EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Master Ghost Scott-Freeman	**v**	Bell Group Limited

Heard at: Reading **On:** 6, 7 & 26 June 2023

Before: Employment Judge Anstis (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Ms H Coutts (solicitor)

RESERVED JUDGMENT

1. The claimant's application to amend his claim is refused.

2. The claimant's claims are dismissed.

REASONS

INTRODUCTION

1. The respondent is the country's largest painting and decorating contractor. The claimant is an experienced and skilled painter and decorator. He has run his own business and is used to operating as a self-employed tradesperson or sub-contractor.

2. The claimant applied for a role for the respondent via an advertisement placed by an agency. He started work for them via the agency from 23 March 2021, and within a few weeks was working as a direct employee of the respondent. It is not in dispute that the respondent typically recruited painters, decorators and working foremen by way of an initial three week period of work for via their retained agency. The claimant says he was recruited as a working foreman. The respondents seemed in some doubt about that, suggesting that he had simply assumed the role. Nothing depends on this. Similarly the claimant says he was later promoted to contracts manager, but nothing depends on that.

3. The claimant worked for the respondent's Thames Valley branch. All his work for the respondent was carried out under a contract the respondent had with Engie for painting courts. Phil Bartlett was a contracts manager at the branch.

Jeff Noordermeer was a surveyor employed by the respondent at the branch, and latterly the branch manager. Chris Mitchell was for a time the respondent's interim branch manager for the Thames Valley branch. I had thought that Chris Mitchell was branch manager at the time of his decision to dismiss the claimant, but it was Mr Noordermeer's evidence that he (Mr Noordermeer) had been branch manager at the time but Mr Mitchell had been brought in to deal with the claimant given difficulties that arose between the claimant and Mr Noordermeer.

4. Each of those three gave evidence for the respondent, although by the time of the hearing none of them were still employed by the respondent and two were attending (at least for the first two days of the hearing) under witness orders requested by the respondent. The claimant gave evidence, as did his partner and his friend and colleague Burnard (or Ben) Mihayo.

5. The claimant had no written contract with the agency, nor later any written statement of terms of employment with the respondent. There is not even an offer letter setting out basic terms of engagement or employment. It is agreed that whether with the agency or the respondent the claimant was to be paid £22.50/hour for night work. There is a dispute about the possible rate for day work, but the claimant did almost all his work at night. It is also agreed that there was the capability for the claimant to earn bonuses. Those bonuses, how they were calculated and any targets that went with them were never recorded in writing by the respondent.

6. In those circumstances it is perhaps hardly surprising that the claimant was quickly in dispute with the respondent about what wages he was due. Part of his claim is a claim for unpaid wages. He also says that the sole or main reason for his eventual dismissal (by Chris Mitchell on 13 May 2021) was that he had made protected disclosures or that he had asserted a statutory right.

7. At a case management hearing on 17 August 2022 EJ Welch set out the protected disclosures alleged to have been made by the claimant. During the course of the hearing the claimant limited his alleged protected disclosures to WhatsApp messages he had sent to Phil Bartlett, Chris Mitchell and Jeff Noordermeer. He accepted that to the extent they related to his personal circumstances they were not made in the public interest, but he said that where those disclosures comprised complaints that others had not been paid by the respondent they were made in the public interest and so could be protected disclosures. The alleged protected disclosures were (using EJ Welch's numbering) the following WhatsApp messages:

   (1.1.1.1) to Phil Bartlett on 27/4/21 at 09:21

   (1.1.1.5) to Jeff Noordermeer on 23/4/21 at 15:47*, 26/4/21 at 15:49, 27/4/21 at 09:21. 30/4/21 at 09:17 and 03/05/21 at 15:22*.

8. The claimant accepts that it is only the starred messages that could be read as suggesting that pay to other workers was due from the respondent.

