EMPLOYMENT TRIBUNALS

Claimant: **Mr T J Barker**

Respondent: **Vertu Motors plc**
(correct respondent: Bristol Street First Investments Limited)

FINAL HEARING

Heard at: Birmingham (via CVP) **On:** 13, 14 & 16 November 2023

Before: Employment Judge Camp Members: Ms J Keene
Mr R White

Appearances
For the claimant: Mr M Barker, claimant's father
For the respondent: Ms L Gould, counsel

REASONS

1. A judgment dismissing the whole claim, with reasons, was given orally at the hearing on 16 November 2023. These are the written reasons, subsequently requested by the claimant.

Introduction, background & issues

2. The claimant was employed as a trainee car sales executive from 15 April to 29 June 2021 at Bristol Street Motors in Stoke-on-Trent. He was on the face of it dismissed for having failed his probationary period and amidst allegations of misconduct. He is bringing two types of claim: a claim for automatically unfair dismissal under section 103A of the Employment Rights Act 1996 (ERA) – what is commonly referred to as 'whistleblowing unfair dismissal'; a single complaint of detriment for making protective disclosures under ERA section 48 – 'whistleblowing detriment'.

3. Perhaps before we go any further we should say that the reason there ended up being a hearing in November 2023 for a case which concerns things that

happened in 2021 is that the final hearing was originally listed to take place in 2022; that hearing was postponed on the Tribunal's own initiative, we think due to lack of a judge to hear it; unfortunately, the first mutually convenient date for the postponed final hearing was November 2023.

4. There was a standard preliminary hearing for case management in January 2022. What was said by both sides at the start of this hearing to be an agreed list of issues was produced on the back of what happened at that hearing. (A draft list of issues had been produced by the parties before the preliminary hearing; Employment Judge Perry commented on it and it was amended in light of those comments). There is a copy of it at the end of these Reasons for ease of reference. It is part of this decision in accordance with rule 62. However, it turned out that certain parts of the 'agreed' list of issues were not agreed and we had several discussions about that. Eventually, just one significant change was made to the list of issues: to the alleged protected disclosures relied on.

5. The way in which the case had been put in the list of issues was that the disclosures were disclosures made to the claimant's legal adviser, and were protected disclosures in accordance with ERA section 43D. The claimant's legal adviser, and his representative throughout these proceedings, was his father, Mr Martin Barker, who provides unregulated legal services through a company called Martel (UK) Ltd which trades as Martel Legal Services[1] ("Martel"). Martin Barker / Martel sent letters by email to the respondent on 27 May 2021 and 28 May 2021. In the list of issues they were not themselves said to be protected disclosures but were instead said to 'reflect' the protected disclosures allegedly made by the claimant to Martin Barker before those emails were sent.

6. What has changed is: first, the allegation that the claimant made protected disclosures to Martin Barker has been abandoned; secondly, the first of the emailed letters – the one dated 27 May 2021 – is now said to be a protected disclosure made to the respondent in accordance with ERA section 43C by the claimant, through Martin Barker / Martel as his agent. The letter was addressed to the respondent's CEO. Just this one alleged protected disclosure is now relied on.

7. We gave the claimant permission to change his case in this way. This change gives rise to an additional issue around whether or not someone can make a protected disclosure through an agent, something we shall deal with later.

[1] During the final hearing it emerged that Martin Barker was acting for the claimant on a contingency fee basis. This was a problem because neither Martin Barker nor Martel Legal Services is or was registered with the FCA. We permitted Martin Barker to continue to represent the claimant after he said he was scrapping his contingency fee arrangement and would be acting pro bono.

8. We also discussed the possibility of the claimant making allegations of detriment other than the only one in the list of issues. The one in the list of issues is: being the subject of an investigation by the respondent into the claimant's alleged misconduct. That possibility was ultimately not pursued. The only complaints we have been dealing with are therefore:

    8.1 automatically unfair dismissal under ERA section 103A;

    8.2 the single complaint of detriment for making a protected disclosure just mentioned.

9. Both complaints rely on the emailed letter sent by Martel on the claimant's behalf of 27 May 2021 as the means by which one or more protected disclosures were allegedly made. We shall refer to this as the "PID letter". We do so for convenience and even though, as we shall explain later, we do not think protected disclosures were made when it was sent to the respondent.

The law

10. This is one of those cases where the focus has been on the facts rather than on the law. In summarising the relevant law, it is unnecessary for us to go much further than noting the wording of the relevant legislation: ERA sections 43B, 47B, 48, and 103A.

11. In terms of relevant cases, we have considered the following in particular:

    11.1 as to whether there was a reasonable belief that any disclosure of information was made in the public interest, paragraphs 32 to 37 of **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731;

    11.2 as to whether a detriment was done "*on the ground that*" the claimant made a protected disclosure, **NHS Manchester v Fecitt** [2011] EWCA Civ 1190.

