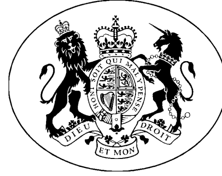
Case Number: 2209964/2023



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr S Zawadzki		Nurtur. Group Limited

Heard at: London Central Employment Tribunal

On: 20, 21, 22 & 25 March 2024

Before: Employment Judge Adkin

Representations

For the Claimant: In person
For the Respondent: Mr T. Wood, Counsel

REASONS

1. Further to an oral judgement given on 25 March 2024, confirmed in a written judgment sent to the parties on 5 April 2024, the Respondent requested written reasons.

The Claim

2. The Claimant has brought three complaints:

   2.1. Automatic unfair dismissal under s.103A of the Employment Rights Act 1996 (“ERA”);

   2.2. “ordinary” unfair dismissal under s.98 of the ERA; and

   2.3. a claim for breach of contract for unpaid bonus.

3. Only the claim for breach of contract was well founded. The other two claims were not well founded and were dismissed.

Evidence

4. I received an agreed hearing bundle of 242 pages and an agreed witness bundle containing the following witness statements:

   4.1. Claimant;

   4.2. Damon Bullimore, Chief Technical Officer;

   4.3. Jon Cooke, Chief Executive Officer & Claimant's line manager

   4.4. Jennifer Scott Reid, Chief People & Development Officer, until her retirement 31 December 2022;

   4.5. Charles Hobley, Group Finance Director.

5. Each of these witnesses gave oral evidence. I found that all witnesses gave evidence to the best of their recollection to assist the Tribunal.

Findings of Fact

6. Findings of fact are made on the balance of probabilities, based on the oral evidence of the witness statements, the contemporaneous documentation and in my judgement what is inherently most likely. There are a number of points in dispute. Some of the factual disputes I have not tried to resolve since they are not essential for my decision.

<u>History</u>

7. The Respondent is a company which operates a group of brands which develop technology for businesses in the property sector such as estate agents.

8. The Claimant commenced employment at Property Technology Limited ("**PTL**") in March 2016. At all times material to this claims he was CEO of that business.

9. PTL is a software business which had a product called Lead.pro. This is software designed for businesses in the estate agency sector. It had a relatively small number of employees which was in the region of 8-10 at the point of acquisition.

<u>Acquisition of PTL</u>

10. The Claimant sold the PTL business to the Respondent under a share purchase agreement in 2021 and became an employee of the Respondent under a separate contract of employment.

11. In 2021 the Respondent had slightly more than 300 employees. It was majority owned by a private equity fund.

12. The Respondent's strategy in 2021 at least was buying a number of software businesses and attempting to integrate them into a common platform.

Claimant's terms of employment working for the Respondent

13. On 21 July 2021 in an internal email from Jennifer Scott-Reid to Jon Cooke and Charles Hobley attaching a job description and setting out in headline terms the package to be offered to the Claimant, that is £125,000 basic salary and (OTE which is on target earnings £150,000 plus options, private healthcare, life insurance and pension). That email was forwarded to the Claimant on the same day.

14. On 27 September 2021 Jennifer Scott-Reid who was Chief People and Development Officer sent the Claimant a copy of a proposed employment contract, which did not contain provisions regarding a bonus.

15. On 30 September Miss Scott-Reid and the Claimant had a discussion about terms which she followed up with an email. She sent an amended contract of employment to the Claimant. The covering email contained the following:

> "The bonus will be payable on achievable of delivery of annual recurring revenue attached to 12 month contracts. All existing contracts are transitioned onto 12 month contracts and all new contracts are a minimum of 12 month contract. Also in assisting the business in delivery of the group wide platform".

16. That wording was not included in the "Executive Employment Contract" dated 1 October 2021. The practice of the Respondent was to provide employees with a separate letter documenting the terms of a bonus. This never happened in the Claimant's case. I find that that was an oversight not a deliberate omission and in other words it was the intention of both parties and agreed that there would be a bonus, it was not however documented in a bonus letter. It was agreed that the bonus would be £25,000, representing the difference between the £125,000 basic salary and the £150,000 on target earnings figure.

17. On 1 October 2021 there were a number of emails exchanged between the Respondent and the Claimant, Mrs Scott-Reid sent to the Claimant at 8:26am a covering email, (with Mr Hobley in copy) at page 59 with a termination letter in relation to PTL. That email read:

> Thanks for your email last night confirming you are happy to sign the contract. Can you please also put the termination letter on your letter head and sign. (please find attached).
>
> I can confirm that there are no KPIs for the allocation of growth shares.
>
> The bonus will be payable on two elements:
>
> • achievement of all existing contracts transitioned onto 12 month contracts, and all new contracts are a minimum of a 12 month contract to deliver annual recurring revenue.

> • assisting the business in delivery of the group wide platform (this is as per the job description and achievable in the split time allocated for the Group).

18. The Claimant wrote back on the topic of KPIs at 09:35:

> The KPIs for the bonus are not achievable, we have many small agents as customers who will not move to 12 month contracts, and forcing all new customers to sign up for 12 month contracts would be a real barrier to getting new business, as agents are so risk adverse they want to have rolling monthly contracts. Can we change it to enterprise clients (those spending more than £5k per year) are moved to 12 month contracts. And that churn of contracts on rolling monthly clients is below 5% per month? I think that is achievable!