9. In closing submissions it was clear that Mr Noordermeer had not received the 3 May 2021 message as it was send during a period when he had blocked the claimant on WhatsApp. Accordingly, we were left with only one alleged protected disclosure relating to the respondent's non-payment of other workers, which was a message sent to Mr Noordermeer on 23/4/21 at 15:47. In her closing submissions Ms Coutts accepted that this met the legal criteria for a protected disclosure and was a protected disclosure.

10. In his closing submissions the claimant spoke for the first time (at least in this hearing) of a protected disclosure having been made by him during the final Zoom meeting. He says this was raised with EJ Welch, but it does not form part of her order and, as recorded above, this hearing proceeded on the basis that the claimant's protected disclosures were only messages sent by WhatsApp.

11. In summary, by the conclusion of the case, the claimant's alleged protected disclosures had been refined to one WhatsApp message which referred to others being unpaid by the respondent, and which did not suggest that he was the person responsible for paying them. That was accepted by the respondent to be a protected disclosure. The protected disclosure is:

> *"Hi Jeff still not heard why I haven't been paid yet fella that's two weeks in a row and not one person has given me answers today as to what's gone wrong and when me and lads are getting paid."*

12. The claimant says that his assertion of a statutory right was of his right to a statement of employment particulars, and that this was included within the protected disclosures and also in a WhatsApp message to Chris Mitchell on 8/5/21 at 17:37. Although there were other mentions of not having a contract, it was this message that assumed particular importance during closing submissions as it was the closest in time to his dismissal and was sent to the person who dismissed him. The message is:

> *"Hi Chris I have just forwarded this message to Jeff as there has been much dishonesty on Jeff's behalf and he felt no way to let me take fall for decisions authorised by him and Phil, I need to be able to trust the senior employees above my pay grade unfortunately this has not been the case, I need to know why this mess has been allowed to go as far as it has and why I was promised contracts manager position by Jeff to assist Phil yet <u>I still have no contract of employment</u> and Jeff thinks it a good idea I go back and work for agency until my contract is sorted, this is nonsensical and I will not be entertaining this foolishness can you let me know who can find resolution to the differences between me and Jeff in order to move forward without things escalating further its unfair on me and my team and I won't be pushed about by likes of Jeff because he does not want to honour oral agreements."*

13. I have underlined the section that relates to not having a contract of employment and which is said by the claimant to amount to assertion of a

statutory right. Ms Coutts did not accept that this amounted to the assertion of a statutory right under s104 of the Employment Rights Act 1996. This was on the basis that simply saying you did not have a contract of employment did not amount to any kind of assertion that the respondent was in breach of its obligations under s1 to provide a written statement of terms of employment.

14. There were multiple disputes of fact between the claimant and respondent about his work and the terms on which he worked. I have to refer to some of these to properly explain the claim, but for reasons I will set out it is, on the whole, not necessary for me to resolve these disputes of fact.

15. Ms Coutts accepted that given that the claimant did not have a statement of particulars of employment it was open to me, if any of the claimant's claims succeeded, to make an uplift of compensation under section 38 of the Employment Act 2002.

THE HEARING

16. The hearing had been listed for two days to address matters of liability and remedy. It took me some time on the morning of the first day to read into the case and start to understand the issues between the parties. I also allowed some time on the first morning for the claimant to identify precisely what his alleged protected disclosures were. His witness statement ended by saying "*I have gone into more detail in other instruments of my relationship with respondents …*", naming a number of other documents he had prepared for the tribunal. I was not sure which of those he wanted me to take as incorporated in his witness statement. After consideration he said that his witness statement taken together with the "*sworn affidavit of better particulars of claim*" was to be taken as being his witness evidence for the tribunal.

17. A notable feature of the case was that the claimant's schedule of loss totalled around £38m, based on lifelong loss and an annual basic (net) salary of £321,056.16. The vast bulk of this related to his unfair dismissal claim, and it was agreed that at this stage I would deal with liability and remedy on any question of unlawful deductions from wages, but only liability for unfair dismissal.

18. Ms Coutts questioned the claimant from lunchtime on the first day through to around 12:00 on the second day, at which point we took a lunch break.

