EMPLOYMENT TRIBUNALS

Claimant: Mr Ian Ritson

Respondent: Milan Babic Architects Ltd

Heard at: London South Employment Tribunal, Croydon
On: 18, 19 and 20 January 2023

Before: Employment Judge Abbott, Mrs A Williams and Mr J Turley

Representation
Claimant: Mr J Frater, Consultant, of 360 Law Services Limited
Respondent: Mr T Dracass, barrister, instructed by Starford Limited

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that all of the Claimant's complaints (being for public interest disclosure detriment and for automatic unfair dismissal) are not well-founded and are dismissed.

REASONS

Introduction

1. The Claimant, Mr Ian Ritson, was employed by the Respondent, Milan Babic Architects Ltd, as an Architect from 23 April 2018. His employment ended with him being dismissed, purportedly on grounds of redundancy, effective 15 March 2020.

2. The claims to be determined by the Tribunal come under the following heads: (1) Detriment for making a Protected Disclosure pursuant to section 47B Employment Rights Act 1996 (***ERA***); (2) Automatic Unfair Dismissal pursuant to section 103A ERA; and (3) Automatic Unfair Dismissal pursuant to section 105 ERA. The Respondent denied the Claimant's claims.

3. The case came before the Tribunal for Final Hearing on 18-20 January 2023. The hearing was conducted as a hybrid hearing, with the Claimant, his

representative (Mr Frater) and his witness (Mr Donaldson) attending remotely via video, and the Respondent's barrister (Mr Dracass), solicitor (Ms Winton) and witness (Mr Babic) attending in person. With the permission of the Tribunal, Ms Winton joined via video on the second day of the hearing. Mr Donaldson attended the hearing only for the period he was giving evidence. There were no meaningful technical issues.

4. The Claimant provided a witness statement and gave oral evidence. He also relied upon a witness statement from Mr David Donaldson who also gave oral evidence. At the outset of the hearing, the Respondent raised objections on the grounds of relevance to certain paragraphs in each witness statement that were concerned with the circumstances of Mr Donaldson's departure from the Respondent, which took place around a year after the Claimant's dismissal. Having heard the parties, the Tribunal directed that those paragraphs be redacted from the statements, and they were not read by, or considered, by the Tribunal in reaching its decision.

5. The Respondent relied upon a witness statement from Mr Milan Babic, its founder and controlling mind, who gave oral evidence. At the outset of the hearing, the Claimant made an application for disclosure of documents relating to the length of service of employees of the Respondent other than the Claimant; however, this application was rendered moot by a concession made by the Respondent that four employees other than the Claimant had less than 2 years' service at the time that the Claimant (and one other employee) was dismissed.

6. The Tribunal was provided with a bundle running to page 305d and a skeleton argument from the Claimant. Further pages (306-357) were added to the bundle at the start of the first day following an application by the Claimant which (save in respect of one page, which was concerned with the circumstances of Mr Donaldson's departure and therefore excluded on the same basis as the paragraphs of the witness statements) was unopposed by the Respondent. After the end of the Claimant's evidence, the Claimant made a further application to add certain publicly available documents to the bundle (pages 358-371), relating to a change of address for the Respondent's accountants and the financial statements of the Respondent filed at Companies House for the period October 2019 to December 2020. Having heard from the parties, the Tribunal allowed those documents to be added, on the basis that the Respondent be permitted to identify and rely on other financial documents, including internal documents, by way of context. After an extended lunch break, a small number of documents were identified, to which the Claimant did not object, and these were added to the bundle (pages 372-393) and addressed during Mr Babic's oral evidence.

7. Both representatives provided written and oral closing submissions. The Tribunal reserved judgment, taking time to deliberate on the afternoon of 20 January 2023.

<u>The issues: liability</u>

8. The issues to be determined were settled by Employment Judge Self at a Preliminary Hearing on 20 January 2022. Following discussion with the

parties on the first day of the hearing, the issues were refined as follows (numbering is as per the original order):

Public Interest Disclosure Detriment: s.47B ERA

2. As a matter of fact, did the Claimant make either of the following disclosures?

a) Did the Claimant send a text message on 03 April 2020 timed at 10.18?

b) Did the Claimant send a text message on 03 April 2020 timed at 13.59?

3. If yes, do either of the disclosures made amount to a qualifying disclosure within the meaning of S43B ERA?

a) Did the Claimant make a disclosure of information?

b) Was the disclosure of information, in the reasonable belief of the Claimant, made in the public interest?

c) Did the disclosure of information, in the reasonable belief of the Claimant tend to show one of the matters set out at section 43A (1) (a) and (b)?

4. If the Claimant has made a qualifying disclosure (as defined by section 43B) is it a protected disclosure in accordance with any of sections 43C to 43H.

5. As a matter of fact, did the Respondent do any of the following acts?

a) Did the Respondent say "It's your choice today but it will be mine later" on 03 April 2020?

b) Did the Respondent fail to undertake a fair redundancy process?

[…]

d) Did the Respondent say "You have left on a sour note" on 20 April 2020?

e) Did the Respondent say, "Not for the first time I have to say to you, that you made a choice but it will be mine further down the line." on 20 April 2020?

f) Did the Respondent refuse to re-engage the Claimant on 20 April 2020?

g) Did the Respondent fail and/or refuse to retain the Claimant on Furlough on 09 and 15 April 2020?

h) Did the Respondent breach the Redundancy Procedure as set out in its own handbook?

i) Did the Respondent fail to engage an independent decision maker to hear the Appeal?

j) Did Mr Babic determine the Claimant's Appeal against termination when he was the original decision maker?

k) Did the Respondent fail to consider, either properly or at all, alternatives to redundancy.

