visit dealers so they could look at options and alternatives for the claimant.
40. The claimant responded to explain that there were four significant reasons he could not drive from home to store and country to country at that point. He explained that the rules had a travel restriction which meant that work travel was only permitted if that work could not be carried out at home. Also, Scotland had gone further at a local level and one could not travel to another ward out with your current home ward.
41. The claimant also explained that he was living with and looking after a terminally ill family member who had been diagnosed with cancer the previous week. In answer to cross examination questions the claimant explained that he was providing this information because as a carer of a vulnerable person he could not put his uncle at risk by visiting others.
42. The response from Mr Farrant sent on 10 December set out that the claimant's reply and reasons for not visiting customers were disappointing when colleagues were doing so. The email also commented that when Mr Farrant phoned the claimant last week, he was visiting his uncle, yet now he was saying that his uncle lived with him and that was one of the reasons he could not leave home. It concluded that this was not a satisfactory situation as the claimant was employed as a sales rep to cover a region of the country.
43. The claimant's response on 10 November was to explain that he desperately wanted to get back on the road as soon as possible. The

email said *"if you can drop me a line outlining how you believe this can happen within the system, I will take this to the police and council and the second they sign off on it I will be on the road as fast as possible".*

44. It was agreed that the claimant did raise all the matters which are set out in the issues list as the qualifying disclosures the claimant seeks to rely on. He did this in a telephone conversation on 6 November, in an email on 9 November and an email on 10 November
45. Mr Farrant accepted in his written evidence that he was frustrated, and he regretted that this had come through in his reply. This regret was not part of his oral evidence. He felt that the claimant was not being straightforward with him in relation to his uncle and he also believed that travel to bike retailers was permitted across all three countries. He did not receive notification from any relevant industry body that bike retailers across three countries needed to do things differently to one another. In his written witness statement, he compared the actions of the claimant unfavourably to that other colleagues.
46. We find that Mr Farrant was angered by the claimant's response, that he was suspicious about what the claimant was telling him, particularly in relation to his uncle, and he believed the claimant was incorrect about the travel restrictions and that he was in fact refusing to carry out his job. We find that he compared the claimant's conduct unfavourably with that of his colleagues. We find that, despite a long and successful working relationship this communication exchange caused Mr Farrant to distrust the claimant and his attitude towards him changed as a result.
47. On 13 November the respondent then began a redundancy process that would remove the claimant's role. We set out the business rationale given for this which started with a letter of that date. There were primarily two reasons.

<u>Potential redundancy -the business reasons</u>

<u>Different habits in Scotland</u>

48. Mr Farrant's written evidence as to his reasons reflected what was set out in the letter of 13 November, which was that as a result of the information from the claimant he started to think about the need for a field-based sales employee in Scotland. He said that he reflected back on what the claimant had said that so many bike retailers in Scotland were closed. He stated that Ms Elliot was finding that retailers were trading as much as usual. In fact, what the claimant had said is that offices, that is the back office and accounts functions were closed, not the retail stores. We accept the claimant's evidence that retailers were also open in his territory and that was not a difference. We find therefore that part of the reasoning which Mr Farrant relied on for his business case was incorrect.
49. Mr Farrant also set out that if retailers in the claimant's territory were just as happy to deal remotely, was there a need for the role to be physically present in the region? When the initial offer was rejected Mr Farrant set out further reasons in his letter of 26 November. He again said that unlike the position in England and Wales the claimant's retailers had found remote working somewhat effective so it had not materially altered the claimant's sales performance.
50. He reiterated this on 3 December when he said that "*as proved for the*

*last eight months of trading it is clear that the shops in your territory have been successful for us without your visits".*This makes it clear that the respondent is relying on eight months worth of data. That must be the period from April through to November.