19. On resuming on the second day I attempted to sum up where I saw the case at that point. As referred to below, there seemed to be considerable confusion about how much pay (if any) the claimant was owed. The scope of his alleged protected disclosures was more limited than originally thought, and whatever the reason for his dismissal it seemed to me highly unlikely that a claim for £38m had any chance of getting anywhere near that. The claimant himself had accepted in his evidence that it was "unrealistic" but it was not clear to me what the claimant considered to be a more realistic amount.

20. It was also apparent to me that if the claimant's net annual salary was really £321,056.16 then not only would he be by far the best paid decorator (or even contract manager) in the country, he may well have been the best paid employee of the respondent. Even if, as the claimant suggested, this was authorised by local management it seemed to me that there was bound to come a time when this was noticed at head office and steps were taken to correct it – perhaps by dismissing him, which could be done at any point within his first two years without the need for any particular reason. I was not sure if the claimant had taken that into account in preparing for this hearing. I also noted the points previously raised with the respondent. If the claimant succeeded to any extent it seemed likely we would be into the possibility of an uplift to any compensation to reflect the claimant's lack of written particulars of employment, and the respondent seemed to have largely brought this case upon itself by poor administration and a lack of any documentation.

21. There was certainly more to come, but it was clear by then that the case was bound to go part-heard and may require another two days to complete – perhaps more if we were to get to a remedy hearing for unfair dismissal. In those circumstances, and conscious of my duties under rule 3, I invited the parties to take time to discuss whether they could resolve the claim by agreement. Both accepted that invitation but they were not able to reach agreement and the case continued.

22. That afternoon the claimant's partner and Mr Mihayo gave evidence but were not subject to substantial cross-examination from the respondent.

23. That left time to hear the evidence of Chris Mitchell, before adjourning to resume on 25 & 26 June 2023.

24. The claimant also said at the end of the hearing that he had only received the respondent's witness statements very late on and had not had a proper opportunity to prepare questions to the respondent's witnesses. On resuming at 26 June 2023 the claimant did not take this point any further.

25. On 26 June 2023 Phil Bartlett and Jeff Noordermeer gave evidence for the respondent. As described below I heard and refused an application by the claimant to amend his claim. The parties made closing submissions and I reserved this judgment.

THE UNLAWFUL DEDUCTIONS FROM WAGES CLAIM

26. The claimant had not set out his unpaid wages claim in his witness statement and, as described above, his pay arrangements were not recorded in writing. The starting point seemed to be that he was on £22.50/hour for night work, plus a bonus, but the bonus arrangements were not set out in writing either, and no witness explained to me what they were, how any bonus was to be calculated and what (if any) targets it related to.

27. The claimant's schedule of loss claimed a figure of £21,463.48 but did not explain how this figure had been calculated. When I asked the claimant about this he referred back to some earlier calculations his partner had prepared for the tribunal, which showed a claim of £21,962.97. It was not clear to me how this had been calculated, and the claimant was not able to explain this to me.

28. On the evening between the first and second days of the hearing the claimant's partner revisited those calculations and, on the morning of the second day, told me that the total due to the claimant was £466.49. However, she had not been able to discuss this with the claimant himself as he was on oath overnight during a break in his evidence. After speaking to him, the claimant revised the figure claimed to just short of £2,000. The claimant explained that his partner typically dealt with his paperwork and financial administration. When she came to give evidence she could not explain this new figure of around £2,000.

29. As I explained to him at the time, in a claim of unlawful deductions from wages the claimant bears the burden of proof to show that there has been an unlawful deduction from wages, and in circumstances where a claimant could not explain what it was that they were entitled to the claim was bound to fail.

30. At the conclusion of the second day the claimant asked whether there was any further opportunity for him to explain his unpaid wages claim. I said that the time for oral evidence from him and his witnesses had now ended. If he was proposing to explain the claim to me by reference to evidence I had already heard and material I had already seen, that could be done in closing submissions. If he wanted me to take into account further evidence, that evidence would need to be prepared by him and sent to the respondent ahead of the next hearing, where he could make an application for me to take it into account.

