# EMPLOYMENT TRIBUNALS

**Heard at:** Croydon (hybrid) **On:** 4 to 7 March 2024

**Claimant:** Mr Anthony Stone

**Respondent:** Bouygues E & S Solutions Limited

**Before:** Employment Judge E Fowell

Ms C Bonner

Mr D Wharton

**Representation:**

**Claimant** In Person

**Respondent** Ms Laura Redman of counsel, instructed by Pinsent Masons LLP

# JUDGMENT

1. The claimant made a protected disclosure but the claim of automatically unfair dismissal is dismissed as the reason for the claimant's dismissal was not on grounds of the disclosure.

2. The claim of automatically unfair dismissal on health and safety grounds is dismissed as the claimant did not leave work in circumstances of danger.

3. The claim of detriment at work for making a protected disclosure is dismissed as none of the alleged detriments were on grounds of the disclosure.

4. The respondent was not in breach of contract in relation to the provision of a work phone or email address.

# REASONS

## Introduction

1. These written reasons are provided at the request of the claimant who preferred not to remain and listen to oral reasons.

2. The respondent, Bouygues, provides all sorts of services such as building security, catering, cleaning and maintenance. One of their clients is Westminster City Council and Mr Stone worked on this contract as part of a team of maintenance engineers. Their job was to go around various council buildings testing fire alarms, emergency lighting and making sure that essential services were working properly, and if need be carrying out maintenance work.

3. Mr Stone was with them for about nine months. The company say that there were concerns about his performance and he was dismissed at the end of his probation period. He says that he was a whistleblower, having sent an email to the council hierarchy about various shortcomings on the part of the company, mainly about a lack of tools and equipment.

4. The complaints presented are therefore as follows:

   (a) automatically unfair dismissal for making a protected disclosure

   (b) automatically unfair dismissal on health and safety grounds

   (c) detriment at work for making a protected disclosure

   (d) breach of contract in relation to notice pay.

5. The issues to be decided were set out in the case management orders made following the hearing on 27 November 2023 and so need not be repeated at the outset. We will return to them shortly.

## Procedure and evidence

6. This case had a difficult start. The date before the hearing the respondent's solicitors emailed the tribunal to say that they had received no witness statement from Mr Stone. He had also told them that he was sick so there was some doubt about whether he would attend. In the event he did, providing a witness statement on the morning of the hearing together with an application to strike out the response. That is the third such application. The last one was dealt with by a written judgment recently. The main reason for refusal on that occasion was that the points raised would need to be explored in evidence. We also refused the latest application. Some of the points raised were also part of the last application. Essentially his case was that there had been delay of 18 days in providing him with the original

documents, which arrived by 29 December, and this led to a 17-day delay in providing him with the witness statements. They were received on 19 February, about two weeks before this hearing. He said this did not give him sufficient time to prepare.

7. We felt that it did. The witness statements run to 44 pages in total. He said however that he had not read them or the bundle. We took the view that that was the main reason for him not being ready. After discussing these points at some length on the first morning the hearing was adjourned until the following morning to allow him time to go through those witness statements in the necessary detail.

8. As to his witness statement, the document he provided was a three-page statement which had previously been provided last September, before the preliminary hearing. It was rather brief by comparison with the respondent's statements but he was content to rely on it, and the respondent raised no further complaint about its late arrival.

9. Mr Stone had also submitted two written applications in the last few weeks, one for witness orders and one for anonymity. He asked for orders that 12 additional witnesses employed by Bougyes or the Council attend. Some of those named were managers who have left, others had no obvious involvement in the case at all. His intention was to cross-examine them, but witness orders are only granted for supporting witnesses. He had not contacted any of them and did not know what they would say about any particular point, so we took the view that such orders were not appropriate.

10. As to the anonymity request, that was on the basis that any reported judgment might affect his job prospects, and we concluded that that was not sufficient to displace the principle of open justice.

11. Having dealt with these points we heard evidence from Mr Stone, and on behalf of the company from:

    (a) Mr Ricky Chapple (Operations Manager at the time), who became Mr Stone's line manager from April 2022 and who held the probation review meeting on 29 April 2022;

    (b) Ms Lindsay Fordham (Senior HR Manager), who provided HR support throughout;

    (c) Mr Mark Farrington (Contract Director), who held the hearing of the appeal against dismissal: and

    (d) Ms Tiffany Pantelli (General Manager), who held the grievance appeal meeting.

12. Although four witnesses seems a healthy number, Mr Farrington and Ms Pantelli only became involved after his dismissal and Mr Stone said he did not have any questions for them (although in the event he did put one or two). The manager who decided to dismiss Mr Stone was Mr Kevin Scanlon, and he also dealt with his concerns about health and safety. Both have now left the company and so were not here to give evidence. Ms Fordham was present at the dismissal hearing and at the various meetings in his grievance process, but she was not the decision maker and so could not give first-hand evidence about the reasons for dismissal.