19. A further email from Mrs Scott-Reid sent later on in the morning at 10:46am said:

> With regards to your query on the KPI for the bonus, this can be for enterprise clients who sign a contract (not click to accept), and aim to get 70% by revenue.

20. The final version of the contract was provided page 63 of the agreed bundle which included as clause 2.1:

> the company hereby appoints you to act as Chief Executive Officer of Property Technology Limited and Chief Product Officer of the company in accordance with the terms of this agreement which apply with effect from the commencement date.

21. Clause 20.1.1:

> “PILON does not include bonus”.

22. Clause 23.4:

> on termination of the appointment however arising you shall not be entitled to any compensation for the loss of any rights or benefits under any share option, share incentive, bonus, long term incentive plan or other incentive plan operated by any group company in which you may participate.

23. On the day the Claimant’s employment was transferred to E Prop Service Limited which was subsequently renamed Nurtur. Group Limited which is the Respondent. The Claimant signed a termination letter which ended his employment with PTL.

Claimant's role

24. It was agreed at that time the Claimant would spend 80% of his time on the role of Chief Executive Officer of Property Technology Limited and 20% on the role of Chief Product Officer.

Annual appraisal

25. On 20 January 2022 the Claimant had an annual appraisal with John Cooke who is the CEO of the Respondent. He was rated on a variety of criteria, there were 12 in all, on a 5 point scale. For work ethic, motivation and adaptability/flexibility he was rated 1 which meant consistently exceeds expectations, for every other category he was awarded 2 which means exceeds expectations in certain respects. There is no narrative in that document but on any view just based on the numbers this was a very good review. There are no points identified which suggested any kind of performance issue and it is not the Respondent's case that there were performance issues with the Claimant's work at all, either at this stage or later.

Brief Your Market

26. In March 2022 Damon Bullimore joined the Respondent following acquisition of "Brief Your Market" ("**BYM**") which was one of several acquisitions which included the acquisition of PTL.

27. BYM was a significantly larger business by revenue than PTL.

28. Shortly after Mr Bullimore started he met with the Claimant to discuss whether a similar strategy to that used for sales and marketing at BYM might work for the PTL business. In fact in the end the Claimant did not go down the approach of using that sales and marketing strategy.

10 May 2022 discussion: intemperate words

29. Although this did not appear in the written statements it came out in cross examination that there was a discussion between the Claimant and his Line Manager Mr Cooke on 10 May 2022 which degenerated into unpleasantness.

30. Mr Cooke said something along the lines of, "you can take your earn out and fuck off".

31. The following day Mr Cooke called the Claimant and apologised. I accept that Mr Cooke seldom lost his temper but that he was under significant stress due to the poor health of a family member at that time, which was unrelated to work. It seems that the apology was accepted and matters moved on.

8 September 2022 lunch meeting – alleged protected disclosure

32. On 8 September 2022 a meeting took place between the Claimant and Mr Cooke. It was an early lunch date at 12:00 at the Ivy Asia restaurant.

33. Precisely how this meeting should be characterised was in dispute. The Claimant says that this was a formal one to one appraisal meeting. Mr Cooke on the other hand says he saw this as being more of an informal catch up meeting.

34. It may be that in fact each of them had a slightly idea as to what the meeting was but ultimately I do not need to make a decision about that. I do make an observation that it would be slightly unusual to have a formal appraisal in quite a smart restaurant. I accept Mr Cooke's evidence that from his perspective it was supposed to be more of an informal chat. Plainly however the context was of a line manager and an employee and this was not primarily a social conversation.

35. The Claimant says in that meeting that he made a protected disclosure and in fact set that out in a further particulars document which was produced nearly a year later on 29 August 2023 which appears at page 49 of the agreed bundle. The relevant part of that is the third and fourth paragraph on that page where the Claimant says that he said:

> I want to talk to you about Damon [*Bullimore the CTO*], he's technically excellent but I'm very worried about Ecosystem. I can't see how he's provided an accurate plan, costs or timeline to the board for approval, as from what I can see Ecosystem hasn't been run through our product development process. Aside from some mocs there has been no planning work done on this project, no client consultation and no return on investment calculation. There has also been no task refinement so I really don't see how any of the technical information can be accurate when none of this has been done. It's worrying, especially as I know that the board is largely non-technical, so I'm worried that you're just going along with what Damon says without knowing if the information is accurate, you're trusting him with the entire strategy and future of the business without having anyone else verifying the information.
>
> I disagree with working on Ecosystem while there is so much technical debt in the business. I know that we need to get the company ready for IPO and to bring the technology businesses together but I don't think starting an unplanned new project makes any sense when we have such risks from technical debt in the businesses.

<u>What was said?</u>

36. There is no contemporaneous evidence of the content of this conversation nor any follow up from either side.

37. I consider it unlikely that the Claimant would have had perfect recollection of the conversation which took place 51 weeks earlier. I also accept the submission put forward by the Respondent that this recollection may have been coloured by subsequent events and matters that were raised during the

redundancy consultation process by which stage of course the Claimant looked likely to lose his employment.

38. I accept Mr Cooke's evidence that he did not have a detailed recollection of the conversation, which is realistic from his point of view. He accepted however that there might have been a discussion about the CTO officer not making all of the decisions and there might have been some technical risks contained within the product. I find that this is what was discussed and the Claimant in general terms did have a concern about the CTO and his approach to planning to the business case and to development.

39. Mr Cooke is adamant that there was no "disclosure" as such and if he had perceived that there was something that amounted to "whistleblowing" he would have taken the appropriate steps to deal with that under an appropriate policy.

