EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Tatham	**v**	**John Lewis Plc**

Heard at: Central London Employment Tribunal

On: 1 – 3 February 2023

Before: Employment Judge Brown sitting alone

Appearances:

For the Claimant: In person
For the Respondents: Ms G Holden, Counsel

JUDGMENT having been sent to the parties on 20 February 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preliminary

1. By a claim form presented on 30 March 2021 the Claimant brought a complaint that he was unfairly dismissed by the Respondent for making a protected disclosure pursuant to s103A Employment Rights Act 1996.

2. The Claimant relies on an email sent on 18 October 2020 to Karen Lord (Head of Branch) at 14.48 as his protected disclosure.

3. At a Preliminary Hearing on 29 October 2021 EJ Deol set out the issues to be decided at the Final Hearing as follows:

   (i) has the Claimant disclosed information in that email?

   (ii) did he believe the disclosure of information was made in the public interest?

   (iii) was that belief reasonable?

(iv) did he believe that it tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and/or that the health or safety of any individual has been, is being or is likely to be endangered,

(v) was that belief reasonable?

(vi) was the disclosure made to the Claimant's employer?

(vii) if the Claimant has made a protected disclosure, whether the reason or principal reason for dismissal that the Claimant made that protected disclosure? The Respondent will say that the Claimant's dismissal was on the grounds of serious misconduct.

(viii) if successful, what remedy is the Claimant entitled to?

4. At this Final Hearing, the Tribunal heard evidence from the Claimant. It heard evidence from Mahmoud Mohamed-Ali, a previous employee of the John Lewis Partnership. For the Respondent, the Tribunal heard evidence from Ian Wallis, Deputy Branch Manager; Connor Donnelly, Team Manager and investigating officer; and Dominic Kyndt, Team Manager and disciplinary hearing manager

4. There was a Bundle of documents. Page references in these reasons refer to pages in that Bundle.

5. The Tribunal timetabled the case at the outset.

6. Both parties made submissions. The Respondents made both written and oral submissions.

Relevant Facts

7. The Claimant was employed by the Respondent at its Oxford Street branch from until 22 December 2020 when he was dismissed without notice.

8. At the Respondent, all employees are partners in the business and are often referred to as partners, rather than employees.

9. He had previously been employed by the Respondent between 2 June 2008 and 1 December 2017, when he had resigned. During that period the Claimant had worked at the Respondent's Peter Jones branch for around 8 years from June 2008 to April 2016 and had then transferred to its Stratford Branch, where had worked for about 18 months until December 2017.

10. When the Claimant applied to work at Oxford Street, he completed an application form, p200. The application form asked: " Are you / have you ever been employed in either Waitrose or elsewhere in the John Lewis Partnership?" The Claimant answered "Yes". The application form then asked "… Please enter your original employee number". The Claimant did so. It was not in dispute that this employee number would give access to the relevant employee's full employment history, at all branches of John Lewis.

11. The application form then asked for “Previous Position” which the Claimant completed as “ Sales Assistant and Partner Voice”. The form asked for “Branch”, to the Claimant responded, “Peter Jones”. The form asked for “salary” and “Date from” and “Date to” and the Claimant replied “Jun 2008” to “Sep 2017”.

12. The form did not ask for “branches”, as opposed to “branch”, nor “positions”, as opposed to “position”, and it did not ask for more than one set of start and end dates. The form did not ask for the Claimant’s complete employment history with John Lewis.

13. The Claimant’s birth surname was Fineman. When his mother remarried, the Claimant changed his surname by Deedpoll to Tatham in 2007. However, his father worked at Peter Jones and recommended the Claimant, so the Claimant used his birth surname when he joined Peter Jones. He used his surname Tatham when he was employed at Oxford Street.

14. The Claimant is a Muslim. One day, while he was working at the Respondent’s Stratford store, he was questioned at the store by police officers, who asked him about religious extremism. Afterwards, the Claimant complained to the Metropolitan Police about this treatment. He received a letter from Sergeant Dave Leishman of the Metropolitan Police Professional Standards Unit which said, “I can confirm that no information will be obtainable in the public domain from this meeting and that the officer was quite content with your answers and that you wouldn’t hear back from him again. We discussed how sometimes people can be mistaken in what they hear and might interpret information differently. You indicated that you were satisfied with the explanation given and that you wished to discontinue your complaint…” p55.