13. There was also a bundle of about 400 pages plus Tribunal documentation. Having considered this evidence and the submissions on each side, we made the following findings of fact.

**Findings of Fact**

14. Mr Stone began his work as a maintenance engineer in October 2021. He was supervised on a day-to-day basis by a Mr Jamie Cole, and his line manager was Mr Les Gibbons, the Senior Operations Manager.

15. Each of the engineers worked remotely, attending all sorts of council premises such as care homes, libraries and even a cemetery. Often there would be other Bouygues employees there, either on reception or working in some other capacity. They could let him in and give him access to keys or spaces where testing was carried out.

16. Fire alarm testing would be done weekly at each site. So would water outlet flushing. There would then be monthly visits to check emergency lighting, water outlet temperature and for boiler checks. If something was broken the engineer would report it and that would be logged as a reactive maintenance task, as opposed to the planned preventative maintenance (PPM) which was his main role.

17. Those jobs are sent to the engineers in advance on a personal digital assistant (PDA). It uses an app called Maximo. To begin with, Mr Stone was sent the jobs for that week but later it became monthly, so he might have 140 jobs or checks to carry out on his PDA. Ideally the jobs are closed on the system as soon as they are done but if there is a problem with Wi-Fi connection, for example, the app will process the job when it picks up a signal somewhere else.

18. Also on the PDA was an app called Kronos. This is the time management system. Engineers use it to clock in and out. If they don't, a report is automatically generated. It is the same system used by all members of staff, and they have to be within about 500m of the building to be able to log in or out, so it would soon become obvious if there was a problem with the Wi-Fi at a particular building.

19. As a new joiner Mr Stone was given an induction by the HR department and issued with a staff handbook. He should have had a company mobile phone but this was

slow in arriving. There was also a long delay in providing him with a work email account, so he was using his own phone and email account from time to time to keep in touch with his managers. Perhaps for that reason Mr Gibbons felt that he was poor at communicating and that it was difficult to get hold of him [230].

20. The handbook sets out the probationary review process [121]. New employees are invited to at least two probationary review meetings. The first should take place after 12 weeks and the second at 24 weeks. The member of staff is then scored on a matrix against 8 competencies on a scale of 1 to 5, 5 being the best.

21. Mr Stone had his first meeting on 21 January 2022 with his Mr Gibbons. He was scored as a '3' in all areas bar one – he got a '2' for work output. The form [202] does not record the reasons but a 2 corresponds to "sometimes has to be reminded about standards or procedures." No other shortcomings were noted.

22. Shortly afterwards, on 1 February 2022, Mr Stone started isolating due to Covid concerns. He did not test positive himself but he told us he had a cold and did not think he should be going into care homes. He was off for a total of 9 working days. The company's policy allowed for 8 days of self-isolation providing that there was evidence from Track & Trace that the person needed to self-isolate, and Mr Stone did not provide any.

23. Mr Stone came back to work on 14 February. His return to work meeting with Mr Gibbons did not take place until 22 February [232]. It is not clear why it took so long but it seems that at that meeting Mr Gibbons told him that his absence was logged as unauthorised so he was not going to be paid for it. Mr Stone thought this very unfair.

24. Later that day there was a team meeting. The maintenance engineers had monthly get-togethers with the manager known as toolbox talks. Mr Gibbons used this one as an opportunity to drive home the importance of the work they did and there was a discussion about tools and equipment.

25. The next day, 23 February 2022, Mr Stone sent an email to Westminster City Council [211-212]. It went to the email addresses for the Chief Executive, Deputy Chief Executive, and to the media team. He had to google who to send it to. But he did not send it to anyone at Bouygues. A flavour of it can be had from the opening paragraphs:

> "On Monday 24th Jan 2022 at the Bouygues toolbox talk/ staff meeting at Lisson grove 3rd floor office, the engineers for Westminster's were given test equipment for the first time we had to sign for to check the water temperature,
>
> 3 months into the job and I have just been given this and some engineers still don't have any tools to test for legionella or the emergency lighting or do the fire alarm test this is dangerous but the manager Les Gibbons Senior Operations Manager seem

> to have his priority wrong he was more concerned that the staff all had their full uniform on when on site."

26. It went on to raise many other criticisms of Mr Gibbons and the company generally. He said that:

    (a) engineers did not have ladders to check emergency lighting

    (b) not every site had a safe ladder, so engineers were expected to stand on chairs and tables to complete emergency light tests

    (c) engineers were made to complete the test sheet in the Bouygues logbook on site.