The facts & evidence

12. The witnesses who gave evidence at this hearing were the claimant and Martin Barker and, for the respondent: Mrs M Rees, HR Business Partner and the person who did the investigation that the detriment complaint is about; Ms L Smith, another senior HR Manager, who did the probation review hearing at the end of

which the claimant was dismissed. There was also a file of documents of 403 pages, including its index. The important documents were very few in number, consisting mostly of some of the correspondence between the claimant / Martel and the respondent.

13. This is not a negative criticism of him, but we note that during Martin Barker's cross-examination of the respondent's witnesses I [the Employment Judge] intervened a number of times. The reason I did so was partly to limit irrelevant questions, but primarily to ensure that the claimant's case was fully and properly put by Martin Barker or, failing that, by me on the claimant's behalf. The claimant's case did seem to change during the hearing and was in some respects rather unclear and it was necessary to ask Martin Barker about it.

14. The relevant facts begin with the claimant being at the start of his employment and in a probationary period. He was required to attend a training course, delivered online, via Zoom. He was invited to attend by email. He didn't attend it. Because of this, the dealership in which he was working was fined £500. The fact that the dealership was fined would indirectly affect the remuneration of the General Manager of that dealership, a Mr Barnes.

15. On 27 May 2021, Mr Barnes had a meeting with the claimant. At that meeting Mr Barnes, as it were, 'had a go' at the claimant. The claimant secretly recorded the meeting so we have a transcript of it. The first part of the meeting is missing from the transcript, and presumably from the recording. Amongst other things, Mr Barnes told the claimant that he would have to pay £500 from his own wages to the dealership.

16. The claimant discussed with his father what had happened. His father wrote and sent the PID letter, in his own [Martin Barker's] name. It was emailed late in the evening of 27 May 2021. It appears at pages 181 to 182 of the electronic bundle and we refer to it. Broadly, it covers two issues. It begins with the discussion about IT difficulties and then, in the critical paragraph dealing with the first issue it states, "*Due to these IT issues some (if not all) of his* the claimant's] *sales have been allocated to his line manager's account and/or that of other salesmen. He has been told not to worry about that as he is on guaranteed commission for the first two months. However, my son is concerned that this will affect his commission payments in future months and of course there is the possibility that the claiming of commission by others for sales which my son has achieved is a breach of company policy and may even be an offence of fraud by false representation contrary to section 2 of the Fraud Act 2006*". That is, then, the first broad issue which is dealt with in that email.

17. The second matter relates to missed training: "*Today, 27 March 2020, he* [the claimant] *was called in to a manager's* [Mr Barnes's] *office for what was openly described by that manager as 'a b*ll*cking', the nature of which was that because my son had failed to attend the online Zoom training course the manager in question had been fined £500 from his personal salary by Vertu's head office which he required my son to reimburse to him. My son was given the option of paying the full £500 to the manager immediately or paying £100 per month for the next five months, with a strongly implied threat of summary dismissal if he failed to agree one of those options. The manager insisted that company fines to managers being 'passed on' to employees was a company policy implemented by Vertu's head office, which I very much doubt as this would be an illegal deduction of wages. …. Upon discussing this with other sales colleagues, my son has discovered that some of them have also been forced to make similar payments to the same manager under similar threat of summary dismissal.*"

18. The PID letter's beginning included this: "*I request that you keep this email strictly private and confidential for the time being because of the serious nature of the matters I am about to bring to your attention. These matters concern illegal actions of other employees in your organisation, and since as I am a qualified lawyer*[2] *and my son's legal advisor, this email is a protected disclosure pursuant to the Employment Rights Act 1996 as amended by the Public Interest Disclosure Act 1998.*" It was sent directly to the respondent's CEO, a Mr Forrester. Mr Forrester passed it on to others in senior management and notably to a Mr Barr, who was HR Director.

19. There followed quite a lot of correspondence, mainly by email but possibly including some WhatsApp messages, between Martin Barker and Mr Barr. Out of that correspondence, two emails are particularly important.

20. First, there is an email from the claimant's father forwarding a copy of an internal email that had been sent from Mr Barnes to the claimant. The email from Mr Barnes discussed imposing fines on the claimant and other salespeople for a reason other than them missing training, namely failing to meet customer satisfaction targets. That was not something mentioned in the PID letter.

21. At the tail-end of that email from Mr Barnes to the claimant which was forwarded by Martin Barker to Mr Barr was a list of customers – a couple of dozen or so of them – giving their full details: names, addresses, emails, telephone numbers and so on. What Martin Barker forwarding the email to Mr Barr revealed was that the

[2] It is understood that in fact Martin Barker is not a qualified lawyer but simply has a Postgraduate Diploma in Law.

claimant had previously forwarded that email, including those customers' details, from his work email to a personal email address.

22. The second important email from Martin Barker to Mr Barr was sent on 11 June 2021. It included this: "*I am currently in the process of collecting corroborating statements from recent customers at Bristol Street Stoke … who have said, inter alia, that they felt under intense pressure to give 9's and 10's in customer feedback forms*".

