EMPLOYMENT TRIBUNALS

Claimant: Mr B Bilson
Respondent: Keltbray Ltd

Heard at: Croydon Employment Tribunal (by cloud video platform)
On: 24 and 25 November 2022 and 5 January 2023

Before: Employment Judge Nash
Ms R Serpis
Ms S Khawaja

Representation
Claimant: In person
Respondent: Mr Allsop of Counsel and Mr Dobbin, Solicitor

JUDGMENT having been sent to the parties 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

1. The claim was presented on 23 February 2021.

2. At this hearing the Tribunal heard from the claimant and his sister, Ms Carly Bilson.

3. From the respondent it heard from: -

   Mr Peter Burnside, its CFO who heard the appeal;
   Mr Vince Corrigan, its Chief Operating Officer;
   Ms Thea Pretorius, the claimant's Line-Manager; and
   Mr Neil Paterson, at the time Head of Environmental HR.

4. The Tribunal had sight of an agreed bundle to 272 pages with a number of pages added on the first day, by consent, from the respondent.

5. The Tribunal asked the claimant to trace a copy of the fourth protected disclosure, an email sent to the Health and Safety Executive, but he was unable to provide a copy.

The Claims

6. The claims before the Tribunal were as follows:-

   (i) Unfair dismissal under section 98 Employment Rights Act 1996, so called ordinary unfair dismissal;
   (ii) Unfair dismissal for making a protected disclosure under section 103(A) Employment Rights Act 1996; and
   (iii) Detriment by reason of making a protected disclosure under section 47(4) Employment Rights Act 1996.

The Issues

7. The issues were agreed as follows:-

   Protected Disclosure

   (i) Did the claimant make one or more qualifying disclosures as defined in section 43(B) Employment Rights Act 1996?

   (ii) What did the claimant say or write? He said that he made disclosures on the following occasions: -

      PD1 On 20 March he emailed the HR IT department to say that he was not allowed to work from home;

      PD2 On 23 March he texted his Line-Manager asking if she had seen the news and whether they were needed in the office or whether they should work from home;

      PD3 On 24 March he spoke to Ms Pretorius and said that he would contact the authorities;

      PD4 On 27 March his sister contacted the Health and Safety Executive;

      PD5 On 31 March the claimant sent an email to Besicom at a Parliament.UK email address; and

      PD6 On 31 March the claimant informed Ms Pretorius that he had reported the respondent to the authorities.

   (iii) Did he believe that any disclosure of information was in the public interest?

(iv) Was any such belief reasonable?

a. Did the claimant believe that any disclosure tended to show either
(i) a failure to comply with the legal obligation to which the person was subject or
(ii) that the Health and Safety of any individual had been, was being or was likely to be endangered.

b. After reading and taking into account the documents, the Tribunal informed the parties that, as the claimant was an unrepresented person, it would consider both whether any putative disclosure tended to show a proscribed failure in respect of a legal obligation as well as a Health and Safety reason.

(v) Was such any such belief reasonable?

(vi) If so, any disclosures made either to his employer, to the HSE (which was accepted as a prescribed person) were a protected qualifying disclosure.

(vii) Did any disclosures not made either to his employer, to the HSE come within section 43(F) or 43(G) Employment Rights Act 1996?

(viii) If so, this was a protected qualifying disclosure.

Detriment s48

(a) Did the respondent do the following things?

(i) Put the claimant's redundancy decision on hold whilst his grievance was dealt with.

(ii) Put the claimant on furlough.

(iii) Cancel the claimant's annual leave.

(iv) Contact with the claimant whilst on furlough.

(v) Only checking in once with the claimant whilst he was on furlough in respect of his well-being.

(b) By doing any of those things, did it subject the claimant to detriment?

(c) If so, was it done on the ground that he made a protected disclosure?

Unfair Dismissal

(i) Was the reason or principal reason for the dismissal because the claimant had made a protected disclosure? If so, he would be regarded as unfairly dismissed.

(ii) If not, what was the reason or principal reason for dismissal? The respondent says the reason was redundancy.

(iii) Did the requirements of the business for employees to carry out work carried out by the claimant cease or diminish?

(vi) If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the claimant?

(vii) If the dismissal was procedurally unfair, would and could the respondent have been in a position to dismiss the claimant fairly in any event (known as a Polkey point)?

The Facts

8. The respondent, Keltbray is a large company with a number of different business streams. A significant part of its business is involved in the construction sector, in particular, large-scale construction projects such as the redevelopment of Battersea Power Station.

9. The claimant started work in the respondent's office in Esher in April 2018 as the IT Service Desk Manager. He worked in particular on the 'Service Now' system, a ticket system for the respondent's IT function. This enabled respondent employees to raise IT issues by generating a "ticket", which was then resolved by the IT technicians.

10. The claimant worked in an eight-person team including his Line Manager, Ms Pretorius. He was also responsible for project management of software and hardware up-grades especially for Service Now. He was responsible for incident and ticket management and for reports and complaints.

11. There was little difference between the accounts of the respondent and the claimant as to his duties, save that the respondent disputed that the claimant carried out and had the skills and experience to do the technical part of the role, that is, the actual responding and resolving of tickets and up-grades. The respondent contended that this distinguished the claimant from the technicians who did these tasks on a daily basis.

12. Both of the claimant's colleagues, when interviewed as part of a later grievance process, agreed that the working relationship between the claimant and Ms Pretorius left something to be desired. There was, perhaps, something of a power struggle. In effect, they were "butting heads" with each other.

13. The events material to the claim started in the middle of March 2020 when the country went into lockdown because of the Covid Pandemic.

