EMPLOYMENT TRIBUNALS

Claimant: Mr Terry Hancox

Respondent: S K Heating and Cooling Limited

Heard at: **Bristol** **On:** **15 and 16 April and 13 and 14 May 2024**

Before: **Employment Judge Livesey**

Representation
Claimant: In person
Respondent: Mr Bradley, HR consultant

JUDGMENT having been sent to the parties on 18 May 2024 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Claim

1.1 By a claim form dated 20 October 2022, the Claimant brought a complaint of automatically unfair dismissal under s. 103A of the Employment Rights Act. The claim included an application for interim relief.

2. Evidence

2.1 The following witnesses gave evidence;

- The Claimant;
- Mr Smith, Director;
- Mr Dolphin, Director;
- Mr Bradley, HR Consultant;
- Mr Gibbins, Director.

2.2 The following documents were produced;

- C1; Claimant's supplementary bundle (in two parts with no index);

- C2; Claimant's skeleton argument;

- C3; Claimant's second skeleton argument;

- R1; Hearing bundle (indexed and paginated).

3. Issues

3.1 The issues had been discussed, agreed and set out in the Case Management Order of 4 November 2022. They had been repeated in the Case Management Order of 21 August 2023 and, although the Claimant had not been present at that latter hearing, he did not subsequently seek to challenge the accuracy of the Order or Summary.

3.2 The issues were revisited with the parties at the start of the hearing, as was the Claim Form which clearly contained an assertion of automatically unfair dismissal under s. 103A of the Employment Rights Act.

3.3 Although the Claimant agreed that he was advancing a complaint under s. 103A, he also asserted that his claim ought to have included complaints of detriment claim under s. 47B and that became the basis of an amendment application (see, further, below).

4. Relevant background and preliminary applications

4.1 Employment Judge O'Rourke dealt with the interim relief application which had been brought within the Claim Form on 4 November 2022. He dismissed it. He also provided case management directions and listed the case for a three-day final hearing, having identified issues.

4.2 A Response was filed on 24 November 2022.

4.3 The file grew. There was a large amount of correspondence between the parties and to the Tribunal, much of which was rather combative, particularly from the Claimant. Many of his emails concerned the outcome of the interim relief hearing which had taken place before Employment Judge O'Rourke. He also applied to strike out the Response and, at a hearing conducted by Employment Judge Leverton on 23 June 2023, a further preliminary hearing was listed to consider their application.

4.4 Employment Judge Gray dealt with the application on 21 August 2023 and dismissed it. The Claimant did not attend that hearing. He said that he was unwell. A final hearing was then listed for 15 to 17 April 2024.

4.5 A further hearing became necessary in December, the fourth. That was because the parties remained in dispute over disclosure issues. Employment Judge Richardson made some further orders on 7 December 2023 on that issue, and he pushed back the date for exchange of witness statements.

4.6 Despite that hearing, the dispute over documentation rumbled on. Employment Judge Bax wrote out to the parties in January and attempted to discover what was in issue at that point. It was clear that the Claimant was still alleging that the Respondent had been guilty of non-disclosure. On 16 January, not only did the Tribunal have to inform the parties that it

appeared to be having to 'micro-manage' the case, but it also urged them to focus on the issues and resolve their differences through cooperation.

4.7 On 13 March, the Claimant stated that he was not ready for the hearing. He blamed issues relating to outstanding documentation and/or disputes over the bundle. A few days later, he applied to have the interim relief decision reconsidered, which Judge O'Rourke rejected as having been out of time. It was then more than a year out of time.

4.8 On 3 April, Employment Judge Self told the parties that the hearing remained listed and that any outstanding disclosure issues would be addressed at its start. If the Claimant remained unhappy about the contents of the bundle, he was invited to bring his own bundle of additional documents to the hearing.

4.9 In reply, the Claimant applied for a postponement "*on health grounds*" (anxiety). Judge Self indicated that many parties became anxious as their hearing approached and that, in the absence of up to date medical evidence, the hearing remained listed.

4.10 On 10 April, the Claimant referred to a list of 17 detriments which had been provided to the Tribunal sometime before. He said that, if they were allowed, the hearing would have to be postponed. The Regional Employment Judge asked him to provide a copy of that list as it was not obvious from the voluminous file when it had been provided and/or whether an application to amend had been made.

4.11 On 11 April, the Claimant provided the list which mainly spanned a date range of 'mid Sep' (2022) (No. 1) to 4 November 2022 (No. 14). Allegations 15 and 16 concerned the Respondent's alleged dissemination of "*false allegations*" about the Claimant and its continued failure to provide a reference. The 17th allegation concerned the fact that Employment Judge O'Rourke's Judgment in relation to the interim relief application had been published online. It was not clear how the Respondent was said to have been blamed for that.

