EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Capeling**

Respondent: **TFX Group Limited**

HELD at Teesside Justice Centre **ON: 8 to 14 March 2024**

BEFORE: Employment Judge Johnson
Members: B G Kirby
G Gallagher

WRITTEN REASONS

1. These are the written reasons requested by both parties in respect of the Judgment promulgated on 27 March 2024, dismissing the claimant's complaint of automatic unfair dismissal for making protected disclosures and being subjected to detriments for making protected disclosures.
2. The claimant conducted these proceedings herself. The claimant gave evidence and called to give evidence Mr Max Trebilcock. The respondent was represented by Mr Singer of counsel, who called the following witnesses to give evidence:-
    i. Mr Gideon Lake (strategic accounts director).
    ii. Mr Arco Vander Kaaden (regional commercial director).
    iii. Miss Hayley Twinn (national sales manager).
    iv. Mr Keith Lalor (HR manager).
3. There was a bundle of documents containing 922 pages of documentation. There were two supplemental bundles, the first containing 78 pages of documents and the second containing a further 66 pages of document.
4. Mr Singer on behalf of the respondent asked the Tribunal to make an Order under Rule 50 of the Employment Tribunal Rules, preventing the publication or use of one of the documents in the bundle, other than in the course of these

proceedings. That document is the "Technical File" which appears at P.699-740 in the bundle and in respect of which the claimant had sought, and obtained, an Order for specific disclosure. Mr Singer submitted that this file contains commercially sensitive information which ought to be protected from improper use or publication. Mr Singer referred to the respondent`s written application for that Order and the claimant`s response to it. The Tribunal saw no good reason for that document to be utilised outside these proceedings and, having read the claimant`s response to the written application, made an interim Order restricting such use during the course of the Hearing.

5. The claimant, her witness and the witnesses for the respondent had all prepared typed, signed witness statements.

6. By a claim form presented on 28 November 2022, the claimant brought complaints of automatic unfair dismissal for making protected disclosures, contrary to section 103A of the Employment Rights Act 1996 and being subjected to detriments for making protected disclosures, contrary to section 47B of the Employment Rights act 1996. There were two preliminary hearings before Employment Judge Martin on 21 March 2023 and Employment Judge Pitt on 1 November 2023. Following those hearings, it was accepted by the claimant that she would rely upon three individual protected disclosures, the first dated 28 July 2022 relating to documentation for the use of catheters, the second dated 11 August 2022 relating to the claimant's performance targets and the third dated 29 August 2022 relating to the existence or otherwise of Dispensing Appliance Contracts (DACs).

7. The relevant statutory provisions engaged by the claimant's complaints engage sections 43A and 43B of the Employment Rights Act 1996:

   43A MEANING OF PROTECTED DISCLOSURE

   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.

   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,

   (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

   (d) that the health or safety of any individual has been, is being or is likely to be endangered,

   (e) that the environment has been, is being or is likely to be damaged, or

   (f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

8. The word "information" is not defined in the legislation, nor is "reasonable belief" and nor is "public interest". The Employment Tribunal must therefore rely upon

guidance given by the higher courts as to the interpretation of those specific words. Reference was made by the Tribunal to the claimant on several occasions throughout this hearing, as to the principles to be applied in claims such as hers and how those principles are to be applied. It was clearly explained to the claimant that the protected disclosures upon which she seeks to rely must be disclosures of "information", which word should be given its ordinary meaning. Making an allegation, raising a concern or asking a question may or may not form part of a disclosure of information. What the Employment Tribunal must do is to look at everything that was said or written and examine all the circumstances in which it was said or written. The Tribunal must also consider the claimant's knowledge and motive at the time the disclosure was allegedly made. The Employment Tribunal should separately identify each individual disclosure and identify the following:-

i. What are the facts disclosed?

ii. What is the legal obligation?

iii. What tends to show any breach of that legal obligation?

iv. Is the claimant's belief in the breach reasonable?

v. Does the claimant believe that the disclosure is in the public interest?

vi. Is that belief reasonable?

vii. Has there been a qualifying disclosure.