14. The respondent's evidence was as the country went into lockdown it was 'all hands-on deck' in the IT department. There was an urgent need to transfer the respondent's staff, about 1,500 people, from on-site to remote working. This involved a number of large-scale tasks. When the country went into lockdown the respondent only had the capacity to connect a few hundred employees for remote working. For lockdown it would need many more. The respondent needed to source laptops, set them up, get them out to employees and to get employees up and running on remote working. This involved both hardware and software. It was necessary, for instance, to get staff using Microsoft Teams for video meetings. Because of the lack of connections, a VPN needed to be set up and made to work.

15. There was a dispute between the parties as to the extent of this urgent work. For instance, the claimant said that there were only twenty to thirty laptops which were sent out to employees.

16. The claimant pointed out that everything, including an issue with a laptop was recorded by a ticket and the number of tickets did not point to a large amount of extra work. Nevertheless, the Tribunal found the respondent's account of the immediate effect of lockdown on the respondent's IT function was credible. The Tribunal took into account its knowledge that many workplaces with little warning or preparation had to pivot from on site working to remote working. It was credible that this was a significant task in light of the size of the respondent workforce.

17. The Tribunal found that on the balance of probabilities there would have been very considerable pressure on the IT department at this time to effect the transfer from on-site to off-site working. The Tribunal, in effect, accepted that there was a considerable amount of work to do in the IT department in a short time period. There was some corroborative evidence for this from a statement to the grievance investigation by an IT employee that there was a lot of work to do, and it was not possible at this time for IT staff to work from home.

18. The claimant had booked the 19 and 20 March as leave. He told the tribunal this was partly because he was concerned about staff in the IT department potentially displaying symptoms of Covid. He therefore wanted to be out of the workplace.

19. On 19 March Ms Pretorius said that she was cancelling all leave in the IT department because of the urgency. Ms Pretorius phoned the claimant on the 19 March and told him to come in on the 20 March. **(Detriment 1)** The respondent later accepted that it had not given the claimant sufficient notice to cancel his annual leave, even taking into account the circumstances.

20. The claimant then raised this with HR in an email as follows (**PD1)**:

> '*None of IT are allowed to work from home. The reason I am emailing you is because I was meant to be on holiday yesterday and today but then Thea Pretorius cancelled all holiday for IT without further notice which is why I am in today.*

1. *Can I have my day back?*
2. *Is she able to do this?*
3. *Has this come from HR?*

21. He quoted from Ms Pretorius' email as follows:

> *'We are at the frontline of providing services to the business and due to the ever-changing situation we are facing, I have no choice to suspend all holidays indefinitely.'*

22. HR's replied to him later that day that, '*staff were working remotely where possible, but the decision went down to local department heads'*. HR referred him back to discuss it with Ms Pretorius.

23. The claimant then emailed HR that he thought Ms Pretorius' decision was directed at him personally because other employees had been permitted to take annual leave.

24. The issue for the Tribunal was whether Ms Pretorius was aware of his email. Her account was that she was not. The email was not copied to her. The claimant accepted that he had no direct knowledge of what happened to the email.

25. On the balance of probabilities, the Tribunal accepted that Ms Pretorius did not have knowledge of this email for the following reasons. The tribunal accepted Ms Pretorius' account that this was an exceptionally busy and stressful time – the first impact of Covid on 19 March 2020. The situation was fast moving, unstable and unpredictable. Accordingly, HR was likely to be extremely busy. It was therefore credible that a short email discussion was not reported to Ms Pretorius, particularly when HR advised the claimant that he should speak to Ms Pretorius himself.

26. The claimant, in his email and before the Tribunal, claimed that his colleagues, Mr Brown and Mr Murphy had been treated differently in that they had not been required to give up their annual leave. The respondent, however, said that this was not true : Mr Murphy was not on annual leave and Mr Brown was ill. The Tribunal accepted Ms Pretorius' evidence of this account for the following reasons. The account was detailed, and she gave different explanations for the two employees. Further, these facts were not challenged by the claimant. Accordingly, the Tribunal did not accept that the claimant was singled out. It was a matter of happenstance as to who was on annual leave at the time.

27. On 23 March the country went into lockdown, that is the Prime Minister announced that everyone should avoid travel and work from home wherever possible.

28. The claimant emailed Ms Pretorius that day 23 March to ask if he should come in***,*** *'Are we in as normal tomorrow?'* ***(PD2)***. Ms Pretorius replied, yes because it was in line with Government guidance.

29. There was some dispute as to how much and to what extent that the claimant had asked the respondent if he could work from home. Ms Pretorius told the grievance

investigation that the claimant could have worked from home if he had asked, and it was not a problem. In her statement she said that the claimant continued to ask to work from home. However, she told the Tribunal that the claimant could just have asked to work from home. So Ms Pretorius's account was inconsistent. Accordingly, the tribunal found that Ms Pretorius did know at the material time that the claimant wanted to work from home.

30. We now turn to **PD3**, on 24 March 2020, when the claimant said that he spoke to Ms Pretorius. He was unhappy with her response and said that he would be contacting the authorities as he believed that there was a breach of Health and Safety unless he was allowed to work from home by the end of the week. He had told Ms Pretorius that she and another member of staff were unwell - potentially with Covid - although Ms Pretorius said that she might have hay fever. (Later tests indicated that she had probably not had Covid at that time.)

31. Ms Pretorius denied that this conversation had taken place. She said that the claimant came in to work as normal on 24 March and they did not speak. She said that she was busy discussing Covid with the CEO and CFO, and would have reported any such comments to them, particularly in light of the importance that the respondent attached to Health and Safety issues in a safety critical business.

32. The claimant provided a document called a Timeline. The Tribunal thought it most likely that he had prepared this in August 2020, five months later (for his grievance). According to the Timeline, he had told Ms Pretorius that he would be going to the authorities.

33. According to the claimant, in any event, after this, he and Ms Pretorius spoke very little.

34. On 27 March 2020 the claimant's sister, unbeknownst to him, contacted the Health and Safety Executive. This was **PD4**. The respondent said that it was not aware of this at the time.