31. On resuming the hearing on 26 June 2023 the claimant indicated that he had not yet finalised his position on the unpaid wages claim. He questioned Phil Bartlett about payments that had or had not been made to him.

32. When it came to closing submissions, the claimant indicated that his claim for unlawful deductions from wages was a claim for £6,840.39. This comprised deductions of £4,950 and £1,020 referred to at paras 4.4.10 and 4.4.11 of the respondent's amended response, together with a further underpayment of £425.39 and the amount of tax deducted (the claimant said incorrectly) from a payment of £680 travel expenses. The respondent's amended response said that the £4,950 and £1,020 had been deducted because they had previously been paid to the claimant via the agency, but the claimant said this was not the case.

33. The claimant had questioned Mr Bartlett about the deductions of £4,950 and £1,020, but I was concerned that this was the first time the claimant had put his claim of unlawful deductions from wages in this way. I have cited above the figures that the claimant gave, including figures given in response to a formal

order from the tribunal to give details of the amounts claimed as unlawful deductions from wages. As far as I could tell, the matters he now raised as unlawful deductions from wages had not previously been alleged to be unlawful deductions from wages, and the first time these were said to be the unlawful deductions from wages was in his closing submissions.

34. In those circumstances I took the view that if I was to consider that complaint the claimant would need to apply to amend his claim. While there had always been a claim of unlawful deductions from wages it he never previously been understood on the basis he now put it. Accordingly, the claimant made an application to amend his claim to include this claim of unlawful deductions from wages, which was opposed by the respondent.

35. I refused the claimant's application to amend his claim. As set out above, this understanding of his unlawful deductions from wages had only come out in his closing submissions, which was the first time either I or the respondent had heard him put his claim this way. If I was to allow the amendment, the respondent would need the opportunity to reply to this claim and this may well require further documentary and oral evidence. I did not consider that the amendment should be allowed at this late stage.

36. It follows that the claimant's claim of unlawful deduction from wages cannot succeed. He bears the burden of proof on such a claim, and with the refusal of this application to amend there is simply no explanation of what he was due and what deductions the respondent has made.

37. Lest this is seen as a vindication of the respondent's position, I record that I have made this decision only on the basis that the claimant has not proven that there have been any unlawful deductions from wages, not because I am satisfied that he has been properly paid. None of the respondent's witnesses explained why the claimant had been paid what he was. Their opaque pay structure, and the claimant's response to that, seems to have made it all but impossible to work out what he should have been paid.

THE DISMISSAL CLAIM

38. The claimant says that the reason or principal reason for his dismissal was that he made a protected disclosure or asserted his statutory right to a written statement of terms and conditions of employment.

Which dismissal?

39. In his closing submissions the claimant said that he had been dismissed three times: first in the Zoom meeting when Jeff Noordermeer tried to get him off the respondent's payroll and back to the agency, then by the agency itself, and finally by Chris Mitchell on 13 or 14 May 2021.

40. There are some legal difficulties with the idea that he has been dismissed three times. The most prominent of those is that up until then I had understood his case to be that his dismissal was carried out by Chris Mitchell on either 13 or 14 May 2021. That was the basis on which the hearing had proceeded, and EJ Welch's order records his employment as continuing to 14 May 2021. Apart from the legal difficulties, there are some factual difficulties. At the time of the Zoom meeting everyone agrees that he was employed by the respondent, but if he was dismissed by Jeff Noordermeer in the Zoom meeting then his later mention to Mr Mitchell of not having a contract of employment cannot have been a factor in that dismissal. Also if he had been dismissed at that meeting then Mr Mitchell's later purported dismissal was pointless. As I understand it, although the respondent wanted him to go back to the agency, and thought he had agreed this during the Zoom meeting, he later changed his mind and did not in fact go back to the agency, in which case the agency had no authority to dismiss him. It is clear to me that throughout that period his employment continued with the respondent until it was terminated by Chris Mitchell.