9. These principles were explained to the claimant in what the Tribunal considered to be clear and unequivocal terms. The Tribunal was satisfied that the claimant understood what was expected of her. The claimant accepted and acknowledged that, unless she could prove that she had made at least one protected disclosure, then none of her claims could succeed. The Tribunal acknowledged at several times during the hearing, that the claimant is a litigant in person dealing with what can be difficult and complicated areas of employment law. It was apparent throughout the hearing that the claimant was affronted and insulted by being dismissed by the respondent for the first time in her long career. The Tribunal found that the claimant's resentment at that dismissal tainted her approach to these proceedings. The claimant was frequently aggressive and confrontational when giving her evidence, when answering questions in cross-examination and when cross-examining the respondent's witnesses. Any evidence given by the respondents which the claimant felt contradicted her own, was met with an accusation of "lying" or even "perjury". The respondent's witnesses and their legal advisors were accused of collusion and wrongful manipulation of documents. The Tribunal found those allegations by the claimant to be unfounded and unwarranted. The Tribunal had to remind the claimant that the Employment Tribunal is not a forum for her to criticise publicly what she perceives to be shortcomings in the respondent's business methods, as a retaliation for her dismissal. The claimant had to be frequently reminded that her task was to satisfy the Employment Tribunal on the balance of probabilities that :-

i. She made protected disclosures.

ii. She was dismissed as a result.

iii. She was subjected to detriments as a result.

10. The Tribunal spent the first day of the hearing (Friday 8 March 2024) reading the witness statements and examining the documents referred to in those statements. On the morning of Monday 11 March, the Tribunal explored with the claimant exactly which protected disclosures she intended to rely upon. The claimant was asked to identify those paragraphs in her witness statement and those documents in the bundle which she relied upon to show that she had made any of those alleged qualifying disclosures. Having undertaken that exercise and acknowledging the order in which cases of this nature should be dealt with, the Tribunal decided to first of all identify the alleged qualifying disclosures and to decide whether any of those amounted to a protected disclosure. The Tribunal would then go on to consider whether any of those disclosures was the reason or the principal reason for the claimant's dismissal, or whether they had any material influence on the imposition of any of the detriments upon which the claimant relies.

11. The claimant's employment with the respondent began on 16 March 2023, when she was appointed as the National Sales Manager (Urology). The claimant accepted that her appointment was subject to a six month probationary period. The claimant was dismissed before the end of that six month period, on 8 September 2022. The reason given by the respondent was the claimant's failure to perform satisfactorily during that probationary period. The claimant maintained that the real reason why she was dismissed, was because she had made protected disclosures.

12. In her claim form ET1 at page 17 in the bundle, the claimant states, "I have made a disclosure in the public interest – further details on the following page". At page 24 in the grounds of complaint, the claimant states the following:-

> "*I was unaware that my regular 1-1 with Arco Vander Kaaden on 8 September had been changed to a dismissal meeting and was shocked to see Keith on the call, there had been no HR discussions with me at any point during my probation, apart from a disclosure conversation with Arco on 29 August 2022. I fear fair practice was not adhered to and that I had been dismissed because of the disclosure conversation. Why suddenly, so close to passing my probation should I be dismissed? I have identified and have full evidence to support my whistleblowing claims – across the UK urology business there is a lack of business acumen, poor decision making and a low standard of communication, all this is having a high impact on the UK urology business gross margin, and ultimately the shareholder figure."*
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> At page 27 in the bundle the claimant goes on to state:-
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> *"I would like to confirm I made a disclosure in the public interest to my line manager Arco on Monday morning on 29 August after the EMEA manager's call and one week later I was dismissed. On the call we discussed some issues raised by Jan Breugelmans, Hayley's line manager around interdepartmental relationships in the UK. It was at this point I explained the actions of Hayley Twinn and Lisa Conlan at our breakfast meeting in Glasgow on 19 July, I disclosed the corporate negative culture, the attitude, aggressiveness and bullying I was undergoing from Hayley and Lisa. On that same call I also had a conversation with Arco about the missing contracts from Gideon Lake in the commercial vision of the DACs, the affirming of Arco that on our previous joint call, Gideon did admit in front of Arco and myself that there were no other contracts in place other than the four I had been provided with."*

That is the only alleged qualifying disclosure referred to in the original claim form.

13. At the first preliminary hearing before Employment Judge Martin on 21 March 2023, it was identified that the claimant may be seeking to rely on more than one alleged qualifying disclosure. As result, the claimant was ordered to provide further information, setting out, in writing, details of each and every disclosure she wished to rely upon. The claimant was ordered to identify each disclosure and to state how that alleged disclosure satisfied the requirements of section 43B.