4.12 The Claimant subsequently indicated that the list had been sent to the Tribunal on 17 March 2024. He was right. In his email in which he had applied to have the interim relief judgment reconsidered, he had also included the list and had asked whether the detriments would be added by amendment or whether he would have needed to file a new ET1. Amongst the morass of other correspondence at the time, that individual question was not answered.

4.13 On Friday 12 April, the Claimant wrote to indicate that he would not "*be taking part in a hearing unless it has a panel*". He said; "*if you wish to hold the hearing in my absence then go ahead. This is a public interest whistleblowing case and I am entitled to a panel*". A reply was sent in which he was informed that, as a complaint of unfair dismissal only under s. 103A, the claim would be heard by a judge sitting alone in accordance with s. 4 of the Employment Tribunals Act.

4.14 On Saturday 13 April, the Claimant emailed the Tribunal again. In the attached letter, he argued that his claim was one which required a full tribunal panel to hear it. He also raised an issue in relation to documents within the bundle. He suggested that Mr Bradley had included evidence of pre-termination negotiations which were inadmissible under s. 111A. In the letter he also said that he hoped that he would not be a lengthy journey from Birmingham for the case *not* to be heard.

4.15 The Claimant emailed again on the morning of the hearing at 8:08 am. He said that he knew that he was "*entitled to a panel for this type of case*". A message was received from him just before 10:00 am that he was going to have been late because of problems on the roads. He stated that he would attend by 10:45 am. He was present in the building by 11:05 am. The hearing started soon afterwards. There were then a number of things to sort out.

Hearing bundle

4.16 The Claimant maintained that he had not received a copy of the hearing bundle in its final form. Mr Bradley said that it had been sent to him on 20 December. The Judge checked the Tribunal's file which revealed that a bundle had been sent to the Tribunal and the Claimant that day which appeared to have been the same bundle.

4.17 The Claimant said that he had received a different hardcopy bundle which he worked from during the hearing without apparent difficulty. He did not identify any document which was missing and/or any material differences between the bundles during the hearing.

Composition

4.18 The Claimant had raised the issue of the Tribunal's composition in correspondence in the week before the hearing (see above). The position was explained again at the start of the hearing, as it had been in reply to his correspondence; a claim brought under s. 103A was heard by a judge sitting alone in accordance with s. 4 of the Employment Tribunal's Act. The Claimant was also referred to s. 111 of the Employment Rights Act, the Employment Tribunals and Employment Appeal Tribunal (Composition of Tribunal) Regulations 2024 and the absence of a Practice Direction from the Senior President of Tribunals.

Section 111A

4.19 The Claimant asserted that documents within the hearing bundle were covered by s. 111A and ought to have been excluded. He was given time to identify which they were. He identified the document at page 501. The Judge also identified another potential candidate at pages 337-8.

4.20 The Judge pointed out the provisions of s. 111A (3); the section did not apply in a situation in which a claim of automatic unfair dismissal was alleged on those grounds.

4.21 During the Claimant's cross-examination of Mr Bradley, he suggested, further, that the document at page 337-8 might have been covered by the without prejudice rule, but no application was pursued in that respect.

Claimant's witness statement

4.22 The Claimant offered a new, abridged witness statement at the start of the hearing. He applied to replace his original one with the new one. Mr Bradley did not object. When he gave evidence, however, he applied to revert to the old one.

Claimant's supplementary bundle

4.23 The Claimant arrived at the hearing with a supplemental bundle. On 3 April, Employment Judge Self had told him that, if there were disclosed documents missing from the main bundle which he wanted to put before the Tribunal, he could do so in a supplemental bundle of his own. At the start of the hearing, he was asked if that bundle included *only* documents which had been previously disclosed. He responded '*I think so*'. As it was, he referred to none of the additional documents in his witness statement, during his evidence or in cross examination of any of the Respondent's witnesses.

Respondent's statements

4.24 The Respondent indicated that, of the seven witness statements exchanged, it only intended to call four witnesses to give live evidence. Mr Bradley sought to rely upon the statements of Mr Behan, Mr Graham and Mr Rayner in writing only.

4.25 The Claimant wished to cross examine those additional witnesses. The Judge indicated that he could not compel the Respondent to call witnesses that it did not wish to. The Respondent could rely upon written statements but, in any situation in which the evidence was contested, it was unlikely that much evidential weight would have been placed upon them.

Mr Bradley's statement

4.26 The Claimant accepted that he had received all of the Respondent's witness statement upon exchange on 4 March, except Mr Bradley's. Mr Bradley, however, forwarded an email to the Tribunal which demonstrated that all of the statements had been sent to the Claimant at the same time, including his own. The Judge was satisfied that the Claimant had received it at the same time as the others.

Reasonable adjustments

4.27 The Claimant indicated that he needed reasonable adjustments in order to participate effectively in the hearing. He stated that he should have had the bundle at least seven days before the hearing and that the Judge should put his questions in cross examination to the Respondent's witnesses on his behalf.