The claimant's work

41. It is not in dispute that the claimant was recruited to work for the respondent initially via an agency, Aspire Evolve. The many disputes between the parties (and the lack of any documentation from the respondent) start with a disagreement about whether he was recruited as a working foreman or as a painter and decorator. The claimant was sure that he was recruited as a working foreman. The respondent's witnesses varied in their recollection, with some saying he had been recruited as a painter and decorator. There is no documentation to show which it was. Even the witnesses who say that he was only recruited as a painter and decorator accept that given his experience and ability he rapidly assumed the role the role of working foreman, and I will proceed on the basis that from the start he was a working foreman. I have already noted that he was a very experienced and skilled tradesperson with long experience of working as a sub-contractor and running his own business.

42. The working foreman would typically be team leader for a small team of painters and decorators. Mr Bartlett said, and I accept, that turnover in these roles was high. Workers of varying quality and abilities would come and go very quickly. I also accept his evidence that experienced and high quality painters and decorators were in short supply. Mr Noordermeer was frank that he was not particularly interested in the individuals who did the job. All that he needed was people who could do the job and he was not particularly bothered who they were.

43. The claimant carried out his work for the respondent almost exclusively at night, which was unusual. All his work was carried out under sub-contract to Engie, painting courtrooms. As such he and others on the job only had access to the courtrooms between 6pm and 4am, presumably because they were being used during the day. He worked on courts in London, the Thames Valley and Surrey.

44. As I have said before, there are many disputes between the claimant and the respondent. What follows is not intended as a comprehensive or authoritative statement of what occurred, but is simply to give context to the question I have to answer, which is whether the reason or principal reason for the claimant's dismissal was him having made a protected disclosure or asserted his statutory right to a written statement of terms of employment.

45. It is agreed that the claimant's basic hourly rate for night work was £22.50/hour. It is also agreed that each job had a labour budget assigned to it. If the work was completed within that budget (called a target) then once everyone had received their basic hourly rate anything left in the budget was divided amongst the team, typically at the discretion of the working foreman who would be in a position to determine the various individual contributions to the work. If the work was not completed within the budget then the workers would simply be paid £22.50/hour. It appears that this was the rate that would be paid irrespective of whether the individual worked under the agency or direct for the respondent – at least that was the way it worked for the claimant. There was talk of a separate "bonus" that applied outside this target system, but I did not hear any detail of this.

46. The claimant's first job was at the City of London Magistrates' Court. The first night he and his team could not get access to the court so were sent home on full pay. There was supposed to be a four person team working there but in fact there were only three people (including the claimant) on the job. They were told that if they did the job with three people within the budget they could then split whatever was left over between them. Ultimately the work was completed by the claimant and one other person.

47. It appears (but I am not at all sure of the detail) that the work was completed well within budget and the fact that the work had been completed with two or three people rather than four meant that the claimant and his colleague were entitled to a large payment out of the target at the end of that job (although exactly how and when this was payable or paid was not clear to me).

48. Due to the shortage of workers the respondent's practice was to ask any new starters if they knew any other people who could do work for them. Thanks to his connections in the trade, the claimant did. He brought on board Ben Mihayo, who was an old friend and colleague of his. They went to work with others at Guildford Magistrates' Court. It appears that by this time, based on his experience at the City of London Magistrates' Court, the claimant saw the opportunity for he and others he brought into the business to earn substantial bonuses where the work could be completed within the targets. If he brought efficient and high quality workers such as Mr Mihayo in then he saw scope for the work to be completed well within budget, with the resulting bonus then to be shared between him and his workers. It appears that the claimant envisaged himself running multiple teams of people and generating high earnings for all concerned. While not inconsistent with employment or agency work this

approach is, of course, much more akin to that of a self-employed sub-contractor than an employee or agency worker.

49. It is clear that the respondent recognised the claimant's leadership capabilities and his trade skills and he was, at least initially, regarded as being an exceptional worker with great potential.