51. The sales figures were at page 81. It is agreed that the sales staff were all acting remotely from March until late June, so that this period cannot be relied upon as a comparison of the different attitudes for remote selling between the areas. In July, when the claimant was unable to travel, Ms Elliot was making visits and the figures show her face-to-face activity was more successful than the claimant's remote activity in that month. The data for this month does not support the respondent's business case that remote selling was just as effective.
52. The claimant was carrying out visits as was Ms Elliott in August and September and October and therefore these figures cannot be relied upon to evidence the impact of remote selling in one area compared to the other. The period of comparison when the claimant was relying on remote contact while his colleagues were not was limited to July, November and December, but the redundancy process was started in November.
53. The figures do show the claimant is generally more successful, but the sales figures the respondent has produced do not show any greater success by the claimant in selling remotely compared to his colleague's activity face-to-face. We find that there was no financial data which evidenced this difference and that the main thrust of the apparent justification for removing the claimant was clearly wrong on information readily available to the respondent at the time.

<u>Different travel restrictions</u>

54. The respondent also relied on there being different travel rules in Scotland and stressed the need for visits to produce reports. In his witness statement Mr Farrant says that he could see how the claimant might breach rules by travelling into protection levels 2. In answer to a question Mr Farrant accepted that there were restrictions in place from 1 November 2020 which prevented the claimant from travelling to customers.
55. We have found that he did his own research on the Scottish rules but he did not expressly check the position in England but relied on his own knowledge. We find that where such an important decision was being made, if the reasons for ending the claimant's employment were as set out, this would have been done. We find this lack of checking was based on a desire to find a way to achieve an outcome.

<u>The reports</u>

56. We were taken to a number of the sales reports prepared by the claimant's colleagues as a result of face-to-face visits during the second lockdown. These report on stock levels and conversations with the retail shop owners.
57. The value of these reports was discussed between the claimant and Mr Farrant during the redundancy process and this is also given as a reason to support the redundancy. At page 584 of the bundle Mr Farrant states that while other members of the staff had effective remote contact with customers which also led to good orders, the main difference is that other

salespeople wrote informative reports on dealers which helped in understanding buying trends which in turn helped with forecasting, planning and purchasing. In response to the claimant's reaction to this statement at page 592, Mr Farrant said that his comment about sales reports was not intended as a criticism of the claimant. He notes that the claimant has tended to provide information differently but that has never really been a problem all the while he's performed so well.

58. We find from this exchange that there had never been a concern with the way in which the claimant provided intelligence about his dealers and that had not changed and become less effective during the lockdown period. We also find that his colleagues had always provided the reports in a different way. This was not therefore a valid concern that was raised and could not form part of a legitimate redundancy exercise.

<u>The reason for dismissal</u>

59. We do not accept Mr Farrant's evidence as to his reasoning for suggesting that the claimant be redundant. We find redundancy was not the reason. We reach this view on a number of grounds. As set out above we find that Mr Farrant relies on two matters as a justification for a redundancy which we have found do not support his position (the closure of retailers in Scotland compared to England and the comparative ease of remote selling in Scotland compared to England). His on the record explanation as to the reason to remove the claimant's role as redundant is not based on accurate information. We find that on the balance of probabilities this means that it was being used to achieve the removal of the claimant, rather than in support of a legitimate business case.
60. Further, his official reasons for the redundancy as set out in the documents at the time do not accord with the evidence he gave to the tribunal. He told us that the stock had all been presold for 18 months ahead. He didn't think he needed as many sales staff. Mr Rudd had decided to retire, a decision that he made known in around September 2020.This triggered his thinking about reducing sales staff and Mr Farrant told us that because they had sold all the stock, he didn't need a sales manager in Scotland. He selected the sales manager in the Scotland and North region because it was his evidence that the other two sales managers did different jobs.
61. We have found that that was not the case in relation to Ms Elliott and we find that she should have been in the pool for selection if the respondent had proceeded to initiate the redundancy process for the business reasons Mr Farrant gave us. He did not do so but instead set out business reasons he said applied uniquely to the claimant which we have found was not the case. We find that the different reasons he has given for the redundancy in front of us compared to his reasons set out in the documentation at the time indicates that his on the record reasoning was not genuine. His failure to consider Miss Elliot when she should have been in the potential pool also show that this was designed to remove the claimant.
62. We also make this finding because of the speed of his reaction to the claimant's emails and the initiation of the process, our findings as to Mr Farrant's reactions to other events (set out below) and (as also set out below) because we have found that a number of steps in the process

itself indicates the decision was predetermined.