15. Later at Stratford, the Claimant was the subject of a complaint from a colleague. There was an investigation into the complaint. The Claimant resigned during the investigation, but presented a grievance. The grievance outcome said, amongst other things, “… a colleague recalled that you had said you could “kill” Sofia. My investigations have concluded that while this was not taken literally by the Investigating Manager and that your response to this statement was required, it escalated the matter sufficiently to deem it sensible for you to not attend work while the investigation continued. Your letter of suspension clearly articulated that suspension is not a disciplinary sanction and is not an indication that investigation had already been concluded.” p197.

16. The letter also said that an investigating officer had been appointed to investigation a concern about the Claimant’s behaviour towards the colleague, and to decide whether the matter should be progressed to a formal disciplinary procedure, but that the investigating officer had not concluded either way because the Claimant had resigned. P197.

17. The Claimant’s employment in the Respondent’s Oxford Street store started well and he was praised for his positivity, customer service, and excellent feedback from customers, p216 – 217.

18. On 26 September 2019, David Deacy, a “Loss Prevention Partner” at John Lewis in Oxford Street, sent an email to colleagues, Lindsay Kidd and Kelly Laurance, concerning the Claimant, p228. He said that a manager visiting the Oxford Street store from the Stratford branch had seen the Claimant and had made allegations about the

Claimant. The allegations reported in Mr Deacy's email were outrageously untrue; including that the Claimant had been removed from the Stratford store "because of links to terrorism", that he had been" trying to recruit people from the store" and that there had been an investigation into this, which had led to the Claimant resigning "before he was sacked." Mr Deacy said that he had, "… emailed the Ops manager this morning to just get further details of everything that happened and who dealt with the case." he said, "The partners name is James Tatham and he currently works on the Lower Ground Floor. Just wanted to let you both know and see if there is anything further I need to do." P228.

19. In January 2020, there was an email discussion about the Claimant between his managers, criticising the Claimant for the loudness of his opinions and for revealing a dislike of the management team, P231C-E. On 4 January 2020, his manager, Michael Elliot, said, "I received a call from a TM from another floor that identified this partner as being vocal on Friday about us and apparently mentioned names which included myself in not such favourable terms on partners roof garden. So as far as I am concerned I no longer consider this partner to be a person that we should make any effort to retain within the business." p231D.

20. This email was printed off and left in an office. The Claimant was in the office and saw the email. He retained a copy because he was concerned that this discussion had been had about him by his manager.

21. An investigation took place into the Claimant's comments about managers but no disciplinary action ensued.

22. On 16 September 2020 an employee who had previously worked at the Stratford branch contacted the Respondent's Human Resources department – known as Personnel Policy and Advice ("PPA"), p326. The employee reported that the Claimant had previously worked at Stratford and "had been sacked from Stratford." This was untrue. She said that he had been sacked because he had threatened her and threatened to kill her. Again, as set out in the Claimant's grievance outcome from the Stratford branch, this was untrue. The employee reported that the Claimant had changed his name. This was true.

23. PPA advised that there should be an investigation into whether the Claimant had said that he had previously worked for John Lewis on his Oxford Street application and that the Claimant should be asked whether he had previously worked for John Lewis and about his previous name, p326.

24. From the PPA notes at the time, there were multiple discussions between the Claimant's Manager, Michael Elliot, and PPA about the Claimant's previous work at Stratford and what he had said in his application to the Oxford Street Branch, for example, on 16 September 2020, p325, 21 September 202, p325, 24 September 202, p324, 28 September 2020, p320 - 323, 29 September 202, p319, 2 October 2020, p317.

25. By September 2020 John Lewis stores were open again after the covid pandemic lockdown. Employees who had returned to work were being asked to work more flexibly. Some were being relocated to Waitrose food stores which were busier than department stores.

26. The Claimant set up a wellbeing group for partners on 4 October 2020, p356. He emailed Karen Lord, about this, saying, “Recently I have assembled a group of people united by one vision, the general wellbeing of every individual. This group was created from a passion of mine and by extension the others involved. You can find us on Google Currents: 1GROUP. "Our goal is to create a community built upon the pillars of trust, confidentiality, understanding and your general wellbeing and health. We would like to ask you for your support with this initiative as we feel very passionate about it. We would be grateful for 10 minutes of your time to discuss our vision and understand how we can all support one another.”

27. Karen Lord replied, inviting the Claimant for a chat in her office, p360. She suggested he pick up with Danny Boreham-Fish p360, which the Claimant did, p359 and p362.

