EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107195/2023

Held in Edinburgh on 12 March 2024

Employment Judge M Sutherland

Liam Johnston	**Claimant** **In person**
Aim Group (Holdings) Limited	**Respondent** **No response** **and no appearance**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the complaints of whistleblowing detriment do not succeed and are therefore dismissed.

REASONS

Introduction

1. The Claimant appeared on his own behalf. The Claimant's prior complaint of automatically unfair dismissal had been withdrawn because he had accepted he was not an employee of the Respondent and worked for them via an agency.

2. The Respondent's attempt to lodge their response late had previously been refused because it had not been accompanied by an application to extend the time for lodging. Although it had previously been explained at Case Management, the Claimant continued to believe that because the claim was undefended he was entitled to a default judgment. It was explained that there remained a burden of proof upon him and that he required to lead evidence with a view to satisfying that burden.

3. The Claimant gave evidence on his own behalf and did not call any other witnesses. He lodged some documents and exhibited others on his phone. He did not make any submissions.

4. The following initials are used in this judgment by way of abbreviation –

Initials	Name	Job Title
BM	Blair McDonald	Managing Director
GH	Gavin Haw	Assistant Manager
JM	Jodi Miller	Health and Safety ('H & S') Manager
TG	Tom Grey	Workshop Manager

List of Issues

5. The issues to be determined in this case were discussed with the Claimant and noted as follows –

Worker status (Sections 230 and 43k Employment Rights Act 1996 ('ERA'))

a. Did the Claimant a work under a contract whereby by he undertook to do or perform personally any work or services for the Respondent as party to the contract? (Section 230(3))

b. If not, did the Claimant work for the Respondent in circumstances in which he was introduced or supplied to do that work by a third person and the terms on which he was engaged were in practice substantially determined not by him but by the Respondent or the third party or both of them? (Section 43k)

Public interest disclosure (Section 47B ERA)

c. Did the Claimant make the following disclosure of information to his employer?

i) On 2 October 2023 the Claimant said to TG, Workshop Manager that bogie parts were being passed to him for welding with two tacks for assembly when they should have had four tacks for assembly prior to being welded.

d. Did the Claimant reasonably believe the disclosure was in the public interest and tended to show that the health and safety of staff has been or is likely to be endangered?

e. Was the Claimant subjected to the following detriments on the ground that he made the protected disclosure?

i) On 4 October 22023 being 'dismissed' (i.e. not given more work) by GH, Assistant Manager

ii) On 4 October being spoken to in an inappropriate manner by GH and JM, Health and Safety Manager.

Findings in fact

6. The Tribunal makes the following findings in fact:

7. The Claimant is an experienced and qualified welder. The Claimant is registered with CIS (the Constructive Industry Scheme). Under the CIS scheme a contractor deducts 20% tax from a sub-contractors pay which then counts towards their tax and national insurance contributions.

8. The Respondent provides fabrication services to commercial clients. The Respondent required welding work to be performed. They entered into a contract with First Achieve Limited ('FAL') to identify and supply a welder to perform that work. The Claimant responded to an advert place by FAL. FAL arranged for the Claimant to be interviewed and weld tested by the Respondent who then approved the Claimant to undertake the work. The place, method and hours of work were determined by the Respondent. The Claimant negotiated directly with the Respondent over a modest increase in the hourly rate to £19 and discussed his lack of availability for overtime. The Claimant was advised by FAL and by the Respondent that he would be "employed" through the agency for the first 15 weeks at the end of which there may be the opportunity to secure permanent work with the

Respondent. The Claimant considered that there was a high chance of securing that work because welders were in demand and he was an experienced welder.

9. The Claimant entered into a "self-employed contract" with Rebus Consulting Services Limited ('Rebus') on their standard terms but with the hours and rate reflecting his discussion with the Respondent. Rebus supplied the Claimant to undertake welding work for the Respondent. The Respondent paid FAL for the welding work (including an agency fee). The Respondent in turn paid Rebus for supplying the Claimant to do that work and Rebus then paid the Claimant for that work.