4.28 The Judge was satisfied that the first of those requests had been complied with. As to the second, the Claimant was asked upon what basis it was

asserted that such an adjustment was required. He stated that medical evidence had already been provided. That evidence was not quickly found within the Tribunal file and the Claimant was given an extended lunch to enable him to consider his questions to Mr Dolphin and Mr Smith, who were both very short witnesses. He was told that, if at the end of lunch, medical evidence was found which justified the adjustments sought, the Judge could put those questions to those witnesses himself.

4.29 The file was reviewed over lunch. The Judge could see that the Claimant had applied for a postponement of the hearing on health grounds (anxiety) on 3 April. At that point, Employment Judge Self had replied, refusing the application on the basis that there was no up-to-date medical evidence upon which such a postponement could have been granted.

4.30 There was an old piece of medical evidence on file; a GP's letter dated 30 May 2023 which stated that the Claimant had been taking antidepressant medication since 2012. At that point he was complaining of irritability and moodiness but he was in work and the report had been written to support a request for an extension of time in relation to the provision of documents within the Tribunal and EAT processes.

4.31 Whilst the tribunal did have a duty to make reasonable adjustments in respect of a disabled litigant under s. 20 of the Equality Act, it obviously needed to be satisfied, amongst other things, that the litigant would have suffered a substantial disadvantage without them having been made (see, for example, the case of *Rackham-v-NHS Professionals Ltd* [2016] UKUT 10 and the *Equal Treatment Bench Book* and the *Presidential Guidance on Vulnerable Parties and Witnesses* of April 2020).

4.32 There was insufficient, current evidence to suggest that the Claimant ought to have been given the adjustment requested regarding the cross-examination of the Respondents witnesses there was no evidence that he would have suffered a substantial disadvantage and/or that his condition caused a sufficient impairment upon his day-to-day activities so as to have constituted a disability at that time.

4.33 As it turned out, the Claimant declined to ask any questions of the Respondent's first witness, Mr Smith. He then expressly stated that he agreed the evidence of Mr Dolphin and then proceeded to cross examine Mr Bradley at length for over two hours.

Amendment; relevant principles

4.34 As set out above, the Claimant had applied to amend his claim to include 17 allegations of detriment under s. 47B of the Act.

4.35 An Employment Tribunal only had jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of *Chapman-v-Simon* [1994] IRLR 124). If a case was not before the Tribunal, an application to amend was needed to include it (see, in particular, the observations of Langstaff P in *Chandhok-v-Turkey* [2015] IRLR 195 EAT from paragraphs 16-8).

4.38 In *Cocking-v-Sandhurst (Stationers) Ltd and anor* [1974] ICR 650 NIRC, Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changes to the basis of the claim or adding or substituting respondents. The key principle was that, in exercising their discretion, Tribunals ought to have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. The test was approved in subsequent cases and restated by the EAT in *Selkent Bus Company Ltd-v-Moore* [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in *Ali-v-Office of National Statistics* [2005] IRLR 201 CA.

4.39 The EAT held in *Selkent* that, in determining whether to grant an application to amend, the Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. That balancing exercise was at the heart of the determination of such applications an "*there are no permissible shortcuts*" (HHJ Tucker in *LQP-v-City of York Council* [2022] EAT 196). In *Selkent* Mummery J, as he then was, explained that relevant factors would include:

(i) The nature of the proposed amendment; applications to amend could range, on the one hand, from the correction of minor clerical and typing errors to, on the other, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal had to decide whether the amendment sought was one of the minor matters or a substantial alteration pleading a new cause of action.

A distinction may be drawn between (i) amendments which were merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which added or substituted a new cause of action, but one which was linked to, or arose out of the same facts as the original claim (often called "relabelling"); and (iii) amendments which added or substituted a wholly new claim or cause of action which was not connected to the original claim at all.

Mummery J in *Selkent* suggested that this aspect ought to have been considered first (before any time limitation issues were brought into the equation) because it was only necessary to consider the question of time limits where the proposed amendment sought to adduce a new complaint, as distinct from "relabelling" an existing one. If it was a purely relabelling exercise, then it did not matter whether the amendment was brought within the timeframe for that particular claim or not (see *Foxtons Ltd-v-Ruwiel* UKEAT/0056/08).

The fact that it was a new cause did not prevent an amendment from being made. The Court of Appeal stressed in *Abercrombie and ors-v-Aga Rangemaster Ltd* [2013] IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raised new causes of action, focus "*not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it*

is that it will be permitted". Where the effect of the proposed amendment was simply to put a different legal label on facts that were already pleaded, permission would normally have been granted;

(ii) The applicability of time limits; if a new claim or cause of action was proposed to be added by way of amendment, whether or not it arose out of the same facts as the original claim, it was "*essential*" (per Mummery J in *Selkent*) for the Tribunal to consider whether that claim or cause of action was out of time and, if so, whether there should have been an extension. Where the amendment was simply changing the basis of, or "relabelling", the existing claim, no question of limitation arose (see, for example, *Foxtons Ltd-v-Ruwiel* UKEAT/0056/08 per Elias P at para 13).