40. Nevertheless I do accept that the "bare bones" of the content of page 49 were said, i.e. that the Claimant was concerned about the absence of product planning process which meant that the Board were potentially being misled.

<u>Derby meeting 20 September 2022</u>

41. On 20 September 2022 the Claimant and Mr Bullimore had a meeting in Derby.

42. One of the topics of conversation was whether the Claimant should buy another business which would provide additional revenue and have the effect of increasing the Claimant's earn out. Mr Bullimore was against this, he says that there were reasons why it was not a good idea leaving aside the fact that it would lead to an increased earn out for the Claimant.

<u>Email follow up</u>

43. Following that meeting Mr Bullimore emailed Mr Zawadzki with a list of reasons why he believed he lacked the skills of a Chief Product Officer and was more suited to the role of Chief Commercial Officer (CCO). He gave some specific feedback and specific reasons why he thought the Claimant would be better suited for the latter role. He emphasised that the Claimant was good with very large customers.

44. Mr Bullimore denies that by September 2022 he was already mulling over a restructure. It seems to me likely however, in view of subsequent events shortly afterward that Mr Bullimore must have been thinking about the future shape of the organisation, albeit that his thinking may not have been at a very developed stage.

45. There is no direct evidence that the conversation the Claimant had with Mr Cooke on 8 September 2022 directly led into this conversation with Mr Bullimore. I should say reading the email dated 22 September 2022 which was a follow up, Mr Bullimore was very clear to praise certain strengths that he saw that the Claimant had. The tone of the correspondence generally was positive, apart from the points that were raised about the CPO role.

Offsite & genesis of restructure

46. On 11 October 2022 there was an “off site” meeting of the Respondent’s senior management where there was a discussion about the future structure of the business.

47. Mrs Scott-Reid’s evidence which I accepted was that as a result of multiple acquisitions there were in her words “too many chiefs” i.e. too many senior managers.

Earn out

48. October 2022 represented the first anniversary of the acquisition of the PTL business. There are various developments with regard to negotiation of the Claimant’s “earn out” at around this time which the Claimant sees as being directly relevant to matters which led to his dismissal for redundancy, whereas the Respondent’s case that these matters are unrelated.

49. I do not need to make detailed findings but it is part of the history which I shall record in summary.

50. On 31 October 2022 the Respondent provided a Deferred Consideration statement providing that they pay an earn out payment of £651,209.

51. The Claimant filed his document indicating his disagreement on 1 November 2022 about serious breaches of contract including conflicts of interest and again the Respondent’s position is that this was irrelevant to the present claim.

52. Subsequently there was an evaluation process for an independent accountant to be appointed as an “expert determinator” to make a decision on the earn out. Ultimately the Respondent was required to pay a figure £1,152.581.

53. The Claimant says the Respondent’s proposal of the earlier figure was a deliberate breach of legal obligation. The Respondent’s position as explained by the CFO Mr Hobley is that they were proposing to structure payment in a different way with a further step leading to a contingency payment.

54. The Respondent does not accept that this was a deliberate breach of obligation and the Respondent says in any event this was not relevant to the claims currently brought.

Restructure report

55. On 14 November 2022 an employee of the Respondent Ricky Bostock produced a report recommending a restructure.

Risk of redundancy

56. On 17 November 2022 (which the Claimant says was the last contractual day of the earn out could be negotiated before the third party review process), the Claimant was notified that his employment was at risk of redundancy. The Claimant’s position is that this was an attempt to bully him and use the

redundancy process as leverage to try to get him to accept lower earn out settlement. The Respondent denies this and again the Respondent's position is that these matters were not connected.

57. The Claimant was notified that he was at risk of redundancy with four others.

58. The redundancy process was run by Jennifer Scott-Reid and Damon Bullimore.

59. It was announced that there were to be three new roles. First, Head of Group Services, second MD Webservices and the third KAM/Brand Director.

60. The Claimant requested job descriptions by email but in fact they were not provided until he chased that up in a meeting on 24 November 2022.

<u>Claimant's bonus entitlement discussion</u>

61. There was an email exchange also on 17 November 2022 about the Claimant's entitlement to a bonus and that appears at page 126.

62. That email exchange was between Mrs Scott-Reid, Charles Hobley with Michael Warren and Jon Cooke in copy. Mr Hobley identified that there was no bonus letter put in place but recites a series of messages exchanged between the Claimant and Mrs Scott-Reid.

63. In a later email, Mrs Scott-Reid on 22 November wrote as follows:

> With regards to Mike's comments on Sam's bonus, please take my comments in the spirit of my role to help protect the company from any potential claims, and please find below my feedback:
>
> 1. 1. An agreed bonus is non-contractual and never forms part of anyone's employment contract. Although discretionary there has to be a valid reason for non-payment.
>
> 2. 2. Although Clause 23.4 states no bonus is payable on termination, we are currently going through a process and you cannot make the decision based on termination now. If we do not get Sam to agree to a settlement agreement, and this decision is taken now it could be challenged in an Employment Tribunal and could evidence that a decision had been made prior to the conclusion of the process, and therefore, unfair dismissal and unfair selection for redundancy.
>
> 3. 3. The main question that needs to be answered first is whether he has hit the KPI for the bonus, as this has been documented in emails and, therefore, has been expressly stated. On the 29th September I asked for clarification of the KPIs for Sam's annual £25000 bonus, and was given authorisation on the details.
>
> a. a. The following was provided to Sam. The bonus will be payable on achievement of delivery of annual reoccurring revenue attached to 12 months contracts. All existing contracts are

transitioned onto 12 month contracts and all new contracts are a min 12 month contract. Also in assisting the business in delivery of the group wide platform.