50. The claimant took it upon himself to advertise (in the name of his business) for other workers.

51. Eventually the claimant had recruited four workers: Ben, Duane, Adam and Damien. Around this time he moved to be directly employed by the respondent. There is no written record of how this came about, no written terms of employment, no contract of employment nor even an offer letter. The claimant's terms of employment were entirely undocumented by the respondent, leaving questions and disputes around such essential matters as his job title and pay arrangements. I have not even been referred to emails or text messages recording any element of the arrangements for him to become directly employed. It appears, however, that the plan was that the claimant's pay would remain unchanged from what it had been when he worked for the agency.

52. Difficulties with these working arrangements quickly became apparent.

53. First, while the respondent appeared grateful to receive these new workers, neither the claimant nor the respondent made any arrangements for how they were to be engaged. The respondent seems to have assumed that they were engaged through the agency, and it seems this is what happened in the end, although at different times and sometimes a long period after they started work. Essentially the individuals just turned up for work having spoken to the claimant. Neither Mr Bartlett nor Mr Noordermeer seemed to be particularly concerned by how they had been engaged. This was consistent with Mr Noordermeer's indifference to who was actually doing the job and Mr Bartlett's experience that people came and went all the time with a very high turnover. It is, nevertheless, remarkable that the respondent did not take steps at the time to ensure that these individuals were properly engaged, either via the agency or as direct employees.

54. This was not simply a matter of the respondent not knowing on what basis these individuals were working for it. The individuals themselves did not know who they were working for or on what basis they were working. They had been recruited by the claimant, but they did not know who they should be looking to for payment.

55. To add to these problems, the agency itself became upset, apparently accusing the respondent of having breached some sort of exclusivity agreement with these new recruits.

56. Second, the claimant had from the start submitted invoices for his and his teams' work, rather than the timesheets that the respondent expected. It is not clear why the claimant thought that invoices were appropriate given that he was either an agency worker or an employee, but it seems to have been what he was used to from his work on a self-employed basis. It is also not clear why the respondent did not do anything to stop this, or insist on timesheets. It appears that Mr Bartlett did his best to try to convert the invoices into timesheets that he himself prepared, but this led to some very questionable results, including a timesheet showing the claimant as having worked 100+ hours one week, and seems to be one of the things (along with ambiguities about the targets and subsequent division of bonus) that made the claimant's wages so difficult to calculate. It appears that around the time the claimant took up direct employment with the respondent there was some sort of attempt at reconciling the claimant's invoices, which resulted in a large lump sum payment to him.

57. Third, budgets for the jobs became tighter. It is not clear why this was. Perhaps the jobs had, as the claimant suggested, been mis-priced from the start. Whatever the reason for it, the claimant had concerns that the work (even at standard hourly rates) could not be completed within the budget, let alone leaving the scope for bonus payments that he had hoped for.

58. A combination of these factors led to times when the workers recruited by the claimant, and possibly even the claimant himself, were not paid on time. This obviously led to financial difficulty for the workers. They were confused about who should be paying them and even who they were working for. This confusion seemed to be shared by the claimant since, probably drawing on his previous self-employed experience, he was submitting invoices for their work and at various points talks about him being paid so that he can pay his workers. Unsurprisingly, on not receiving their pay some of them felt they had been misled by the claimant and took out their frustrations on him. The claimant in turn appealed to the respondent to pay his invoices. This does not seem to have been addressed by the respondent with any degree of urgency, nor does it, at least initially, seem to have prompted them to correct the claimant in his submission of invoices nor to regularise or document the basis on which the workers worked for them.

59. Around this time the claimant says that he was promoted to contracts manager. I do not need to decide whether that happened or not as it makes no difference to my decision. I note, however, that there appears to have been a conflict between the respondent's view of the claimant as a very effective worker and team leader – someone who could be relied upon to get work done in an often difficult working environment – and the increasingly chaotic and unresolved administrative issues that were arising around the claimant and his workers.

60. The administrative issues could, perhaps, be overcome in time, but the more fundamental problem was that the model the claimant was pursuing of running

his own teams was becoming uneconomic. The tighter budgets left no room for the bonuses that the claimant was expecting for him and his teams.