23. What happened next that is relevant is set out in Mrs Rees's statement from paragraph 12: "[Mr] *Barr forwarded me an email from the Claimant's father (Martin Barker) dated 11 June 2021 …. In this email, Mr Barker stated that he was 'in the process of collecting corroborating statements from recent customers of Bristol Street Stoke' in relation to his allegation that customers were pressured to give scores of 9 and 10 in customer feedback forms to avoid deductions from a Sales*

Executive's salary. Matthew [Mr Barr] *wanted to get my view on that specific comment. It was a significant red flag for me, as I couldn't understand how Mr Barker would have come to be in possession of our customers' contact details. I therefore asked Matthew to send me all relevant emails exchanged up to that point, which he did.*"

24. Mrs Rees then goes on to explain that one of the things she was sent was the email from the claimant's father to Mr Barr forwarding the email from Mr Barnes to the claimant (and others) with the customers' details in it. She was not at that point – 14 June 2021 – sent the PID letter. She also did not discover until later – until after her direct involvement in the claimant's employment ceased – that Martin Barker was not approaching customers of the respondent other than his family and friends. She assumed – as we think anyone in her position would tend to – that Martin Barker was contacting customers using contact details from the list of customers in the email from Mr Barnes. She strongly suspected Martin Barker had got that email from the claimant, something that would necessarily have involved the claimant breaching the respondent's IT policy and probably committing a data breach under the respondent's Data Protection Policy.

25. Pausing there, we reject as wholly unfounded any suggestion that at any stage Mr Barr told the claimant, or indeed the claimant's father, or encouraged either of them to contact the respondent's customers. Asking for evidence to support what the claimant was saying about him being fined – which Mr Barr may well have asked for – is not the same as asking for evidence to be obtained in a certain way, particularly not a way that the respondent was bound, understandably, to find objectionable.

26. Mrs Rees began an investigation into the claimant's conduct. This is the investigation the claimant makes his detriment complaint about. She decided to speak to him, and did so on 16 June 2021. We have a transcript of that meeting, to which we refer. The claimant was suspended. Mrs Rees prepared a report and in that report she recommended that a probationary review hearing be undertaken where consideration would be given to terminating the claimant's employment because, essentially, he had failed his probation. She decided that it would not be appropriate for her to conduct that hearing herself and that whoever conducted it would have to make their own decision.

27. The person who actually did the probation review hearing or meeting was Ms Smith. The meeting took place on 29 June 2021. Ms Smith decided at the meeting that the claimant's employment should be ended and it was ended with effect on that date. The three reasons she made that decision were those given in her letter of 1 July 2021.

28. The first was that she didn't believe that the claimant did not have notice of the training course which he had failed to attend. She didn't accept his evidence about

    that and this, from her point of view, gave rise to an integrity issue. The reason she didn't was that evidence from the respondent's IT department on the face of it showed that, contrary to what he had said, he did have access to his emails before the email notifying him of the training course was sent to him.

29. The second reason Ms Smith decided to dismiss the claimant was him forwarding to himself the email from Mr Barnes containing the list of customers. She believed this was, amongst other things, a breach of the GDPR.

30. The third reason was that she had "*concerns around the accuracy of information that you were providing to your father / legal adviser. Although upon review of this point I explained that this was the area I was least concerned about I did feel that there was some evidence that you were not telling your father the full picture*". This was a reference to a number of things where it did indeed appear to be the case either that the claimant had misinformed Martin Barker or that Martin Barker had misunderstood what the claimant had told him. For example, there was an unfounded allegation – made in one of Martin Barker's letters – that Mr Barnes had made a "*veiled threat*" that he would lock the claimant in the boot of a car overnight.

31. The example given in the dismissal letter itself was the claimant going, "*out to assist your* [his] *friend who was having trouble with their car, this situation was presented back to the business* [by Martin Barker] *as you having to deal with sales customers out of hours and therefore I believe demonstrated a skewed version of*

the truth which again leads us to question your integrity." On the evidence we have, that was a reasonably accurate representation of something the claimant and Martin Barker had done. In any event, it was how the situation genuinely, and reasonably, appeared to Ms Smith to be.

Decisions on the issues – the respondent's correct name

32. The first 'live' issue in the list of issues is as to the respondent's "*correct name*", by which the parties mean its correct legal identity. The respondent named in the claim form is Vertu Motors plc, but the respondent's case is that the correct respondent – the claimant's employer – was Bristol Street First Investments Limited, Vertu Motors plc being its parent company.

33. There is no dispute that the written offer of employment was expressly made on behalf of Bristol Street First Investments Limited. There was a set of employment particulars, provided in accordance with ERA section 1, identifying Bristol Street First Investments Limited as the employer. The claimant received that offer letter and those particulars. He told us during his oral evidence that he even signed the offer letter, although we don't have a signed copy of it. Clearly Bristol Street First Investments Limited was the employer. There would be no proper basis for us to decide otherwise.