b. b. Sam challenged as follows: The KPIs for the bonus are not achievable, we have many small agents as customers who will not move to 12 month contracts, and forcing all new customers to sign up for 12 month contracts would be a real barrier to getting new business, as agents are so risk adverse they want to have rolling monthly contracts. Can we change it to enterprise clients (those spending more than £5k per year) are moved to 12 month contracts. And that churn of contracts on rolling monthly clients is below 5% per month? I think that is achievable!

c. c. The following was authorised and agreed for Sam: With regards to your query on the KPI for the bonus, this can be for enterprise clients who sign a contract (not click to accept), and aim to get 70% by revenue.

4. 4. Charles has confirmed that he has hit 73% and, therefore, would be due the bonus for this element. However, there is a secondary part to the bonus which is assisting the business in the delivery of the group wide platform and has he hit this KPI? We need to ensure we are watertight on the reasons for the bonus not being hit, or part hit, as this needs to be communicated now.

5. 5. The bonus was called an annual bonus which is why Sam is requesting payment on his 12 month anniversary.

You could say that this is inferred in the emails, and as a bonus letter is missing there is no clarification that annual bonus's are normally paid in January for the Executive team. However, it is custom and practice that all annual bonus's are paid in this manner, therefore, it would be difficult to challenge a decision that if a bonus is due that it is not payable until January, and then clause 23.4 will take precedence in the contract on a potential termination, unless we make it part of the settlement agreement if needed.

6. 6. The Board have agreed other similar bonuses even with the existence of an earnout which offers a very significant incentive considerably in excess of anything likely to be earned through bonus. The bonus was agreed as part of the negotiations with Sam.

7. 7. The annual bonus amount has been expressly stated as £25000.

[duplicate numbering in original document]

Communication with Claimant re: bonus

64. On 23 November 2022 Mrs Scott-Reid wrote to the Claimant by email to state that the Respondent's policy is that bonuses are not paid until after year end and the bonus payments were discretionary not contractual. The Claimant responded that is not correct, it is worth noting that this is the first time that either of those points i.e. payment after the year end or the fact of the bonus payments being discretionary was drawn to the Claimant's attention.

Consultation

65. On 24 November 2022 there was a redundancy consultation meeting with the Claimant attending with Damon Bullimore and Jennifer Scott-Reid.

66. The bundle contains a transcript of that meeting.

67. There was a discussion about the reasons for the need for redundancy. The Claimant disagreed with the rationale of the redundancy.

68. The Claimant challenged Mr Bullimore for failing to complete an "epic" which is a type of planning document. He says that there were no task refinement and no business case for the changes that Mr Bullimore was proposing to make. He quotes one of the team as having told him that "if Damon [i.e. Mr Bullimore] wants something done we just do it". The Claimant alleged in that meeting that the CPO role was being removed so that there would be no check on the way that Mr Bullimore ran the product development process.

69. Mrs Scott-Reid told the Claimant that the restructure was a group decision and in fact she confirmed in her oral evidence in the Tribunal hearing that the decision was taken jointly by Jon Cooke and Damon Bullimore.

70. As to bonus, in the meeting the Claimant raised the question of OTE on target earnings bonus. He suggested it was performance based and that there was nothing agreed about it being discretionary and pointed out that he had not been paid.

71. Mrs Scott-Reid said it was custom and practice that the Claimant should have been paid after the end of year when the company had hit EBITDA but admitted that this had never been explained to the Claimant. She also admitted he had beaten the 70% target but said that it was a discretionary bonus because it was normally "hit with EBITDA".

72. The Claimant separately and further on in that meeting made the comment that the redundancy was "political" and that it was about "power and control".

73. At a later stage the Claimant notified the Respondent that he did not intend to apply for any of the proposed new roles on the basis that they were not suitable alternatives either in seniority or in terms of the content of the job descriptions. His case is essentially these roles were earmarked for specific individuals.

No interviews in restructure

74. There were no competitive interviews. Three other people who had also had been placed at risk of redundancy essentially slotted into the three roles without the need for a competition.

75. Mrs Scott-Reid who was the other person who was made redundant took retirement at this time.

Correspondence re: CPO role

76. On 1 December 2022 the Claimant sent an email to Jennifer Scott-Reid setting out his views why the role of CPO was still required within the Respondent business structure.

77. On page 150 Mr Bullimore prepared a long response to that email to send in response, it is quite clear from content of both that email and also what is discussed at the consultation meetings that the Claimant and Mr Bullimore had fundamentally different philosophies to product planning and product development.

Further consultation meeting

78. There was a further consultation meeting on 6 December 2022 (notes of that begin at page 198). At that meeting the Claimant and Mr Bullimore and Mrs Scott-Reid were present and again there was further debate about the proposal to remove the CPO role.

Notification of termination

79. On 7 December the Claimant received notice in writing that he was being made redundant and his final day of work would be 31 December 2022.

80. On 9 December there was a further meeting by video, the Claimant attended and present was Mr Bullimore and Mrs Scott-Reid to further discuss the proposed restructure of the Respondent and in that conversation the Claimant questioned how Mr Bullimore could possibly given accurate information without any technical specification or research into the product plan.