28. The Claimant emailed Karen Lord further on 18 October 2020, raising observations about the general feelings of partners, p368. He relies on this remail as his alleged protected disclosure in this claim. In his email he said,

    “I have a couple of observations that I'd like to raise with you regarding the general feeling of Partners.

    The following are not just my own observations but have also been vocalised by numerous people themselves and this has caused me great concern. I would like to use this as an opportunity to find a balance between the needs of Partners and the Partnership itself.

    Understandably these are extremely challenging times we find ourselves in, both from a business perspective and on an individual level, mentally.

    Since coming back from the furlough scheme there has been a real lack of coherence in terms of the message being relayed from TM to TM. I feel this has been extremely ambiguous in nature and has caused a lot of confusion amongst Partners.

    …

    There is a great emphasis downstairs to have as many Partners cross-trained as possible. Therefore at times when we haven't been particularly busy, Partners have been learning from one another on the shop floor. That being said, these same Partners in many cases are being pulled off the shop floor by management and having informal written investigations for apparently being caught "talking." Many feel as though they have been targeted and condemned as guilty before the facts have even been established. The feeling of many Partners is that this is coming from "above" and being used as a means to manage them out of the Partnership. Over the last ten days that I've been off from work I've had numerous Partners call me, evidently quite stressed and anxious with regards to their futures.

    …

    Economically speaking, we all know the dire state the country is in and the impact that this can have on jobs across all sectors. That being said, I feel as though Partners are daily reminded by TM's about the potential loss of their jobs. This in my opinion isn't a way to motivate Partners to work to higher standards, but rather increases cortisol

levels and creates a downward trajectory and can been extremely detrimental to people's state of mind and even physical health.

I propose that everyone be given an equal opportunity to start afresh. I would like their to be clear-cut communications informing Partners of procedural changes that may have occurred and the new standards of expectations that we will be measured by. I think it is only fair that the "apparent" drive toward recording meetings for being caught "talking" are scrapped, at least until we are all communicated to and are on a level playing field. I feel this would enable the Partnership to build deeper levels of trust, reassure people and alleviate many mental distresses that have been the result of these things."

29. Karen Lord replied on 19 October, thanking the Claimant and saying that she had shared his email with Ian Wallis, the operations manager for the lower ground floor, with a view to him discussing the matters raised with the Claimant p361.

30. On 19 October 2020 Ian Wallis emailed the Claimant saying, "Just a quick note to say that Karen has kindly forwarded on your recent note. I would really value some time to fully understand yours and Partners feelings, observations and ideas on how we should work together to be a stronger team. Really looking forward to catching up asap, will touch base on the floor Tue and we can agree a suitable time." P377.

31. The Claimant took a period off work on annual leave but returned to work on 17 October 2020.

32. On 20 October the Claimant thanked Ms Lord, saying he had spoken with Ian Wallis that day which was 'extremely positive' and that they had arranged a meeting to catch up, p361.

33. However, in the same message to Ms Lord, the Claimant reported that he had also been spoken to about his application to Oxford Street that day, "I was pulled off the shop floor today for an investigation meeting based on my application that I used to apply for my current role almost two years ago. Whilst I have been vocal for the rights of partners and their wellbeing, I feel the exact problems that I've been trying to highlight I am now being made the victim of. I have tried to dispel this idea amongst partners that speaking up will end up in them being singled out ... and yet I feel that for speaking up I have now been subjected to this. P361. Ms Lord replied, advising the Claimant to reach out to Ian Wallis and Partner Support for advice and support, p361.

34. Ian Wallis met with the Claimant for about an hour on 27 October 2020. They discussed the work environment. Mr Wallis reported back to management on the ground floor, where the Claimant worked, about the Claimant's observations. Mr Wallis told the Tribunal that he was satisfied that management of issues such as 'talking' on the shop floor had been appropriate.

35. Karen Lord had also sent the Claimant's email to Amanda Montague-Sweetland, Commercial Manager, on 19 October 2020 at 08:21, who replied saying, "Karen There is significant history here, he is in Ians team and we have much going on, we will need to talk through." P374.

36. The Claimant had been off work from 7 - 17 October 2020. On 20 October 2020 Michael Elliot had sought to conduct an investigatory interview with the Claimant about his application form to the Oxford Street branch. The allegation to be investigated was that the Claimant had been dishonest on his Oxford Street application form. The Claimant did not agree to Mr Elliot conducting the meeting, because he did not believe that Mr Elliot would be independent, because of what he knew of Mr Elliot's email of 4 January 2020 saying that the Claimant should not be retained in the business.