Outcome predetermined

63. We find that the decision had been taken before the redundancy process concluded. The process started when Mr Farrant sent the claimant a letter on 13 November which was marked "without prejudice and subject to contract" This letter was sent as an attachment to an email which referred to the attached redundancy offer and settlement agreement and which stated *"sorry it has come to this but we feel it is the right way forward for the company".*
64. This was the first intimation the claimant had been given that his job was at risk. He considered that the apology and the *expression "this is the right way forward for the company"* to mean that the decision had already been made and that his job was effectively gone. Mr Farrant disputed that and said that there was nothing in what was a very short email to say the position was not negotiable. It was also submitted that this cover email had to be read with all the documents which included a very transparent explanation of Mr Farrant's thinking. We have considered this, but find that the accompanying documents, which were a settlement agreement and a flawed business rationale, assist us in finding that the natural meaning of the words in the email did reflect a decision had been taken at that point to remove the claimant.
65. We were also taken to page 529, which is Mr Halcrow's report of his visit to customers within the claimant's sales territory. The claimant's evidence was that this was unprecedented. He accepted there was no exclusivity in a retail relationship, but explained that when his colleague visited one of his customers to deliver training or to do a demonstration, he would always have made this clear by noting this on the schedule of his visits which all had access to. He also accepted that his colleague had visited his suppliers previously, including those visited on 25 November, but was adamant that in advance of the visit his colleague would have spoken to him about the lay of the land and generally they would have attended together. On this occasion the claimant told us that did not happen. He saw the schedule and later the report of the visit and was shocked by what he saw. He felt that this also showed that his job had gone as his colleague was carrying out the activities of a sales manager in his territory.
66. In reviewing the content of Mr Halcrow's report we find that he was not attending to carry out training or a demo. His report mentions that as a result of the visit a demonstration has been scheduled, but the main purpose of his visit as described by him was to show pictures of the new product. He also takes the opportunity to discuss stock levels and to gather feedback on products. We find that these are tasks typically done by a Sales Manager and were not part of Mr Halcrow's training role.
67. We were taken to a particular part of the report which shows that the owner of one of these businesses refers to the fact that he is going to put orders through the claimant. It was put to the claimant this showed his colleague was not cutting him out as orders would continue to go to him and he did not correct the business owner by saying no, address them to me because the claimant will be leaving shortly.
68. We prefer the claimant's view of this statement and find it simply shows an intention by the owner to continue as usual, the funnelling of orders

through the claimant was not suggested by Mr Halcrow. We find that Mr Halcrow is therefore, on 25 November, carrying out sales tasks within the claimant's sales area. We accept that he did so without informing the claimant or involving him and that this was not business as usual but was a significant departure from practice.

69. Mr Farrant was asked why Mr Halcrow was making these visits to key customers within the claimant's sales area and replied that he was using his initiative and that the retailers did not belong to the claimant and that Mr Halcrow also carried out training and therefore had contact with all customers. We find that this visit was carried out with the knowledge of the senior management and was a field visit and so not within Mr Halcrow's role in this territory, and on the balance of probabilities, we find it likely that he was instructed to make the visit by Mr Farrant who had already decided that the claimant's employment would be ended.
70. We were also taken to the email of 3 December and the words *"and we therefore believe the proposed redundancy is still the best option for us."* We find that this reflects he has made the decision and that the claimant's employment will end.
71. We set out below the process that was followed to implement this decision.

On the record formal redundancy process

72. The claimant rejected the settlement offer on 23 November. On 25 November his uncle died. Once the without prejudice offer had been rejected the respondent then began an on the record process. We set out what this consisted of although, we find that this was in effect a sham process triggered by anger at the claimant's actions and not for business reasons as the process tried to suggest.
73. On 26 November the claimant was sent a letter warning him of possible redundancies. This referred to the exchange of emails on the 9 and 10 November and set out Mr Farrant's thinking based on this exchange. On his own evidence in letters written at the time, Mr Farrant explained that the redundancies were triggered by the communication exchange between them on these dates. We have found this to be the case but not because of the information the claimant provided but because of the allegations.
74. The claimant replied on 2 December. The claimant believed that it was the strength of long-term relationships that allowed him to continue serving the visitors remotely, but they would return to normal once the restrictions are removed. He stated that conducting calls remotely would be ill-advised as regular face-to-face contact is fundamental to developing the relationship and ensuring continuity and commitment to the retail partner. While Mr Farrant had asked him for information about his activity, the claimant set out that this would be unproductive and inaccurate. He set out a summary of that activity and identified where in the respondent's records, this could be found. We accept that Mr Farrant had all the information and did not need to ask the claimant.
75. Mr Farrant replied on 3 December in an email which stated that they are hoping to introduce a demo role in the future for the claimant's territory that might interest the claimant. The claimant believed that this showed the decision had been made. It was submitted that this was a future hope