    (d) the logbook was poorly maintained and pages were missing

    (e) Maximo had lots of faults – it crashed, had poor signal, was slow to update, and duplicated jobs 3 or 4 times

    (f) engineers did not receive some jobs until they were too late to meet the requirements of the contract

    (g) there was poor communication from management on how to perform work correctly

    (h) the team was constantly short-staffed so there were delays in getting repair work done

    (i) Mr Gibbons would not give him a work email address, so he did not always know when he had an important email because it would get overlooked in his personal email

    (j) Kronos did not work - employees were underpaid as a result as it made it look like they were not at work

    (k) Mr Gibbons would not listen to him and was a poor manager, and

    (l) The health and safety of staff and customers was in danger in the day centres for the elderly, and the nurseries were at risk of legionella and a fire.

27. If there was any written or email response from the council we did not see it. That is a concern. No doubt the council wanted this needed looking into urgently. That seems to follow from the subsequent haste. Westminster must have contacted Bouygues about it that day because a letter was then sent to Mr Stone on 23 February inviting him to a grievance investigation meeting at 1 pm on 24th [214]. It was to be with Kevin Scanlon, the General Manager for the contract, and Mr Gibbons' line manager. Ms Fordham, a Senior HR Manager, was there to take notes, so it was being dealt with urgently and at a high level [215].

28. Mr Stone was not expecting this. He came along but was on his own and was about two hours late. The invitation letter had reminded him of his right to be accompanied but there was little time for him to arrange anyone. He said he was not ready but he agreed to go on with the meeting, and Mr Scanlon went through with him in some detail the concerns he had raised. The tone of the meeting was concerned and Mr Scanlon went into a good deal of detail. He quizzed Mr Stone about why he had gone directly to Westminster City Council rather than to his client - the response was that he could not find anyone at Bouygues to send it to whereas he had been able to google people at the council – and they went through the points raised. It soon became clear that a lot of the points raised were things that Mr Stone had picked up from the toolbox talk and he personally had the equipment he needed. For example, Mr Scanlon made the point that the company did not test for legionella, that was done by an outside firm. They just did water temperature tests. Mr Stone's main concern was about the unreliability of the Kronos and Maximo apps.

29. We note in passing that Mr Scanlon seems to have been under the impression that the email had been copied to Mr Gibbons, or perhaps sent shortly in advance, but it is clearly not addressed to him and we have no such document. We conclude that this was an error at the time, and neither side raised it at this hearing.

30. This was followed by a meeting on 1 March 2022 with Mr Gibbons to get his side of the story [225]. Again it was a detailed discussion. Mr Gibbons said, for example, that Mr Stone wasn't doing any jobs that needed tools. He had a temperature gauge and there were keys on site to access emergency lighting and fire alarms. He had not been given a PDA to begin with and had had to use his own phone. That meant taking photos of jobs and emailing them in for a while, but now he had a PDA. And he did not need a ladder. If he had to work at height it would be reported as a reactive job and someone else would come out to deal with it.

31. An investigation report was prepared on 9 March 2022 [232]. The main conclusions [235] were that there were some areas where he should have received more support from his manager, such as being given a company email address and a check should have been done at the start to make sure he had the tools and equipment he needed. There was also a period from the end of November to 1 January when there was no supervisor in place. However, he was receiving emails as part of the email group for engineers and he could have used that to raise any concerns or queries. Save for the first sentence of his email, which mentioned the previous toolbox talk in January, all of the concerns raised were based on the discussions at the toolbox talk in February, when Mr Gibbons had emphasised the importance of the various checks. Mr Stone had not voiced any concerns at the toolbox talk but had assumed from what Mr Gibbons was saying that checks were not being carried out at some sites. But maintenance records on Maximo showed that that was not the case. Many of the concerns were found to be simply misconceived. For example, the test equipment issued in January was not being given out for the first time. It had been taken in for recalibration and was then returned to the engineers.

32. The recommendations of the report included providing him with a work email address, an audit of logbooks to be carried out and training for Mr Stone on how to raise concerns. However, this report was not given to Mr Stone at the time. The conclusions were not explained until a meeting on 4 May, nearly two months later. That delay suggests that the report was in fact mainly for the benefit of Westminster City Council. Equally however, Mr Stone did not chase at any time to find out what the outcome was.

33. On 14 March 2022, Mr Stone went off sick, citing poor mental health. During his absence, Mr Gibbons left to take up another role and Mr Chapple joined the company as his new line manager. He had been with the company before and knew their systems and procedures.

34. Mr Stone came back to work on 18 April, and on 25th he was at last issued with a company mobile phone. This should have been issued long before as it was part of his contractual benefits.

35. Then on 29 April 2022 he had his second probationary review meeting, this time with Mr Chapple. This was the first time they had met, which of course made it difficult to assess his performance.