14. The claimant provided that further information on 18 April 2023, which appears at page 60-63 in the bundle. In that document the claimant identified three separate disclosures as follows:-

    i. No legal regulatory instruction in place on the information for use (IFU) as to how the soft simplastic indwelling catheter (a Teleflex medical device) can remain in a patient's bladder.

       The claimant alleged that this was a disclosure which tended to show that the health or safety of any individual had been, is being or was likely to be endangered and that the information tending to show any such matter had been, was being or was likely to be deliberately concealed.

    ii. I was being held accountable for two differing sets of target figures by Mr Vander Kaaden my line manager. No other EMEA country national sales managers had two sets of target figures. I was being singled out, discriminated against, having higher targets, which are harder to achieve impacting my financial bonus earning capacity.

       The claimant alleged that this disclosure tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he is subject. The claimant went on to allege that the information tended to show that a matter falling within anyone of the preceding paragraphs had been, was being or was likely to be deliberately concealed.

    iii. The claimant alleged that 6 out of 10 reseller DAC's contracts were not legally in place.

       The claimant alleged that this tended to show that the health or safety of an individual had been, was being or was likely to be endangered or that information tending to show such matter had been, was being or was likely to be deliberately concealed.

    The Tribunal dealt with each of those three alleged disclosures separately.

15. (**First disclosure).** The claimant at paragraph 25 of her witness statement, states as follows:-

    "On the afternoon of 28 July 2022 Holly Thompson, account manager urology Midlands and South Yorkshire, emailed me asking if marketing had any literature that states the soft simplastic catheters are for short term use (seven days). Holly asked me this question because a urology nurse specialist informed her that the doctors thought that those catheters were for long term use (12 weeks). See Holly's email on page 369. The email clearly demonstrates the clinicians don't know how long to use a catheter for and have unknowingly using it "off label"".

    At paragraph 43 of her statement, the claimant states as follows:-

> *"Miss Twinn responded on 28 July at 17:00 informing me that the information required was on our internal ACT or learning platform. I found this quite incredulous and emailed straight back, pushing her for printed accessible documents for the clinicians as can be seen on page 373.*"

At paragraph 45 of her statement, the claimant goes on to state as follows:-

> *"So I called Miss Twinn to discuss the situation that had arisen from Holly's email. "Hi Hayley just wanted to catch up about the lack of wear-time on the IFU." Then I asked her directly, "is this a MARCOM issue?"* (MARCOM is described as all the messages and media deployed to communicate with clinicians and patients; it brings branding, packaging, printed materials, advertising and online presence. She said*, "I'm not sure, it might be down to product registrations." I asked Miss Twinn, "can you urgently pick this up, we have a safety gap, will you speak to Jan and Patrick to get further direction please".*

16. The claimant was unable to identify the date or the time of this telephone call nor the place from which it was made. Miss Twinn denied that any such telephone discussion had ever taken place. The Tribunal found Miss Twinn's evidence to be composed and consistent and that she had a clear and accurate recollection of these matters. The Tribunal accepted Miss Twinn's evidence that no such telephone conversation had taken place. Accordingly, there could have been no qualifying disclosure if the telephone conversation did not take place.

17. The Tribunal examined what the claimant had written in her email of 28 July at page 374. The Tribunal found that no "information" was disclosed by the claimant which tended to show any breach of any legal obligation. The claimant was in fact requesting information from Miss Twinn, which information (the whereabouts of the product information) was promptly provided by Miss Twinn.

18. Mrs Capeling, with the support of Mr Trebilcock, sought to persuade the Tribunal that there was a legal obligation upon the respondent to provide specific information about the length of time for which such catheters could remain in place. No specific regulations were identified by either the claimant or Mr Trebilcock. The Tribunal found that Mr Trebilcock's evidence was a matter of his opinion as someone who had been engaged in the industry for many years. That was tantamount to "expert evidence", permission for which had not been granted by the Tribunal and in respect of which the claimant had been told at the preliminary hearing that prior permission would be required if she sought to introduce expert evidence.