Was there a protected disclosure?

34. As to whether there was a protected disclosure, some concessions have been made by the respondent in relation to the PID letter. We have already identified the two broad issues dealt with in that letter: the claimant's sales being allocated to others, affecting commission payments; the 'fine' for not attending training. In relation to both issues, it seems to be accepted by the respondent (and for present purposes we shall assume this was the case) that the claimant genuinely and reasonably believed that the information disclosed in the letter tended to show breach of a legal obligation in accordance with ERA section 43B, namely actual or prospective unauthorised deductions from wages.

35. What has just been said needs to be qualified. As we've already explained, the PID letter did not come from the claimant himself but from his father and the issue arises as to whether it was the claimant who made whatever disclosures of information were made within it. We shall address that issue later, but for the time being we are examining the question of whether a protected disclosure was made as if the letter was written by and had come directly from the claimant.

36. The first question is whether there was a genuine belief that the information disclosed tended to show a criminal offence was being or was likely to be

committed. The claimant's evidence on this is in paragraph 12 of his witness statement. What he says is, "*I reasonably believed that a number of illegal acts were being committed*". Pausing there, the claimant appears in this part of his statement to draw no distinction between illegal and unlawful acts, the former being criminal acts and the latter not being, or not necessarily being, so. An example of an unlawful but not usually illegal act would be an employer making an unauthorised deduction from a worker's wages.

37. According to the claimant (paragraph 12 b. of his statement), he reasonably believed crimes "*including, but not necessarily limited to*" the following "*were being committed*": "*theft / fraud*", "*obtaining monies by deception*", "*obtaining monies with menaces*".

38. The claimant's evidence in paragraph 12 of his witness statement about what he actually believed was not challenged in cross-examination. Given this, it is not open to the respondent to ask us to find that he did not genuinely believe that. We are therefore bound to accept that he did believe that and the question then becomes one as to the reasonableness of that belief.

39. We bear in mind that what we are looking at is the reasonableness of a belief as to what the information disclosed in the PID letter tended to show rather than of any belief as to whether a particular state of affairs existed. It seems to us that objectively the information disclosed in the PID letter relating to the commission issue did tend to show that the claimant's line manager and others were guilty of

    fraud; we – the Tribunal – think that that is what it shows or tends to show. The test is not, of course, what we think, but whether it was reasonable for the claimant to think / believe that; however, we consider ourselves to be reasonable in our belief about this and therefore the claimant was too. The allegation made in the PID letter is that because the claimant was on guaranteed commission, he was being persuaded to give his sales to other people who would then record those sales as their own and claim commission from the respondent for them. The net result would be the respondent paying out more in commission in total than it should have been paying. Subject to the question of whether the people doing this acted dishonestly, this would be a criminal offence.

40. If, then, this were a letter from the claimant himself rather than one from his father we would accept that it contained a disclosure of information from the claimant that in his reasonable belief tended to show a criminal offence had been, was being, or was likely to be committed.

41. The next question that arises – something on which the claimant <u>was</u> challenged in cross-examination – is whether he genuinely and if so reasonably believed that

disclosures were "*made in the public interest*". Once again, we are for the time being ignoring the fact that the PID letter did not come from the claimant.

42. We find that the claimant's primary motive in all of this was his own personal, mainly financial, interests. There is nothing wrong with that, but the fact that there is nothing wrong with it does not mean that he believed that making the disclosures was in the public interest. Equally, his own interests being his primary concern does not preclude him believing that was also acting in the public interest. Nevertheless, we do note that in relation to this part of the PID letter – the part relating to commission – there is no suggestion that this practice of commission being paid to other people was a common or general practice; no suggestion in the letter itself. The information disclosed in the relevant paragraph of the letter, the one beginning "*Due to these IT issues*" we quoted earlier, was about something that was happening to the claimant and to him only, the impression given from the letter being it was happening because of IT issues and that those IT issues affected him and him only. On the face of the letter, the suggestion that others might be claiming commission for sales, which is the thing we have identified as a criminal offence or potentially so, is in the letter as something of an afterthought, it seems to us. Also, it is raised as a possibility ("*may even be an offence …*") and not as something that is necessarily the case.

43. In conclusion on this point, we are not satisfied that the claimant, subjectively, had any real concern in raising this other than for his own personal situation; he did not believe he was making it in the public interest. That goes for the disclosure of information relating to commission both as an allegation of a criminal offence and as an allegation of breach of a legal obligation.

44. We turn to the rest of the letter – the part of it relating to the claimant being fined for missing a training session. In relation to this, if there was a belief that a criminal offence was being committed, of the options mentioned in the claimant's witness statement (see above), it can conceivably only be "*obtaining monies with menaces*". What the claimant must be referring to is the alleged threat of dismissal if the claimant did not agree to pay £500.