and therefore did not show a settled decision. We find that that this statement does reflect a concrete plan to replace the claimant's role had been made and we accept the claimant's reading of this statement that it demonstrates the decision was made.

76. It was intended that there was a meeting on 3 December, but Mr Farrant's diary meant that he was unable to meet as planned. He suggested that if the claimant still wanted a meeting, he would arrange one. We find that this is not the action of employer who is interested in listening to alternatives, the meeting is offered only if the claimant wants one. While it was submitted that the claimant had effectively set out anything he wants to be considered in the correspondence, that is at odds with Mr Farrant's evidence about what he hoped to get from the meeting when it did take place, which was to hear the claimant's views.
77. On 8 November there was a brief teams meeting between Mr Farrant, Mr Patterson and the claimant. No notes are taken at that meeting. Both the respondent's witnesses gave evidence that the claimant appeared angry and did not want to discuss Mr Farrant's ideas which he described as going around in circles.
78. It was Mr Farrant's evidence that he intended Mr Patterson to chair the meeting because he was the claimant's line manager, and he would listen to what the claimant said to allow him to make a final decision. He also told us that he was hoping they could have more clarity on travel in Scotland before deciding and that he wanted to give the claimant an opportunity to say whatever he wanted at that meeting. He was hoping that Mr Patterson and the claimant would lead the conversation. Despite this chairing role for Mr Patterson, both Mr Farrant and Mr Patterson confirmed that Mr Farrant was the sole decision maker on the claimant's redundancy. Mr Patterson did discuss it and agreed with the conclusion, but he did not take part in the decision-making. We accept that Mr Farrant was the sole decision-maker.
79. All agree that Mr Farrant opened the meeting by asking the claimant whether he was unhappy with the settlement offer made. The claimant replied that it was insulting, and the meeting broke down and there was no further constructive discussion. When he was asked about this Mr Farrant said that he was unsure what the going around in circles comment meant, but that he had planned for a constructive meeting that would result in a good redundancy package and a good reference for the claimant. This supports us in our finding that the decision had already been taken, what was required was an agreement on the package.
80. On 1 December the First Minister identified that Glasgow, the area where the claimant lived would remain at level 4. In his witness statement Mr Farrant told us that this announcement and the guidance from the Scottish government led him to believe that the prospect of level 3 restrictions remaining in place for sometime were high and that the claimant would be prevented from visiting over half his territory for some considerable time. Considering what the claimant had told him about the effectiveness of sales remotely supported by strong sales figures he reached the decision to dispense with the physical sales presence in Scotland.
81. It appears that Mr Farrant took no steps to check what the position was in England after 8 December in order to ensure that the face-to-face visits his English staff were carrying out could continue. It was submitted to us that he relied on his own knowledge as he lived in the south-east. We find that it was a flaw in the process not to check the rules as these were

evolving quickly and Mr Farrant had already discovered he had failed to understand the rules in one territory. We find this supports our conclusion that the process was not a fair one but had a predetermined conclusion.

82. The claimant was sent notice of redundancy on 11 December 2020 and his employment was terminated with a payment be made in lieu of notice.
83. No alternative roles were effectively discussed with the claimant. Reference is made to using freelancers to demonstrate bikes in stores that Mr Patterson confirmed that this had not been put into operation.
84. In considering the evidence we find that, despite the wording of the documents which suggest that the decision-maker's mind had not been made up until after 8 December, this was not the case. We find that the decision to make the claimant redundant had been made when the settlement offer was sent to him on 13 November .
85. We find that Mr Farrant had been angered by the claimant's insistence on not breaking the law and protecting health and safety and his allegations that the respondent's business was acting illegally and therefore took the decision to remove the claimant's role. We find that Mr Farrant had reached a decision to remove the claimant from the business by 13 December. We find he did so in reaction to the information about covid rules the claimant had raised.