19. The Tribunal found that what was written by the claimant in her email of 28 July did not amount to a qualifying, protected disclosure. It did not contain any "information" which could possibly satisfy the statutory definition.

20. (**Second disclosure)** The second alleged disclosure upon which the claimant relies is dealt with in paragraphs 14-24 of her witness statement. On 12 July 2022 the claimant was presenting a business plan and "performance v target" at the respondent's manager's meeting in Rotterdam. During the course of that meeting, the claimant "realised I was the only country manager that had two sets of targets." The claimant identified that her first target was shown as Plan 1 on the EMEA file, whilst the second was shown as Plan 2 on the annual operating

plan, which was a higher target. At paragraph 16 of her statement, the claimant states as follows:-

> *"I asked out loud to the whole group: "What's this all about?", pointing at the two columns of targets. Mr Vander Kaaden replied, "Continue on as you are". I then asked, "So should I get the annual operating plan (AOP) as the correct target figures uploaded into the monthly circulated EMEA file?" Mr Vander Kaaden answered "No". I tried to make the matter seem lighter as I was anxious and with a nervous laugh said, "I prefer the first set of targets" referring to those being widely circulated demonstrating the higher 11.9% growth performance."*

21. The claimant goes on to state at paragraph 17, "*At first I couldn't understand the rationale for not updating the circulated monthly EMEA file, then it occurred to me that Mr Vander Kaaden was falsely keeping the EMEA file alive because it made him appear to be overachieving in the eyes of the wider organisation, showing double digit growth. The consequence of this deception would potentially serve for a higher bonus payment for Mr Vander Kaaden and he was planning his own very expensive wedding. I do understand AOP figures can flex, and it should always be AOP that is worked towards. However, what other motivation would Mr Vander Kaaden have not to update the official circulated EMEA monthly file with the correct EMEA figures?*"

22. The Tribunal found Mr Vander Kaaden's evidence on this matter to be clear, consistent and accurate. Mr Vander Kaaden explained the difference between the two sets of figures and also explained that the discrepancy in the figures would make no difference whatsoever to his own personal bonus. Apparently what had happened was that the original set of target figures contained an error in the way they had been split between individual countries and individual regions. The numbers were adjusted, but due to some computer glitch, the original figures also remained on the file. As a result, all of the managers had been originally given the wrong set of figures. The Tribunal found Mr Vander Kaaden's explanation to be perfectly reasonable and likely to be correct. The Tribunal did not accept the claimant's interpretation of the figures, particularly as she had described herself as an "intelligent and capable business woman". The Tribunal was not satisfied that the claimant genuinely believed that there had been a breach of any legal obligation on the respondent's part. The Tribunal did not accept that a discrepancy in the claimant's target figures could reasonably be described as a matter of public interest. The Tribunal did not accept that the claimant reasonably believed that this was a matter of public interest. The claimant failed to identify the source of any legal obligation and failed to identify any breach. The Tribunal found that what was said by the claimant at the meeting did n ot contain "information" and could not and did not amount to a qualifying disclosure in accordance with section 43B.

23. (**Third disclosure)** The claimant alleged that during her employment with the respondent, she had a number of discussions with Mr Gideon Lake (director of strategic accounts) about obtaining copies of the signed DAC agreements. The claimant says at paragraph 51 of her statement that she wanted to see the DAC's contracts "*to ensure there were no restrictions that would prevent me progressing the project. There were 10 DACs in total, with whom legally binding agreements should have been in place. Mrs Conlan was part of this DAC discount rationalisation project and even she didn't have copies of the other six agreements as they were in fact missing. Mr Lake was a director of longstanding*

within Teleflex and was covering up his inadequacy to legally protect the business and patient user. At one Teams meeting he actually shocked me by shouting at me, "the lack of available contracts is inconsequential". I have never ever in my career partnered with another organisation and not had formal contracts in place."