81. Following this meeting the Claimant says he raised a protected disclosure to Matthew Seibert, Jon Clarke and Mark Phillips regarding the information being provided to the Board by Damon Bullimore which he says was false and misleading. That is not disputed but the details of that we have not gone into in this hearing because this post-dates the decision to dismiss the Claimant and all parties realistically agree that that cannot be relevant to the s.103A claim.

Termination

82. The Claimant’s employment ended on 31 December 2022. He was paid notice plus statutory redundancy. He did not appeal the decision to dismiss him.

83. The Claimant was not paid a bonus. Growth shares were issued in January 2023 to other employees but not the Claimant who by that stage was not an employee.

Post-dismissal recruitment

84. On 1 February 2023 Lindsay Sumner was hired as Head of Agile Delivery which the Claimant says was a product role which in his view was very similar his own or contains similar elements. Sidonie Lawree was appointed Head of Product.

85. The Respondent's evidence is that both of these roles were significantly less senior than the Claimant's roles which I accept given that these roles appear further down the management structure than the Claimant's CPO role.

Proceedings

86. The Claimant commenced the ACAS conciliation process on 28 March 2023 that conciliation process ended with the issue of a certificate from 9 May 2023.

87. The Claimant presented a claim on 3 June 2023 which came before me at this hearing.

LAW

PROTECTED DISCLOSURE LEGISLATION

Protected disclosure detriment ("whistleblowing")

88. The Employment Rights Act 1996 contains the following provisions:

> 43B Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> 47B Protected disclosures.
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

> 48.— Complaints to employment tribunals
>
> (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
>
> (2) On a complaint under subsection … (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

89. The burden of proving each of the elements of a protected disclosure is on a claimant (*Western Union Payment Services UK Ltd v Anastasiou*, 13 February 2014 per HHJ Eady QC at [44]).

<u>Disclosure</u>

90. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 the Court of Appeal held that a sharp distinction between "allegations" and "disclosures" which appeared to have been identified in earlier authorities was a false dichotomy, given than an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a **sufficient factual content and specificity** such as is capable of tending to show one of the matters listed in subsection (1)."
>
> [emphasis added]

<u>Reasonable belief in relevant failure</u>

91. Whether a belief is reasonable is to be assessed by reference to "what a person in their position would reasonably believe to be wrongdoing": *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 per Judge McMullen QC at [62]. In that case Mr Korashi was a specialist medical consultant and an assessment of what was reasonable needed to be by reference to what someone in that position would reasonably believe.

<u>Burden of proof</u>

92. There is an initial burden of proof on a claimant to show (in effect) a *prima facie* case that she has been subject to a detriment on the grounds that she made a protected disclosure. If so, the burden passes to a respondent to prove that any alleged protected disclosure played no part whatever in the claimant's alleged treatment, but rather what was the reason for that alleged treatment. Simply because the respondent fails to prove the reason does not act as a default mechanism so that the claimant succeeds. The tribunal is concerned with the reason for the treatment and not a quasi-reversal of proof and deemed

finding of discrimination i.e. there is no mandatory adverse inference mechanism (*Dahou v Serco Ltd* [2017] IRLR 81, CA).

Public interest

93. The Court of Appeal in *Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979 confirmed that public interest does not need to relate to the population at large, but might relate to a subset, in that case a category of managers whose bonus calculation was negatively affected. It seems that it cannot simply relate to the interest of the person making the disclosure. The following guidance was given on that case as to reasonable belief in the public interest:

> "27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.
>
> 28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. **All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative**.
>
> 29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at

all; but the significance is evidential not substantive. Likewise, **in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable**.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

[**emphasis** added]

CONCLUSIONS

94. There was a list of issues that was prepared at an earlier case management hearing.

Automatic unfair dismissal under s.103A of the Employment Rights Act 1996.

Issue 1.1 - did the Claimant make a qualified protected disclosure? On 8 September 2022 did the Claimant disclose to the group CEO Mr Jon Cooke concerns about the accuracy of technical information and planning being shared by Damon Bullimore the group Chief Technical Officer?

95. The Respondent accepts that if a disclosure was made in the terms at page 49 this was a protected disclosure but submits that the Tribunal ought not to find that a disclosure in precisely those terms was made.

96. The Respondent's position is that this disclosure came later but after the decision to dismiss.

97. What was the information that was disclosed? The Claimant expressed to Mr Cooke that he had a concern about whether technical information provided to the Board was accurate given that he perceived that there was a lack of proper product development process and a lack of proper document documented business case showing for example what the return of investment would be.

98. I did consider whether this was simply an opinion rather than a disclosure of information but it seems to me that there is some specific content. The absence of documented development process and the business case which is the *content* of the disclosure and what that has led to is the Claimant to question whether the information provided by Mr Bullimore was being given to the Board was accurate.

Issue 1.2 – in relation to the disclosures detailed above each disclosure tends to show fall within the following:

1.2.1 that a criminal offence had been committed, is being committed or is likely to be committed. The Claimant relies upon the disclosure of an offence of fraudulent training being committed contrary to s.993 of the Companies Act 2006

99. Section 993 of the Companies Act 2006 contains the following:

> 993 Offence of Fraudulent Trading
>
> (1) if any business of a company is carried on with intent to defraud creditors of a company or creditors of any other person or for any fraudulent purpose every person who is knowingly a party to carrying on of the business in that manner commits an offence.