It was crucial to remember that the doctrine of 'relation back' had been held to no longer apply to Employment Tribunal proceedings following *Galilee-v-Commissioner of Police for the Metropolis* UKEAT 0207/16/RN. Accordingly, the date of that the new claim was brought was the date of the amendment application, not the date of the claim form which was being amended.

The use of the word "*essential*" should, however, not have been taken in an absolute sense and applied in a rigid and inflexible way so as to created an invariable and mandatory rule that all out of time issues must have been decided before permission to amend could have been considered. The judgments in both *Transport and General Workers' Union v Safeway Stores Limited* UKEAT 009207 and *Abercrombie-v-AGA Rangemaster Limited* [2014] ICR 209 CA emphasised that the discretion to permit amendment was not necessarily constrained by limitation. See also *Reuters Ltd-v-Cole* UKEAT/0258/17/BA in which HHJ at paragraph 31.

The fact that an application to amend was made *in* time was also not determinative of the application being granted. All factors had to be considered. It was no trump card (see paragraph 44 of *Marrufo-v-Bournemouth, Christchurch and Poole Council* UKEAT/0103/20/BA).

(iii) The timing and manner of the application; an application should not have been refused solely because there had been a delay in making it. Amendments could, in theory at least, be made at any stage of the proceedings. Delay in making the application was, however, a discretionary factor. It was relevant to consider why the application was not made earlier and why it was being made when it was: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Delay may have counted against the applicant because the overriding objective required, among other matters, that cases were dealt with expeditiously and in a way which saved expense. Undue delay may well have been inconsistent with these objectives.

The later the application was made, the greater the risk of the balance of hardship being in favour of rejecting the amendment (*Martin-v-Microgen Wealth Management Systems Ltd* EAT 0505/06). However, an application to amend should not have been refused solely because there

had been a delay in making it, as amendments may properly have been made at any stage of the proceedings, as confirmed in the *Presidential Guidance on General Case Management for England and Wales (2018).*

The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in *Ladbrokes Racing Ltd-v-Traynor* EATS 0067/06: a Tribunal will need to consider (i) why the application was made at the stage that it was and why it was not made earlier; (ii) whether, if the amendment was allowed, delay would ensue and whether there were likely to have been additional costs because of the delay or because of the extent to which the hearing would have been lengthened if the new issue was allowed to have been raised, particularly if they were unlikely to have been recovered by the party that incurred them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue was no longer available or was rendered of lesser quality than it would have been earlier.

4.40 These factors were not exhaustive and there may have been additional factors to consider. For example, it may have been appropriate to consider whether the claim, as amended, had reasonable prospects of success. The EAT observed in *Woodhouse-v-Hampshire Hospitals NHS Trust* EAT 0132/12 that there was no point in allowing an amendment to add an utterly hopeless case, but otherwise it should have been assumed that the case was arguable. In *Cooper-v-Chief Constable of West Yorkshire Police and anor* EAT 0035/06, one of the reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to have been investigated "*if this new and implausible case was to get off the ground*". However, Tribunals had to proceed with caution because it may not have been clear from the pleadings what the merits of the new claim truly were. Clearly identifiable factors of weakness needed to be found before such a point could have been taken against a proposed amendment (*Kumari-v-Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132).

4.41 In *Vaughan-v-Modality* [2021] IRLR 97, the EAT (HHJ Tayler), following the spirit of Underhill LJ in *Abercrombie and others-v-Aga Rangemaster Ltd* [2014] ICR 209, urged Tribunals to focus upon the practical consequences of allowing an amendment;

"*Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions.*"

Assumptions should not be made about prejudice;

"*Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice.*"

4.42 An application to amend had to be properly set out, as if it was part of the original claim. A failure to do so was 'fatal' (see *Ladbrokes* above and *Scottish Opera-v-Winnings* EATS 0047/09). A party cannot be given

permission to amend a claim on a carte blanche basis, on an undertaking that some details or grounds might have been provided subsequently.

Amendment; determination

4.43 The application to amend to include the 17 proposed detriment complaints under s. 47B was dismissed for the following reasons;

- The Claim Form was succinct and clear. It advanced a simple case of unfair dismissal under s. 103A which was recorded in the first Order of 4 November 2022 and reiterated in the subsequent one of 21 August 2023. The Claimant had not sought to challenge the recitation of his case;

- Most of the amendment application concerned matters that were significantly out of time. The application was dated 17 March 2024 yet most of the events occurred before and/or up to 4 November 2022. Section 48 (3) of the Act contained a three month time limit which could only be extended if it had not been reasonably practicable for such claims to have been advanced within time. No reasons for the Claimant's delay had been proffered;

- If the last three allegations within the list (Nos. 15, 16 and 17) truly were part of a continuing series of similar acts under s. 48 (3), the Claimant could still bring proceedings in respect of them;

- The application itself was made late, after four previous hearings and a month before the final hearing, which had been listed since August 2023. The claim was approximately 18 months old and needed to be resolved. The amendments would have led to a postponement of the hearing, the need for further case management, the collation and preparation of further evidence and re-listing;

- The Respondent opposed the application. It wanted (and was entitled to) a resolution of the claim without further delay and/or cost.