35. The tribunal did not have sight of the email from Ms Bilson to the HSE. However, it saw an internal HSE record of a contact (which did not say if the contact was by email or phone). Ms Carly Bilson agreed broadly that this was an accurate record of her report to the HSE, and the tribunal accordingly treated it as such. According to the HSE record, the discloser (we now know to be Ms Bilson) was a family member of someone (the claimant) who was being asked to go into the office despite the ability to work from home.

36. On 31 March 2020 the claimant emailed "Besicom" at a Parliament UK email address, informing them that the respondent IT department was being kept in the office against Government guidelines. Besicom was the House of Commons Business and Energy Industrial Strategy Committee. This was **PD5**.

37. Ms Pretorius and the respondent denied any knowledge of the Besicom email. The claimant accepted that he did not know what, if anything, had happened as a result of his email to Besicom. The Tribunal found no indication that this email had come

to the attention of anyone at the respondent and, accordingly, made a finding that the respondent was unaware of this email.

38. We then turn to **PD6**. The claimant's case was that on 31 March he told Ms Pretorius that he had reported Keltbray to the authorities. Ms Pretorius denied this conversation. She told the tribunal that she first learned of any contact with the authorities at the grievance hearing in August.

39. The Tribunal considered this conflict of evidence. There was no reference in the claimant's witness statement to this 31 March conversation although it was included in the Timeline (probably prepared in August 2020). In the view of the Tribunal, on the balance of probabilities, the claimant did not tell Ms Pretorius that he had reported Keltbray to the authorities on 31 March. This was because the claimant's account was that they hardly spoke at all after this date, and this conversation was not referred to in his witness statement which gave an account of the other material conversations.

40. According to the respondent, when the country first went into lockdown in March 2020 many of the construction sites on which the respondent was operating particularly in London were paused or closed down. Further, a number of construction projects in the pipeline were put on hold. This had a significant adverse impact on the respondent's business which suffered a sharp decline in revenues. The Tribunal accepted the respondent's account as it was credible in light of the economic situation in the UK at the time.

41. According to the respondent, its Board at this time started to meet on a daily basis and formed a Covid Crisis Management Group ('CCMG') made up of its main business leaders. Ms Pretorius worked closely with the CCMG because IT was essential to the transition to and implementation of remote working. This account was unchallenged by the claimant and appeared plausible. Accordingly, the tribunal accepted the respondent's account.

42. The CCMG and the Board oversaw how the respondent would operate the Coronavirus Job Retention Scheme, usually known as the Furlough Scheme. At its peak the respondent had about seven hundred employees on furlough out of about fifteen hundred - about half of its staff.

43. During lockdown the respondent was faced with a significant reduction in its income. To the extent this did not impact immediately, due to the time lag in some construction projects, it was "incoming" at some speed. As part of the respondent's management of its cashflow difficulties, Ms Pretorius said that she was asked to identify candidates for furlough.

44. The Tribunal accepted that it was credible that the respondent, in effect, would want to take advantage of Government help to pay the wages of its staff to help it through the cashflow crisis. Accordingly. it was likely that the respondent would put as many staff onto furlough as it could.

45. The work in the IT department quietened down after the first impact of lockdown as the respondent's staff transferred over to home working. The tribunal was told that in the two months prior to lockdown, in January and February 2020, the number of IT tickets (issues raised for the IT department to resolve) was 1316 and 1178 respectively. In March due to the transition to home working the number of tickets increased to 1358. However, once employees were set up for home working, there was a sharp decline. In April 2020 the number of tickets fell to 808 and in May to 751. The Tribunal found this credible evidence particularly when about half the workforce were on furlough.

46. Ms Pretorius told the tribunal that the crisis of Covid and lockdown put IT projects including Service Now on hold. Therefore, this part of the claimant's role was not immediately necessary. Further, the claimant was responsible for managing the tickets but not resolving the tickets. A senior member of his team, Mr Brown was in a position to manage and resolve tickets. Accordingly, she took the decision to put the claimant, rather than anyone else, on furlough. He was the only person in IT in the Esher office who that was furloughed, although another IT employee elsewhere was furloughed.

47. The respondent sent the claimant a letter on 3 April 2020 informing him that he would be on furlough from 6 April. This was the **second detriment.**

48. The HSE record showed that Ms Carly Bilson's complaint was only handed to its Inspector on 22 April 2020. In fact, the HSE record referred to 22 March. It was accepted that this was an error as it was before the date that Ms Bilson had contacted HSE. The Tribunal found that HSE contacted Ms Bilson on 23 April with their apologies for the delay. The HSE then telephoned the respondent's headquarters and on 23 April HSE emailed the respondent about the complaint.

49. On 28 April Mr Corrigan of the respondent's HR started to investigate to prepare a response to the HSE. Mr Corrigan in his email referenced that this was an issue relating to the Esther office.

50. In the event, the HSE closed down the investigation into the respondent very quickly. This seemed to be because most of the staff that the complaint related to were on furlough. The Tribunal found this credible as HSE were very busy at this point - as shown by their failure to take any action for a month.

51. The claimant said that he was then contacted by the respondent to do work whilst on furlough - **detriment 4**. For instance, Ms Pretorius asked him for his password.

52. As the Covid situation continued, the respondent took the decision that it needed to make more permanent cuts to its costs. It accordingly asked managers to identify potential candidates for redundancy. Mr Paterson said that the respondent was looking to cut 15% of its operating costs. Ms Pretorius was asked to identify cuts but not supplied with specific numbers.

53. According to Ms Pretorius, the claimant's time was distributed as follows:-

    33% distributing and chasing up tickets;
    33% team leader and team management; and
    33% on project management.

54. Ms Pretorius said that the roll out of Service Now could now be done by a third party contractor under a contract costing £14,000, which would be cheaper than a third of the claimant's salary and associated costs. This arrangement would also give the respondent more flexibility. According to Ms Pretorius, and the tribunal saw evidence consistent with this, the number of IT tickets continued to decrease during 2020. Ms Pretorius said that she and Mr Brown were able to manage the tickets with the help of the remaining IT team.