100. That is the relevant provision but it is clear from the subsequent provisions that this is a criminal offence with potential for leading to imprisonment.

101. I note that at the second page of the Claimant's witness statement which is the third substantive paragaraph he refers to knowingly or recklessly providing false or misleading information to a company's members (shareholders). By contrast section 993 relates to the intent to defraud creditors of the company rather than members or shareholders. There is something of a mismatch between what the Claimant is representing that provision contains and the wording of the provision itself.

102. Based on the content of the alleged protected set by the Claimant at page 49 I do not find that it was reasonable to believe that there was either criminal conduct or fraudulent conduct based on that disclosure, so from my assessment this does not satisfy s.43(b)(1a) i.e. criminal conduct.

1.2.2. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (section 43B(1)(b) Employment Rights Act 1996). The claimant relies upon Mr Cooke as a Director failing to comply with his legal obligations and fiduciary duties as a Director.

103. I turn to the alternative basis said to make this a protected disclosure – breach of legal obligations.

104. In summary the legal obligation is the duty as a Director to provide accurate information to the Board and it is not in dispute that that is a legal obligation.

105. Whether the Claimant had a reasonable belief in the wrong doing, based on the content of page 49 it is not seriously questioned. I accept that the bare bones of the matters that are set out in page 49 were said by the Claimant during the course of that conversation. And in those circumstances it is not questioned that there was a reasonable belief in that wrong doing.

Issue 1.4 – did the Claimant reasonably believe that the disclosure was in the public interest? The Claimant says that due to a number of employees and shareholders the public interest test is satisfied under Chesterton case (Chesterton Global Ltd v Nurmohamed 2018 ICR 731 CA).

106. I find that the Claimant did reasonably believe that this was in the public interest. This is a low threshold. It applied to the interest of other shareholders which included the Claimant and so in those circumstances I find that the Claimant has cleared the fairly low threshold that is established by the **Chesterton** case. Other people are affected; it was not simply about his own interest.

107. I find in conclusion that there was a qualifying protected disclosure, albeit I also accept Mr Cooke's position which is he did not perceive that this was whistle blowing, which is relevant to Issue 1.6 below.

Issue 1.6 – was the reason or principal reason for dismissal of the Claimant made a protected disclosure. The Respondent asserts that the reason for dismissal was redundancy.

108. In summary I do not accept that the *sole or principal reason* for dismissal was a protected disclosure for the following reasons.

109. First the context. The position of the Respondent and in particular the evidence of Mrs Scott-Reid was that there were "too many chiefs". The result of a number of acquisitions were that there were too many senior people. This I find was the underlying reason for the restructure.

110. Second, the reduction from five senior roles to three senior roles in this restructure meant that there were two people who were going to leave. There is not a suggestion that there was another whistle blower, in other words the stage had been set for two people to leave not simply one. I find that the underlying reason for the restructure here was not any whistleblowing on the part of the Claimant.

111. Third, the intemperate exchange in May 2022, namely the comment made by Mr Cooke about the Claimant leaving. It seems to me that that betrayed Mr Cooke's honest view that he did not see the Claimant's long term future in the Respondent organisation, albeit the precise and unprofessional way this was expressed was as a result of the personal pressure he was under at that time.

That exchange significantly predated the protected disclosure on 8 September 2022.

112. Fourth, the Claimant's comments and the consultation on 24 November about this being a political redundancy relating to control and power, I find that was an astute comment. There was an element of politics, but I find that this related to the personality politics of senior management within the Respondent rather than the protected disclosure.

113. Fifth, there was a difference of philosophy regarding product development between the Claimant and Mr Bullimore.

114. Sixth, I take account of the fact that Mr Bullimore came into the Respondent business with a business that was significantly larger in revenue than the Claimant's business. To the extent that there was a difference of approach between the two men the Claimant was at disadvantage because of the disparity in size of the parts of the business that they were responsible for.

115. Seventh, I take account of the fact the Claimant himself chose not to apply for any of the roles available in the restructure and did not appeal, in other words he did not fight for a place in the new organisation.

116. Eighth, importantly I accept Mr Cooke's perception he did not see this as "whistleblowing" or the making of a protected disclosure. This does not to undermine the legal conclusion that was a protected disclosure. It is relevant to how much of an impact it would be likely to have made on Mr Cooke's thinking. If Mr Cooke did take anything away from the conversation with the Claimant on 8 September it was that the Claimant and Mr Bullimore had a complete difference of approach. In other words it was going to be difficult to have both of these people in their current senior roles and to manage it successfully.

117. Part of Mr Cooke's realisation it seems to me can be attributed to the disclosure on 8 September. The conversation on 8 September would not be the only source of his understanding about relations within the management team.

118. In conclusion, I find that there were number of reasons for the dismissal, structural, financial, "political". I find that it was for the reasons set out above. Any comments that were made on 8 September were no more than a minor part of the overall picture. I do not find that that conversation "made waves" speaking colloquially such that it explained what subsequently happened in the restructure in the organisation.

119. In conclusion I do not find that the sole or principal reason was the protected disclosure.

120. Given that conclusion the section 103A is **not well founded**.

"Ordinary" unfair dismissal under section 98(4) ERA

Issue 2.1 – length of service

121. The Respondent is not taking any point on length of service in relation to the claim of "ordinary" unfair dismissal.