45. Although we are concerned with what the information in the PID letter tended to show, what was written in the letter has to be considered in its proper context. Its proper context is that it describes, or purports to describe, a conversation had between the claimant and Mr Barnes on the same day the letter was sent, a conversation the claimant had a recording of. We do not in any way condone what Mr Barnes was doing in the conversation. It was wrong, in breach of company policy, and unlawful in the sense that what he was proposing was potentially a breach of contract and/or the making of unauthorised deductions from the claimant's wages. However, having read the transcript of the recording of the

conversation between the claimant and Mr Barnes, we think that even assuming in the claimant's favour that he genuinely believed what was being disclosed in the letter tended to show the commission of a criminal offence, we do not accept that such a belief was a reasonable one. No reasonable person in the claimant's position would think that the conversation involved, or that the description of it in the letter was a description of, actual or threatened crimes.

46. The missed training session fine allegation in the letter is, then, purely the disclosure of information that in the claimant's reasonable belief tended to show breach of a legal obligation. We ask ourselves whether, in the hypothetical situation where the claimant had written this letter himself (or had, for example, dictated it to his father), he genuinely and reasonably believed he was making that disclosure of information in the public interest. We bear in mind we are not asking whether, in the abstract, the claimant might reasonably have believed it was in the public interest for that information to be publicised, but whether he genuinely and reasonably believed writing the particular words that were written and emailing the letter to the CEO of the respondent was in the public interest.

47. What was described in the PID letter about the missed training session fine allegation was on the face of it one rogue manager acting contrary to company policy. We again note that in relation to fines, the PID letter is concerned only with the imposition of fines for missed training sessions. There is no hint in the letter of people being fined for other things, for example for failing to meet customer satisfaction targets. Fines for missing customer satisfaction targets was an issue that arose later, something we can see from the contemporaneous correspondence.

48. The letter does mention "*other* [unnamed] *sales colleagues*" [plural] having to make "*similar payments*" (meaning, objectively interpreted, having to pay fines for missing training sessions). However, we are not satisfied that at the time this letter was written, the claimant believed that anyone else had been fined other than, possibly, a colleague called Chris who he apparently spoke to on 27 May 2021. The claimant gave some evidence about having spoken to people other than 'Chris', but that evidence was very vague. We think that the claimant has become confused about what happened when.

49. We are not saying he was trying to mislead us, but it was evident that, unsurprisingly given the lapse of time, the claimant had mixed up the order of events. We could clearly see him doing exactly that in relation to another factual issue: when he learned that Mr Barnes allegedly had a relative – possibly a brother-in-law – in another dealership. The contemporaneous correspondence shows that that he didn't learn about that until later. The issue arose in the following circumstances: Chris had agreed he would provide some evidence supporting

what was being said on the claimant's behalf by Martin Barker; Chris then withdrew that agreement because he was moving to another dealership and that other dealership, it turned out, was one with which Mr Barnes had a close association. In his oral evidence, contrary to what is shown in the other evidence, the claimant suggested that it was in his conversation with Chris on 27 May 2021 that Chris told him about Mr Barnes having a relative working at that other dealership.

50. In the above circumstances, we are not satisfied that the claimant genuinely believed that the disclosures relating to fines for missing training were made in the public interest, or were to any significant extent being made in the interests of anyone or anything other than his own private interests. We think "*other sales colleagues*" were mentioned not in their interests, let alone in any wider public interest, but simply with a view to strengthening his own position.

51. In conclusion on this point, even putting to one side the fact that it did not come from the claimant himself, no protected disclosures were made in the PID letter because there was no genuine and reasonable belief that the disclosures in it were being made in the public interest.

52. Finally in relation to this, we should specifically address a submission made on the claimant's behalf to the effect that the claimant must have believed he was making disclosures in the public interest because that was, as it were, a box that needed to be ticked in order for him to be making protected disclosures and, as explained above, the PID letter started with a statement that it was a protected disclosure. We reject that submission. Saying something is a protected disclosure does not make it one; there is no suggestion that the claimant is or was an expert in employment law; there was no evidence before us that at the time the claimant had any idea what requirements needed to be satisfied in order for something to be a protected disclosure. Even if the letter had said in terms that the claimant believed he was making a disclosure of information in the public interest, that

    would not make it so. On this issue, we really cannot ignore the fact that the claimant did not – even on his own case – write or draft the letter. It was carefully composed by his father, apparently acting as a legal adviser as well as a concerned parent, for particular purposes, including advancing the claimant's interests by suggesting that a protected disclosure was being made.

53. It necessarily follows from the fact that no protected disclosure was made that the entire claim fails. We shall nevertheless, for the sake of completeness, give our decisions on other issues.

Making a protected disclosure through an agent

54. We shall now move on to consider the complication we had temporarily put to one side, namely that the PID letter was not from the claimant but from his father.