6. If the Tribunal finds that the Respondent did do any of the above acts, does it or do they amount to a detriment within the meaning of S47B ERA?

7. If the Tribunal finds that the Claimant did make any protected disclosure(s) and suffered a detriment, was the Claimant subjected to any detriment on the ground that he made a protected disclosure?

Automatic Unfair Dismissal: s.103A ERA

8. Was the Claimant dismissed, and, if so, was the principal reason for the dismissal the fact that he had made any of the protected disclosures set out under paragraph 3 above.

Automatic Unfair Dismissal: s.105 ERA

9. Was the principal reason for the Claimant's dismissal redundancy?

10. Were the circumstances constituting the redundancy applied equally to one or more of the employees in the same undertaking who held positions similar to that held by the Claimant but who were not dismissed?

11. Was the principal reason why the Claimant was selected for redundancy that he had made a protected disclosure?

9. This reserved judgment concerns liability issues only.

Relevant law

Public Interest Disclosure Detriment: s.47B ERA

10. Under section 47B ERA, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer (or a fellow worker of the same employer) done on the ground that the worker has made a protected disclosure.

11. A detriment for the purposes of section 47B ERA is some kind of treatment that a worker might reasonably view as being to their disadvantage (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11). Dismissal is expressly excluded from being a detriment: section 47B(2).

12. "On the ground that" means that the protected disclosure must materially influence the employer's treatment of the worker, in the sense of being more than a trivial influence (*Fecitt v NHS Manchester* [2012] ICR 372, CA). The Respondent also drew the Tribunal's attention to the recent decision of the Court of Appeal in *Kong v Gulf International Bank UK Ltd* [2022] EWCA Civ 941 concerning the concept of separability of reasons, which the Tribunal

considered to be an important issue in this case. Simler LJ summarized the position at paragraph 59 of the judgment:

> "The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment."

13. A "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Qualifying disclosures made to the employer are protected under Section 43C.

14. Section 43B(1) ERA 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,
>
> […]"

15. In *Cavendish Munro Professional Risks Management Limited v Geduld* [2010] IRLR 38 it was held that there is a difference between conveying information (*i.e.* facts) and making an allegation. However, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, CA, the Court of Appeal held that the conveying of information in the context of section 43B can cover statements that could also be categorized as allegations. This is a question of fact for the Tribunal. In order for a statement or disclosure to be a qualifying disclosure according to the statutory language, it has to have sufficient factual content and specificity to be capable of tending to show one of the matters listed in subsection (1).

16. The Tribunal has to determine whether the worker's belief is reasonable. The EAT confirmed in *Soh v Imperial College of Science, Technology and Medicine* UKEAT/0350/14/DM that there is a distinction between saying, "I believe X is true", and, "I believe that this information tends to show X is true". So long as the worker reasonably believes that the information tends to show a state of affairs identified in section 43B(1) , the disclosure can be a qualifying disclosure. There can be a qualifying disclosure even if the facts relied upon subsequently turn out to be wrong (*Darnton v University of Surrey* [2003] ICR 615, EAT).

17. The Tribunal must also determine whether the worker reasonably believed that the disclosure was in the public interest. In *Chesterton Global Limited v*

Nurmohamed [2018] ICR 731, CA, the Court of Appeal held it is a question of fact for the Tribunal. The question involves two stages: first, to identify whether the claimant subjectively believed that disclosure was in the public interest, and second, whether that belief was objectively reasonable. On the second stage, even where the interest in question is personal in nature, the Court suggested the following factors might be relevant in determining whether disclosure is also in the public interest: (a) the numbers in the group whose interests the disclosure served, (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed, (c) the nature of the wrongdoing disclosed, and (d) the identity of the alleged wrongdoer.

Automatic Unfair Dismissal: s.103A and s.105 ERA

18. Section 94(1) ERA provides that an employee has the right not to be unfairly dismissed by their employer. It is not in dispute that the Claimant was a qualifying employee and was dismissed by the Respondent. Generally this right only arises after 2 years' service, but this does not apply where *inter alia* section 103A or 105 ERA applies (see section 108).

19. Section 103A ERA provides that:

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

The meaning of "protected disclosure" is addressed in the "Public Interest Disclosure Detriment" section above.

20. Section 105(1) ERA provides that:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,
>
> (b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
>
> (c) it is shown that any of subsections (2A) to (7N) applies."

Subsection (6A) applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A, *i.e.* that the employee made a protected disclosure.

21. Where (as here) the employee does not have 2 years' service, the burden is on the claimant to show the reason or principal reason for dismissal was the

automatically unfair one (*Smith v. Hayle Town Council* [1978] IRLR 413, CA).

Findings of fact

22. The relevant facts are, we found, as follows. Where it was necessary for us to resolve any conflict of evidence, we indicate how we have done so at the relevant point. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in these reasons. We have not referred to every document read by the Tribunal in the findings below, but that does not mean such documents were not considered if referred to in the evidence and/or in the course of the hearing.

23. The Claimant was employed as an architect by the Respondent from 23 April 2018. He worked on a part-time basis, 4 days per week, for a salary at the time of his departure of £36k per year.

24. The Claimant is a member of the Royal Institute of British Architects and is registered with the Architects Registration Board. As such, he is subject to the codes of conduct of each body, which require among other things him to act with honesty and integrity.