10. From 2 August 2023 to 8 October 2023 the Claimant undertook 39 hours a week welding work for the Respondent at their premises and was paid by Rebus for that work £741 gross a week (£574.40 net after deduction of their fee of £23 and 20% tax under CIS). At the start of that work the Claimant met with the HR from the Respondent and signed various paperwork relating to Health and Safety and his right to work.

11. The Respondent required welding work to be performed in furtherance of contract to supply bridge decks to Ineos. The bridge decks would be assembled by the fabricators and then passed using a crane or fork lift to the Claimant for welding.

12. The Claimant reported to TG, Workshop Manager who in turn reported to the main managers including BM and GH. The Respondent held 'toolbox talks' with the workshop team every morning to discuss any issues arising. These were attended by everyone in the workshop including the FLT operator, 3 or 4 fabricators, the Claimant as the welder, and TG as workshop manager. In mid-September JM joined these meetings as the new H & S Manager.

13. The Claimant had a good relationship with the workshop team. The Claimant initially received praise for his work but he noticed management had a change in attitude towards him in mid-September. He had a difficult conversation with GH, Assistant Manager regarding concerns that TG, Workshop Manager might get fired. The Claimant felt that from then on GH was looking to get him dismissed. BM, Managing Director took issue with

him taking unscheduled 'fag' breaks when he was waiting for assemblies to weld.

14. The work for Ineos finished around mid-September and the workshop started work on a contract to fabricate chassis for 'buses' to run on tracks at a commercial site. The Claimant was involved in fabrication of the bogies on which the chassis would sit. The bogies comprised welding triangular wings (which would house the axel and the wheel) to 1½ long steel box sections. The bogies would be assembled by the fabricators first and then passed to the Claimant for welding. According to the technical drawings the fabricators ought to have applied 4 tack welds to the wings to provide a temporary hold prior to final welding. The first 30 assemblies had been prepared correctly using 4 tack welds but the last 20 assemblies were not. It was apparent to the Claimant that following a change in practice (namely the use of a jig which made it harder to apply 4 tack welds) the fabricators were only applying 2 tack welds. This meant the Claimant had to apply the second 2 tack welds prior to final welding to materially reduce the risk of distortion during the final weld. The Claimant was unhappy about performing this additional time consuming work which ought to have been performed by the fabricators.

15. On Monday 25 September 2023 the Claimant raised with TG, Workshop Manager the fabricators failure to apply 4 tack welds which was making his job more time consuming because he was having to apply the missing 2 tacks.

16. On Wednesday 27 September 2023 JM, H & S Manager raised an issue with the Claimant that the wings on a bogey were distorted and the Claimant took the opportunity to mention the fabricators failure to apply tack welds.

17. On the afternoon of 29 September 2023 the Claimant was using a crane to lift 6 assembled bogeys into his bay for welding. As crane slings came under tension one of the wings fell to the floor. GH, Assistant Manager told him to stop, advised him that he was not doing the lift correctly and it was unsafe, and instructed him to lift only 1 assembled bogey at a time which the Claimant proceeded to do. It was apparent to the Claimant that GH was unhappy with him. The Claimant did not however believe that there

was a health and safety issue because the crane was only lifting to ankle height and there was no-one else in the workshop. The Claimant had previously had wings fall to the floor on lifting which the Claimant had not raised.

18. First thing on the morning of Monday 2 October 2023 the Claimant raised again with TG, Workshop Manager the failure by the fabricators to apply 4 tack welds which was making his job more time consuming because he was having to apply the missing 2 tacks. He also noted that JM, H & S had raised an issue that a wing was distorted and GW raised an issue with a wing falling off. At that morning's toolbox talk TG, Workshop Manager reminded the fabricators of the need to apply 4 tacks during assembly. No issue was raised by the fabricators in response who appeared to accept this.

19. On Wednesday 3 October 2023 the Claimant was approached by JM, H & S Manager who raised his concerns regarding a defective weld namely an undercut on a welded plate (JM was also an experienced welder). The Claimant checked the weld and did not agree that there was a defect. JM instructed him to stop work and advised that he would demonstrate. JM said he was going to get his kit but failed to return.