36. So, in preparation for it, Mr Chapple gathered what information he could. He noted the scores in the previous probationary review meeting and had a word with Jamie Cole, Mr Stone' supervisor. The feedback was not very positive. Mr Cole described him as very distant, said that he would often arrive late, was poor at communicating and was often unaccounted for during the working day. He also failed to keep in good contact during his absences, did not turn up on site as often as he should, and when he did was often not wearing the correct uniform. Some of this matched Mr Chapple's own brief experience. He had received a few calls from council staff to say that Mr Stone had not been on site when he was expected. This was a real concern because it is important that fire alarm tests are carried out at the advertised time.

37. Bouygues used an external company called Goodshape to monitor absence so Mr Chapple looked at those records too. They showed a total of 35 days absences so far – 26 days for mental health reasons and 9 days for covid-related absence.

38. He also reviewed Kronos, the time management system. Mr Stone's timesheets had lots of red exceptions, showing that he had arrived at work late and / or left early.

39. Finally he checked on Maximo. Engineers were expected to complete about 10 jobs a day, but Mr Stone's results were much more patchy, and this too indicated that quite often he was not turning up to sites to complete his tasks.

40. That was the background to their meeting. We also note, and accept, that Mr Chapple was unaware of the email to Westminster City Council. That may seem surprising, but there was no particular reason why he would have been informed, and we accept his evidence that he was genuinely taken aback when Mr Stone mentioned this in the meeting.

41. It came to light when they began discussing health and safety awareness, one of the eight competencies. Mr Stone said that he had reported some health and safety issues. Mr Chapple commended him for it, and in fact gave him a '4' in that box as a result.

42. There were other areas of concern though, and '2's were recorded in three areas:

    (a) attendance / punctuality,

    (b) appearance, and

    (c) work output.

43. Under the attendance heading, they went back over his covid absence and the fact that no evidence had been provided of a positive test. They also discussed his recent absence due to poor mental health. At that point Mr Stone said he was under stress because of the pressure put on him by Bouygues after his whistleblowing complaint to Westminster City Council. Mr Chapple was somewhat baffled by this, and he was just finding out about this and had not been putting any pressure on him.

44. They also discussed his timesheets on Kronos. Kronos uses GPS and members of staff can clock in or out of work using Kronos when they are within about 500 yards of a site. Mr Stone said that he had been having issues with the GPS signal at a couple of sites (Hanwell and Farm Street Depot) which meant that he was unable to do so. Mr Chapple said that he would go to these sites to test the signal. (In fact it was Mr Cole who went out to check them. There was indeed an issue with the GPS signal at these two sites at the time, which was reported to the relevant department and rectified shortly afterwards.)

45. However, that still did not explain why Mr Stone had failed to clock in or out of other sites where there were no GPS issues. His 'exceptions' were across various sites. Sometimes he would clock in but not out, and other times he would clock out but not in. All the engineers had been encouraged to report any such issues, but Mr Stone had not done so. So, Mr Chapple emphasised that he needed to let him or Mr Cole know as soon as possible by text, email or phone if he was experiencing any issues clocking in or out of work.

46. They also discussed his appearance. Mr Stone said he had now received all his uniform but he had been seen by Mr Cole and the client wearing his own style jacket

and sweatshirt on site. He was told this was not acceptable and if he needed any other uniform items he should contact Mr Cole.

47. The final problem area was with work output. They talked about the low number of PPMs and reactive tasks being completed on Maximo. Mr Chapple also noted that he had received complaints that Mr Stone had not turned up to site on several occasions, and that this matched his Kronos and Maximo reports. This meant that other engineers had to cover for him. Mr Stone said that he was having issues with Maximo which would duplicate jobs and sometimes crashed when he was trying to close down jobs. Mr Chapple disagreed and said that Mr Stone was the only one having those issues, and told him to get in contact if he had any issues with these apps.

48. The probationary review record states that an employee who gets a '1' or '2' against a key competency, should either

    (a) receive further training or guidance

    (b) have their probation extended; or

    (c) have their employment terminated.

49. Mr Chapple decided to extend Mr Stone's probation for three months, until 5 July 2022. That was a perfectly understandable decision in the circumstances. There were clearly some performance concerns and so it was not appropriate to record him as having passed his probation. Equally, this was the first time they had met so it would have been a big step to dismiss him at that stage. The obvious alternative was to extend his probation to give him time to improve, applying the guidance which Mr Chapple had given him at the meeting, particularly about the importance of good communication.

50. Meanwhile the grievance investigation continued. The view was taken that it would be better to discuss these with Mr Stone face-to-face rather than simply give him a letter announcing the conclusions, but as already noted, it was not until 4 May 2022 that this meeting took place. Ms Fordham was present and her view was that Mr Stone appeared satisfied that his concerns have been looked into.

51. However, the next day he went off sick, with a bad back. There is nothing to suggest that the two events were connected; it seems that he had injured his back operating a roller shutter door. But, it led to considerable period of absence, during which he had little or no contact with the company. He declined a referral to occupational health and although he was invited to a wellbeing meeting on 15 June 2022 he did not attend. He returned to work on 1 July 2022.

