EMPLOYMENT TRIBUNALS

Claimant: Mr I Turner

Respondent: Tower Demolition (Holdings) Ltd[1] (company number 07747685)

Heard at: Initially in person in Croydon, then via CVP **On:** 20/3/2023 to 22/3/2023

Before: Employment Judge Wright

Representation
Claimant: Dr J Bickford Smith - counsel
Respondent: Mr J Egan (initially) - director

JUDGMENT having been given on 21/3/2023 and 22/3/2023 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Although oral judgment was given on 21/3/2023 and 22/3/2023, written reasons have been provided further to the claimant's request and due to the respondent's absence from the hearing once the adjournment application had been refused.

2. The Tribunal's Judgment was that the claims were well-founded. It made an award of compensation.

3. The claim was presented on 16/6/2022 after the claimant's employment terminated on 9/6/2022. The claimant made a claim for interim relief and a hearing was listed for 15/9/2022. The interim relief application was withdrawn and that hearing was converted to case management. This hearing was listed at that case management hearing.

[1] According to Companies House, the respondent was called Tower Demolition and Enabling Ltd between 5/1/2022 and 1/3/2023 and then changed its name to Tower Demolition (Holdings) Ltd.

4. The claimant's claims are for unfair dismissal contrary to s.94 Employment Rights Act 1996 (ERA) and for automatic unfair dismissal contrary to s.103A ERA (whistleblowing). It was confirmed that although the claimant had indicated in box 8.1 that he was claiming notice pay; he was not pursuing a notice pay claim.

5. At the outset of the hearing some preliminary matters were discussed. One issue raised was that there had been a dispute between the claimant and directors of the respondent, which included a claim in the High Court against the claimant and his brother. That clearly fed into accusation and counter accusation. Both parties had disparaged the other. These 'squabbles' were not matters which the Tribunal would make findings on. The only matters which the Tribunal would determine were those which went to the issues to be determined.

6. There was an issue regarding how the claimant's remuneration was calculated and how that fed into s.124 (1ZA)(b) of the ERA. This matter was left to remedy.

7. The respondent had on 17/3/2023 made an application for the hearing to be postponed. In short, it could no longer pay its legal advisers. It asked for a 6-8 week postponement when it expected its cashflow would improve.

8. The claimant opposed the application.

9. It was pointed out to the respondent that Rule 30A of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 applied. As did Rule 76(1)(c), which provides that a costs order may be made in these circumstances.

10. There was an adjournment for that and other reasons. Following that, the respondent confirmed that it wished to formally make its adjournment application; which it did. The respondent expanded upon its application and said that its witnesses should not be subjected to cross-examination by the respondent's professionally qualified counsel; when it was not legally represented. The respondent said that its witnesses were not prepared to be questioned or give evidence. The claimant remained opposed to the adjournment application.

11. The application was refused. The date of this final hearing was provided at the preliminary hearing on 15/9/2022. Although the time between the preliminary hearing and final hearing was unusually short in this region, the parties had been on notice of it since September. The respondent was legally advised until last week. If cashflow, in terms of continuing to fund representation in this claim was an issue, it is highly unlikely that would only have cropped up only last week. Plus, there was no evidence that cashflow would improve in 6-8 weeks with the result that the respondent could afford to re-instruct its advisers. The respondent had issued a High Court claim against the claimant in November 2022. Clearly there were legal costs associated with that and the issue fee was £10,000. In view of the time limits in the Tribunal and the High Court, and the listing of this

final hearing, it is a matter for the respondent as to how it allocates its resources to the litigation which it defends and pursues.

12. Furthermore, if this hearing was adjourned, it was unlikely that the case could be re-listed before mid-to-late 2024. Avoiding delay is a key component of the overriding objective. The hearing was fully prepared (witness statements had been exchanged on 10/3/2023 and the bundle was prepared). The claimant was present and was ready to be questioned. The respondent was represented by two directors and it had indicated that it would call two additional witnesses. For those reasons, the adjournment application was refused.