Issue 2.2 – what the principal reason for the dismissal? The Respondent says it was for redundancy which is a potentially fair reason under s.98(2c) of the Employment Rights Act 1996.

122. I find that the reason for dismissal was redundancy.

Issue 2.3 – was there a genuine reason that redundancy situation in relation to the role of Chief Product Officer. The Claimant's case is that the role was still required.

123. I have considered the statutory definition contained within s.139(1)(b)(1) of the Employment Rights Act 1996 the fact that requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

124. It is not within the remit of the Tribunal to go behind of the commercial reasons for a redundancy or second guess that commercial judgment on the part of the employer provided that there is a genuine redundancy.

125. The Respondent had decided upon a structure without a CPO role. I find that the CPO role was an employee of a particular kind; specifically a product role at the most senior level.

126. The Claimant challenges that there was a reduction and says that there was a need for that kind of role. He argues that there are other people being recruited into what might loosely be described as product roles. I accept that there were roles which impinged on matters relating to product development.

127. I also accept the Respondent's evidence that these were at a much lower level of the organisation and that they were substantively different to a CPO role. These were not employees of a particular kind in common with the Claimant to mean that there was no such genuine redundancy. I find that there was a redundancy situation corresponding to the statutory definition in s.139(1)(b)(1).

Issue 2.4 – the Claimant accepts in his role that he was in a pool of one. There is therefore no issue as to selection.

128. This issue was somewhat difficult to understand.

129. There were five individuals placed at risk of redundancies and there were three new roles created. Jennifer Scott-Reid retired meaning that there were four individuals at risk of redundancy and three roles.

130. Given that situation, it is not clear to me that there was a pool of one, since it appears that five people were placed at risk.

131. The Claimant believed that roles were earmarked for others, it seems to me that is probably was in the minds of senior management that there were particular people who may be suitable for particular roles. Nevertheless the Claimant did not apply for any of the roles as part of the process nor make any alternative suggestions directed at attempting to avoid a redundancy situation.

132. There was no selection because the Claimant did not put himself forward to those three roles. He might have rightly perceived that these roles were better suited for others but ultimately there was no selection because he did not put himself forward. It is for that reason that there is no unfairness arising from this part the process. In short, since there was no need for selection the Respondent's process cannot be criticised under this heading.

Issue 2.5 – was there a fair consultation?

133. The Claimant's position is that any consultation was a sham.

134. I find that there was a consultation which included was a frank exchange of views. I did not detect the Respondent particularly changing its position in response to the Claimant's criticisms and comments but his principal position was that they should not delete the CPO role, which was a central plank of the Respondent's proposal. Essentially the two parties did not agree.

135. It is not clear to me from the documented notes that the Claimant put forward a completely different proposal nor that there was a failure to evaluate a proposal. Mr Bullimore's very detailed email of response to the Claimant shows that he was at the very least engaging with the points which the Claimant was raising rather than simply ignoring them and I would say also the consultation meeting there was a back and forth and exchange of views. Again Mr Bullimore was engaging with the points albeit that his position did not change.

Issue 2.6 – was there proper consideration of suitable alternative employment.

136. There was no suitable alternative employment has been identified. That is not surprising since this was a very senior role and it was being deleted or rather the role was being made redundant.

2.7 – if dismissal was procedurally unfair would the Claimant have been dismissed in any event and if so when

137. This poses a preliminary question which is: was the dismissal procedure unfair?

Appeal

138. I have considered quite carefully the appeal rights and really there are two points that relate to this. The evidence of Jennifer Scott-Reid was that although the letter confirming the dismissal was signed by herself the decision about the

redundancy was made collectively including Damon Bullimore and Jon Cooke, the appeal right was to Jon Cooke and Michael Warren.

139. The Claimant makes the point that it would not have been a fair appeal since these two individuals made a decision denying him his bonus.

140. It seems to me that there is a further point which is if Jon Cooke was involved at an earlier stage there is a question about whether he should also have been involved in the appeals stage, could it be said that he was independent? It seems on one view of it he was involved in both the decision to dismiss and also at the appeal stage and I did wonder whether this was arguably a procedurally unfair aspect.

141. Taking that second point first, Jon Cooke took a decision about the restructure but he did not take the decision to dismiss the Claimant since the Claimant himself decided not to be considered for any of the roles. Mrs Scott-Reid confirmed the position which was that he would be made redundant having not applied for any of those roles.

142. As to the question of the bonus and whether these individuals could not have heard an appeal fairly and independently I acknowledge the argument put forward by the Claimant that this was certainly not a situation where Mr Cooke and Mr Warren were coming to this with no preconceptions or with a completely blank sheet. On the other hand the Claimant was in a very senior role. The appeal needed to be dealt with by someone senior and ideally more senior than him, the options were limited.

143. Given that the Claimant submitted no appeal and there no appeal hearing it is difficult to find the appeal unfair. If the Claimant had suggested as part of the internal process that these were not the right people to hear the appeal, giving reasons and that request was ignored again that might be something that I could examine but that is not something that did happen.

144. The Claimant did not apply for any roles. Since he did not appeal, the argument that the appeal was unfair is hypothetical rather than based on a process which was put into effect.

145. In these circumstances I do not conclude that there was an appeal which fell outside of the range of reasonable responses.

Fairness of whole process

146. Stepping back, as I am required to do to look at the whole process I do understand the Claimant's position he felt there was essentially a foregone conclusion. Looking at the process objectively, there was an appropriate process that was followed and there was consultation with him. He was given the opportunity to participate in it, the fact that the Claimant does not agree with the outcome does not make this an unfair dismissal.