52. Shortly afterwards, on 4 July, he had a return to work meeting with Mr Chapple [285]. They talked through a standard set of questions used by Goodshape, and the gist

was that his back was still not 100%. He was taking ibuprofen for the pain but that also made him nauseous. Again, Mr Chapple emphasised to him the need to let him know if he was not well enough to carry on at any point. It was suggested that Mr Chapple had suggested that he go home when he was not feeling well, but that is at odds with Mr Chapple's evidence and his previous approach which was to emphasise the importance of good communication.

53. In the meantime, Mr Stone was invited to his final probation hearing which was to take place on 13 July 2022. He was well aware that he would either pass his probation or would be dismissed. Given that he had been absent for about two months since his last probationary review meeting, he may well have felt that dismissal was the likely outcome.

54. The evening before that hearing he sent an email to Mr Chapple containing what he put forward as minutes from the previous return to work meeting [302]. No minutes had been taken by Mr Chapple because they had simply worked through the online form provided by Goodshape, so this was an attempt by Mr Stone to put his version of events on the record. According to this document Mr Chapple arrived 2 ½ hours late for the meeting and gave no reason for his absence, then told him that if he did not turn up for his next hearing he would definitely be dismissed. It also said that his PDA was not working properly so it was not showing all the jobs he had done, that nothing had been done about health and safety issues even though he had been complaining about them for six months and that he would need to contact Westminster City Council again to complain about this. Mr Chapple had no opportunity to respond to any of these points prior to the probation hearing, at which he was to present the management case, and none of these points were put to Mr Chapple when he gave his evidence. That may have been an oversight. It may also be that Mr Chapple did stress the importance of attending the probation review hearing. The purpose of sending this document, it seems to us, was to bolster his position ahead of that hearing by raising the prospect of a further whistleblowing complaint.

55. The hearing itself was relatively brief. Ms Fordham was there, with Mr Scanlon, who had reviewed all of the previous evidence. Mr Stone wanted to record the hearing, which was refused, at which point Mr Stone left. He suggested at this hearing that he was bullied about the fact that he was wearing sunglasses. Ms Fordham's evidence was that this was not mentioned. We conclude that Mr Stone has confused this hearing with the appeal hearing at which he was asked to remove them, and in any event that was not the reason for his departure.

56. That left Mr Scanlon with the existing records. Even then, he did not simply conclude that Mr Stone should be dismissed. One further check was to make sure that GPS were working at the two locations in question. He therefore asked the cleaning contract manager to make checks there, since his staff were also employed at those

locations. This was in fact delegated to another colleague who reported back on 18 July that GPS was now working at each of them [314].

57. Mr Scanlon then set out his decision in a letter dated 25 July 2022 [320]. It explains his reasons very fully. His starting point was the previous probationary review meeting and the three areas of concern, to which Mr Chapple had added a specific concern about poor communication. Mr Chapple's position was that dismissal was appropriate.

58. Mr Scanlon reviewed the level of absence, which by now had become a real concern. He also recounted each of the days when a full day's attendance had not been logged, and the occasions when he had not logged off successfully at all. He went on to look at the communication issues, including during his recent absence. Then he set out the many days in which no actual jobs were logged as having been performed. Uniform was not considered an issue. Finally, he gave a point by point response to those raised by Mr Stone the evening before the meeting in the form of minutes from the 4 July meeting. For example, he noted that it was Mr Stone who had been late for their 8.00 meeting, that Mr Chapple had then left on other business and had returned to the office at 10.30 when he was told that Mr Stone had turned up. All those points appear to be fair and measured. The outcome therefore was that he was dismissed on one week's notice.

59. It is not necessary to set out a great deal of further detail. Subsequently Mr Stone lodged an appeal against this decision which was considered by Mr Farrington at a hearing on 7 September 2022. That too was a thorough and conscientious review of the evidence supporting the dismissal and he came to the same conclusion.

60. Shortly before his dismissal letter, Mr Stone also made a claim for expenses because of the extra cost of using his personal mobile phone and the travel costs he had incurred. Although they did not accept that he was entitled to travel costs from home to work, it was agreed, as a gesture of goodwill, to pay him travel costs of £1177, or £11 per day. It was also agreed to reimburse him for the six months in which he had not had a company mobile phone at the rate of £30 per month. This was based on the best reasonable tariff for his phone company, although he did not produce evidence supporting those costs. He raised a grievance about the inadequacy of those payments which was heard by Ms Pantelli in due course. He did not attend that meeting but was contacted by phone and confirmed that those were the only two points that he wanted to pursue. Her conclusions, like ours, were that the sums paid were more than sufficient in the circumstances.