61. In his sworn affidavit of better particulars of claim the claimant says that he raised this with Mr Noordermeer, who acknowledged that there was an error in the pricing and, effectively, authorised the claimant to raise the targets to a level that he felt was appropriate. Mr Noordermeer denied having given this authority to the claimant.

62. I simply do not see how Mr Noordermeer could have done this. As Mr Noordermeer said, to allow the claimant the authority to raise the targets was akin to giving him a blank cheque. The targets formed the basis of the bonus for the claimant and his workers. No surveyor would ever agree to such a thing. Mr Noordermeer did not agree to it.

63. It appears, however, that for a time after this the claimant did adjust the target and submitted invoices on the basis of the revised targets.

64. In early May 2021 a meeting (by Zoom) was held to try to resolve the outstanding matters – in particular how much the claimant and his workers were owed. This seems to have been convened by the agency. The claimant attended, as did Mr Noordermeer, Mr Bartlett, Mr Mitchell and a representative from the agency. The intention seems to have been to clear the air, work out what the claimant and his workers were owed, and find a way of moving forward.

65. It is clear by this point that the relationship between the claimant and the respondent was not good. The claimant describes himself at various points in time as being “furious”, and making constant phone calls to the respondent. That is consistent with the respondent’s witnesses’ evidence that the claimant was by then frequently in touch with them for extended periods of time, to such an extent that Mr Noordermeer took steps to block his phone number. The claimant himself was coming under intense pressure from his workers about why they were not getting paid. The claimant says he had “lost all faith” in Mr Noordermeer and Mr Bartlett. By this point the claimant was not actually carrying out any work for the respondent.

66. The Zoom meeting took place on Friday 7 May 2023. During the course of this, it was identified that the claimant had been changing the targets, and the circumstances in which his workers were recruited became clearer. Mr Noordermeer recounts the outcome of the meeting as being an agreement by the respondent to pay the claimant a further sum of around £3,000 to clear his account and for the workers to be engaged via the agency. One way or another the meeting also seems to have concluded with the idea that the claimant would revert to working via the agency. According to the claimant this was to be temporary while the respondent caught up with a backlog of HR work and provided him with a contract. He agrees that he accepted this idea, albeit under

pressure from the respondent. In any event, as I have set out above this was not a dismissal.

67. The following day the claimant sent a long WhatsApp message to Mr Bartlett, including the following:

> "*Hi Phil had time to think since yesterday zoom meeting and have decided to stay direct for Bell group …*"

68. The claimant's witness statement concludes in this way:

> *"60. The following Monday I received correspondence from* [the agency] *telling me that respondents no longer wished to continue with my employment, I politely reminded him that I no longer worked for him or Aspire Evolve therefore it was not his responsibility to tell me that my employment had been terminated it was for the respondents to do so.*
>
> *61. I contacted head office on the Wednesday and once again requested to speak to* [HR] *regarding the whistleblowing policy … I spoke to an employee … who worked in respondents HR division, she took my grievance after a lengthy conversation regarding the disclosures I had been making to the contracts managers who failed to act responsibly.*
>
> *62. I was told* [by her that she] *would be in touch but instead after hearing about my dismissal the same day I made my disclosures to head office,* [she] *informed her staff not to continue the investigation into my treatment and instead shared my grievances with the culprits responsible for the negative conduct.*
>
> *63. Shortly after my … phone call with* [HR] *I received a message from* [the agency] *saying that I had been threatening, violent and abusive to* [HR] *making her breakdown and cry, I … advised him that at no point was I disrespectful, abusive violent or threatening towards* [her].
>
> *64. The same day I also received call from Chris Mitchel stating that my employment was being terminated, when asked for a reason for dismissal he said it just was not working out, Jeff said the same thing and that it was just not working out."*

69. The respondent's position is that the claimant was dismissed by Chris Mitchell on 13 May 2021, not because of any protected disclosure or assertion of a statutory right but because, as Mr Mitchell put it in his oral evidence, he was "*not working the Bell way*", "*sucking everyone's time*", "*inflating targets*", not providing proper timesheets, his relationship with Mr Noordermeer had completely broken down and it was "*easier to walk away*". In its amended

response the respondent described this as being a matter of conduct, but the essential point is that the issues surrounding the claimant and his work had become so great that it was no longer worth the respondent's while to continue to employ and try to manage him.