13. Following that the respondent said, very respectfully, that it was withdrawing from the proceedings and intended to leave. It was pointed out to the respondent that not being legally represented was not a disadvantage; although it may appear that way to the respondent. The overriding objective obliges the Tribunal to ensure the parties are on an equal footing. In addition to that, it is rare in the Tribunal for all parties to be represented and the Tribunal is accustomed to facilitating an unrepresented party. It was pointed out that it was unlikely the respondent would be able to successfully defend the claim, if it chose not to participate in the proceedings. It was also pointed out that in these circumstances that a reconsideration or an appeal was also unlikely to be successful.

14. A break was offered, after which the respondent could question the claimant (him being the only witness on his behalf). It was also suggested that the respondent need not question the claimant for more than an hour, but that it used that opportunity to put its case to the claimant or to challenge what aspects of the claimant's case it disagreed with. Once that process was concluded, the Tribunal would hear the respondent's evidence and claimant's representative would put questions to the respondent's witnesses on his behalf.

15. The respondent was offered a further break to consider matters and it politely declined. The respondent then left the proceedings making it clear that it did not intend to allow its witnesses to be cross-examined and it was no longer going to participate.

16. Following that, the future conduct of the case was considered. The claimant gave his evidence in respect of liability. The hearing was then adjourned to the following day to hear submissions on liability, followed by evidence on remedy and submissions on the same. The second and third days of the hearing were converted to CVP.

17. The issues to be determined were set out in the case management order of 15/9/2022.

18. An electronic bundle of 951-pages was provided. The claimant took issue that there were numerous irrelevant documents in the bundle and it was agreed that only the documents referred to would remain in the bundle.

The Law

19. The claimant pleads that he has made a protected disclosure under s. 43B of the ERA and he was automatically unfairly dismissed per s. 103A ERA.

> 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—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
>
> 47B Protected 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.
>
> 103A Protected disclosure
>
> 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.

20. In Kilraine v London Borough of Wandsworth [2018] ICR 1850 the Court of Appeal said that the word 'information' in S.43B(1) ERA has to be read with the qualifying phrase 'tends to show'; the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) ERA. An example was given of a hospital worker informing their employer that sharps had been left lying around on a hospital ward. If instead the worker had brought their manager to the ward

and pointed to the abandoned sharps, and then said 'you are not complying with health and safety requirements', the oral statement would derive force from the context in which it was made and would constitute a qualifying disclosure. The statement would clearly have been made with reference to the factual matters being indicated by the worker at the time.

21. Section 43B(1) ERA requires that, in order for any disclosure to qualify for protection, the person making it must have a 'reasonable belief' that the disclosure 'is made in the public interest'. That amendment was made to avoid the use of the protected disclosure provisions in private employment disputes that do not engage the public interest.

22. In Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA, a disclosure regarding internal accounts was held to be in the public interest.

23. Section 94(1) of the Employment Rights Act 1996 (ERA) provides that 'an employee has the right not to be unfairly dismissed by his employer'. Dismissal is defined by Section 95(1) ERA. Once a dismissal has been established it is for the employer to show the reason or principal reason for the dismissal and 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 the employee holding the position which the employee held.

24. Section 98(2) sets out five potentially fair reasons, one of which is conduct (section 98(2)(b)). Once the reason for the dismissal has been shown by the employer the Tribunal applies Section 98(4) to the facts it has found in order to determine the fairness or unfairness of the dismissal. The burden of proof is neutral. Section 98(4) provides:

> 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)—
>
> 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
>
> shall be determined in accordance with equity and the substantial merits of the case.

25. In considering Section 98(4), the Tribunal asks itself whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer. It is not for the Tribunal to substitute its own view for that of the decision makers in the case. The case of Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT, established that the correct approach for a Tribunal to adopt in answering the questions posed by Section 98(4) is as follows:

> The starting point should always be the words of section 98(4);
>
> in applying the section, a tribunal must consider the reasonableness of the employer's conduct, not whether the tribunal considers the dismissal to be fair;

> in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what the right course to adopt should have been;
>
> in many (although not all) cases, there is a band of reasonable responses in which one employer might reasonably take one view, whilst another might reasonably take another; and
>
> the function of the tribunal is to determine whether in the particular circumstances of the case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band of reasonable responses, the dismissal is fair. If it falls outside the band it is unfair.

26. In the case of Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23 CA, the court of appeal held that the objective standards of a reasonable employer must be applied to all aspects of the question whether an employer was fairly and reasonably dismissed, including the investigation.