Claimant's failure to attend on the second day of the hearing

4.44 On the second day of the hearing, 16 April, the Claimant did not attend. An email was received which suggested that he had been taken ill. The hearing was postponed on condition that he subsequently supplied medical evidence justifying his non-attendance (see the separate Order of that date). After an unless order was issued for non-compliance, the Claimant did eventually provide some medical evidence in accordance with the order. The hearing then continued on 13 and 14 May by video with the parties' consent.

5. Facts

5.1 The following factual findings were reached on the balance of probabilities. Page numbers within these reasons relate to pages within the hearing

bundle, R1, unless otherwise stated and references have been provided in square brackets.

5.2 The Respondent is a heating and cooling installation and maintenance business, based in Gloucester. It employs approximately 40 people, with another 20 to 40 subcontractors engaged at any one time. Mr Smith, Mr Dolphin and Mr Gibbins were all Directors and a Mr Coiley was the CEO. The Respondent is part of a larger group of companies.

5.3 The Claimant was employed from December 2021 as a Mechanical Services Design and Project Engineer.

5.4 During the course of the hearing, several of the Respondent's policies were referred to, but none were produced into evidence. The Claimant's contract was produced [279-287].

Initial verbal disclosures

5.5 The Claimant alleged that he made a number of verbal disclosures about the alleged non-safe manner in which the Respondent's air-conditioning units had been installed. He was specifically concerned about the danger of asphyxiation. In his Claim Form, he said that his concerns were raised "*with my manager in March and April 2022*".

5.6 The Claimant contended that his manager's response was that the installation practice would be stopped and that previous installations were to have been reviewed and corrected if necessary. The Claimant urged him to concentrate upon those in domestic and/or hotel settings.

5.7 The Respondent agreed that the Claimant *did* raise concerns about its installations which concerned new gases which were being used in the industry which were regulated by BSEN378 and the EU F-Gas Regs. Mr Dolphin and Mr Lawrence, an air-conditioning coordinator, looked into the issue but found nothing to indicate that the installations had been non-compliant (see the subsequent email at [407-8]).

5.8 A few months later, in June, the Claimant's employment position was confirmed following the completion of his probationary period. He received a pay rise and the email included the following [402];

> "*Your suggestions and input on improving Health and Safety are welcomed and we look forward to your proposals, as this is part of a Project's Engineer role.*"

That appeared to have been the end of the matter.

Circumstances leading to the Claimant's dismissal

5.9 On Thursday, 29 September, the Claimant was thought to have left work early without good reason. Investigations were undertaken, including an

examination of the tracking data that was produced by the application on his business phone.

5.10 On Monday, 3 October, the Claimant's absence the previous week was raised with him. The Respondent's case was that he denied it at first but, when he was shown the tracking data which revealed that he had been at a competitor's premises (Hockley Building Services), he admitted that he had been to an interview. Having considered his position he resigned, giving notice. His resignation was accepted and he then walked around the office saying his 'goodbyes' to colleagues, Mr Dolphin, Mr Graham, Mr Rayner and Mr Behan.

5.11 The Claimant's case was rather different. He alleged that redundancies had been discussed with him as a possibility. He indicated that he had been interviewed at Hockley Building Services. He made that specific admission during his evidence. He further accepted that he spoke to colleagues, but only to say that he 'would be likely to be leaving at some point in the future'. His case was that he did not resign that day. In evidence, he said that the Respondent had simply 'invented' that suggestion.

5.12 On the balance of probabilities, Mr Smith's account was more likely to have been correct, as recorded in his notes of that week [335-6]. In other words, that the Claimant was effectively caught out for having attended an interview on company time, that he left the room for a moment to consider his position during the meeting on 3 October and that he returned and resigned, by giving notice. He then said farewell to his colleagues in anticipation of his imminent departure.

5.13 That account was more likely to have been true for the following reasons;

- The Claimant did not dispute Mr Dolphin's witness statement at all, which included the following;

  "*Late afternoon on Monday, 3 October 2022, Terry approached me at my desk to tell me he was leaving the company within the next few days as he was starting a new job at Hockey Services in Birmingham, whilst shaking my hand.*"
- The Respondent's email in which they accepted his resignation ([327] and [490]) would have been an odd one to have sent if the Claimant had not resigned (see below);
- He told others outside the business that he had left (see, further, below);
- The Claimant admitted in evidence that he had been to an interview, which corroborated the Respondent's account. During his closing submissions, he sought to distance himself from the word 'interview' and used the word 'meeting'. However it ought to have been described, it was still with a competitor and on the Respondent's time;
- The Claimant was not an impressive witness when he gave evidence; he was argumentative and did not readily accept the contents of contemporaneous written documents.