25. In late February / early March 2020, there were escalating concerns regarding the spread of COVID-19 into and across the UK. The Government issued a first action plan on 3 March 2020.

26. Also on 3 March 2020, Mr Babic, the controlling mind of the Respondent, emailed all of his staff communicating guidance on hygiene and staying at home if staff felt ill.

27. On 20 March 2020, Mr Babic emailed all staff again to say that from the following Monday all staff hours would be reduced, with office working on a 4-day basis. For the Claimant, this meant he would be reduced to a 3-day week (although in fact this didn't actually occur before the Claimant went on furlough). At this time the staff of the Respondent comprised Mr Babic, the Claimant, Mr Poplett, Mr Somora, Ms Almeida, Ms Rao and Mr Steven Babic as employees, and Mr O'Dwyer, Mr Donaldson and Mr Nagore as contractors. Of the employees, aside from Mr Babic himself, the highest earners were the Claimant and then Mr Poplett (both being architects qualified in this jurisdiction). Mr Somora and Ms Almeida were foreign-qualified architects.

28. Later on 20 March 2020, the Government announce that it would be creating a Coronavirus Job Retention Scheme (CJRS). Whilst the principle of the scheme, which was to avoid employers having to make employees redundant during the pandemic, was announced, the details of the scheme were not available at that stage.

29. On 23 March 2020 the Prime Minister announced a national lockdown, with effect from 27 March 2020.

30. On 24 March 2020, the Claimant emailed Mr Babic highlighting the option offered by the CJRS, and Mr Babic responded the same day indicating that he was intending to utilise the scheme. Also in that email Mr Babic raised some concerns about the Claimant's interest and work ethic, but commented favourably on work the Claimant had done on certain projects:

> I have to say that over the past few months your interest and work ethic in the office has been poor. Googling a lot as I note your right forefinger hits the mouse button far too often so that I can't see what you are looking at. . It also seems to me that you have your family, your new dwelling and then my work as a poor and least priority. However, I am minded that you did extremely well on ripple, rushy green and prince regent and other schemes and for that reason alone, I will support you.

31. Very shortly after emailing the Claimant, Mr Babic emailed all staff forwarding details about the CJRS and other government support schemes that he had received from one of his accountant advisors, and indicating his intention to apply to the CJRS.

32. On 30 March 2020, Mr Babic again emailed all staff explaining that he had been told there would a substantial shortfall in income from at least one of his clients, Aktar, and this was likely to be an industry-wide problem. He explained that, on his accountant's recommendation, it would be in everyone's interests for all employees to go on furlough. At this stage it was envisaged, as stated in the email, that employees would be paid at the end of April. Mr Babic invited employees to accept the furloughed position. He also stated that "*Moving forwards the furloughed position is that you are no longer working*".

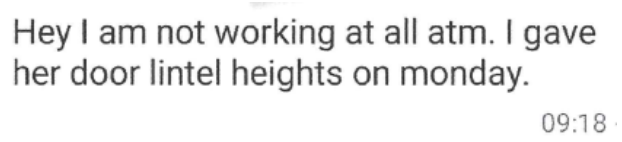
33. By return email the same afternoon, the Claimant accepted the position and stated that he would not do any further work from tomorrow (i.e., 31 March) until told to return. He also stated that he would be on emails until 5pm that day and on WhatsApp thereafter.

34. On 3 April 2020, various messages were exchanged between Mr Donaldson and the Claimant, and between Mr Babic and the Claimant, and conversations took place between Mr Donaldson and Mr Babic regarding ongoing work on a project at Prince Regent Lane (also referred to as PRL). Taking them in order:

    a. 9.16am, a Whatsapp message from Mr Donaldson to the Claimant:

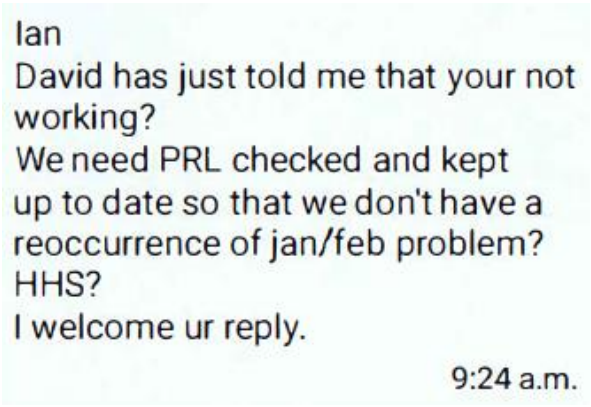
> I'm in the office. Are you dealing with Prince Regent? Angela is asking for these lintel heights. Bell me if you need to 09:16

    b. 9.18am, a WhatsApp message from the Claimant to Mr Donaldson:

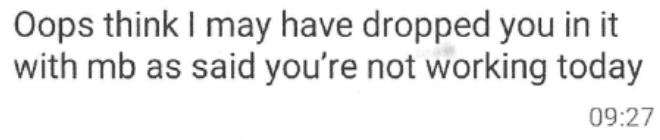


c. Sometime between 9.18am and 9.24am, Mr Donaldson spoke with Mr Babic and informed him that the Claimant was not working. There was a verbal exchange between the two. Mr Babic accepted in oral evidence, and we find, that he reacted angrily to what he felt was the inflexibility of the Claimant and said words like "*I can't believe it, he's refusing to work*". We find these words were said in the context of dealing with the immediate PRL issue, out of a concern to avoid the repeat of a delay on the project (Mr Babic believed, we find genuinely, that the Claimant was primarily responsible for a 3 week delay to that project in January 2020 due to a failure to promptly follow up on an issue). We also find that Mr Babic genuinely believed at the time that the Claimant dealing with the task at hand would not be a problem under the furlough rules given the limited nature of the task required. Whatever exactly was said between the two, Mr Donaldson formed the impression that Mr Babic was sufficiently angry that he might dismiss the Claimant for refusing to assist with the PRL issue.