**Applicable Law and Conclusions**

*Was there a Public Interest Disclosure?*

61. Whistleblowing claims appear straightforward. The principle is clearly that if someone "blows the whistle", i.e. if they report some serious wrongdoing, they

should not be dismissed or subject to any detriment at work. However, there are number of tests to be met before this principle is applied. Firstly, there are restrictions about the sort of wrongdoing that counts. Then, the allegation has to be specific enough, not just a general moan about the state of things. After that, it has to be shown that the disclosure of information was in the public interest, not just a private concern. And if all that is satisfied, the complaint has to be made to the right person. Usually the complaint is made to the employer, so this is not an issue. But where the disclosure is made to someone else, an outside body like Westminster City Council, more stringent rules apply. We will take each step in turn.

62. By section 43B of the Employment Rights Act 1996:

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following.

63. There are then six possible types of complaint, including criminal offences or damage to the environment, but the relevant ones here are, potentially, that:

> (a) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, or
>
> (b) that the health or safety of any individual has been, is being or is likely to be endangered

64. There are clearly a number of disclosures here to the effect that Bouygues was not complying with its duty under the contract to carry out the relevant tests, and by extension the health and safety of those using council buildings might be endangered. Consequently, the disclosures did tend to show a relevant concern.

65. The next question is whether the disclosures were specific enough. They must be of "information". The mere making of an allegation is insufficient but, as Ms Redman reminded us, there is no bright line between an allegation and information. The Court of Appeal in **Kilraine v London Borough of Wandsworth** [2018] ICR 846 emphasised that the two are not mutually exclusive and that tribunals should consider instead whether the disclosure has "a sufficient factual content and specificity such as is capable of tending to show one of the six relevant failures".

66. Without going back over each of the allegations set out in the email, they are essentially a detailed list of shortcomings. It is not a general statement about lack of equipment or training. These are, for the most part, specific points about such matters as lack of testing equipment, apps which do not work properly or which only alert the engineer too late, and poor record keeping.

67. The allegations do not of course need to be true. Mr Stone just has to have a reasonable belief in them. It was not challenged that he did actually believe that all these points were valid, and although he may have picked them up from what he

heard at the toolbox talk, supplemented by his own experiences, they are not fanciful points, and we see no reason to question whether he had a reasonable for believing that what he stated in that email was true.

68. A public interest test then also has to be met. In many cases this is not an easy question. People tend to complain about things that affect them personally. But here there was no particular personal advantage in raising these points (apart perhaps from gaining protection as a whistleblower, which was not suggested). The concerns are about tests for fire alarms and emergency lighting, essential safety features of public premises such as care homes. Hence, we accept that the public interest test is also met.

69. The last issue is whether Mr Stone complained to the right people, or at least to permitted people. Section 43A of the Act provides that:

> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

70. Sections 43C to 43H are six separate provisions, each providing a permitted type of disclosure. Usually it is not necessary to go further than section 43C which provides that:

> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure—
>
> (a) to his employer, or
>
> (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
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> (i) the conduct of a person other than his employer, or
>
> (ii) any other matter for which a person other than his employer has legal responsibility,
>
> to that other person.
>
> (2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

71. The disclosure here was not to his employer, and he was not working for the council. Nor was he complaining about anything done by the council. Although they have ultimate responsibility for the safety of their premises, he was not suggesting that they were at fault. It would be different if, for example, he had written to them saying that he had been trying to test the fire alarm at one of their buildings and the roof

was in danger of collapse so they should do something about it. That would be a failure which related to the conduct of the council. This section simply does not cover allegations to a third party that an employer was at fault. And subsection (2) does not apply either as he was not authorised by Bouygues to make the disclosure.

72. Turning to the following sections, section 43D covers disclosures to legal advisers and section 43E covers disclosures by employees of statutory bodies to a Minister of the Crown. Clearly, they do not apply here.

73. Section 43F covers disclosures to certain "prescribed persons". These persons are listed in the Public Interest Disclosure (Prescribed Persons) Order 2014. They include bodies like the Financial Conduct Authority, the Care Quality Commission, and Health and Safety Executive. But they also include "Local Authorities which are responsible for the enforcement of health and safety legislation." There is then a description of the sort of matters they can deal with, i.e. those "which may affect the health or safety of any individual at work; matters, which may affect the health and safety of any member of the public, arising out of or in connection with the activities of persons at work." That appears to apply squarely here. So, although Mr Stone was complaining to the council as customer rather than as an enforcement body, his disclosure comes within this section.

74. This was not a point raised at the hearing. Hence, we have not heard any evidence as to whether Westminster City Council does have powers to enforce health and safety legislation. The point may be academic in view of our overall conclusions but local authorities in general have a statutory duty under section 18(4) of the Health and Safety at Work Act 1974 to "make adequate provision' for health and safety enforcement in their area". Hence we will proceed on that basis.