37. Mr Elliot then asked another Team Manager, Connor Donnelly, to conduct the investigation. Mr Donnelly did not know the Claimant. The Claimant does not contend that Mr Donnelly intended to ensure the Claimant's dismissal.

38. Mr Donnelly told the Tribunal in his witness statement that, "I reviewed the following documents which evidenced the alleged dishonesty

    (a) James' application form for his current position at the Branch (pages 200 – 203)

    (b) Email from David Deacy to Lindsay Kidd and Kelly Laurance (page 228)

    (c) Case Record – Career History Request (pages 327 – 339)

    (d) Email chain Emma Groombridge and David Deacy (page 346)

    (e) Email chain Nicolette Keough and Debbie Wardle (pages 349 – 351)

    (f) Email Nicolette Keough to Michael Elliott (page 364 - 367)"

39. I noted that 2 of those documents emanated from David Deacy and related to the completely untrue allegation, made in 2019 against the Claimant, that he had been investigated and/or removed from the Stratford branch because of links to terrorism.

40. I asked Mr Donnelly about those documents. He told me he had disregarded them because they were not relevant. However, I noted that he had not said that in his witness statement. Nor was there any record, during his investigation, of Mr Donnelly saying that these documents were irrelevant and should be disregarded.

41. I concluded that Mr Donnelly did not recognise that these documents were incorrect, or irrelevant to his investigation, or decision making.

42. Mr Donnelly interviewed the Claimant on 22 October 2020, p386 - 392. There was a dispute between the parties about whether the Claimant had refused to sign the notes of the meeting. There was also a dispute about whether Mr Donnelly was entitled to record the meeting without the Claimant's written consent. It was not necessary for me to resolve those issues because the contents of the notes of the meeting were not significantly in dispute.

43. Mr Donnelly asked the Claimant in the meeting whether he had been employed by the Partnership before his current appointment at the Oxford Street Branch. The Claimant said that he had worked at Peter Jones from 2008 for around 7 years. Mr Donnelly then asked him whether he had worked at any other Partnership branches following Peter Jones, and the Claimant confirmed he had worked at the Stratford Branch. Mr Donnelly asked the Claimant why he had not mentioned the Stratford Branch on his

application form and the Claimant responded that he assumed the Partnership would search his employee number.

44. Mr Donnelly told the Tribunal that he considered that the Claimant had been evasive and long winded in his answers. He said the he assumed that the Claimant would have known he should include his full employment history. He said that he would have expected the Claimant to include his most recent experience at Stratford on his application form and that he decided that the Claimant had been intentionally dishonest in not including his Stratford employment because he had been involved in an investigation there and did not want the recruiting manager to find out.

45. After the investigatory meeting, Nicolette Keogh, from PPA, wrote a note on the PPA records, p394-395. I found that that note recorded Ms Keogh's understanding of the case, based on discussions with Mr Donnelly. I did so because the note recorded Mr Donnelly's conclusions after the investigatory meeting. The note said, " Connor asked to investigate the dishonesty about the P[artner] applying for a role and not being honest in this role. … he did not declare stratford branch – at this time he was involved in an investigation and suspension. The case was going to a disciplinary – P resigned. P then changed his name by deed poll. P admitted that the application was flawed. P thought it would be clear he was a previous records. Issues at Stratford included threats of violence and death threats. .. 1. Connor confident in taking this forward for dishonesty – he believes this P withheld this information in order to get through the application. … Connor will now pass forward to a disciplinary."

46. This note was striking. It contained numerous material inaccuracies, all of which were prejudicial to the Claimant. For example, it recorded that the Stratford "case was going to a disciplinary" when, on the facts, no decision had been made at Stratford that a disciplinary hearing would be held. Further, the note said, "P admitted that the application was flawed". The Claimant had not admitted this in his investigatory interview. More seriously, the note said, "Issues at Stratford included threats of violence and death threats." This was completely untrue. The matter at Stratford had included one statement by the Claimant that he "could kill" a colleague which had <u>not</u> been taken literally as a threat to kill.

47. It was noticeable that Mr Donnelly's original statement to the Tribunal said, at paragraph 5, "The Branch was made aware of James' previous employment by a Partner who had recently transferred from the Stratford Branch. The same Partner was one of many who had received inappropriate comments, namely death threats, from James which resulted in the disciplinary action at the Stratford Branch." Mr Donnelly changed this statement at the start of his evidence to say that there had not been "many" partners who had received inappropriate comments, but only one.