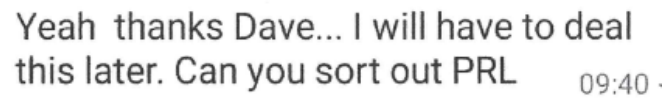
d. 9.24am, a text message from Mr Babic to the Claimant:



e. 9.27am, a Whatsapp message from Mr Donaldson to the Claimant:



f. 9.40am, a WhatsApp message from the Claimant to Mr Donaldson:



g. 9.41am, a Whatsapp message from Mr Donaldson to the Claimant:

No problem. 09:41

h. 9.40am, a WhatsApp message from the Claimant to Mr Donaldson:

Let me know if you need anuthing 09:41

i. 10.18am, a text message from the Claimant to Mr Babic:

Hi Mian from your email about putting us on the job retention scheme and from my own reading too my understanding is that I'm not allowed to work in this period. This is different from self employed people who get the money even if they do work but I don't want to cause any problems for you or I by working while you're claiming the grant. I believe David is still working on PRL? Kind regards Ian

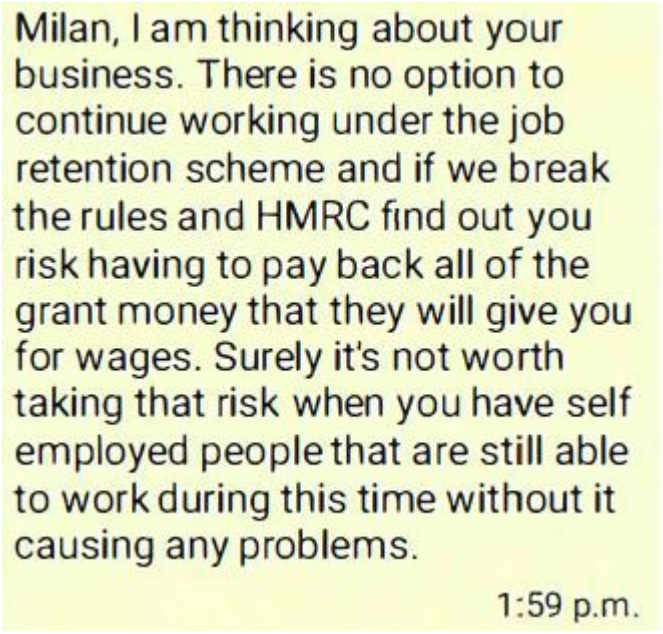
10:18 a.m.

j. 11.11am, a text message from Mr Babic to the Claimant:

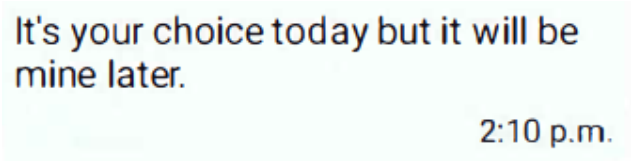
Noted and understand your position. Once c19 is sorted out there will b a time lag of 3-6 months which I will have to fund even though clients will not have money to pay me. Therefore I'll look after the staff who r looking after my business first? Enjoy ur holiday.

11:11 a.m.

k. 1.59pm, a text message from the Claimant to Mr Babic:



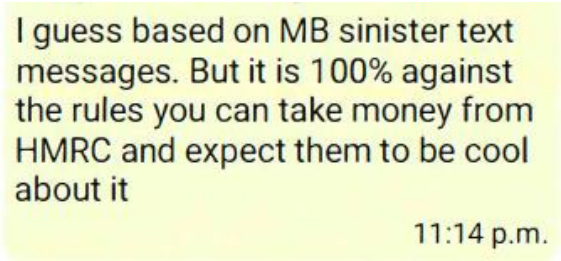
l. 2.10pm, a text message from Mr Babic to the Claimant:



35. The messages at 34.i and 34.k above are relied upon by the Claimant as protected disclosures. The Tribunal finds, relying primarily on the language of the messages themselves, that when the Claimant sent the messages he subjectively believed that doing what he was being asked to do by Mr Babic was contrary to the rules of the CJRS, and that he did not want to do something that would put him, or the Respondent, in trouble with HMRC and/or with professional regulators. The Tribunal did not accept the Claimant's evidence that he actually had in mind at the time a wider public interest in avoiding taxpayer money being taken fraudulently if he, and others, worked whilst on furlough – such a belief cannot be divined from the messages themselves and is tainted by hindsight given that the meaning of "work" under the CJRS rules and, more specifically, what might amount to a fraud on the CJRS was far from clear by this time. We also did not accept the Claimant's evidence that he was actually concerned Mr Babic might ask other staff to break the law if the issue was not highlighted to him, which we again considered to be tainted by hindsight. The messages are, on their face, concerned only with the position of the Claimant and the Respondent, and the Claimant accepted in oral evidence that he was not aware at the time of Mr Babic having asked any other employees to work while on furlough.

36. The message at 34.l above is relied upon by the Claimant as a detriment. The Tribunal finds that the Claimant did reasonably interpret this message as threatening as regards the Claimant's future employment.