20. First thing on the morning of Tuesday 2 October GH, Assistant Manager approached the Claimant and advised him that he was being let go (i.e. he would not get any more work) because of unsafe lifting operations. The Claimant took issue with this because the lift was not unsafe (it was at ankle height and no-one else was present) and because he had then followed his instructions to stop and lift one at a time.

21. As the Claimant was leaving with his own belongings JM, H & S Manager shouted at him "Where's my fucking helmet". The Claimant ignored him because he had already left this in the bay area.

22. When the Claimant reached his car he realised he had left something in his overall and went back to retrieve this. He passed JM and GH who were laughing about something. He approached JM and asked why he had told him to stop work the day before but had not returned to demonstrate. JM then aggressively stated "I'm no the fucking welder; I'm the fucking health

and safety". The Claimant immediately asked why he was getting attitude and GH shouted in reply "get the fuck out of here." The Claimant accepted that that it was not unusual for there to be swearing in workshops but he took issue with their aggressive manner.

23. On Friday 6 October the Claimant returned to the Respondent site to confront BM, MD about what had happened. BM invited him into the office. The Claimant said he did not think that he was let go was because of unsafe lifting but an issue of cost. Towards end September the Claimant had heard rumours that the Respondent had decided to hire 2 welders from India as cheap labour. At the meeting BM, MD confirmed that these rumours were true.

24. Around mid-November the Claimant returned to the Respondent site to return an item of personal property to colleague and friend. GH, Assistant Manager walked in and the Claimant asked for his job back but there was no answer.

25. After the termination of that work the Claimant did not initially apply for other welding work – he had been put off by this and other bad experiences in the industry. The Claimant secured universal credit which he supplement with his savings. The Claimant has previously worked as a marine, a security officer and a driver. The Claimant recently secured work as a driver with McGill buses. He will earn broadly the same as he did before (namely £18.95 an hour).

Observations on the evidence

26. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

27. The Claimant came across as credible and reliable his testimony which was not challenged under cross examination because the claim was undefended.

28. The Claimant did not provide a copy of his contract with Rebus but did provide copies of his pay slips which referred to them receiving payment from PAL, the CIS deduction and his self-employed status.

29. The Claimant did not assert in his claim that he had been subject to the detrimental treatment because he had made a protected disclosure and he did not give any evidence to this effect despite being reminded of this specific issue during the hearing.

The law

Protected disclosure

Disclosure to employer or other responsible person

30. Under Section 43A Employment Rights Act 1996 ('ERA') a protected disclosure is a qualifying disclosure made by a worker to their employer or other responsible person (Section 43C) or to a prescribed person (Section 43F).

31. Under Section 43C a worker may make a disclosure to their employer or other responsible person where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of that person or any other matter for which that person has legal responsibility.

32. Under Section 230(3) a worker is an individual who has entered into or works under a contract, whether express (including oral or in writing) or implied, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

33. Under Section 43K a worker includes an individual who is not a worker as defined by Section 230(3) but who worked for a person in circumstances in which he was introduced or supplied to do that work by a third person and the terms on which he was engaged to do the work were in practice substantially determined not by him but by the person for whom he worked, by the third person or by both of them.

Qualifying disclosure

34. Under Section 43B ERA a qualifying disclosure is any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show relevant wrongdoing including "(d) that the health or safety of any individual has been, is being or is likely to be endangered." The burden of proving a protected disclosure rests upon the Claimant.

Disclosure of information

35. The disclosure must be an effective communication of information but does not require to be in writing. The disclosure must convey information or facts, and not merely amount to a statement of position or an allegation *(Cavendish Munro Professional Risks Management Ltd v Geduld 2010 IRLR 38, EAT)*. However an allegation may contain sufficient information depending upon the circumstances *(Kilraine v Wandsworth London Borough Council [2018] ICR 1850, Court of Appeal).*

Reasonable belief

36. The worker must genuinely believe that the disclosure tended to show relevant wrongdoing and was in the public interest. This does not have to be their predominant motivation for making the disclosure *(Chesterton Global Ltd v Nurmohamed [2018] ICR 731, Court of Appeal*). Their genuine belief must be based upon reasonable grounds. This depends upon the facts reasonably understood by the worker at the time.

Relevant wrongdoing – endangering health and safety

37. A qualifying disclosure arises where there is disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered. It does not necessarily entail breach of a legal obligation.