5.14 After the meeting on 3 October, at 1:21 am on 4 October, the Claimant sent an email which attached a letter to Mr Gibbins in which he raised a number of public interest disclosures under s. 43B (a), (b), (d) and (e); concerns about potential unsafe and/or illegal fittings carried out by the Respondent due to the increased flammability of A2L gases. Specifically, he was concerned about the risks posed to those sleeping in residential and/or hotel settings [412-3]. He followed the letter up with another one on 5 October [441-2].

5.15 Mr Gibbins responded and said that the matters which he had raised were taken very seriously and that the Claimant would hear from him in due course [316-7]. Also, in light of the Respondent's concerns about the Claimant's intended departure to a competitor, he was placed on garden leave and his mobile phone and other devices were sought.

5.16 Also on that day, the Respondent wrote to accept the Claimant's resignation [327] and [490];

> "*Following our discussion yesterday afternoon, we confirm our acknowledgement of your verbal resignation from your position as Mechanical Services Design and Projects Engineer. Your resignation has been approved. Your final day of employment will be 28/11/22.*
> *As detailed in your contract of employment item 14.3 we now confirm it would be in the best interests of all parties to put you on garden leave for the duration of your employment."*

5.17 In response to that letter correspondence, the Claimant replied to assert that he had not resigned [316]. He further alleged that he would take legal action if his phone was not returned to him [315]. He then wrote as follows [319];

> "*What will happen if you continue this victimisation is for me to contact relevant bodies such as besa and the hse to investigate my claims of serious negligence that could endanger life.*
> *I hope you change course tomorrow if not I will take action both as described above and I will initiate tribunal proceedings against SK and individuals….*
> *John Fisher has not forwarded me the information requested and has not unblocked my phone, he also can be liable through tribunal proceedings for acting as an agent of SK if he is found to conceal information.*"

5.18 In response, Mr Gibbins asked him again to "*remain away from the business*" [312-3].

5.19 On 5 October, the Claimant sent a significant number of further emails. He wrote to Mr Graham and accused the Respondent of behaving "*highly illegally*". He was rude about another employee, Mr Fisher [310]. He wrote to Mr Dolphin in which he stated that he would have been 'within his rights' to have contacted customers "*to warn them of the dangers posed by the systems we have installed*" [337]. He stated that he could have brought court action "*that will be costly and will damage reputations.*"

5.20 Mr Bradley was then introduced to the Claimant as the Respondent's HR consultant who was to deal with a disciplinary investigation which was to have been conducted into his absence on 29 September and his subsequent communications [307]. His response to that was to threaten him with personal liability for acts of victimisation and/or detriment [306]. He accused him of a 'farcical' approach and of having a 'startling' lack of knowledge [304].

5.21 Mr Smith became concerned that the Claimant was contacting the Respondent's clients on 5 October. A public sector client council had been told that the Claimant "*has effectively left*" the Respondent [343]. Mr Smith knew that that information could only have come from the Claimant himself and was therefore concerned what damage might have been done if the Respondent was not in control of that information and how continuity was going to have been provided. Mr Bradley asked him to stop contacting clients, which produced the following response [305];

"*Just one more correction your instruction not to contact any stakeholders as stated in my contract has no legal standing when dealing with a disclosure in the public interest and I advise you not to repeat that instruction as it is illegal.*"

5.22 The Claimant's emails on 4 and 5 October were often threatening and somewhat bombastic and demanding in tone. But they continued. He made further allegations of illegality in relation to the tracking application on his phone and said that he would have been reporting the matter to the police [418]. He issued instructions to Mr Bradley and made further threats that he would contact clients if the Respondent failed to comply with his wishes and/or that he would issue litigation [422] and [434];

"*As Wheatpieces is a job my name is linked to I will consider informing the client myself of the potential associated risks to their staff and guests in how the system has been installed. I will advise them to report the issue to Acrib and the Besa to investigate who can arbitrate on the matter if you continue to refuse to investigate and remedy.*" [422]

"*There is no rush to bring a claim as these detriments will be piling up with your help and I am hopeful that this does not end up in the Tribunal as they are busy enough and the reason it will end up in Court is if SK do not follow process ….*

What I suggested was for myself and the Directors to sit down to discuss and remedy my concerns about illegality rather they have taken the approach that leaves little option but confrontation. The window for dialogue is still open but it is closing, the other choice is escalation, I will leave that up to the Directors of SK. Me sending this letter was avoidable with dialogue." [434]

5.23 On 11 October, the Claimant was invited to a disciplinary hearing to face four allegations [297-8];

- His early departure on 29 September, despite a verbal warning on 20 September;

- His retracted resignation which had caused 'operational disruption';
- "*Inappropriate, misleading and offensive emails*" having been sent to company stakeholders;
- His failure to adhere to reasonable requests to limit his communications.