48. There was no evidence as to where Mr Donnelly had obtained the information that the Claimant had made "death threats". I concluded that Mr Donnelly had a seriously prejudicial view of the Claimant which was completely unwarranted on the facts. There was no evidence upon which he could have held the view, which he continued to hold to the date of the Tribunal hearing, that the Claimant had made "threats of violence" or "threats to kill" (plural) at Stratford.

49. I noted that Mr Donnelly had not made any decision to disregard the highly damaging and wholly wrong allegations about the Claimant in Mr Deacy's emails.

50. I concluded that Mr Donnelly did not bring a fair and open mind to the investigation, or to the decision he made to refer the Claimant's alleged dishonesty to a disciplinary hearing.

51. Mr Donnelly denied in evidence that his actions were in any way influenced by the Claimant's alleged protected disclosure. The Claimant did not allege that Mr Donnelly had done anything detrimental to the Claimant because the Claimant had made a protected disclosure.

52. On 3 December 2020 Mr Donnelly asked Dominic Kynt, a Team Manager, to conduct the disciplinary hearing in relation to the Claimant. Mr Kynt did not know the Claimant.

53. On that day, Mr Kynt spoke to Nicolette Keough at PPA, p410. She made a note of the telephone call. The note said, "… P resigned during an investigation. P then reapplied for a role in another branch and had changed his name … P declared Peter Jones but left out Stratford. This was deliberate and done to hide the truth."

54. That note appeared to record a conclusion, made before the disciplinary meeting was held, that the Claimant's failure to mention his employment at Stratford "was deliberate and done to hide the truth." Mr Kynt told the Tribunal, however, that this note was not accurate and simply recorded questions in Mr Kynt's mind. Mr Kynt agreed that the way the note had been written appeared to make a statement, rather than ask a question.

55. Mr Donnelly gave Mr Kynt (a) a copy of the Partnership's disciplinary procedure and; (b) the meeting notes from the investigation meeting (pages 386 – 392).

56. From Mr Kynt's evidence to the Tribunal, Mr Donnelly did not give Mr Kynt the Claimant's application form, nor did Mr Kynt ever look at the Claimant's application form.

57. Mr Kynt first invited the Claimant to a disciplinary meeting to be held on 7 December 2020. The Claimant was off work, sick.

58. On 8 December 2020 Mr Kynt called PPA. PPA notes of the call included, " Dominic [Kynt] feels that the partner is delaying to get 2 years' service is not concerned with the appeal and feels that the partner is playing the partnership. They are happy for them to go to the ET if they appeal."

59. That note appeared to suggest that Mr Kynt was already envisaging that the Claimant would appeal and go to the Employment Tribunal. It was put to Mr Kynt that he had already decided, in advance of the disciplinary meeting, that he would dismiss the Claimant. Mr Kynt denied this. He said that he always had possible Tribunals in mind when dealing with disciplinary issues. He denied that it had been he who had viewed the Claimant's notice period for dismissal on 8 December 2020, p578. It appeared however, that someone had checked the Claimant's notice period for dismissal that day.

60. Mr Kynt invited the Claimant to a disciplinary hearing on 14 December 2022, p419. The invitation letter said that the purpose of the hearing was to discuss the allegations of "potential serious misconduct, namely dishonesty and serious error of judgement".

The letter set out the Claimant's right to be accompanied to the meeting and said that the meeting could result in disciplinary action being taken against him, up to and including dismissal. The letter enclosed the disciplinary procedure and the notes of the investigatory hearing. These had not been sent to the Claimant previously and were not complete. The Claimant was provided with a complete version before the disciplinary hearing.

61. The Claimant was not provided with a copy of his own application form.

62. The disciplinary meeting took place on 22 December 2020, p423 – 429.

63. Mr Kynt told the Tribunal that the relevant dishonesty which the Claimant was because he had not declared in full his employment history with the Partnership. He told the Tribunal that, " When applying to the Partnership, all applicants are required to declare that they have provided full, correct and accurate information."

64. Mr Kynt was asked about the application form. He was asked whether the application form asked for the Claimant's "full his employment history". Mr Kynt acknowledged that it did not.

65. Mr Kynt was also asked where, on the Claimant's application form, there was the declaration to which Mr Kynt referred. He said that it was not there, although he recalled making such declarations himself.