27. In Polkey v AE Dayton Services Ltd [1988] ICR 142 the House of Lords made it clear that procedural fairness is an integral part of the reasonableness test. The House of Lords decided that the failure to follow the correct procedures was likely to make a dismissal unfair, unless in exceptional circumstances, the employer could reasonably have concluded that doing so would have been futile. The question: 'would it have made any difference to the outcome if the appropriate procedural steps had been taken?' is relevant only to the assessment of the compensatory award and not to the question of reasonableness under section 98(4).

28. It is the employer who must show that misconduct was the reason for dismissal. According to the EAT in British Home Stores Ltd v Burchell 1980 ICR 303, EAT, a three-fold test applies. The employer must show that:

> it believed the employee guilty of misconduct;
>
> it had in mind reasonable grounds upon which to sustain that belief; and
>
> at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

29. This means that the employer need not have conclusive direct proof of the employee's misconduct; only a genuine and reasonable belief, reasonably tested.

30. If the Tribunal is satisfied that the respondent conducted matters in accordance with the Burchell guidance it has to decide whether the dismissal was a reasonable response to the misconduct and must not adopt a 'substitution mindset'.

31. The manner in which the employer handled the dismissal is important in considering whether the respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant. A Tribunal will therefore be keen to find out that the process which led to the claimant's dismissal was affected in an appropriate way,

i.e. within the range of reasonable responses applicable to an employer of the size of the respondent with such administrative resources available.

Automatic unfair dismissal

32. The respondent submitted that the disclosures of the 15/3/2022 and 18/3/2022 fell to be considered together. The disclosures of 15/3/2022 was an oral disclosure by the claimant to Mr Egan, which was substantively repeated in a letter from the claimant's solicitors on 18/3/2022 (page 323).

33. That letter in essence, states that Mr Egan was in breach of his duties under the Shareholders Agreement and his fiduciary and statutory duties as a statutory director of the respondent. The letter also referred to section 43B (1)(a) and (b) ERA. The disclosure was made to the claimant's employer.

34. The Tribunal may have had some doubts as to the bona fides of this disclosures, for example, the five companies Mr Egan was said to be involved in were incorporated between 18/2/2020 and 4/2/2022. The claimant became aware of this in or around March 2022 (witness statement 43); there is no explanation as to how this came to his attention, or why it had not done so earlier. At the very least, the respondent referred to the claimant from July 2015 regarding it (the respondent company) as his own personal fiefdom (paragraph 5 page 45). Even if the claimant disagrees that there was animosity between the parties, there is no explanation as to how this information came to his attention in March 2022.

35. Clearly something prompted the parties so that they both looked to confront each other. The claimant raised his protected disclosure and the respondent took action against the claimant.

36. That said, the claimant's evidence was unchallenged and as such, the Tribunal accepts they were qualifying disclosures.

37. The disclosure was made in the public interest and as per the authorities, that test is not particularly onerous. The Tribunal accepts that an allegation of a breach (and whether or not there was any breach) of statutory duties by a director of a limited company, is a matter of public concern. That is whether or not the 'public' in that context is the workforce, shareholders, competitors, suppliers or end users of the respondent. Although the respondent is a separate corporate legal entity, it operates and is bound by, the actions of its individual directors. As such, in respect of these allegations, they are matters of public interest.

38. It is the respondent's case that the knowledge of wrongdoing by the claimant (expressed simply as the claimant making payments into his brother's and his pension accounts the 'Pension Payments') pre-dated the protected disclosure. Therefore, the respondent says that the reason for the suspension (on 30/3/2022), subsequent disciplinary meeting and

dismissal (the meeting was on 31/5/2022 and the dismissal took place on 9/6/2022) was not due to the claimant's protected disclosure.

39. One of the respondent's explanations for not challenging the claimant over his behaviour earlier was the fact that it did not want to disrupt the discussions over the management buy out (MBO). The heads of terms for the MBO were signed on 25/1/2021 (page 271) and the MBO was completed on 8/6/2021 (page 280).