147. I find the decision to dismiss was within the range of reasonable responses both substantively and procedurally.

Breach of contract (bonus)

3.1 – did the Claimant have a contractual entitlement to a performance bonus or was it discretionary?

148. The Claimant relies on terms agreed in an email dated 1 October 2021 at 10:46 from Mrs Jennifer Scott-Reid to himself in an email between the parties on 17 November 2022. If I start first with what was agreed I must look at what was agreed between the parties at the time i.e. September/October 2021 and any possible implied terms at that time. I do not find that there was a subsequently agreed variation.

Express terms

149. What were the express terms? Was there a clear and certain agreement?

150. The Claimant can only be deemed to have agreed what was in the emails unless there are implied terms. The Claimant was not for example referred to the terms of a bonus policy so that he could understand that he was being included in a company wide bonus scheme. There was no documentation provided to him at the time to make it was being agreed that there was only a discretionary bonus.

151. I find that it is clear that the bonus was to be £25,000 that part is certain. I find that it was to be payable following the conclusion of two elements by the Claimant. First, transitioning all existing contracts onto a twelve month contract relating to enterprise clients which was 70% by revenue. Also the second element assisting the business in delivery of the group wide platform.

152. There is no documentation which says that EBITDA was a consideration in the valuation or payment of the bonus that is something that is mentioned over a year later on. In October 2022 I do not find that there was an agreed variation.

153. As to whether the contract was said to be *discretionary* I bear in mind that the figure of £25,000 is contained within in the on target earnings of £150,000. The fact that other individuals might have had a discretionary bases for their bonus it seems to me this is not relevant here or at least not determinative, it is quite clear that the bonus arrangements were tailored to an individual and tailored to individual senior employees. It was not an express term that bonus would only be paid subject to management discretion or after the calculation of EBITDA.

154. As to the suggestion that the bonus was "non-contractual", the terms of the bonus were not defined within the body of the written employment contract. That is not remarkable in itself because the Respondent generally provided for bonuses by a separate arrangement.

155. I do not find that the written employment contract or the main body of the written contract represented a decision by the parties not to award a bonus. It is clear from subsequent discussions and particular comments by Mrs Scott-Reid that in her view it was agreed that there was going to be a bonus. This is significant bearing in mind she was the person negotiating with the Claimant on behalf of the Respondent. It is also realistic and consistent with the contemporaneous exchange in 2021. I find that there was an intention to create legal relations. The discussion about the bonus was taking place at the same time as a resignation from PTL, a new contract of employment was being entered into and furthermore it had been agreed with the Claimant that his package was £150,000 on target earnings. That was £125,000 salary and £25,000 bonus.

156. Given that the Respondent failed to follow up with a bonus letter we are simply left with the exchange of the emails at the time. I do not find that the Tribunal should infer from the circumstances that he should be governed by a document that he was never provided with. That was not part of any agreement with him.

<u>Implied term: Custom & Practice</u>

157. The Respondent relied on an implied term that by custom and practice bonuses were only paid after the end of the year. In this case that would be January 2023. I have considered the IDS brief commentary on customer practice and it says this:

> "terms may be implied into employment contracts if they are regularly but not necessarily universally adopted in a particular trade or industry in a particular locality or by a particular employer. It will be assumed that the parties were aware of the custom and tacitly agree that it should be part of their contract without any need for it to be put in writing".

158. A bit later on it say this:

> "The traditional requirement for the implication of terms under this head is that the custom in question must be reasonable, notorious and certain. It must be generally established and well known and that it must be clear cut".

159. I do not find that there was a practice from a particular locality or this particular employer that was reasonably notorious, meaning "well known and certain", that bonuses would only be paid from the following calendar year. The Respondent has failed to prove the existence of such an implied term.

160. As to meeting the terms of the agreement relating to bonus, it is not in dispute the Claimant hit the KPIs see paragraph 17 of Mrs Scott-Reid's witness statement.

161. Given that evaluation of EBITDA was not any element of the bonus, there was no need e.g. from the point of view of business efficacy for accounts to be produced at the end of the year in order to have an EBITDA figure.

Timing of payment of bonus

162. The question is therefore one of timing. When should the bonus have been paid, if it was after a point when the employment had come to an end then the Respondent argues that there is no entitlement by operation of clause 23.4.

163. I find in this case it was an annual bonus and there are two reasons, first is what Mrs Scott-Reid says in her email of 22 November 2022 the second is the figure of £25,000 was plainly linked to the Claimant's annual remuneration.

164. The contract does not expressly provide for a date of payment. On the other hand the position of the Respondent cannot be and I find that it cannot have been agreed (nor implied for business efficacy) that the Respondent could simply dictate any later point in time when that bonus would be paid. There was no need to wait for the end of the year since the Respondent's EBITDA figure was not a relevant consideration.

165. I find that given that this is an annual bonus the period that it refers to is the period ending on 30 September 2022 (i.e. one year from the commencement date of 1 October 2021) and it was therefore due at that point. I do not accept the argument that by either express or implied terms the bonus was not payable until January 2023, some three months later.

166. In those circumstances I find that there was a bonus which was due of **£25,000**. That figure has not been paid in breach of contract and accordingly I entered judgment for that sum.

Employment Judge Adkin

Date 24 April 2024

REASONS SENT TO THE PARTIES ON

15 May 2024

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