37. On Sunday 5 April 2020, Mr Donaldson raised concerns to the Claimant that he felt the Claimant's job was at risk. Specifically, Mr Donaldson expressed this was because the Claimant was "*not willing to work*" while on furlough. The Claimant's only substantive message in the exchanges was at 11.14pm to say:



The nature and timing of the exchanges is indicative of a closer relationship between the Claimant and Mr Donaldson than mere work colleagues; we find that they were friends.

38. On 6 April 2020, Mr Babic forwarded information from his Payroll Manager to all staff. This information was provided to Mr Babic in response to him taking on board comments from the Claimant regarding the CJRS. This includes information from the Government website indicating that the online service to claim furlough pay was not yet available, but was expected to be available by the end of April 2020.

39. At around this time Mr Babic was taking advice from his accountants regarding when he could reasonably expect to receive furlough money. This included advice given orally and not recorded in writing – we found Mr Babic's evidence on this credible in view of the unusual and developing circumstances of the time. Given the wording from the Government website, we find it was objectively reasonable for Mr Babic to have concerns that money would not be received rapidly enough to address his short-term cashflow issues, since the system for claiming was only expected to be online by end of April 2020 and inevitably there would be some time delay after claims were made before funds would be received. We find that the advice he was given was that it was not likely that money would be received in April 2020, and it was reasonable for Mr Babic to act on that advice in the circumstances.

40. Therefore, in discussion with his advisers, we find that Mr Babic determined, due to the foreseen cash-flow issues, that he had no option but to make some redundancies. He decided that, to release the most cash, the best solution would be to make redundant the highest paid employees (other than himself), being the Claimant and Mr Poplett. We find that was a reasonable position for him to adopt in the developing circumstances. Mr Babic wrote to the Claimant (and to Mr Poplett) on the evening of 7 April 2020. The key paragraphs of the letter to the Claimant were:

We are living in unprecedented times and facing difficulties previously unknown in our lifetimes. As a services business my responsibility is to ensure the continuation of our business in a very uncertain economic climate.

I had thought that I could protect all of the Company's staff by furloughing you in accordance with the government guidelines on lockdown and in order to avoid having to make any staff redundant. Unfortunately, I am being told that the Government Coronavirus Job Retention grants are not going to be available for businesses to access in April as was anticipated. This means that if we keep all of the staff on furlough as employees, we would need to pay 80% of salaries not only for this month but probably for May and June as well. This is not a situation that the Company can sustain as we simply do not have the cash flow to enable us to do this.

It is therefore with regret that I am having to take very difficult decisions with regards to making certain staff redundant. Whilst I have not yet made a final decision I am placing you at risk of redundancy and need to speak to you urgently tomorrow (Thursday 9th April 2020) to discuss the possibility of making you redundant and whether there are any suggestions that you might have that would avoid this.

As you are currently at home, I would like to arrange a call with you at 11.00. You are entitled to be accompanied on the call. This would normally be a work colleague or a trade union representative, but in the circumstances, I am happy for you to be accompanied by a family member.

41. On 8 April 2020, Mr Babic emailed all staff explaining his concerns about cash-flow and his expectation that furlough money may not be received until June at the earliest, and therefore that he was considering redundancies. He invited all staff to consider whether they would be prepared to take unpaid leave for 2-3 months. We find this was a genuine attempt to avoid the need to make redundancies. It was not successful and, we find, in the absence of any positive response to this email, by the time Mr Babic "consulted" the Claimant and Mr Poplett regarding possible redundancy, he had already determined that he would make both redundant.

42. On 9 April 2020 from around 11am, there was a telephone conversation between Mr Babic, the Claimant, and the Claimant's wife. There is some dispute over what exactly was said, and there are competing notes of the conversation. We find that at least the following was discussed:

    a. Mr Babic explained the cash-flow issue and not having sufficient funds to wait 2-3 months for reimbursement from the CJRS. He also explained this was not just a short-term issue, but that in his view, it may be 3-6 months before clients would be in a position to pay the Respondent.

    b. After this, the Claimant handed over the call to his wife.

    c. Mr Babic explained that only the highest paid employees were in scope for redundancy as he did not consider it made sense to make those on lower salaries redundant, and that he had sufficient flexibility with the self-employed staff.

    d. There was a debate around the likely timing of when CJRS money could be expected, with Mrs Ritson asserting that money would likely

come through before end of April, contrary to the advice Mr Babic was receiving.

e. It was also discussed whether there could be an option to delay payment to the Claimant if CJRS money was not received on time.

43. That afternoon, at 2.21pm, Mr Babic wrote to the Claimant by email having taken further advice from his accountant regarding timing of CJRS payments:

> Ian and Louise ,
> I spoke to my accountant regarding registering a claim on 20 April 20 and getting paid within 4-6 days.
> He said, how on earth are HMRC going to process millions of claims and pay out in 4/6 days; no chance. It will not happen .
> He then advised me to work towards expecting the start of refunds in July as he felt this was more realistic.
> Regards
> Milan

We accepted Mr Babic's evidence that he did take advice and that this email accurately conveyed the information he had received.

44. The Claimant challenged Mr Babic's position by a further email at 3.28pm that afternoon.

45. At 6pm on 9 April 2020, Mr Babic emailed the Claimant attaching a letter terminating the Claimant's employment with effect from 10 April 2020. The letter explains the financial situation and the economic climate as being the drivers for the decision:

> Following our call today I am writing to confirm that, with regret, MB Architects is making you redundant from your role as an architect. As we discussed, the economic climate and the unprecedented situation with the Covid 19 virus has meant that our pipeline of business has diminished and the financial situation for the business going forward is very difficult. I therefore feel that I have no choice but to make certain staff redundant in order to ensure the long term survival of the business.