55. Ms Pretorius therefore considered putting the claimant at risk of redundancy. She treated him as being in a pool of one. Her account was that had she not pooled the claimant with other IT staff because it was her view that he had limited technical ability. Further, the claimant's salary was significantly more than that of his colleagues and other members of the team. The claimant denied that he lacked technical ability.

56. The tribunal saw evidence of large-scale meetings redundancy meetings consistent with a large-scale redundancy programme. A number of employee representatives were elected who met with senior members of the company. Ms Pretorius herself was elected as an employee representative and was therefore unable to deal with the claimant's redundancy herself because of a conflict of interest. She passed the redundancy to her colleague, Mr Pearce.

57. Nevertheless, Ms Pretorius told the claimant that he was at risk of redundancy on 16 June 2020.

58. The claimant's individual redundancy consultation process, as opposed to the collective redundancy consultation process, started on 23 July 2020. His first consultation meeting was on 5 August 2020. He was told that he was in a pool of one. He made a number of representations which Mr Pearce took back to Ms Pretorius. Essentially, the claimant's argument was that the workload in the department was not reduced, and services were on-going. In effect, he contended that his role was not redundant.

59. The claimant then raised a grievance on 12 August 2020. He raised objections to being at risk of redundancy. He complained that he had not been allowed to work at home, that he had been subjected to differential treatment by Ms Pretorius, that more generally, there was a history of a poor work relationship between him and Ms Pretorius. In addition, he complained of Ms Pretorius' management of colleagues.

60. The grievance was heard on 24 August by Mr Franklin, Group Supply Chain, Systems and Facilities Director for the respondent. He interviewed Ms Pretorius and two of the claimant's colleagues.

61. Mr Franklin partly upheld the grievance and dismissed the remainder. He found that the claimant was not put on furlough due to any protected disclosure as there was no evidence that Ms Pretorius was aware of any formal complaint and there were good reasons for the claimant being put on furlough. He found that the claimant had not been put at risk of redundancy for personal reasons but for business related reasons. He found that the claimant had not significantly requested to work from home, and, in any event, this was not possible.

62. He upheld the claimant's complaint that his annual leave was cancelled with insufficient notice. In respect of the respondent contacting the claimant whilst he was on furlough, he said that the respondent had only asked for specific information, however, this could and should have been avoided.

63. The claimant appealed against the grievance outcome on 5 October 2020.

64. The grievance appeal was heard on 21 October 2020 by the Finance Director for the Built Environment, Mr Donovan. The claimant's appeal was on very substantially the same grounds as his original grievance and Mr Donovan's rejection of the appeal was on substantially the same grounds as the grievance decision.

65. The respondent then recommenced the claimant's individual redundancy consultation. The claimant attended his second individual consultation meeting on 29 October 2020. He was told that the management of the ticket process was covered by a third-party, Mr Brown and another, Mr Crockett. Mr Brown covered the work up to assigning the incoming tickets and he had carried out up-grades whilst the claimant was on furlough.

66. By September the ticket numbers had increased to 1124 and by October there were 1057, so slightly but not significantly below than the pre-Covid levels.

67. As part of the respondent large-scale redundancy program, it was supposed to circulate vacancy lists to employees at risk. There was confusion as to whether these had been sent to the claimant or not. The claimant said that he had not wanted to look at his professional email because he thought this was not permitted whilst on furlough. The Tribunal had sight of the vacancy lists which were brief. The respondent's case was that there were few vacancies because of the large-scale redundancy exercise and there were no roles in IT.

68. By November the IT tickets were back to pre-Pandemic levels but Ms Pretorius' evidence was that she and Mr Brown were managing the tickets and the technicians were resolving the tickets in an acceptable manner. Service Now would not need significant input for another two years.

69. Accordingly, according to the respondent, it decided to terminate the claimant's employment by reason of redundancy. A letter of termination was sent on 4 November 2020 stating that he was terminated for the reasons of redundancy after a failure to find suitable alternative work. The letter appeared to be a pro forma letter and was signed by an HR Manager.

70. On 1 November the respondent promoted Mr Brown to Service Desk Manager. By this time the respondent's business had grown and it had acquired another business. (However, at some later date Mr Brown found that the role was too much and he stepped down as Manager.)

71. On 9 November 2020 the claimant appealed his redundancy. His grounds were briefly that he was not selected for business reasons, the selection was pre-determined, he was put on furlough because of his protected disclosures and complaining about IT management, his grievance was not properly investigated, and the respondent had made a decision to make him redundant after contact by the HSE.

72. Mr Burnside was appointed to hear the appeal. He interviewed Ms Pretorius who told him that High Metric, a third company was providing outsourced support. Mr Burnside relied on the IT team's assertion that the outsource support would only cost £14,000.

73. In effect, by this point, the reason for the redundancy had evolved to some extent. It was not there were less tickets but that the team was, in effect, operating acceptably without the claimant by using some contractor resources.

74. There was discussion in the appeal about whether the vacancy list had been sent to the claimant. He was shown the vacancy list at the time and agreed that there was nothing suitable. Most of the vacancies, which were few in number, were in construction.

The Law

75. The applicable law is found in the Employment Rights Act 1996 as follows:-

43BDisclosures 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,

…, or

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

…

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

47BProtected disclosures.

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a)by another worker of W's employer in the course of that other worker's employment, or

(b)by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B)Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C)For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

43KExtension of meaning of "worker" etc. for Part IVA.

(1)For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—

(a)works or worked for a person in circumstances in which—

(i)he is or was introduced or supplied to do that work by a third person, and

(ii)the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b)contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",

98General.