55. We accept that in principle someone can make a protected disclosure through an agent. For example, if a worker composed a letter themselves but it was signed – "pp"d – and sent by someone else explicitly on their behalf, then any protected disclosures made in the letter would be made by the worker. Nothing like that happened in the present case, however. The letter was composed and written by Martin Barker in his own name. We are not satisfied that the claimant even read it before it went out. We think what probably happened was that he told his father what he believed had happened, his father said something the gist of which was that he would deal with it, and his father then did deal with it, by writing the letter and sending it out without first going through it with the claimant. The original source of the information disclosed within it may have been the claimant, but any disclosures were being made by his father and not by him; the claimant himself did not disclose any information at all in this letter. Apart from anything else, given that the claimant did not and could not have known precisely what information was disclosed in the letter, he cannot have believed that it contained specific disclosures of information tending to show anything, nor that any particular disclosures it contained were being made in the public interest.

56. To illustrate the point further: the allegations made in the PID letter were not allegations the claimant was himself making. Instead, they were (presumably) allegations Martin Barker believed his son was making. But Martin Barker could easily have misheard or misunderstood what the claimant had told him. Clearly, if there was in the PID letter a disclosure of information that the claimant did not believe because of a misunderstanding by Martin Barker, that could not conceivably be a disclosure of information by the claimant. But if that is so, on what basis can any disclosure of information made in the PID letter be said to have been made by the claimant? It would be illogical to decide whether disclosures were made by Martin Barker or by the claimant on the basis of whether the source of the information disclosed was an accurate or an inaccurate recollection of Martin Barker of what the claimant had told him.

57. Accordingly, even if the PID letter would have contained protected disclosures made by the claimant had it been written by him, it would not in fact have contained them because it was written by his father without any input from him, even to check it, after his father started writing it.

Causation

58. We shall now consider what the situation would be if we had found that the claimant made protected disclosures when the PID letter was sent. The 'headline' is that even if we had made that finding, such protected disclosures were not a significant part of the reason for the detriment or for dismissal.

Detriment

59. In relation to the detriment claim, based on the list of issues the question we have to ask ourselves is why was the claimant the subject of an investigation by the respondent into his alleged misconduct? The crystal clear answer on the evidence is: because he sent a list of customer details to his own personal email address, which was a breach of company policy and quite possibly (we think probably) a breach of the GDPR[3]. We have already explained how the investigation came about: see paragraphs 23 to 25 above. In short, Mrs Rees was sent by Mr Barr emails from the claimant's father in which he said he was contacting the respondent's customers and which showed that he had an email sent to the claimant incorporating a copy of a list of the respondent's customers' details, something she naturally thought he had probably obtained from the claimant, by the claimant forwarding that email to a personal email account.

60. There is no mystery to any of this; nothing making us suspicious that her true motive might be something else. Mrs Rees's own good faith and honesty was not challenged during this hearing in any event and there is no basis in the evidence to challenge it. We therefore accept in accordance with her evidence that her decision to instigate the investigation was entirely her own and that it was uninfluenced by anyone else; and that the investigation report she produced was entirely her own work.

61. The claimant's case, made for the first time in, or just before, closing submissions was that Mrs Rees was substantially influenced to investigate and to decide what she decided by Mr Barr. The way in which Mr Barr supposedly did this was by selectively providing her with evidence that he knew would lead to a disciplinary investigation and probably dismissal, but not other evidence and information. (We should say that the case put forward on the claimant's behalf around this did shift

[3] It was not part of his evidence, but during the hearing Martin Barker told us that he had been advised by the Information Commissioners Office that it was not a breach of the GDPR. It turned out that this was almost certainly because he had told the ICO that the sending of the list of customers was part of a protected disclosure, something that was not true.

during the hearing and was at times a little confusing and difficult to follow, but what we are saying now about it is our best understanding of the final position that was adopted).

62. Connected with what we have just mentioned, during closing submissions and during the hearing generally, Martin Barker kept trying to suggest that Mr Barr had encouraged him and/or the claimant to forward the email containing client contact information to him – Mr Barr – and/or had encouraged the claimant to send out that email to himself. This seems to be part of the allegation we indirectly referred to earlier (see paragraph 25 above): that Mr Barr was asking the claimant for evidence to support his allegations. To the extent that there is any truth in that suggestion it is an irrelevance; a red herring. First, the allegation is not that the claimant or Martin Barker told Mr Barr that they had an email containing customer details. Instead, it seems to be something like that they told him they had an email from Mr Barnes which supported their case. As the claimant and his father accept, Mr Barr could not have known that the email contained customer information before he had seen it. Secondly, it is and was the claimant's case that he and Martin Barker did not realise that, or overlooked the fact that, the email contained that information. Thirdly, again as the claimant and his father accept, there was no good reason for the claimant to send himself the client information; the corroborating evidence he wanted to send himself did not include that part of the email from Mr Barnes.