He was not sent any evidence in support of the allegations, either then or later. The Claimant responded in a similar vein to his previous communications [300-2].

5.24 The disciplinary hearing took place on 13 October remotely. It involved Mr Bradley and the Claimant. Mr Bradley's evidence was that, although the hearing was long, it was not antagonistic. The Claimant had accepted the thrust of the allegations against him, he had moved on and had secured other work and he seemed somewhat ambivalent about the outcome. He certainly expressed no doubt or confusion as to the reasons behind the hearing and/or the evidence which the Respondent had relied upon to get to that position. No notes of the hearing were made which was surprising and a shame.

5.25 The Claimant was subsequently sent an outcome email [288-9];

"*The facts - it is accepted that you went early, it is accepted that you went for a job interview, and it is accepted that the firm wrote to you 'accepting' your resignation. I have had to apply a balance of probabilities between Laurence Smith's version of events and yours. I have found however that Matt Dolphin, Ryan Behan, Iain Graham and Anthony Rayner have all confirmed that a meeting between you and Laurence and following this you went to each of them advising them that you were leaving. This obviously outweighs your version and suggests that you did mislead management in allegation two and me in this process. This leads me to conclude that allegation one, in the circumstances, is more likely proven noting the credibility issue you now have and the material evidence in this matter. Noting also that you appeared to agree to parts of allegation three and all of allegation for these all, in summary, lead to allegation five also being proven. In summary on the balance of probability it is more likely than not that all these events occurred as claimed rendering you in breach of company rules and ultimately proving gross misconduct.*

As a result of your actions, the Company has totally lost its confidence in you. You are therefore summarily dismissed for gross misconduct from your role with SK Heating and Cooling Ltd as from the date of this email, and as such you are not entitled to notice or pay in lieu of notice. "

Mr Smith said in evidence that the decision to dismiss was taken by all of the Directors together.

5.26 The Claimant did not appeal the decision, despite the opportunity to do so having been given to him [289].

5.27 In the meantime, the Respondent had investigated the disclosures that the Claimant had made in early October again with the manufacturers to satisfy themselves that their installations were safe. Having concluded their enquiries, they wrote to the Claimant on 18 October [410];

"*In response to the disclosures submitted by you on the 04/10/2022, we respond accordingly as outlined below.*
We take the disclosure very seriously and have carried out internal investigations to try and ascertain if the disclosure has any factual basis…."

6. Relevant legal principles

6.1 In accordance with the stepped approach recommended in the case of *Williams-v-Michelle Brown* UKEAT/0044/19/00, first, I had to determine whether there had been disclosures of '*information*' or facts, which was not necessarily the same thing as a simple or bare allegation (see the cases of *Geduld-v-Cavendish-Munro* [2010] ICR 325 in light of the caution urged by the Court of Appeal in *Kilraine-v-Wandsworth BC* [2018] EWCA Civ 1346). An allegation could contain '*information*'. They were not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to '*information*' under the section. The question was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-(f) (see, further, *Simpson-v-Cantor Fitzgerald* UKEAT/0016/18). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. For example, the words "*you have failed to comply with health and safety requirements*" might ordinarily fall short on their own, but cross the threshold if accompanied by a gesture of pointing at a specific hazard. The issue was a matter for objective analysis, subject to an evaluative judgment by the tribunal in light of all the circumstances.

6.2 Next, I had to consider whether the disclosures indicated which obligation was in the Claimant's mind when they were made such that the Respondent was given a broad indication of what was in issue (*Western Union-v-Anastasiou* UKEAT/0135/13/LA). A whistleblower did not have to have had the precise legal basis of the wrongdoing asserted in his mind before they were protected (*Twist DX-v-Armes* UKEAT/0030/20/JOJ).

6.3 I also had to consider whether the Claimant had a reasonable belief that the information that he had disclosed had tended to show that the matters within s. 43B (1) had been or were likely to have been covered at the time that any disclosure was made. To that extent, I had to assess the objective reasonableness of the Claimant's belief at the time that he held it (*Babula-v-Waltham Forest College* [2007] IRLR 3412, *Korashi-v-Abertawe University Local Health Board* [2012] IRLR 4 and *Simpson*, above). To that extent, it was a mixed objective and subjective test.

6.4 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. The test was not met simply because a risk *could* have materialised (as in *Kraus-v-Penna* [2004] IRLR 260 EAT). Further, the belief in that context had to have been a

belief about the information, not a doubt or an uncertainty (see *Kraus* above). 'Breach of a legal obligation' under s. 43B (1)(b) was a broad category and has been held to include tortious and/or statutory duties such as defamation (*Ibrahim-v-HCA* UKEAT/0105/18).