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

…

(c)is that the employee was redundant, or

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

S.139(1)

For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —
(a)the fact that his employer has ceased or intends to cease —
(i)to carry on the business for the purposes of which the employee was employed by him, or
(ii)to carry on that business in the place where the employee was so employed, or
(b)the fact that the requirements of that business —
(i)for employees to carry out work of a particular kind, or
(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.'

Submissions

76. The Tribunal heard brief oral submissions from both parties. It had also seen a brief opening note by the respondent's Counsel which was also provided to the claimant.

Applying the Law to the Facts

77. The Tribunal firstly determined if the claimant had made any protective disclosures.

78. PD1 - on 20 March 2020 the claimant's emails to HR. It was agreed that the claimant had disclosed information in his emails – the email was titled "Email about cancelled holiday on 20th March". In it he stated that none of the IT staff were allowed to work from home and that all holiday had been cancelled till further notice. In the follow up email he said that he felt that "this was directed at me". He said that the main reason he had taken leave was that colleagues were suffering with coughs and had not self-isolated.

79. The question was whether, in the claimant's reasonable belief, the information tended to show that the respondent was failing to comply with a legal obligation.

80. The Tribunal considered the legal circumstances. On 20 March the Government had not announced that people should stay at home. In fact, the law did not come into force until 26 March 2020. At the time the Government had yet to urge people to work from home if they could.

81. However, in determining whether a claimant reasonably believes that a respondent is failing to comply with a legal obligation, that belief does not have to be correct. The Tribunal has to consider whether the claimant's belief was both objectively reasonable and subjectively reasonable, i.e., the Tribunal should put itself into the shoes of the claimant, who had no particular legal knowledge, and decide if he reasonably believed that this information tended to show that the respondent was failing to comply with a legal obligation.

82. At this point, in the view of the Tribunal, the claimant was not disclosing information which in his reasonable belief tended to show that the respondent was failing to comply with a legal obligation. There was nothing in the email exchange indicating any legal obligation, even in non-legal language. The claimant asked if Ms Pretorius "could do this," but in the view of the tribunal this was not specific enough to be information that in the claimant's reasonable belief showed that the respondent was failing to comply with a legal obligation. The claimant was asking a question –

he was asking for information. In the view of the Tribunal, this showed unease rather than alarm and there was no suggestion that there was a legal obligation involved.

83. The Tribunal went on to consider whether the information tended to show that the claimant reasonably believed that the information tended to show that Health and Safety was being endangered. The claimant referred to colleagues with coughs not self-isolating. He was saying, in effect, that he was required to attend work when there was a risk of catching Covid, when he wanted to work from home. The Tribunal took the view that this did amount to information which in his reasonable belief tended to show that the health or safety of the claimant had been or was likely to be endangered. The sense was clear.

84. Having found PD 1 to be a protected qualifying disclosure, the Tribunal went on to consider causation. The Tribunal had found that Ms Pretorius was unaware of this disclosure.

85. The second protected disclosure was on 23 March - the claimant's text asking Ms Pretorius if she had seen the news, were they required in the office or could they work from home?

86. In the view of the Tribunal, this was not a protected disclosure. This was not information. There was no specificity. It was simple question. There was no link or reference to any potential proscribed failure. Accordingly, it could not amount to a protected disclosure.

87. The third protected disclosure was the claimant's disputed conversation with Ms Pretorius on 24 March. The Tribunal had to make a finding about what was said before it could analyze if the test for a protected disclosure was made out.

88. The claimant referred to this conversation with Ms Pretorius about contacting the authorities in his grievance timeline and in his witness statement. This was consistent. However, the accounts were somewhat different. In the grievance he said that he <u>would</u> be contacting the authorities because of a Health and Safety breach. In his witness statement there was a subtle but important difference. he said that he told Ms Pretorius that <u>if she did not change her mind</u>, he would contact the authorities.

89. "I*f you don't let me work from home because I am a keyworker, I will contact the authorities"* is different from *'I think my Health and Safety is at risk, I will contact the authorities.'*

90. The claimant, therefore, gave two different accounts of what he told Ms Pretorius. Whilst the situation underlying the two accounts was the same, the two accounts were different.

91. Ms Pretorius, in denying that the conversation had taken place, stated that if the claimant had been so concerned about Health and Safety, that he was, in effect, threatening the respondent with the authorities, he would have put something in

writing or would have complained formally. The fact that he did not, undermined his credibility. The respondent's case was that the claimant would have been aware that it would have taken any suggestion about the authorities seriously because it worked in a Health and Safety critical business.

92. Taking these factors into account, on the balance of probabilities the tribunal found that the claimant did tell Ms Pretorius that he was unhappy at not working from home and had mentioned the possibility of contacting the authorities. However, the tribunal did not find that the conversation went further than this.

93. The tribunal then applied the legal test as to whether this amounted to a protected disclosure. The tribunal found that this did not amount to a protected disclosure for the following reasons. Applying *Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA*, whilst 'information' is capable of covering statements which might also be characterised as allegations, there was not sufficient specificity of information on these facts. The claimant's statement did not have sufficient specific factual content to be a disclosure of information tending to show a relevant failure. The claimant simply told Ms Pretorius he objected to working from home and mentioned contacting the authorities. This was not disclosing information which in his reasonable belief tended to show that the respondent was breaching a legal obligation.

94. For the avoidance of doubt and for the sake of completeness, the tribunal accepted that it was reasonable of the claimant in the circumstances to believe that failing to allow non key workers to work from home amounted to a legal obligation. The legal situation in early lockdown was fluid and confused. In light of government announcements, it was reasonable for the claimant to believe that there were legal obligations about self-isolation, working from home and travel. However, he did not disclose information tending to show that the respondent was failing to comply with any such obligation.