In the public interest

38. A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show relevant wrongdoing.

39. The worker must genuinely believe that disclosure is in the public interest. That belief must be based upon reasonable grounds which may be easier to satisfy where the wrongdoing amounts to a criminal offence or an issue of health and safety. Where the worker has a personal interest in the relevant wrongdoing, it may be relevant consider the number of other workers affected, the nature and importance of the interest, and the identity of the wrongdoer (*Chesterton*).

Detriment

40. Under Section 47B a worker has the right not to be subjected to any detriment by an act, or deliberate failure to act, by his employer (or a fellow worker in the course of their employment) because the worker has made a protected disclosure.

41. A detriment is a reasonably perceived disadvantage (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*). It may arise from a deliberate failure to act which occurs when it is decided upon.

42. For a complaint of detriment the protected disclosure must be a material (i.e. more than minor) influence on the employer's treatment of the whistleblower. Accordingly, the actor (or their manipulator) must have knowledge of the protected disclosure (*Royal Mail Group Ltd v Jhuti [2020] ICR 731, SC)*.

43. The reason for the detrimental treatment may be the means or manner of disclosure rather than the act of disclosure itself but such a distinction must be scrutinised carefully (*Shinwari v Vue Entertainment UKEAT/0394/14, EAT*).

44. Under Section 48(2) it is for the employer to show the reason for the detrimental treatment. The Claimant must first prove on the balance of probabilities that there was a protected disclosure, a detriment and basis upon which it could be inferred that the protected disclosure was a reason for the treatment. Accordingly the employee must provide sufficient evidence this effect (*International Petroleum Ltd & Ors v Osipov & Ors UKEAT/0058/17/DA*). The burden then shifts to the employer to show the reason for the detrimental treatment. In the absence of a satisfactory

explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference.

Remedy

45. Where a claim is well founded the tribunal shall make a declaration to that effect and may make an award of compensation as the tribunal considers just and equitable.

Discussion and decision

Protected disclosure

46. The Respondent was not a party to the contract with the Claimant and accordingly the Claimant was not their worker under Section 230(3).

47. The Claimant was supplied to do that work by a third party namely by Rebus in fulfilment of their contract with FAL. The terms on which he was engaged to do that work were in practice substantially determined not by the Claimant but by the Respondent and Rebus and accordingly he was a worker under Section 43K.

48. On Monday 2 October 2023 the Claimant made a disclosure of information to the Respondent when he raised with TG, Workshop Manager that the fabricators were failing to apply 4 tack welds.

49. The Claimant did not however believe that this disclosure tended to show that the health or safety of any individual has been or is likely to be endangered. The Claimant's only concern was that the failure to apply the missing 2 tacks was making his job more time consuming because he was having to apply the missing 2 tacks.

Detriment

50. On 2 October 2023 GH, Assistant Manager subjected him to a detriment by dismissing him (i.e. refusing to give him more work) and, together with JM, H & S Manager, by speaking to him in an aggressive manner.

51. There however was no reasonable basis upon which it could be concluded that the disclosure of information regarding the missing 2 tacks (which in

any event did not amount to a protected disclosure) was the reason for (i.e. material influence behind) the detrimental treatment.

52. GH, Assistant Manager had raised his concerns regarding unsafe lifting operations by the Claimant on 29 September 2023 which was prior to the Claimant having made the alleged protected disclosure on 2 October 2023. TG immediately raised reminded the fabricators to apply 4 tacks at the toolbox talk who accepted this without issue.

53. The Claimant himself believed that the real reason they had dismissed him was to save cost (they had decided in September to hire cheap labour from aboard) and not because he had lifted unsafely.

54. The aggressive comments were made after he was dismissed and in response to the Claimant going back to raise issue with them.

55. The Claimant did not state in either his pleadings or evidence that he believed that the reason for the detrimental treatment was that he had made the disclosure and there was no reasonable basis upon which this could be inferred.

Conclusion

56. In conclusion the complaints of whistleblowing detriment do not succeed and are accordingly dismissed.

M Sutherland

Employment Judge
14 March 2024

Date of Judgment

Date sent to parties 15/03/2024