75. For completeness, section 43G is headed "Disclosure in other cases". There are some additional requirements under this heading, including that the complaint is not for personal gain, and that he reasonably believed that he would be subject to a detriment by his employer if he went to them, or that evidence would be concealed, or that he had already raised substantially the same information with them. Even then, it has to be reasonable to make the disclosure. For the avoidance of doubt, we conclude that this had no application. Even if Mr Stone had made some mention of his concerns to Mr Gibbons before sending off his email, or had sent him a copy of the email, it would not be reasonable in our view to go on so quickly to contact the council.

76. Finally, section 43H deals with exceptionally serious failures, which we do not believe applies here. These were alleged shortcomings in the testing and maintenance regimes for public buildings, not a disclosure of any immediate threat of harm.

77. However, we conclude that this was a disclosure to a prescribed person, whether by accident or design, and so we are satisfied that the email of 23 February 2022

contained qualifying disclosures within the statutory definition. The next question is whether Mr Stone suffered any detriments as a result or was been dismissed for that reason.

*Automatically unfair dismissal under section 103A Employment Rights Act 1996*

78. By s.103A Employment Rights Act 1996:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

79. The principal reason is the reason that "operated on the employer's mind at the time of the dismissal": per Lord Denning MR in **Abernethy v Mott, Hay and Anderson** 1974 ICR 323, CA. So, for example, in **Kuzel v Roche Products Ltd** [2008] IRLR 530**,** the tribunal found that the principal reason was simply that the line manager lost his temper. It does not have to be a fair reason, as long as it was not because of the protected disclosure. We therefore need to address the reason that operated on the mind of the decision maker, in this case Kevin Scanlon.

80. We have some concerns about the effect that this disclosure had on later events. There are perhaps three main points. Firstly, there is the speed of the first investigation meeting, which shows a degree of concern or even panic on the part of Bouygues. Secondly, there was the delay in reporting the outcome to the claimant, which again suggests that their priority was to look into things and report back to the council. Finally, there was their failure to disclose any correspondence with the council. It seems to us unlikely that there was none, and that is a potentially serious matter. At the same time, it is unlikely that any response from the council would be a call for measures to be taken against Mr Stone. That would be unwise, unlawful and would not be of any benefit to them. More likely, they wanted it looking into promptly and any issues addressed, which is in fact what happened. Bouygues made an extensive effort, including carrying out audits of the records at all sites.

81. Whatever influence was applied, it seems likely to have been felt by the more senior members of staff at Bouygues. It is unclear how far down the management chain this concern may have progressed and we had no tangible evidence to suggest a link to Mr Scanlon.

82. Against that, there are some solid and definite considerations that would have carried weight with him. There had been two previous probationary review meetings which had noted concerns. In fact, the scores had got worse by the second review. And those scores had not been influenced by his protected disclosure. Without going over the dismissal letter again, there had in that period been a further long absence on health grounds, which an employer is entitled to take into account, a lack of communication during that absence, and his recorded attendance and job completion was poor, as shown by the two apps in use. It would be surprising in

those circumstances if he had come to a different conclusion, unless there had been some improvement in performance over those last three months. There was no evidence we can see of any improvement and so dismissal in those circumstances seems to us to have been virtually inevitable. The company's policy did not allow for a further extension of the probation period [122]. Mr Stone had been given that chance to improve. Mr Scanlon had to make a decision whether to ignore all the previous and current concerns and conclude that Mr Stone had passed his probation period, or to conclude that he had not. There is no need, we feel, to search around for an alternative explanation for what was in the end a clear-cut decision. Hence, the complaint of automatically unfair dismissal is dismissed.

*Detriment at work under section 47B Employment Rights Act 1996 for making a protected disclosure.*

83. There are also a number of things – 'detriments' in the language of the Act - that Mr Stone complains about before his dismissal, and here the test is easier to meet. By s.47B:

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

84. So the detriment has to be done "on the ground that" the worker made a protected disclosure. The Court of Appeal in **Fecitt v NHS Manchester** [2012] IRLR considered this test and held that if the disclosure "material influences (in the sense of being more than a trivial influence)" the detriment, this test is met.

85. The first allegation is that his complaints were ignored, but we can see no real basis for that conclusion. They were investigated. He and Mr Gibbons were interviewed and each point was examined in detail. Checks were carried out on the Wi-Fi at the two sites where there were said to be problems. Recommendations were made for an audit, which was carried out, to provide him with a Bouygues email address, to support him with Maximo and Kronos from then on. There was a delay in reporting the outcome to him but it was done on 4 May, over two months before his dismissal, so we do not find that this was a detriment.

86. The next point is that his performance was criticized at the probationary review hearings in April and July 2022. This was the second probationary review meeting and the final hearing. Certainly there were shortcomings noted by Mr Chapple in April, so that is a detriment. He got a '2' in three categories. However, for the reasons already given we are satisfied that Mr Chapple was genuinely unaware of the email Mr Stone had sent to Westminster City Council and so this cannot have influenced his decision.