66. I considered that it was surprising indeed that Mr Kynt purported to be investigating an allegation of dishonesty in relation to an application form when Mr Kynt never looked at the relevant application form, nor did he provide the Claimant with a copy of it.

67. The Claimant told Mr Kyndt, during the meeting, that he was a whistleblower and had sent an email to Karen Lord with his whistleblowing complaint. Mr Kynt did not investigate this further.

68. Mr Kynt told the Tribunal that he had not seen the Claimant's email to Karen Lord and did not know its contents. That did not appear to be disputed by the Claimant.

69. Mr Kynt denied that he had "got his orders from above" in cross examination. It was not put to him that Ms Lord, or any other particular individual, had influenced Mr Kynt to dismiss the Claimant.

70. During the disciplinary meeting Mr Kyndt asked the Claimant again why he had not mentioned Stratford on his application form. The Claimant again responded that the Respondent would have access to his full employment history from his employee number.

71. Mr Kyndt told the Tribunal that he believed that the Claimant had deliberately not included his experience at Stratford on his application form because he did not want the Respondent's Oxford Street Branch to know about his employment with Stratford. He told the Tribunal that he concluded that the Claimant breached the Partnership's policies and was guilty of serious misconduct, namely dishonesty and serious error of judgement.

72. He drew the Tribunal's attention to the Partnership's Employee Handbook which states that that "in certain cases, your conduct may be considered so serious that you may be dismissed summarily…whether or not you have been warned about such conduct on a previous occasion and regardless of your performance or length of service", p537. The Handbook contains examples of serious misconduct which can result in summary dismissal. These examples include a "serious breach of Partnership rules and procedures" p537. He told the Tribunal that he concluded that a lesser sanction than dismissal would not be appropriate. Mr Kynt dismissed the Claimant without notice at the disciplinary hearing.

73. Mr Kynt wrote to the Claimant on 22 December 2020 to confirm his decision to dismiss him on the grounds of serious misconduct, namely dishonesty and serious error of judgment, p 430 - 433. The Claimant did not appeal.

74. The Claimant told the Tribunal that he had seen the same security guard coming out of Mr Kynt's room before the disciplinary hearing as later escorted him from the building. He said that the Tribunal should infer that the security guard had been briefed that he would be required later as the Claimant would be dismissed. Mr Kynt denied that he spoke to the security guard until he had made the decision to dismiss.

75. In evidence, the Claimant told the Tribunal that he had about 20 employees in mind when he wrote the email to Ms Lord on which he relies as his protected disclosure. He said that, at the time, employees were being subjected to performance discussions on a regular basis, at a time when they were already extremely worried about job security as a result of the pandemic. He said that this was having a seriously detrimental effect on employees' mental health.

76. The Claimant contended that his manager, Mr Elliot, and other managers, wanted the Claimant to be dismissed from the Respondent. He contended that there was a group of managers who had been assembled to dismiss employees, partly because of the Respondent's financial position following the pandemic, to reduce employee numbers. He contended that Amanda Montague-Sweetland was one of these and that that was why she had written to Ms Lord about the Claimant's protected disclosure saying, "there is a significant history here, there's a lot going on and we need to talk." He contended that his whistleblowing email was never properly investigated.

Relevant Law

77. An employee who makes a "protected disclosure" is given protection against his employer dismissing him because he has made such a protected disclosure.

78. "Protected disclosure" is defined in *s43A Employment Rights Act 1996*: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

79. "Qualifying disclosures" are defined by *s43B ERA 1996*,

"43B Disclosures qualifying for protection

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

……………..

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

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

80. The disclosure must be a disclosure of information, of facts, rather than opinion or allegation (although it may disclose both information and opinions/allegations). Although there is no strict dichotomy between an allegation and the disclosure of information, a bare assertion, devoid of factual content, such as, "You are not complying with health and safety requirements", will not constitute a valid protected disclosure, *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR 325 [24] – [25].

81. In order for a statement to be a qualifying disclosure for the purposes of s43B(1) ERA, it had to have sufficient factual content and specificity capable of tending to show one of the matters listed in paragraphs (a) –(f) of that section*, Kilraine v LB Wandsworth* [2016] IRLR 422.