46. There is some confusion in the letter over notice – it was indicated that the Claimant would be paid in lieu of his contractual notice, but the letter also suggested a need to discuss what work needed finishing during the Claimant's notice period. The letter contains a right of appeal. The cover email stated "*If matters change I will certain consider your for future employment*."

47. The Claimant replied that evening, raising concerns at the lack of a second consultation meeting and that other options were not explored. He also flagged that the CJRS rules allowed him to be rehired and asked for confirmation he would be rehired in the event that CJRS money was received in a timely fashion:

Milan

There's a lot in this letter and I need to process it fully but I am clearly disappointed that you didn't consider any of the suggestions that I made to potentially avoid this redundancy. Without having had the second consultation that we were meant to have as set out in MBA's employee handbook, I am unclear of the reasons why these avenues to mitigate redundancies have not been explored and would be grateful if you could confirm?

Thank you for confirming that if matters change you will consider me for future employment. I assume this includes the scenario where you are paid the Coronavirus Job Retention Scheme grant money before the cut off date for May payroll and rehire me and claim 80% of my salary through the scheme. This is allowed under the rules of the scheme and by this point you'd have certainty that the grant money is not going to be delayed. Please can you confirm that you will rehire me in these circumstances.

Kind regards

Ian

48. On 14 April 2020, Mr Babic reached out to the Claimant by email querying whether he was working on the Hounslow High Street project. Mr Babic accepted this was done in error as the Claimant had been paid in lieu of notice and his last day of employment had been 10 April 2020.

49. At 9.43pm on 14 April 2020, the Claimant emailed Mr Babic again, raising concerns around his redundancy and indicating his desire to appeal. The letter does not mention any concern that the Claimant had been dismissed due to whistle-blowing.

50. On 15 April 2020 Mr Babic requested that the Claimant provide grounds of appeal.

51. On 16 April 2020 the Claimant responded, saying he still wished to appeal but wanted details of the independent HR expert who, he considered, should be appointed to handle the appeal. Mr Babic responded to say it wouldn't be possible in the circumstances to appoint an independent HR expert, but that he would consider, in discussion with the Respondent's employment lawyer, the Claimant's appeal if the points were set out.

52. On 17 April 2020 the Claimant challenged this, but still did not provide any grounds of appeal. Mr Babic replied that day again asking for grounds of appeal.

53. On 18 April 2020 a Mr Paul MacLennan emailed the Claimant at his personal email address and his email address at the Respondent regarding an architectural project that the Claimant was assisting him with. The email was picked up by Mr Babic who responded to check whether this was a personal project with the Claimant or one for the Respondent. Mr MacLennan confirmed it was the former.

54. On 19 April 2020 the Claimant emailed the Respondent again flagging the possibility of being rehired under the CJRS scheme, saying insofar as relevant the following:

On this note, if you do receive the government job retention money quickly I'd appreciate it if you'd consider rehiring me and putting me back on the scheme. If you are paid quickly this should cost you nothing and not result in cash flow issues as you can 'claim' in advance of payroll and as it's a grant you don't need to pay it back. It would however give me a form of income at this difficult time.

Rehiring me in this way is explicitly allowed under the scheme (I've included an extract from the guidance at the bottom of this email) and former employers are encouraged to do this as there is little prospect of people getting new jobs at this time, especially as an architect.

If you're worried about what happens after the scheme ends, I'm happy to take unpaid leave or discuss other options with you.

55. Mr Babic responded the following day as follows:

I'm not certain that its appropriate to use the work 'claim' as for example Edwin, Sahar, Hydar and Aktar have said that they will not be paying me this month so therefore I will have to cover all costs.

You have left on a sour note. Because my HR lawyer misunderstand my instruction you have been given 4 weeks in lieu payment as well as receiving 2 weeks payments for doing absolutely nothing; that is a personal cost to me. It might have been wiser to accepted the error and worked the Notice.

Not for the first time I have to say to you, that you made a choice but it will be mine further down the line.

Regards

Milan

56. The message at 55 above is relied upon by the Claimant as a detriment. The Tribunal finds that the Claimant did reasonably interpret this message as threatening in tone.

57. The Respondent did not, at this time or thereafter, re-hire the Claimant. However, on 19 May 2020, Mr Babic emailed the Claimant identifying an opportunity for work and asking for his availability. The Claimant did not respond.

58. The Tribunal accepted Mr Babic's evidence that the pandemic had a significant financial impact on the Respondent, not just in the initial months but also in the longer term, as is supported by the financial information provided. It is not necessary to be more specific than that in this judgment.

59. The Claimant brought his claim to the Tribunal on 14 September 2020.

Discussion of the issues

60. We will consider the issues in the order outlined above.

Issues 2, 3 & 4: did the Claimant make any protected disclosures?

61. There is no factual dispute that the Claimant sent two messages to Mr Babic on 3 April 2020 or as to what those messages say. The messages are quoted above at paragraphs 34.i and 34.k.

62. The Claimant submitted that:

a. The messages, taken cumulatively, clearly provide sufficient factual content such as is capable of showing a breach of a legal obligation (namely the obligation not to commit tax fraud).

b. They clearly state that employees are not able to work whilst on furlough and that this is against the CJRS rules, that the self-employed can work without causing problems, and that the Claimant was thinking about the Respondent's business in making the disclosures.

c. It is beyond doubt that protecting the taxpayer from fraudulent furlough claims is in the clear public interest, and that the Claimant had that in mind when sending them, as is clear from the messages themselves (and confirmed by the Claimant in his evidence) and the raising of issues relating to the other employees of the business should the rules be broken.

d. The Claimant reasonably believed that what he said was true (and, in fact, he was correct).