95. In the view of the tribunal, the claimant did not make a protected disclosure – he suggested that he would make one in the future. There is no authority for the contention that a person whom the employer believes may make a protected disclosure is protected under whistleblowing legislation, only a person who has made a disclosure. The Tribunal was aware of the first instance decision *Bilsbrough v Berry Marketing Services ET 1401692/2018*, where an Employment Tribunal, taking a purposive approach and applying Human Rights law, held that such a person would be protected. However, this decision is not binding on this tribunal. In the view of this tribunal there would be material factual difficulties in determining the nature of an anticipated disclosure – would it contain sufficient information, would it tend to show a proscribed failure and the like. In the absence of any authority on this point, this tribunal was constrained by the plain words of the statute which require a person to have made a disclosure before they are entitled to protection.

96. Accordingly, PD3 was not made out.

97. PD4 - the claimant's sister, Ms Carly Bilson, contacting the HSE. The plain words of the statute provide protection for a worker who makes a disclosure. In effect the claimant was arguing that he should be protected from detriment on the basis that someone else had made a protected disclosure. However, Ms Bilson was not the "the worker making the disclosure" as defined in sections 230(3) and 43K Employment Rights Act. As set out in *McTigue v University Hospital Bristol NHS Foundation Trust [2016] IRLR 742, EAT* and *Sharpe v Worcester Diocesan Board of Finance Ltd and anor 2015 ICR 1241, CA*, there must be some contractual relationship between the person making the disclosure the "worker" and the respondent. The claimant's sister was not a worker or employee of the respondent. There was no contractual connection between the respondent and the claimant's sister. Therefore, one of the required elements of a protected disclosure was missing and what she said to the HSE cannot have been a protected disclosure.

98. Secondly, the claimant could not in effect "piggyback" on his sister's putative disclosure to the HSE. His sister was not acting in any way as the claimant's agent. He was in fact unaware that she had contacted the HSE. This was not a situation where a claimant seeks to piggyback on the disclosure made by a colleague with his knowledge.

99. Accordingly, the fourth protected disclosure was not made out.

100. PD5 – the 31 March 2020 email to Besicom. The Tribunal determined that the proportionate way to consider this matter was to move directly to consider causation. The tribunal had found that the respondent did not know of this putative disclosure and accordingly, it cannot have had any influence on any of the respondent's decisions.

101. PD6 - on 31 March the claimant said that he had told Ms Pretorius that Keltbray had been reported to the authorities. Ms Pretorius denied this conversation had occurred.

102. The claimant referred to this conversation in his August 2020 timeline, but not in his witness statement. It was also not included in Ms Bilson's witness statement. On the balance of probabilities, the Tribunal found that this conversation had not occurred. The main factor leading to this conclusion was that it was not in the claimant's witness statement. Further, if the claimant told Ms Pretorius that he had made a complaint to the authorities, it was more likely than not that Ms Pretorius would have alerted someone in the respondent's hierarchy. On the claimant's case, he had not merely indicated he might contact the authorities, he told her that he *had* contacted the authorities and events were therefore in train. This was a potentially serious matter for the respondent. In addition, there was motivation for Ms Pretorius to pass such information on, if only in effect, to "cover her back". It might have been awkward for her if, during a later external investigation, it transpired that she had been forewarned but not passed the warning on.

103. Therefore, the sixth disclosure was not made out.

Detriment on the ground of protected disclosure s47B Employment Rights Act 1996

104. The tribunal had found that the respondent was not aware of the only disclosure that was made out. However, for the avoidance of doubt the tribunal went on to consider the detriments.

105. According to the Court of Appeal in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*, the question for the tribunal is whether the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower.

106. Firstly, the claimant's individual redundancy process was put on hold. Whilst the definition of what constitutes a detriment in the case law is broad, (see *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*) the Tribunal could not see that this was a detriment. The claimant had, as he was entitled to do, interrupted the redundancy process and the respondent was required to consider his grievance before continuing. Whilst a detriment does not need to amount to physical or economic consequences, a worker must have suffered a disadvantage of some kind compared to others. Had the respondent not considered his grievance, this might well have amounted a detriment, but the delay was a consequence of the claimant's actions, not a detriment.

107. The second potential detriment was putting the claimant on furlough on 3 April. The claimant rejected the respondent's submission that this was not a detriment. The claimant wanted to go on working; he did not want to go on furlough. Further, being on furlough potentially put an employee at greater risk if the employee needed to make redundancies later. The clamant suffered a disadvantage compared to fellow workers.

108. However, the Tribunal did not find that there was any link between this decision and any protected disclosure. Only the first protected disclosure was made out and Ms Pretorius was unaware of it. Further, there was a good reason to put the claimant on furlough, as there was with a very large number of other employees. The respondent needed to solve its cashflow problem. The respondent saved more money putting him on furlough than other IT workers due to the salary differential. The decision was shown to be rational because tickets did go down.

109. Detriment 3, the cancellation of the claimant's holiday could not be influenced by any disclosure as it had happened before any of the protected disclosures.

110. The fourth detriment was the claimant being contacted whilst on furlough. In evidence he said that he was not relying on this as a detriment. However, as the claimant was a litigant in person, the Tribunal gave him the benefit of doubt and considered whether or not this did amount to a detriment. In the view of the Tribunal, it was doubtful that this was a detriment. It was a short request for something that was reasonable – a password. It did not put the claimant at a disadvantage compared to others. Further, even if Ms Pretorius somehow found out that the claimant's name was connected with the HSE complaint, this was no reason to make her telephone him for a password. It was a very minor matter and

the Tribunal could see no link between this and the first disclosure or any knowledge that Ms Pretorius might have had that the claimant was linked to the HSE complaint.

111. The fourth detriment was that the respondent only made one well-being check on the claimant during furlough. The respondent pointed out that the claimant had not challenged this during cross examination but as he was a litigant in person, the tribunal did not treat this failure as determinative.