82. in *Simpson v Cantor Fitzgerald Europe*, both the EAT ([2020] ICR 252) and the CA ([2021] IRLR 238) held there is also no such rigid dichotomy between information and queries: EAT at [para 42] and CA at [para 53]. The key question is whether the statement carries information of sufficient factual content and specificity to satisfy the *Kilraine* threshold.

83. In *Kraus v Penna plc* [2004] IRLR 260, the EAT held [para 24] that where the word 'likely' is used, it means that the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation.

84. In *Fincham v HM Prison Service* [2002] (UKEAT/0925/01), the EAT held at [33] that, in a case reliant of a failure to comply with a legal obligation, there must be some disclosure 'which actually identifies, albeit not in strict legal language' the breach of legal obligation relied upon. In *Bolton School v Evans [*2006] IRLR 500, the EAT said that it is not fatal that the worker does not identify the breach of legal obligation but it would have been obvious to all what breach was being relied upon: see [41]. In *Twist*, however, the EAT considered the judgment in *Fincham* did not establish a generally applicable rule [para 91], relying on *Bolton School* to support that conclusion [paras 92-95]. Linden J did not consider *Bolton School* to provide an exception to the rule in *Fincham*, but rather that there was no such requirement [para 102].

85. A qualifying disclosure is a protected disclosure if it is made to the employee's employer, or other responsible person, *s43C ERA 1996.*

Automatically Unfair Dismissal

86. A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed, *s103A ERA 1996*, "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".

87. Where a claimant lacks two years' qualifying service (and hence is unable to bring an ordinary unfair dismissal claim), the burden rests on him to prove that the reason/principal reason for his dismissal is that he made a protected disclosure: see *Ross v Eddie Stobart Ltd* [2013] (UKEAT/0068/13), at [paras 16-17, 23].

88. A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee; Cairns LJ in *Abernethy v Mott, Hay and Anderson* [1974] IRLR 213, at [13].

Discussion and Decision

89. I took into account all my findings of fact, and the relevant law, when reaching my decision.

90. I decided that the Claimant had made a protected disclosure by his email to Karen Lord.

91. I decided that the Claimant disclosed information that "There is a great emphasis downstairs to have as many Partners cross-trained as possible. …. Partners have been learning from one another on the shop floor. … these same Partners in many cases are being pulled off the shop floor by management and having informal written investigations for apparently being caught "talking." Many feel as though they have been targeted and condemned as guilty before the facts have even been established. The feeling of many Partners is that this is coming from "above" and being used as a means to manage them out of the Partnership." … "Over the last ten days that I've been off from work I've had numerous Partners call me, evidently quite stressed and anxious with regards to their futures." "I feel as though Partners are daily reminded by TM's about the potential loss of their jobs. This in my opinion isn't a way to motivate Partners to work to higher standards, but rather increases cortisol levels and creates a downward trajectory and can been extremely detrimental to people's state of mind and even physical health."

92. I decided that he did reasonably believe that this information tended to show that the health or safety of any individual has been, is being or is likely to be endangered.

93. The Claimant set out behaviour of managers which he said was causing stress to employees and that many had contacted him about this. He set out how he believed that this would lead to mental and physical harm.

94. His letter was expressed in reasonable and conciliatory terms, I did not consider the Claimant was unreasonable in the beliefs he set out in it.

95. I also considered that he reasonably believed the disclosure was made in the public interest. It concerned the wellbeing of fellow employees generally, not simply the Claimant himself. I accepted that the Claimant was referring to around 20 people. The

Claimant did reasonably believe that the wellbeing of such a large cohort of individuals is a matter of public interest.

96. I also considered that, had the Claimant had the right to bring a claim of ordinary unfair dismissal, that his dismissal would have been grossly unfair.

97. I considered that Mr Donnelly did not bring a fair and open mind to the investigation, or to the decision he made to refer the Claimant's alleged dishonesty to a disciplinary hearing.

98. On the facts, I also considered that Mr Kynt had already decided to dismiss the Claimant before the disciplinary hearing. I did this for a number of reasons.

99. First, I considered that any decision that the Claimant had been dishonest for failing to declare his full employment history was so unreasonable as to be beyond the wide range of reasonable responses available to a reasonable employer.

100. It was utterly unreasonable to dismiss the Claimant the way he had answered a form which the dismissing officer had never even looked at, nor provided to the Claimant. The procedure was plainly unfair.

101. The relevant application form, which Mr Kynt had never looked at, did not ask for the full employment history. It is grossly unreasonable to decide that a person is dishonest for failing to answer a question which they have never been asked to answer.