63. The Respondent submitted that:

a. The messages amounted to expressions by the Claimant of his understanding of the CJRS rules and his view of what the consequences might be if those rules were broken. As such, the messages do not constitute a disclosure of information tending to show, in the Claimant's reasonable belief, that a legal obligation had been, was being, or was likely to be breached. The Claimant was simply drawing Mr Babic's attention to the existence of a legal obligation and his understanding of it, but not disclosing facts or information that would tend to reveal that a breach of such an obligation had taken place or was likely to take place. At best the Claimant was offering Mr Babic advice about the correct way forward.

b. The Claimant did not genuinely believe he was disclosing to his employer a relevant legal wrongdoing (or if he did it was not a reasonably held belief) because the wrongdoing he had in mind would only have arisen if (i) the Claimant had undertaken work (but he had made clear he would not do so) and (ii) at some future point in time, the Respondent applied for a furlough grant to cover a period when the Claimant was not in fact furloughed.

c. At the time of the sending of the messages the Claimant was not aware of Mr Babic having asked any other employees to work whilst on furlough, or that other employees were so working.

d. At the time of sending the messages the Claimant did not have a reasonable belief that his disclosures were being made in the public interest. The content of the messages is clear: the only interests the Claimant had in mind were those of himself and Mr Babic / the Respondent's business. The evidence given by the Claimant to the Tribunal as to the public interest element was an afterthought on his

part and not part of his subjective belief at the time. The messages themselves refer to no wider public interest and the only reference to HMRC is in the context of the risk to the Respondent of having to pay furlough grant money back.

64. The Tribunal finds that the disclosures are not qualifying disclosures for the following reasons:

    a. Looking at the messages themselves, the Claimant was expressing his understanding of a legal obligation (*i.e.*, the requirement not to work while on furlough) and drawing the Respondent's attention to the possible consequences of breaching that obligation.

    b. No past or current breach was being highlighted: the Claimant had not previously been, and was not aware of any other employee having been, asked to work while on furlough. The fact that the Claimant was refusing to perform work that he felt would be in breach of the CJRS rules meant that there was no basis for the Claimant to reasonably believe there was a likelihood of any legal obligation being breached either.

    c. Accordingly, the messages do not constitute a disclosure of information tending to show, in the Claimant's reasonable belief, that a legal obligation had been, was being, or was likely to be breached.

    d. Further, as set out at paragraph 35 above, we find on the facts that the Claimant had no subjective belief that his disclosures were being made in the public interest. The only interests that the Claimant had in mind were those of himself and of the Respondent.

65. It therefore follows that there were no protected disclosures and, accordingly, all of the complaints must fail. Having heard the evidence we shall, nevertheless, address the other issues.

Issues 5 & 6: did the Respondent carry out the identified acts and do they amount to detriments?

66. We will take the identified acts in turn.

a) Did the Respondent say "It's your choice today but it will be mine later" on 03 April 2020?

67. This act did occur. These words were stated in a text message from Mr Babic to the Claimant on that day: see paragraph 34.l above. For the reasons given in paragraph 36 above, this message amounts to a detriment.

b) Did the Respondent fail to undertake a fair redundancy process? and h) Did the Respondent breach the Redundancy Procedure as set out in its own handbook?

68. The Tribunal finds that this did occur. As set out at paragraph 41 above, by the time Mr Babic "consulted" the Claimant regarding possible redundancy, he had already determined that he would make the Claimant redundant. There was, therefore, no genuine consultation, rendering the redundancy

process unfair (even giving due weight to the unique circumstances prevailing at the time). There can be no doubt that this amounts to a detriment.

d) Did the Respondent say "You have left on a sour note" on 20 April 2020? and e) Did the Respondent say, "Not for the first time I have to say to you, that you made a choice but it will be mine further down the line." on 20 April 2020?

69. These acts did occur. The words were stated in an email from Mr Babic to the Claimant on that day: see paragraph 55 above. For the reasons given in paragraph 56 above, this message amounts to a detriment.

f) Did the Respondent refuse to re-engage the Claimant on 20 April 2020? and g) Did the Respondent fail and/or refuse to retain the Claimant on Furlough on 09 and 15 April 2020?

70. Dealing with these together:

    a. The failure to retain the Claimant on furlough on 9 April 2020 is simply another way of describing the dismissal. Dismissal is expressly excluded from being a detriment: section 47B(2) ERA.

    b. As a matter of fact, the Respondent did not retain the Claimant on furlough on 15 April 2020, because he had already been dismissed by this time. Nor did the Respondent re-engage the Claimant on that date. However, the Tribunal does not consider it is right to characterise that as a “refusal” on the part of the Respondent. What Mr Babic in fact did on 15 April 2020 was to ask the Claimant for any grounds of appeal against his redundancy. We find no detriment here.

    c. As a matter of fact, the Respondent did not re-engage the Claimant on 20 April 2020. However, the Tribunal does not consider it is right to characterise that as a “refusal” on the part of the Respondent. What Mr Babic in fact said in his email of that date is already addressed under points d) and e) and we find no separate detriment under this head.

i) Did the Respondent fail to engage an independent decision maker to hear the Appeal?