<u>Mr Farrant's behaviour</u>

86. The claimant directed us to 2 incidents. On 24 March Ms Elliott reported that there was a lot of confusion amongst her dealers. She explained that one dealer had told her that half the staff were demanding that they shut while the other half wanted to stay open. Mr Farrant responded to her report stating that staff who wanted to close were in the minority and *"are your typical shop steward type that love to destroy companies and if some shops have these types then they need to get rid of them or at least ignore them. In times of crisis the good people step up".*
87. In his written witness statement Mr Farrant stated that he sent the email at a time when emotions were a bit high and it was to express his wish that everyone in retail pull together and keep the cycle market running. In his witness statement he said that remark was not addressed to anybody in particular and not at any of the respondent's staff.
88. In answer to questions about this comment, he confirmed that the email was sent to the directors and all sales staff. He explained that he was concerned because he had invested significantly in the business, and he needed the company to stay open. He did not think it appropriate to mothball a company, they had to stay open and with hindsight he considered that the entire lockdown programme had been a big mistake, the country should never have gone into lockdown and those who had been against lockdown had now been proved right. He did not perceive the email to be a threat.
89. We accept that the email was sent at a time when emotions were running high, and this reflected the difficult circumstances that all were facing with pressures on individuals concerned about personal safety and businesses need to survive financially. Against that background we find that it was reasonable for the claimant to find the email threatening. It was sent to the respondent's staff, and it was reasonable for them to believe it contained a message to them. We also find that it reflected Mr Farrant's

attitude that closure was not the right way to go and his antipathy to those who took the other view and expressed a view that those who dissented should be got rid of. We find that he chose to express this view to his staff and it reflected a view that would equally apply to them.

90. We were referred to the additional documents that the claimant had provided us marked as section 27, 28 and 29. These were an exchange of emails between a supplier and Mr Farrant, text messages between the claimant and Mr Farrant and texts from the supplier. On 27 March 2020 the supplier sent an email saying that they had taken the difficult decision to close the accounts and payments office and would not be able to make any payments to suppliers until it was deemed safe to reopen. Mr Farrant's immediate response to the claimant was to say "*that is just crap, payment can be made from anywhere, does not need an office. Don't send any sales their way".* Mr Farrant also replied directly to the retailer in an email of 28 March telling them that payments require one or two people an Internet link and could be done a thousand miles apart and asked the supplier not to "*treat us as fools.*". He concluded by asking the supplier to review their email and give more detail on the decision and he made a reference to those who help themselves and those who seek to take advantage of the situation, suggesting that they would not want to be thought of as the latter.
91. The claimant explained that the supplier legitimately could not make the payment because it could not access its accounts remotely and it took some time for that to be sorted out. They were a large supplier and they were so offended by the Managing Director's response that they took steps to return all stock. Mr Farrant said the reason they tried to send back stock is because they were expecting to close and were looking to get rid of some of their costs and in the end the stock was not returned. He did not accept the claimant's characterisation of this exchange.
92. We find that this exchange reflects Mr Farrant's direct and forthright communication style. We find that it demonstrates that he has strong opinions and reacts quickly to situations where he does not agree with what he is being told.
93. This, together with the comment made about what should happen to staff who wanted businesses to close in the first lockdown, supports our findings about Mr Farrant's reaction to those who do not do what he thinks is right, and we find this included the claimant.

<u>Relevant Law</u>

<u>Whistleblowing</u>

94. Counsel for the respondent referred us to the five potential questions that we should use in a structured approach to the issue. We have set these out below.
95. Whether a whistle-blower qualifies for protection depends on satisfying the following tests: Have they made a qualifying disclosure? There are a number of requirements for a qualifying disclosure (section 43B, ERA 1996):

a) Disclosure of information. The worker must make a disclosure of information. Merely gathering evidence or threatening to make a disclosure is not sufficient.

b) Subject matter of disclosure. The information must relate to one of six types of "relevant failure".

   i. that a criminal offence has been committed, is being committed or is likely to be committed,
   ii. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
   iii. that a miscarriage of justice has occurred, is occurring or is likely to occur,
   iv. that the health or safety of any individual has been, is being or is likely to be endangered,
   v. that the environment has been, is being or is likely to be damaged, or
   vi. 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"

c) Reasonable belief. The worker must have a reasonable belief that the information tends to show one of the relevant failures.

d) Further, the worker must have a reasonable belief that the disclosure is in the public interest .