40. The claimant made a reference to £80,000 which he described as a short-term loan on 6/1/2020 in an email copied to Mr Bibbey and Mr Egan (page 427). Furthermore, the claimant made an enquiry of the respondent's accountant on 14/1/2021 regarding the tax impact of him making a payment of £42,000 each into his brother's and his pension/SIPP. It being the case that by this time the respondent was in a more favourable financial position and so the Pension Payments could now be facilitated. The accountant responded and the claimant forwarded that email exchange onto Mr Bibbey and Mr Egan on the 15/1/2021 (page 438).

41. On the 4/2/2021 the claimant made amendments to the Board Minutes of the 3/2/2021 in red, which included a reference to a contribution of his brother's and his pension account of £41,666.66 (page 451). The respondent therefore had knowledge of the Pension Payment from January 2021, yet it did not take any action until March 2022.

42. The Tribunal therefore finds that the respondent did have knowledge of the proposed Pension Payment. The Board Minutes following the meeting on 7/4/2021 recorded that the February Minutes were reviewed (page 456). The respondent therefore knew of the Pension Payment before and after the protected disclosure. The respondent only took action after the claimant had made his disclosure.

43. The Tribunal then turns to consider what it was that made the respondent decide to take disciplinary action which resulted in the dismissal of the claimant in respect of the Pension Payment in March 2022? In the absence of any direct evidence from the respondent and based upon the balance of probabilities, the Tribunal finds that the reason for the dismissal was that the claimant made a protected disclosure on the 15/3/2022 and 18/3/2022. There was no other explanation.

Unfair dismissal

44. In respect of ordinary unfair dismissal and in applying the legal test referred to by the claimant, in view of the findings made, it is difficult to find that the respondent had a genuine belief in the claimant's wrongdoing. It cannot have had such a belief having known of the proposed Pension Payment in January 2021, without taking any action. It was open to the respondent to clarify whether or not that payment had been made and this was against a backdrop of the respondent's directors taking legal advice in respect of the MBO, which completed in June 2021. It would be surprising to find in a company that was subject to a MBO, that a sum of £83,000

was unaccounted for. Furthermore, the claimant was not able to challenge the respondent's evidence in its absence.

45. It is not therefore accepted that the respondent did have a genuine belief in the claimant's wrongdoing. It follows that the respondent could not have had a reasonable ground upon which to sustain that belief.

46. The respondent was not a large organisation in terms of its size, although it appears to have administrative resources. The claimant was a senior figure in the respondent and he had accused Mr Egan of wrongdoing. That left Mr Bibbey as a director; however he was implicated in the accusation against the claimant that was the subject of the disciplinary action, in that the claimant said he (Mr Bibbey) was aware of the Pension Payment. Indeed in the dismissal outcome letter, Mr Bibbey made findings in favour of himself/the respondent, in respect of his own evidence (regarding 'our' silence Page 521). Mr Bibbey was not a witness at the disciplinary hearing and there was no clear demarcation of roles in the process. That is almost inevitable when of the most senior three people in an organisation, one is accused of wrongdoing and is in dispute with the other two and of those other two, one is a witness against the wrongdoer and the other is the decision maker.

47. That is not to say that this respondent did not have other resources. It had professional advisers and it called upon Mr Williams to conduct an investigation. Mr Williams was involved in advising Mr Bibbey and Mr Egan in respect of the MBO and he was appointed auditor of a group company (Tower Group).

48. In view of the matters at stake and the financial implications, this is the type of case where the Tribunal would expect an independent third party to have conducted the investigation (for example a HR consultant) and for another third party to have been appointed to conduct the disciplinary hearing. Solicitors were involved and it would have been in the interests of natural justice for those directly involved (namely Mr Egan and Mr Bibbey) to have taken a step back and to have outsourced the investigation and the decision making. In fact a third party was appointed to conduct the investigation, yet Mr Williams was not independent.

49. The other option of course, would have been to have accepted the relationship was ending and to have invested the money which has been used to fund this litigation into a negotiated clean break, or to mediate. It may not have been possible to have a complete clean break in the circumstances in view of the claimant's involvement in other group companies, however, agreement should have been possible.

Conclusions

50. The claimant did make a protected disclosure and the principal reason for his dismissal was the fact he had made those disclosures. The dismissal was therefore automatically unfair.