71. It is not disputed that the Respondent did not, in fact, engage an independent decision maker to hear the Claimant’s appeal. However, since the Claimant never (despite repeated requests) provided grounds of appeal, there was as a matter of fact no appeal to be heard and, therefore, we find no detriment here.

j) Did Mr Babic determine the Claimant's Appeal against termination when he was the original decision maker?

72. As stated in the previous paragraph, there was as a matter of fact no appeal to be determined. Accordingly, this allegation fails on the facts.

k) Did the Respondent fail to consider, either properly or at all, alternatives to redundancy.

73. We reject this allegation on the facts. We find that the Respondent did properly consider alternatives to redundancy, in particular making use of the furlough scheme and inviting employees to take voluntary unpaid leave (see paragraph 41 above), but ultimately decided these alternatives were not suitable. He was entitled to do so.

Issue 7: was the Claimant subjected to any detriment on the ground that he made a protected disclosure?

74. The straightforward answer on this issue is 'no' because, as we have already found, the Claimant did not make any protected disclosures. However, having heard the evidence and submissions, it is important that the Tribunal sets out its findings on why the Respondent did the acts we have found it did.

75. We find that the true reason for the act at point a) was Mr Babic's anger and frustration at (as he perceived) the inflexibility of the Claimant around assisting with resolving discrete issues while on furlough, in circumstances where Mr Babic was under a great deal of pressure due to the financial impact of the pandemic. It was not because of the messages that the Claimant sent, but the position that the Claimant was taking.

76. As regards the procedural flaws at points b) and h), we find that the true reasons were (i) the cashflow issues being faced by the Respondent and (ii) that Mr Babic was being advised that the Claimant was coming up to 2 years' continuous service and therefore needed to ensure he was dismissed rapidly before the 2-year anniversary came to pass.

77. Finally, as regards the acts at points d) and e), we find that the same reasons apply as for point a), with the added reasons that Mr Babic was frustrated by how the Claimant and his wife had acted in the redundancy process. We make no finding as to whether Mr Babic's frustration was reasonable or not, but we accept it was genuine.

Issues 8 & 9: what was the reason for the Claimant's dismissal?

78. In view of our conclusions on protected disclosures, it plainly follows that the reason for dismissal cannot be the fact that the Claimant had made protected disclosures. However, having heard the evidence and submissions, the Tribunal is in a position to make a positive finding as to what the true reason for dismissal was.

79. The Tribunal is satisfied that the principal reason for dismissal is that advanced by the Respondent: redundancy. There was ample evidence before the Tribunal of the financial impact of the pandemic (even in its very early stages) on the Respondent. We accepted Mr Babic's evidence that he was being advised of a likely delay in receipt of furlough grant money, which would pose a significant cash-flow problem (see paragraph 39 above). That supports a conclusion that there was a need for the Respondent to make economies. As the Respondent submitted in closing, and the Tribunal accepts, in such circumstances it is not for the Tribunal to sit in judgment on

the commercial merits of the Respondent's decision to meet the need for economies by making redundancies, for that is the prerogative of the employer. In any event, the fact that another employee (Mr Poplett) was made redundant at the same time is indicative of redundancy being the genuine reason for the Claimant's dismissal.

Issue 10: Were the circumstances constituting the redundancy applied equally to one or more of the employees in the same undertaking who held positions similar to that held by the Claimant but who were not dismissed?

80. In closing arguments, the Respondent submitted that this requirement was not met because the only other employee who held a position similar to the Claimant was Mr Poplett, and he was also dismissed.

81. We reject that submission. Whilst the evidence confirmed that only the Claimant and Mr Poplett were architects qualified in this jurisdiction, there were other employees (Mr Somora and Ms Almeida) who were qualified architects, albeit in different jurisdictions. We find that they held similar positions to the Claimant and were not dismissed.

Issue 11: Was the principal reason why the Claimant was selected for redundancy that he had made a protected disclosure?

82. The straightforward answer on this issue is 'no' because, as we have already found, the Claimant did not make any protected disclosures. However, having heard the evidence and submissions, the Tribunal is able to make a positive finding as to the principal reason for selection.

83. We find that the selection was made principally because the Claimant was the highest earning employee and, in Mr Babic's view, the financial position of the Respondent necessitated dismissal of the highest earners. This reason was discussed in the "consultation" call on 9 April 2020 (see paragraph 42.c above). It is consistent with the dismissal at the same time also of Mr Poplett, who was the next highest earning employee after the Claimant and who it is not suggested was selected because of whistleblowing or any other hidden reason.

84. In reaching that conclusion, we take account of the point raised by the Claimant that both in the ET3 and in Mr Babic's witness statement, the Claimant's length of service was identified as a key consideration. We accept that the Respondent's position shifted somewhat from what is stated in the ET3 and in Mr Babic's witness statement at the hearing, which means we must proceed with some caution. However, as already stated, there is contemporaneous evidence indicating the relevance of the Claimant being the highest earner. Moreover, the 2-year service point was not a complete irrelevance but played a more subtle role in that, because the 2-year anniversary of the Claimant's employment was fast approaching, that gave reason to accelerate the redundancy process. Accordingly, the infelicities in the drafting of the ET3 and Mr Babic's witness statement do not undermine our conclusion.

Overall conclusion

85. For these reasons, the unanimous judgment of the Tribunal was that all of the Claimant's complaints (being for public interest disclosure detriment and for automatic unfair dismissal) are not well-founded and are dismissed.

Employment Judge Abbott

Date: 14 February 2023