63. Fourthly, even if it were true that Mr Barr encouraged the claimant to forward work email to his personal email account and Mrs Rees was unaware of that fact, it was of no significance to her because in no way had Mr Barr encouraged the claimant to commit the specific act of misconduct which she was investigating: emailing himself customer details.

64. We also note that if the claimant thought it was important that he had allegedly been encouraged by Mr Barr to send emails to himself, he could and should have told Mrs Rees this when he met with her on 16 June 2021. If he didn't, this reflects the lack of importance of that issue in practice. If he did (and we don't think he did and it wasn't put to Mrs Rees that he did), Mrs Rees had the information and it evidently did not strike her as significant.

65. In light of Martin Barker's seeming realisation that it was hopeless to base a case on the suggestion that Mr Barr was somehow responsible for the claimant emailing himself the customer details and pressed by the Employment Judge – by me – to provide some clarity and specificity around what the claimant's case was, Martin Barker ultimately explained the claimant's case as being that Mr Barr was deliberately selective in the documents he provided to Mrs Rees. The only thing

he identified that Mr Barr supposedly deliberately failed to provide to her was the PID letter itself. The case being put forward was that Mr Barr did this – deliberately

failed to provide it to her – with a view to ensuring that the claimant was disciplined and dismissed.

66. Considering that allegation, our starting point is that there is precisely zero evidence to support either it or any allegation that Mr Barr deliberately failed to send anything to Mrs Rees, for any purpose, good or bad. Moving on from that and looking at the specifics of the allegation, we are afraid to say that the claimant's case becomes almost incoherent. The PID letter had nothing to do with the issue that Mr Barr had raised with Mrs Rees, namely the claimant's father contacting customers. Moreover, he was contacting customers apparently because of an allegation about staff being fined for failing to meet customer satisfaction targets and that issue was not mentioned or hinted at in the PID letter. The only fines mentioned there were fines for not attending a training course. For Mrs Rees not to be sent the protected disclosure letter in those circumstances is exactly what we would expect to have happened, because she should be being sent relevant things and not irrelevant things. In fact, it would have been odd and positively suspicious had he sent the PID letter to her, because it would beg the question: why was he sending her this irrelevant letter allegedly containing protected disclosures?

67. In addition, we do not see how this plan that Mr Barr allegedly had to get the claimant disciplined and dismissed by not disclosing the PID letter to her could possibly work, even in theory. The misconduct, which the claimant was guilty of by his own admission, was emailing himself customer information. Even assuming Mr Barr wanted to get the claimant into trouble (an assumption for which there is no basis in the evidence), why, conceivably, would Mr Barr think that this might be achieved by not sending her a letter that related to something other than that misconduct and that did not make the claimant any more or less culpable for that misconduct?

68. Further, the evidence we have about what Mr Barr did is consistent only with him taking the claimant's and his father's concerns seriously and seeking to address them as best he could, in good faith. He had no plausible motive for wanting to do the claimant down that we are aware of.

69. For all of those reasons, the claimant's claim for detriment for making protected disclosure fails.

Dismissal

70. It seems to us that in practice, even if not in theory, the claim for automatically unfair dismissal has been abandoned.

71. In paragraph 8.1 of the list of issues it is stated that, "*The Claimant does not challenge the motivation of the decision-maker. The Claimant alleges that the Respondent had an agenda to dismiss the Claimant within which the decisionmaker may have been used unwittingly.*" The "*decision-maker*" being referred to is Ms Smith.

72. At the start of the hearing, and seemingly when the claimant started his claim, his case was that the guilty person – the individual whose unwitting tool Ms Smith had been – was Mr Barnes. During the hearing, he moved away from that and appeared to move towards saying, first, that it was Mrs Rees and, then, that it was Mr Barr who was responsible. That would only work as the basis for a successful claim if Mr Barnes, or Mrs Rees, or Mr Barr had in fact substantially influenced Ms Smith's decision.

73. The claimant has during this hearing not challenged Ms Smith's good faith, nor challenged her evidence as to the reasons she decided to dismiss, which we anyway have no good reason to doubt. He has also not challenged her evidence that it was entirely her own decision and was not based on any oral or written discussions she had with anyone else, Mr Barnes, Mr Barr or Mrs Rees included.

74. Specifically in relation to Mrs Rees, unlike her, Ms Smith had seen the PID letter before she took her decision. Ms Smith's unchallenged evidence was that although she had read Mrs Rees's report, she made her own decision based on her own analysis of the evidence and that evidence included the discussions she had had with the claimant. We have already rejected the suggestion that Mr Barr failing to provide Mrs Rees with the PID letter affected what Mrs Rees did to any extent. But even if we were wrong about that, it had no effect on what Ms Smith did as she had seen the PID letter and did not base her decision on anything in Mrs Rees's report.