112. In the view of the Tribunal, the evidence showed that there was some contact by the respondent with the claimant whilst on furlough. There was evidence that the claimant had opened his work email, containing the checks, whilst on furlough. Further, there was no evidence that Ms Pretorius was involved in these checks or lack of them. They were not her responsibility as they fell under the large scale furlough and redundancy procedures. There was no evidence that, somehow, HR had remembered the claimant's emails from March and been influenced not to send him well being checks in the midst of a large scale redundancy and furlough exercise. This was not plausible. In the tribunal's view, there was no basis to believe that the first disclosure has any influence on this respondent conduct.

113. Accordingly, the claimant was not subjected to any detriment on the ground that he made a protected disclosure.

<u>Automatic Unfair Dismissal – Protected Disclosure s130A Employment Rights Act 1996</u>

114. A claimant will only succeed in establishing unfair dismissal under S.103A if the protected disclosure is the reason or principal reason for dismissal. The Court of Appeal in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*, confirmed that the tests under Ss.47B and 103A are not the same.

115. According to the Court of Appeal in *Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*, the reason for dismissal is the 'set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.

116. When considering causation in protected disclosure cases the tribunal applies the test set out in a race discrimination victimization case *Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL*; 'Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?' (See *Trustees of Mama East African Women's Group v Dobson EAT 0220/05*.)

117. The only protected disclosure made out was PD1, the emails to the HR department of which Ms Pretorius was unaware. The Tribunal considered whether this disclosure could have had any impact in a wider sense on the decision to make the claimant redundant. The difficulty for the claimant was that the first disclosure was one or two short emails to Human Resources made at the very beginning of lockdown. It was unclear why the emails should have been so influential on the respondent that there might have been any impact on the decision to make the claimant redundant later on. There was no clear reason why Ms Pretorius might have been particularly irritated by the emails. She was not seeking to keep her

decision to require the IT department to work in the office in any way secret from HR - they were in the same building.

118. The tribunal considered if the emails to HR might have, together with the HSE investigation, have influenced Ms Pretorius. However, by the time of the decision to put the claimant at risk of redundancy, let alone dismiss him, the HSE investigation was past history. The Covid situation had moved on. The HSE complaint was logged as a one-off and the respondent was no longer being investigated. It had a clean bill of health from the HSE; there were no ongoing issues. Further, there had simply been too much water under the bridge between the claimant's contacting of HR on 20 March and the decision to put him at risk and then dismiss. In the meantime, the claimant had been put on furlough and the respondent's business had been through significant changes.

119. Further, the respondent had a credible explanation for why it made the claimant redundant. It was part of a large-scale redundancy exercise in the context of the adverse effect on Covid on its business. The claimant was the most expensive person in the IT department and the department had coped without him when he was on furlough.

120. Accordingly, the Tribunal did not find that PD1 had any impact on the decision to dismiss the claimant.

<u>Unfair dismissal s98 Employment Rights Act 1996</u>

121. The Tribunal accepted that there was a genuine redundancy situation in that there was statutory definition of redundancy was made out. This was because of the information provided by the respondent in the collective consultation meeting. The respondent had gone to some trouble to explain the details of the situation to its employees.

122. The Tribunal accepted the evidence from the respondent's witnesses regarding its financial situation, which was coherent, consistent and plausible. It is public knowledge that Covid and lockdown had a dramatic and negative impact on the construction sector. There was no real challenge that this was a mass redundancy of several hundred people because of a need to reduce costs. The claimant did not challenge the financial situation which the respondent described.

123. In the tribunal's opinion, this case turned on the selection of the claimant for redundancy. The question was, therefore, whether the claimant's dismissal was by reason of this redundancy situation. In effect, this question was inseparable from the question why the claimant was selected for redundancy and not someone else, and therefore why he was put into a pool of one. Did, as the claimant in effect contended, the respondent take advantage of a genuine redundancy situation to exit him from the business?

124. The claimant's primary case, as the tribunal understood it, was that the decision to put him in a pool of one was made in bad faith or pre-determined. Here, the claimant was not challenging the reasonableness of the redundancy, but whether

redundancy was the reason for dismissal. Accordingly, the tribunal – at this point – was not deciding if the decision to put the claimant into a pool of one came within a reasonable range in the context of whether the dismissal was fair, but whether redundancy was the reason in the employer's mind at all.

125. The tribunal therefore distinguished the case law on the flexibility enjoyed by employers in determining a pool from which they will select employees for redundancy. The Tribunal asked was why was the claimant put into a pool of one. Could he, as he contended, have been pooled with Mr Brown his subordinate, who had at least some management duties? According to Ms Pretorius the two roles were very different. The claimant was not put into a pool with anyone else because his role was unique. The IT team including Mr Brown were mainly dealing with tickets. The claimant was not dealing with resolving tickets but was managing the ticket process, chasing up the tickets, managing people and dealing with strategic IT. This was illustrated by the pay disparity; the claimant was the most expensive employee. In effect, Mr Brown was much more involved in dealing with tickets, whereas the claimant had a wider people management role. Ms Pretorius said that she did not think that the claimant could carry out Mr Brown's role. According to Ms Pretorius, once the claimant was on furlough, she took over the people management. To the extent that the project work went on, it was covered by an outsourcer.

126. The claimant's case was that, contrary to the respondent case, he did have the relevant technical skills so he should have been pooled with Mr Brown. It was difficult for the Tribunal to ascertain the level of the claimant's technical skills, but the Tribunal did accept broadly that the claimant's time was, as Ms Pretorius suggested, one-third managing tickets and chasing them up, one-third managing people and one-third Service Now and other IT projects and strategy. The Tribunal noted that when Mr Brown was on leave, the claimant managed Mr Brown's tickets not by resolving them himself but primarily by reallocating them to other members of the team. In the view of the Tribunal, the effective cause of the claimant being put into a pool of one and, consequently dismissed was the fact that he was on furlough.