87. The criticisms of his performance in July are the basis for his dismissal, which we have just considered. In so far as it is possible to separate the two, the criticisms

were in our view measured and appropriate and based on the evidence available. Nothing appears exaggerated or unfair. Mr Stone did not stay very long in the meeting to dispute the points being raised by Mr Chapple, and even then further checks were made of the Wi-Fi signal at the two venues to satisfy Kevin Scanlon that his conclusions were fair. Hence, we also discount the idea that his findings were influenced to any degree by the protected disclosure.

88. The next alleged detriment is that Mr Stone's absences were counted against him rather than being treated as a mitigating factor. We do not agree that this was a mitigating factor. An employee's level of absence is just the sort of thing that an employer will consider at a probationary review meeting. Mr Stone did not suggest that he had ongoing anxiety and depression, let alone that it affected his performance when he was at work. He has not suggested that at this hearing either, so it is hard to understand why it would be a mitigating factor.

89. The fourth point is that his expenses were withheld. There is a real issue over whether any expenses were due, but he was contractually entitled to a company mobile and was using his own phone on occasion, so the company agreed to compensate him for that. This was only raised with them in July 2022 and even then no supporting evidence was provided. This is all very remote indeed from the protected disclosure of 23 February 2022 and we can see no connection.

90. The last allegation is that his notice pay was withheld or delayed, and this seems to fall into very much the same category. There is no reason why the company would deliberately withhold this payment because of his email to the council, and prefer the explanation that there was simply an administrative error on the form sent to payroll. Consequently, the claim to have suffered detriments as a whistleblower is also dismissed.

*Automatically unfair dismissal on health and safety grounds*

91. The Employment Rights Act 1996 provides for several types of automatically unfair dismissal. The whistleblowing claim we have examined is just one of them. There is a very similar alternative at section 100(1)(c), where someone brings to their employers attention

> "by reasonable means, circumstance connected with his work which he reasonably believed were harmful or potentially harmful to health and safety".

92. That provision has not been relied on here, perhaps because the issues were not raised with the employer. Instead, as recorded at the preliminary hearing, Mr Stone relied on section 100(1)(d), that

> "in circumstance of danger which the employee reasonably believed to be serious and imminent and that she could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work."

93. This is a reference to the time off he had due to Covid when he was self-isolating. However this played no part in the evidence or arguments presented at this hearing, and there is simply nothing to suggest that there were circumstances of danger work, let alone that he believed them to be serious and imminent. He did not have Covid himself and the reason for his isolation was that his brother had Covid, not because of any dangers at work. On the contrary, he explained to us it was because of his concern for people in care homes and the like at work. But even if those points were overcome there is no suggestion that the stance he took on Covid isolation played any part in his dismissal.

*Breach of contract*

94. The final claim is for two particular alleged breaches of contract, the failure to provide him with a company mobile phone and company email account. Dealing with these briefly, neither of these points are fundamental to the contract. There was a delay in providing the mobile phone but it was provided and compensation was paid at a generous rate of £30 a month for the period in which it was missing. Consequently we concluded that that breach was rectified. The phone was not in fact an essential tool of the job. A PDA was provided with the apps installed so that Mr Stone could do the work provided to him and clock on and off at the appropriate times. The main point of having the phone was to be able to communicate, and a theme of the concerns raised about his performance throughout his employment was that he was not very easy to get hold of and did not get in contact when he had a problem. Accordingly he seems to have made little use of his company phone even when it was provided and so £30 a month seems a generous level of compensation.

95. As for the company email address, arguably there is an implied term that he would be provided with an email address in the same ways all the other engineers. Again there was a delay in organising this but such delays are not unknown for new joiners. However we can see no loss resulting from that delay and so no entitlement to compensation.

96. For all of the above reasons all of the claims are dismissed.

**Footnote**

97. An appeal can be to the Employment Appeal Tribunal if you think this decision involves a legal mistake. There is more information here https//www.gov.uk/appeal-employment-appeal-tribunal. Any appeal must be made within 42 days of the date you were sent these written reasons.

98. There is also a right to have the decision reconsidered if that would be in the interests of justice. An application for reconsideration should be made within 14 days of the date you were sent the decision / these written reasons.

99. A decision may be reconsidered where there has been some serious problem with the process, such as where an administrative error has resulted in a wrong decision, where one side did not receive notice of the hearing, where the decision was made in the absence of one of the parties, or where new evidence has since become available. It is not an opportunity to argue the same points again, or even to raise points which could have been raised earlier but which were overlooked.

Employment Judge Fowell
Date: **06 March 2024**

JUDGMENT & REASONS SENT TO THE PARTIES ON
**11 March 2024**

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/