96. Disclosure must also qualify as a protected disclosure (sections 43C-43H, ERA 1996; which broadly depends on the identity of the person to whom disclosure is made. PIDA encourages disclosure to the worker's employer (internal disclosure) as the primary method of whistleblowing. Disclosure to third parties (external disclosure) may be protected if more stringent conditions are met.
97. The public interest test was considered by the Court of Appeal in <u>Chesterton Global Ltd (t/a Chestertons) v Nurmohamed</u> [2017] EWCA Civ 979. Upholding an employment tribunal's decision that the disclosure was a qualifying disclosure, the court gave the following guidance. The tribunal has to determine whether the worker subjectively believed at the time that the disclosure was in the public interest; and if so, whether that belief was objectively reasonable.
98. There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the tribunal should not substitute its own view.
99. In assessing the reasonableness of the worker's belief, the Tribunal is not restricted to reasons that were in the mind of the worker at the time. The worker's reasons are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to a tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

100. Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief…" which is not same as "motivated by the belief…".
101. In Ibrahim v HCA International Ltd [2019] EWCA Civ 2007, the Court of Appeal held that a Claimant alleging whistleblowing must have the opportunity to give evidence directly on the point of whether they had a subjective belief that they were acting in the public interest at the time of making a disclosure They can then be cross-examined and a tribunal will be able to evaluate the evidence and make findings as to subjective belief and the reasonableness of that belief.

What is information?

102. The section refers to the disclosure of information. This was considered in Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA, the Court of Appeal held that 'information' and 'allegation' are not mutually exclusive categories of communication. Allegations can amount to disclosure of information depending on their content and the surrounding context.
103. The test for determining whether the information threshold had been met is that the disclosure has to have "sufficient factual content and specificity such as is capable of tending to show" one of the five wrongdoings or deliberate concealment of the same. Clearly, the more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide.
104. The Court of Appeal in Kilraine also went on to stress that the word 'information' in S.43B(1) has to be read with the qualifying phrase 'tends to show'. The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing.

Direct Discrimination

105. The claim is of direct discrimination. S13 of the Equality Act ("EqA") provides "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.".
106. S.13 EqA focuses on whether an individual has been treated 'less favourably' because of a protected characteristic, the question that follows is, treated less favourably than whom? The words 'would treat others' makes it clear that it is possible to construct a purely hypothetical comparison.
107. Whether the comparator is actual or hypothetical, the comparison must help to shed light on the reason for the treatment. The comparator required for the purposes of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim so that he, or she, is not a member of the protected class. There must be *'no material difference between the circumstances relating to each case'* when determining whether the claimant has been treated less favourably than a comparator.
108. The unfavourable treatment must be "because of" the protected characteristic. The protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

Associative disability

109. We were referred by counsel to a number of authorities which we considered. We accept his submission that where a claim for associative discrimination is brought it is not enough to simply say because the reason for the less favourable treatment has something to do with the protected characteristic that therefore it is "on the grounds of" that characteristic, there must be a closer connection.

Burden of proof

110. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

111. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

112. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage: there still has to be reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground. Therefore 'something more' than a difference of treatment is required.

Automatic unfair dismissal section 103 A Employment Rights Act 1986.

113. We accept the submissions made by counsel for the respondent. The causation test is that the sole or principal reason for the dismissal must be the protected disclosures.

Ordinary unfair dismissal/Redundancy

114. It is for the employer to show the reason or the principal reason for dismissal. Redundancy is defined in S.139(1) ERA The statutory words are:

'For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —

(a)the fact that his employer has ceased or intends to cease —

(i)to carry on the business for the purposes of which the employee was employed by him, or

(ii)to carry on that business in the place where the employee was so employed, or

(b)the fact that the requirements of that business —

(i)for employees to carry out work of a particular kind, or

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.'

115. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

116. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

"... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

117. In Williams and Ors v Compair Maxam Ltd 1982 ICR 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stressed, however, that in determining the question of reasonableness it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead, it had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

118. The factors suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to consider were:

a) whether the selection criteria were objectively chosen and fairly applied

b) whether employees were warned and consulted about the redundancy

c) whether, if there was a union, the union's view was sought, and

d) whether any alternative work was available

<u>Deemed Unfair Redundancy Dismissal</u>

119. Section 105 (1) of ERA provides employee is dismissed shall be regarded 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.*

120. In relation to s105(1)(c) the relevant subsection that is applicable in this case is subsection (6A) which states: 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 s103A.

Conclusion.

121. We have applied the relevant law as set out above to the findings of fact that we have made and have reached the following conclusions on the issues that we were asked to determine.

Protected disclosures

122. We have found that the claimant did make all of the disclosures upon which he relies to his employer, an appropriate internal disclosure. We have considered whether there has been a disclosure of information, if that information relates to a particular category of "relevant failure", whether the claimant had a reasonable belief that his information did show a particular type of relevant failure and whether at the time he made these disclosures he had a reasonable belief that the disclosure was in the public interest.

123. We are satisfied that the protected disclosures set out at (a) i and (b) i, ii and iii all amount to information. They have sufficient factual content and specificity which is capable of tending to show one of the relevant failures. The first , (a)i gives information that a criminal offence will be or has been committed The disclosures in (b) gives information that there is likely to be a failure to comply with a legal obligation and/or the health and safety of an individual is endangered. They all relate to breaches of the covid regulations which were in place to protect public health.

124. We are satisfied that at the time the claimant provided this information he had a genuine belief that the information provided showed these breaches. We conclude that the belief was objectively reasonable. We also find that such disclosures are in the public interest and the claimant reasonably believed this to be the case at the time. This was information that the claimant believed showed that during a pandemic and district lockdowns the business was operating so as to permit or even encourage its staff to break those rules and to travel not only across the country but between England, Wales and Scotland.

125. We are satisfied that these matters amount to protected qualifying disclosures within the meaning of the Employment Rights Act.

126. We reach a different conclusion about the disclosures at (a) ii, (b) iv and (c). Those that relate to the claimant's uncle might be said to show the breach of the covid rules, as the claimant explained that he was trying to point out he did not travel where he was caring for vulnerable person. We find, however, that the time he made the disclosures he did not have a reasonable belief that this disclosure was in the public interest. This relates to the impact on the individual and on the claimant himself.

127. We conclude that the disclosure at (c) is not information about any relevant failure ,but is an enquiry about how matters can be done lawfully. It does not meet the relevant tests to qualify as a protected disclosure.

Direct disability discrimination

128. We have found that on 6 November Mr Farrant was told that the claimant's uncle was dying, and that the claimant could continue to work but would have to be involved in his care. On 9 November he was told that the uncle was terminally ill and had cancer and that the claimant was providing his care. We have considered these remarks did not amount to a qualifying disclosure and have therefore considered whether the claimant has proved that he has been treated less favourably because of his uncle's disability.
129. While we have accepted that Mr Farrant was aware of the fact, there is no evidence to suggest that dismissal was because of the disability, or that it formed part of the reason for the claimant's dismissal. We conclude that the adverse treatment was not on the ground of disability. The less favourable treatment did not have a close connection with the disability. We have found that the treatment was because the Managing Director was angered at the claimant's allegations at (a) i and (b) i-iv. The claimant does not discharge the burden of proof. The claim for direct disability discrimination does not succeed.

Automatic Unfair Dismissal

130. To be an automatic unfair dismissal, the sole or principal reason for dismissal must be because of the protected disclosures. We have set out above those matters that we believe amounted to protected disclosures.
131. We have found that Mr Farrant's principal reason to dismiss the claimant was in reaction to the disclosures made. We have found that the business reasons he set out at the time were not genuine, but were a sham to allow him to remove the claimant. This claim succeeds.
132. As we have made this finding we have not therefore gone on to consider ordinary unfair dismissal or deemed unfair redundancy dismissal.

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Employment Judge Mclaren

______10 January 2023

____

Date