127. The respondent during consultation with the employee representatives denied that being on furlough put staff at risk of redundancy, but in the view of the Tribunal, this is what happened on the ground. In fact, this was Ms Pretorius' evidence. The respondent discovered that it could manage well enough without the claimant when he was on furlough. This occurred in circumstances when the claimant's job was substantially different from his colleagues including Mr Brown and when he had not had the chance to demonstrate his technical ability to the respondent, unlike other members of the IT team.

128. The tribunal considered the decision to put the claimant on furlough in the first place. The Tribunal reminded itself that, notwithstanding its findings on protected disclosures, the working relationship between the claimant and his manager, Ms Pretorius, had not always been harmonious pre-Covid. Then relations soured further in the very early days of lockdown because of the conflict over home working. Then the claimant's name may have been linked to an HSE investigation.

129. On the 4 April there were still a reasonable number of tickets coming in, so the respondent needed technicians. The respondent was in a serious financial situation, and it needed to move staff onto furlough to cut costs. The claimant – who was not a specialist on resolving tickets - was the obvious choice to be put onto furlough.

130. Accordingly, the tribunal found that the reason for the dismissal was redundancy. The claimant was not put into a pool of one in order to exit him from the business. He was put into a pool of one because of the redundancy situation. Therefore, redundancy was the reason for dismissal and the tribunal went on to consider whether that dismissal for redundancy was reasonable.

131. The tribunal directed itself in line with the guidelines set out in *Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT*. It is not for the employment tribunal to substitute its view of what should have been done but to ask whether the employer's conduct came within the range of conduct which a reasonable employer could have adopted – the so-called range of reasonable responses test.

132. The first guideline suggested in *Compair Maxam* was the choice and application of selection criteria including the choice of pool. Therefore, the tribunal revisited the question of the pool for redundancy in the context of the test of reasonableness.

133. Where there is no customary arrangement or an agreed procedure to be considered, employers have a great deal of flexibility if defining a pool from which they will select employees for redundancy. They need only show that they have applied their minds to the problem and acted from genuine motives.

134. The following factors may be relevant. Whether other employees are doing similar work to the group from which the selections were made. In the view of the Tribunal, yes, Mr Brown and the other technicians were doing similar work to that of the claimant.

135. The next factor was whether the roles are interchangeable. In the view of the Tribunal, they were not interchangeable. Mr Brown was not doing IT projects. He was mainly doing ticketing. When Mr Brown was on leave, the claimant managed his tickets not by resolving them but primarily by reallocating them to other members of the team.

136. Other factors - such as whether the employee's inclusion in the unit was consistent with his previous position and whether there was any Union - were not relevant on these facts.

137. The question for the Tribunal was if, therefore, the decision to put the claimant into a pool of one fell within a range of reasonable responses to an employer in the circumstances. Tribunals are reminded by the Employment Appeal Tribunal that different people can quite legitimately have different views about what is or not a fair response to a particular situation. In most situations there will be a band of potential responses to a particular problem. It might be that both solutions, X and Y, will be well within that band.

138. The Tribunal found that it was within the reasonable range to put the claimant into a pool of one as his job was not interchangeable with that of Mr Brown or other members of his team. As indicated by the salary differential, his job was different.

139. Applying *Compair Maxam*, the Tribunal considered whether the claimant was sufficiently warned and consulted about the redundancy. At first sight, this was an entirely unexceptional consultation procedure. There were a number of collective consultation meetings with employee representatives. The claimant had individual consultation meetings. He was provided with the necessary information in advance. He was warned of the possibility of dismissal. He had a chance to have his say before the final decision was taken. He was given the right of appeal before an independent manager.

140. However, because of the time taken by the grievance, the situation when the respondent made the decision to dismiss the claimant had moved on from when it made the decision to put him at risk of redundancy. Ticket numbers had gone back up again. Further, by the time the respondent decided to dismiss the claimant, it had also out-sourced project management and it was, to put it bluntly, managing without him.

141. The tribunal determined that the claimant was in effect warned and consulted about the new situation. He knew about it, and he was able to make representations. Accordingly, the warning and consultation came within a range of warning and consultation available to a reasonable employer in the circumstances.

142. Finally, the Tribunal considered whether any suitable alternative employment was available. The respondent submitted that the claimant could identify suitable roles through its Intranet. The claimant's view was that he was not sufficiently provided with vacancy lists and this was partly because he thought he should not be accessing his work email whilst he was on furlough. Be that as it may, the respondent had sent documents saying that staff should contact HR if they were unsure or had questions about furlough and redundancy. Further, in consultation meetings the claimant was told to look at the Intranet.

143. In addition, there was no evidence or indication of any suitable alternative work. The only examples the claimant saw, and which were before the Tribunal, he frankly and honestly accepted were not suitable. In the view of the Tribunal, it was credible that in the midst of a large scale redundancy exercise, unfortunately, there was no suitable alternative work for someone with the claimant's skills and experience.

144. The Tribunal accordingly found that the claimant had been fairly dismissed.

145. The Tribunal was of the view that, in light of these proceedings, it might be helpful to the respondent to review how it dealt with lockdown and remote and on site working.

146. The Tribunal was under no illusion that this was an exceptionally difficult situation for the respondent. Covid and lockdown were unprecedented. The respondent had

to make decisions very quickly with insufficient information in a rapidly evolving situation.

147. Taking the experience of its industrial members into account in particular, the tribunal considered that it was possible that some of what happened might have been avoided with better communications; had it been made clearer to the claimant in the first place why he was expected to work on site. It appeared from the claimant's grievance and other documents, that he did not understand why he was viewed as a key-worker. The Tribunal did not see any documents or hear evidence that the respondent's thinking was clearly explained to the claimant at the time. The respondent explained this clearly to the Tribunal - some of its functions were being carried out by key-workers, and therefore the IT function which facilitated this meant that the respondent viewed IT staff as key-workers. Better communication at the time, or shortly afterwards, might have avoided some of what followed.

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Employment Judge Nash

Date: 7 March 2023