102. The application form did the opposite of asking for a full employment history. It simply asked for a previous store and a previous position. On the evidence of the form, every one of the Claimant's answers in the form was correct.

103. As Mr Kynt knew, the Claimant had provided his employee number and that number would have provided his full employment history.

104. I decided that his failure, even to looking at the form, indicated that Mr Kynt was not interested in coming to a fair conclusion. The substantive unfairness of the decision also indicated that Mr Kynt had taken no interest in ensuring a fair outcome.

105. Further, I considered that Mr Kynt had already made his decision from the notes of his conversation with HR. He already envisaged an appeal and an employment tribunal. He was very negative in his views of the Claimant – that the Claimant was "playing" the company. Mr Kynt made statement, rather than asked a question, that the Claimant was dishonest, long before the disciplinary meeting.

106. I went on to consider, therefore, whether I could infer that the real reason for the Claimant's dismissal was the fact that he had made a protected disclosure.

107. However, the Claimant did not allege that Mr Donnelly had done anything detrimental to the Claimant because the Claimant had made a protected disclosure.

108. If Mr Donnelly was prejudiced against the Claimant, the most obvious reason for this was the untrue allegations about the Claimant being removed from the Stratford branch, which Mr Donnelly saw and failed to disregard.

109. It appeared to me that the untrue allegations made against the Claimant about his time at the Stratford store, by Stratford managers visiting the Oxford Street branch, were likely to have coloured the attitude of managers at Oxford Street towards the Claimant. That was extremely unfair, but it was not linked to his protected disclosure.

110. There was no evidence that Mr Kynt was instructed or influenced by anyone to dismiss the Claimant. He had discussions with HR, but these seemed to reflect his own prejudgment of the matter, rather than any instructions he was being given by HR. That prejudgment did not appear to be linked to the protected disclosure.

111. Even if Mr Elliott was motivated to ensure the Claimant's dismissal, that appeared to originate in January 2020, for different reasons, long before the relevant protected disclosure.

112. I could not conclude on the evidence that there was a covert operation set up to get rid of employees.

113. Furthermore, while there was a coincidence in timing between the protected disclosure and the dismissal, it was apparent from the documentary evidence that the catalyst for the investigation into the Claimant's job application was another partner raising the issue on 16 September 2020. The investigation was ongoing throughout September and October, as was evident from the HR record. The final step in the investigation process was to interview the Claimant. I concluded that it was simply coincidental that this stage took place after the protected disclosure. The Claimant returned to work only short time before the first attempted interview - he was off until the 17 October 2020, p363. There was no evidence that Michael Elliot was aware of the Claimant's email to Karen Lord on 20 October 2020 when he attempted to interview the Claimant.

114. I did not consider that the timing of the investigation meeting raised an inference that the Claimant's protected disclosure had given rise to the disciplinary process.

115. I agreed with the Respondent's submission that the Respondent's response to the Claimant's protected disclosure email of 18 October 2020 was, in fact, supportive and friendly to the Claimant. Karen Lord responded proactively to the Claimant's wellbeing group on 4 October 2020, p360 &362. Ms Lord thanked the Claimant for his note p361 and advised him to tell Ian Wallis about being investigated after raising concerns. Ian Wallis responded in a friendly manner to the Claimant to arrange a meeting p377.

116. Although Amanda Montague-Sweetland referred to 'significant history here', it was unclear what she meant by this and she was not involved in the further follow-up with the Claimant.

117. I decided that the appointment of the investigation and decision managers did not support a finding that the dismissal was because of any protected disclosure: both Connor Donnelly and Dominic Kynt were independent managers and there was no evidence that they were previously aware of the contents of the whistleblowing disclosure.

118. While the Claimant raised the email to Karen Lord in both the investigatory and disciplinary meeting, neither Mr Donnelly nor Mr Kynt appeared to have paid any heed to the email.

119. The Claimant has not indicated how he says Dominic Kynt was responsible for dismissing him because of his protected disclosure. Although the Claimant referred to 'orders from above', there was no evidence to support a causal link between the protected disclosure and Dominic Kynt's decision to dismiss.

120. Accordingly, while I have considerable sympathy for the Claimant, I have to conclude that his dismissal was not for the automatically unfair reason that he made a protected disclosure.

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Employment Judge **Brown**
Date: 3 February 2023

REASONS SENT to the PARTIES ON

15/03/2023

FOR THE TRIBUNAL OFFICE