75. In conclusion:

    75.1 the decision to dismiss the claimant was made by Ms Smith and her alone;

    75.2 she was not materially influenced to make that decision by anyone other than the claimant himself;

    75.3 her subjective motivation is unchallenged and on the evidence the only reasons for dismissal were those she gave at the time in her letter dated 1 July 2021.

Summary & conclusion

76. It is no part of our decision that the claimant was treated well; nor, indeed, that the claimant was treated badly; or fairly, or unfairly; nor have we made any decision about the reasonableness of the respondent's actions. What we have decided is:

    76.1 that no relevant protected disclosure was made. The thing relied on as a protected disclosure was not one;

    76.2 that even if there was a protected disclosure, it was not the reason or any part of the reason either for the claimant being subjected to a disciplinary investigation or for the outcome of that disciplinary investigation, nor was it any part of the reason for the claimant being dismissed.

77. The claimant's entire claim therefore fails.

Employment Judge Camp

12 January 2024

LIST OF ISSUES

Preliminary Issues

1 Has the Respondent's response to the claim been presented in time?

The Claimant's claim was brought on 4 July 2021. The Employment Tribunal's ET2 Notice of Claim, dated 24 November 2021, stated that any response must be received by the Tribunal Office by 22 December 2021. The Respondent's response was submitted to the Tribunal Office on 22 December 2021 and formally accepted by the Employment Tribunal on 18 January 2021.

2 What is the correct name of the Respondent?

The Claimant's position is that the correct name of the Respondent is Vertu Motors plc.

The Respondent's position is that the correct name of the Respondent is Bristol Street First Investments Limited.

Automatic Unfair Dismissal / Whistleblowing Detriment

3 Did the Claimant raise any issue to the Respondent which constituted a qualifying disclosure for the purposes of section 43B Employment Rights Act 1996 (**ERA**)? Namely:

3.1 Has the Claimant made a disclosure of information? The Claimant alleges that he has made the following disclosures:

3.1.1 On 27 May 2021, the Claimant made a disclosure to Martel Legal Services (**Martel**) in its capacity as the Claimant's legal adviser, which is reflected in an email from Martel to the Respondent on 27 May 2021 at 22:17 (**the First Disclosure**).

3.1.2 On 28 May 2021, the Claimant made a disclosure to Martel in its capacity as the Claimant's legal adviser, which is reflected in an email from Martel to the Respondent on 29 May 2021 at 21:39 (**the Second Disclosure**).

3.2 If so, is the subject matter of the disclosure a relevant disclosure within section 43B ERA? The Claimant alleges that the subject matter of the disclosure(s) regarded:

3.2.1 A criminal offence; and/or

3.2.2 Breach of a legal obligation.

3.3 Did the Claimant believe that the information disclosed tended to show one of these relevant failures?

3.3.1 As to the First Disclosure, the Respondent accepts that the Claimant reasonably believed that the information disclosed tended to show that the Respondent was likely to fail to comply with a legal obligation. The Respondent denies that the information disclosed tended to show that a criminal offence was being committed.

3.3.2 As to the Second Disclosure, the Respondent denies that the Claimant believed that the information disclosed tended to show either of the relevant failures listed at 3.2 above.

3.4 If so, did the Claimant have a reasonable belief that the disclosure(s) were made in the public interest?

3.4.1 The Respondent denies that the Claimant had a reasonable belief that eitherthe First Disclosure or the Second Disclosure were made in the public interest.

4 If the Claimant has made a disclosure, has the Claimant committed an offence by making it? If so, the disclosure cannot be a qualifying disclosure under section 43B(3) ERA.

5 If the Claimant has made a protected disclosure, was the disclosure made to one of the categories of people listed in sections 43C to 43H ERA?

5.1 The Respondent accepts that the First Disclosure and the Second Disclosure were made in the course of obtaining legal advice under section 43D ERA.

6 Did the Respondent cause the Claimant to suffer a detriment? The Claimant alleges that he has suffered the following detriment:

6.1 Being the subject of an investigation by the Respondent into the Claimant's alleged misconduct.

7 If so, was this on the grounds that he had made a protected disclosure for the purposes of section 47B ERA?

8 Specifically in relation to the Claimant's dismissal, was the reason (or, if more than one, the principal reason) for the dismissal of the Claimant by the Respondent because the Claimant had made a protected disclosure (section 103A ERA)?

8.1 The Claimant does not challenge the motivation of the decision-maker. The Claimant alleges that the Respondent had an agenda to dismiss the Claimant within which the decision-maker may have been used unwittingly.

Remedy

9 If the Claimant has been successful in any of his claims, what remedy is he entitled to?

10 What compensatory award is just and equitable in the circumstances?

11 Has the Claimant mitigated his loss and should there be a deduction of sums earned for such mitigation, or to reflect a failure by the Claimant to take reasonable steps in mitigation?

12 Should any compensatory award be reduced on the basis of *Polkey*?

13 Has there been any contributory fault on the part of the Claimant entitling a reduction in any award?