Assertion of a statutory right?

70. Although there is more to the claim of asserting a statutory right than simply the WhatsApp message to Mr Mitchell of 8 May 2021 I will focus on that as it is the closest in time to his dismissal, is sent to the person who dismissed him and the other messages relied upon are in similar terms.

71. Does saying that you have no written contract of employment amount to an allegation that your employer has infringed your right to a statement of a written statement of terms and conditions of employment under s1 of the Employment Rights Act 1996? Ms Coutts argues that it does not. She says it does not go far enough. I note that under s104(3), "*it is sufficient … that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was*".

72. It is clear from that that the employee does not have to specify exactly what right has been infringed, or use technical language.

73. In Mennell v Newell & Wright [1997] IRLR 519, Mummery LJ said, "*the allegation need not be specific, provided it has been made reasonably clear to the employer what right was claimed to have been infringed.*"

74. In considering this point I have considered it appropriate to read the message sent at 8 May 2021 17:37 together with the one sent a few minutes earlier at 17:31. In that earlier message the claimant clearly says "*Bell group are to provide me with my contract of employment at earliest opportunity as I should of legally had it from my first day of works …*". When these messages are read together it is clear to me that the claimant is alleging that the respondent was infringing a relevant statutory right of his.

The reason for dismissal

75. What was the reason for the claimant's dismissal? Was the reason or main reason that he had made a protected disclosure (asking on one occasion for his workers to be paid) or that he had asserted a statutory right (pointing out that he did not have a contract), or was it the wide range of other issues that had built up around his work: the failure to follow procedure in relation to timesheets, amendment of targets, his conduct towards Mr Noordermeer and others meaning that despite his undoubted abilities as a worker and team leader it was no longer worth the respondent's while continuing to employ him?

76. It is clear to me that that reason for the claimant's dismissal is the latter rather than the former. The question of protected disclosures and asserting statutory

rights were ultimately trivial at best amidst the many complications and issues that had arisen with his employment.

77. It seems to me that the claimant was too used to the self-employed way of working and had not understood the limitations that might apply now he was an agency worker or employee. While the many administrative problems were largely of the respondent's own making, they centred around the claimant acting as if he were self-employed: for instance, invoicing rather than completing time sheets, and recruiting his own workers. Added in to that we have the claimant setting his and his teams own targets, which would be unheard of in any employment or agency worker relationship. The administrative difficulties had put the claimant himself under pressure when he and his workers were not paid on time. His workers had taken out their frustrations on him and he in turn had taken out his frustrations on the respondent's employees. After his dismissal he sent a WhatsApp message to Mr Mitchell describing the respondent as "scumbags" and "weasels". While this was after the end of his employment it goes some way to describing how the claimant had felt (rightly or wrongly) let down during his employment for reasons that were not anything to do with his protected disclosure or assertion of a statutory right. Some of that frustration undoubtedly came out in his communications with Mr Noordermeer and others within the respondent.

Conclusion

78. The reason or main reason for the claimant's dismissal was not his protected disclosure or assertion of a statutory right. His claims are dismissed and there will be no remedy hearing or award under s38 of the Employment Act 2002.

79. I cannot let this decision finish without pointing out again that the lack of any proper documentation or paperwork around the claimant's or his workers' employment has contributed significantly to this claim being brought, and the respondent is largely responsible for this lack of proper documentation or paperwork. I have not seen such a large employer fail so completely to provide proper documentation for many years. I hope the respondent will have taken steps to improve its procedures in the light of this claim.

Employment Judge Anstis
Date: 27 June 2023

Sent to the parties on: 4 July 2023

GDJ
For the Tribunals Office