24. At paragraph 53 of her statement, the claimant states as follows:-

> *"On Wednesday 24 August 2022 Mr Vander Kaaden and I had a call with Mr Lake with regard to the DAC discounts, during this call Mr Lake actually admitted for the first time, "there are no contracts in place other than those already provided." Mr Lake was a director operating outside of legally binding agreements."*

25. At paragraphs 55 and 56 of her witness statement the claimant sets out what she considers to be her qualifying disclosure in respect of the DAC agreement. The claimant states as follows:-

> *"On 29 August 2022 after the regular Monday morning manager's call, I followed up on a Teams call with* Mr *Vander Kaaden*. I expressed my utmost concern to *Mr Vander Kaaden about our previous call with Mr Lake, commercial director, which was held just two business days earlier where Mr Lake openly admitted there were no contracts for six of our 10 dispensing appliance contract to customers. I said, "Arco did you hear Gideon admit there were missing contracts from that last call, yes? There are serious implications for us you know, and we are putting our home care patients at risk." Mr Vander Kaaden replied "No" and I said "Sorry? You are kidding me, we are not operating properly here. What about product warranties, indemnity, audit, we could all get into real trouble?" I told Mr Vander Kaaden, "There was a point on one previous call (where I was once again asking for copies of all DAC agreements) Gideon actually shouted at me stating the lack of available contracts was inconsequential."*

26. Both Mr Lake and Mr Vander Kaaden gave evidence to the Tribunal about this matter. Again, their evidence was measured, clear and consistent. Mr Lake confirmed that a DAC agreement governs the commercial relationship between the two parties. Not every relationship with DAC will have a DAC agreement. That is a commercial decision between the parties. Where there is no DAC agreement, the supply of any product is given by Teleflex's standard terms and condition of sale, a copy of which appears in the bundle. Mr Lake's evidence was that the absence of any DAC agreement in a particular case did not infringe upon the general duties to consumers by Teleflex as a manufacturer and has no bearing whatsoever on health and safety. Mr Vander Kaaden confirmed that in his evidence. Mr Vander Kaaden confirmed that the respondent was still in negotiations with some of its suppliers in respect of a renewal of the DAC agreements and that there was nothing unusual in supply continuing whilst those negotiations took place.

27. Again, having described herself as an intelligent and capable businesswoman, the Tribunal found that the claimant was or ought to have been aware of the position at that time with those contractual negotiations. She was a national senior manager and either knew or ought to have known of the respondent's terms and conditions of trading. The Tribunal accepted Mr Vander Kaaden's evidence that the respondent was engaged in "completely normal commercial

negotiations." The Tribunal noted the claimant's description of Mr Lake as someone "covering up his inadequacy" and someone who is "not suitably qualified." The claimant provided no evidence to support those unfounded allegations.

28. The Tribunal found that the claimant had failed to identify the nature and extent of any legal obligation, or that there had been any breach of any such obligation. The Tribunal found that the claimant had failed to establish that the health and safety of anyone had been, was being or is likely to be endangered or that any information relating to any such matters was being concealed. Accordingly, nothing said by the claimant to either Mr Vander Kaaden or Mr Lake amounted to a qualifying disclosure in accordance with section 43B.

29. The Tribunal found that none of the three alleged disclosures relied upon by the claimant, amounted to a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996. Because there were no qualifying or protected disclosures, then the claimant could not have been dismissed because she had made such a disclosure and could not have been subjected to any detriment on the grounds that she had made such a disclosure. Those claims are accordingly dismissed.

30. At the conclusion of the hearing Mr Singer for the respondent asked the Tribunal to specifically draw the claimant's attention to the provisions of Rule 31.22 of the Civil Procedure Rules 1998, which states as follows:-

> *''31.22 — (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where —*
>
> *(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;*
>
> *(b) the court gives permission; or*
>
> *(c) the party who disclosed the document and the person to whom the document belongs agree.*
>
> *(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.*
>
> *(3) An application for such an order may be made —*
>
> *(a) by a party; or*
>
> *(b) by any person to whom the document belongs."*

31. Mr Singer asked the Tribunal to record that the claimant had been informed of those provisions in so far as they relate to some of the documents in the bundles, which the respondent considers to contain sensitive and confidential commercial information.

32. Mr Singer then asked the Tribunal to make permanent the preliminary Order under Rule 50 relating to the technical file and referred to in paragraph 4 above. The Tribunal was satisfied that it was appropriate to make that Order. The technical file was not referred to in any part of the claimant`s statement, nor was it referred to at any time during the Hearing. Mr Singer submitted that it is

something which the claimant should not be permitted to publicise or refer to elsewhere than in these proceedings. The claimant was unable to provide any good reason as to why such an Order should not be made.

_____

Employment Judge Johnson

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Date: 9 May 2024

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