51. The claimant's dismissal was also unfair under s.94 ERA. The purported reason for the dismissal was conduct, whereas the Tribunal finds that the reason was the protected disclosure. As the Tribunal does not accept the reason for the dismissal 'shown' by the respondent to be conduct or alternatively some other substantial reason, the respondent has not satisfied s.98(1)(a) ERA. Furthermore, the dismissal was procedurally unfair as it did not comply with the Burchell test in respect of s.98(4) ERA, notwithstanding that the respondent did not fulfil the requirements of s.98(1) ERA.

Remedy

52. The first issue to determine is what is a week's pay? Although s.124(1ZA)(b) ERA does not apply as the finding was the claimant's dismissal was automatically unfair and therefore, there is no cap on the compensatory award (s.123(1A) ERA); a week's pay is relevant for the calculation of the basic award and other losses.

53. The Tribunal at the outset raised the concern that according to the schedule of loss, the claimant's 'gross annual contractual remuneration' was made up of two elements, £9,492 paid under PAYE and £78,000 guaranteed interim dividend.

54. Dr Bickford Smith sought to persuade the Tribunal that the dividend forms part of the claimant's pay and should be included in the remedy calculations. The Tribunal was referred to O'Laoire v Jackel International [1991] IRLR 170 CA. The headnote states that 'the Tribunal had jurisdiction to award compensation for the loss of the stock options if satisfied that the [claimant] would in fact have obtained the options if he had been made managing director'. This was a claim for wrongful dismissal in the High Court. The Court of Appeal went onto say that the the decision was not based upon a finding that Mr O'Laoire was contractually entitled to the stock options, but was tied into the Tribunal finding that the Mr O'Laoire would have obtained the stock options if he were made managing director.

55. In this case, the claimant was receiving the dividends during his employment (although it appears the respondent ceased paying the dividends once the claimant was suspended in March 2022). This was not a loss of chance case.

56. Dr Bickford Smith also referred to the authority of University of Sunderland v Drossou UKEAT/0341/16/RN, which is authority that an employer's pension contribution came within the scope of 'remuneration' in the definition of a 'week's pay' in s.221(2) of the ERA and should therefore be included when calculating a week's pay for the compensatory award. The EAT found that a pension payment was part of a week's pay and was therefore remuneration for work done, even if the pension payment was not paid directly to the employee and is paid into a pension fund.

57. The Tribunal was not taken to any authority that confirms dividends do form part of 'remuneration' for the purposes of s.221(2) ERA. In any

event, as is confirmed in the extract from the IDS Handbook s.123 ERA does not expressly cross-refer to s.221 ERA. The limit on a week's pay under s.227 ERA does not therefore apply to s.123 ERA. What s.123 ERA does provide for is:

> (1) Subject to the provisions of this section and sections 124, 124A and 126, **the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer**.
>
> (2) The loss referred to in subsection (1) shall be taken to include—
>
> > (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
> >
> > (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
>
> (3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
>
> > (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
> >
> > (b) any expectation of such a payment,
>
> only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.
>
> (4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
>
> (5) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—
>
> > (a) calling, organising, procuring or financing a strike or other industrial action, or
> >
> > (b) threatening to do so,
>
> was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.
>
> (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
>
> (6A) Where—

> (a) the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and
>
> (b) it appears to the tribunal that the disclosure was not made in good faith,
>
> the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%.
>
> (7) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.
>
> (8) Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.

[emphasis added]

58. The IDS handbook does make reference to the first instance case of Sheridan v GTEQ Solutions Ltd 2400314/2014, where the Employment Tribunal held that dividends were excluded from the sums which comprised the claimant's 'remuneration'. It appears that this was considered under s.221 ERA due to the reference to 'remuneration'. Whereas this case is being considered under s.123 ERA and the Tribunal is considering what is just and equitable.

59. It is the claimant's case that it is just and equitable to include the the dividends form part of his remuneration and that the payment was structured in the way it was, for tax efficiency reasons. The Tribunal was taken to the minutes of the board meeting on 3/2/2021 (page 449) where it is recorded:

> *'The directors took the decision to raise their wages based on forward order book and profits in 2020 going forward these will now be 791 -00 PAYE and 6500 dividend this method deemed most efficient for the company and individuals, Dividend status will be checked by company accountants, it was noted that the directors will need to put aside 1200-00 per month for personal tax.'*

60. It is of course correct to say that structuring matters in this way may have been tax efficient. It may also be the case that whilst it is tax efficient to construct matters in one way, there may be an impact in other areas. For example, there is anecdotal evidence that under the Corona Virus Job Retention Scheme, payments were made based upon the PAYE payment and not on other payments which were paid to employees (usually directors), such as dividends.

61. It is accepted that for the purposes of Part II of the ERA, there is a different definition of Wages and in particular s.27 ERA, which has not been replicated in Part X Chapter II.

62. The respondent has made the point that the the payment of dividends did not come from the respondent itself, but from another company (Tower Group of Companies Ltd) in the group.

63. The payslips, P60 and P45 all show a gross basic salary of £791 per month and a gross car allowance of £1,433 (the claimant's schedule of loss shows this as a net sum of £1,200 per month).

64. Furthermore, dividends arise as a result of the claimant's status as a shareholder, not an employee. A shareholder does not have to be an employee. An employee who is not a shareholder cannot be paid dividends. If an employer wished to reward a non-shareholding employee, it would have to pay a bonus through PAYE. There is a distinction, a difference in status and a difference in tax treatment. The claimant was dismissed as an employee and his losses flow from that under s.123 ERA. The loss of his employment may have impacted upon his shareholding under the shareholders agreement, however that is a separate matter to the loss attributable to the respondent in consequence of his dismissal as an employee.

65. The Tribunal therefore makes the finding that the dividend is not included in the claimant's pay that is used for the calculation of a week's pay.

66. A Polkey reduction was discussed. Further submissions were invited and made on this point. In summary, the claimant was entitled under the share holders agreement (MBO) dated 8/6/2021 to work for the respondent on a full-time basis until he decided to reduce his hours. The claimant intended to work until 31/12/2025 and this was tied into the payment of the Loan Notes under the agreement.

67. There was also evidence that the relationship between the parties had not broken down. It appeared one director held a grudge against the claimant, the claimant having dismissed his (the director's) son some years earlier. The 'grudge' was unknown to the claimant during his employment and he continued to work on a daily basis with that director and his fellow director. Although there was animosity between the parties during these proceedings, there was no evidence of that, until at least the claimant made his protected disclosures.

68. The Tribunal's attention was also drawn to H M Prison Service v Beart (No 2) 2005 ICR 1206 CA, which is authority that there should not be a Polkey reduction where the circumstances in question arise from the respondent's own wrongdoing or use that to break the chain of causation. It is not therefore permissible to consider whether or not the claimant would have been fairly dismissed at some point in the future. As found under liability, 'something' happened in March 2022 which led to the claimant making his disclosure with the result that he was dismissed.

69. The Tribunal therefore declines to make a reduction for Polkey.

70. The next matter to consider was whether or not to make an increase for the failure to follow the relevant Acas Code under s.124A ERA. The claimant's protected disclosure was sent by his solicitor to the respondent's solicitor on 18/3/2022 (page 323). The respondent sought advice from its solicitor on 7/3/2022 (paragraph 33 page 57). The failures under the Acas Code were serious and were set out above. As already found, although this was a small employer, it did have resources and it did have legal advice throughout the disciplinary process. It did use an external resource (Mr Williams), however that resource was not independent. In the circumstances, the Tribunal therefore finds that an uplift of 25% is appropriate to reflect the failings which led to the claimant's unfair dismissal.

71. The burden is upon the respondent to raise any issues on mitigation and it has not done so.

72. Remedy calculations:

    A gross week's pay = £513

    A net week's pay (assuming a marginal tax rate of 20%) = £424

    Basic award

    1.5 x 7 x £513 = £5,386.50

    Compensatory award

    Loss to hearing 40 weeks x £424 = £16,960

    Acas increase 25% = £21,200

    Future loss 144 weeks x £424 = £61,056

    Loss of statutory rights £300

    Acas increase 25% = £76,695

    Grand total £103,281.50

    Grossed up[2] = £121,601.88

73. The respondent is therefore ordered to pay the sum of £121,601.88 to the claimant.

[2] £103,281.50 - £30,000 (tax free element) = £73,281.50/100 x 80 = £91,601.88 + £30,000 (tax free element) = £121,601.88

Employment Judge Wright
31/3/2023