6.5 Next, I had to consider whether the disclosures had been '*in the public interest.*' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, I had to consider the objective reasonableness of the Claimant's belief at the time that he possessed it (see *Babula* and *Korashi* above). That test required me to consider his personal circumstances and ask myself the question; was it reasonable for him to have believed that the disclosures were made in the public interest when they were made? It was therefore a mixed objective and subjective test.

6.6 The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Normohamed* [2017] IRLR 837 was of assistance. In it, Supperstone J decided that the public interest may have been limited to a small group of 100 or so employees (in that case, about 100 senior managers were potentially affected by the employer's massaging of performance figures in relation to bonus). The Court of Appeal confirmed the decision and determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure.

6.7 As to the need to tie the concept to the reasonable belief of the worker;

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest*" (per Supperstone J in the EAT, paragraph 28).

6.8 The position was to have been compared with a disclosure which was made for purposes of self-interest only, as in *Parsons-v-Airplus International Ltd* UKEAT/0111/17).

6.9 Finally, I did not have to determine whether the disclosures had been made to the right class of recipient since the Respondent accepted that they had been made to the Claimant's 'employer' within the meaning of section 43C (1)(a).

6.10 Since the Claimant lacked the requisite service to bring an ordinary unfair dismissal claim, the burden was on him to prove the reason for dismissal under s.103A on the balance of probabilities (*Smith v Hayle Town Council* [1978] ICR 996, CA and *Tedeschi v Hosiden Besson Ltd EAT 959/95*). It was a greater burden than the requirement to merely prove a prima facie

case if he had two-year's service under *Kuzel-v-Roche* [2008] IRLR 530; *Ross-v-Eddie Stobart* [2013] UKEAT/0068/13/RN.

7. Conclusions

7.1 The first question to address, if it was not already clear, was whether the Claimant was dismissed. In my judgment, he was. The Respondent's disciplinary procedure ran during his notice period. His dismissal took effect before his notice expired, which was due to have been two months under clause 14.2 of his contract [284]. His dismissal therefore supervened his resignation.

7.2 The next question was whether the Claimant's disclosures were protected and qualifying.

7.3 In respect of those that were made in March or April, the Claimant raised concerns that installation work undertaken by the Respondent may not have been safe. Those concerns were not questioned as having been genuine. The relevant installations were examined and the concerns were ultimately not found to have been well founded. But that did not mean that the Claimant had not made protected, qualifying disclosures; he did disclose information which concerned the health and safety of the occupants of buildings where the installations had taken place and/or that they had not complied with BS Guidelines and/or the EU F-Gas Regs. The Claimant then genuinely appeared to consider that there was a public interest in the matters.

7.4 The further disclosures made on 4 and 5 October ([412-3] and [441-2]) fell to be dealt with in the same manner. Although Mr Bradley did not suggest that they were not protected, qualifying disclosures, their timing may have suggested an ulterior motive (see, further below). Nevertheless, since they were, essentially, a recitation of what had been raised in March or April, they were similarly covered.

7.5 The last and most significant question to address was that of causation; were the disclosures the reason, or principal reason, for the Claimant's dismissal?

7.6 Having considered the evidence and, particularly that of Mr Smith who gave compelling, straightforward and honest evidence, I did not consider that the Claimant's dismissal had been on the grounds of his public interest disclosures, but for reasons associated with his conduct.

7.7 First, it was worthy of note that the Claimant's first verbal disclosure in March or April 2022 was taken seriously and looked into. The Respondent's installations were checked recalculated. Nothing came of it, in the sense that the Claimant received no detrimental treatment, despite the

Respondent concluding that his concerns had been ill founded. Instead, he received confirmation that his probationary period was over, a pay rise and thanks for having raised the matter.

7.8 The issues which had concerned the Respondent and which had led to the Claimant's dismissal were, first, his absence on 29 September during his working day, when he had attended an interview with a competitor. Next, there was his attempt to retract his resignation, which appeared to start a chain of events which saw the Claimant then threaten to contact regulators and customers ([319]], [337], [305] and [422]) and to take legal action if he did not get what he wanted ([315], [319], [337] and [434]). He threatened Mr Bradley [304], was rude about Mr Fisher and Mr Bradley ([304] and [310]), threatened to countermand the Respondent's instruction to remain on garden leave [314], accused the Respondent of acting illegally ([310] and [418]) and then seemingly *did* contact clients [343].

7.9 It was those matters which brought about the Respondent's decision to dismiss and for it to take the view that he had been guilty of misconduct. The Claimant's disclosures of 4 and 5 October appeared to have been an attempt to head off or derail the process which he reasonably anticipated would have followed the events of 3 October and the revelations concerning his activities the week before.

7.10 It had to be accepted that the process adopted by Mr Bradley in arriving at the dismissal was not in accordance with good industrial practice and was highly unlikely to have been fair if the Claimant had possessed two years' service and the case had been examined through the lens of s. 98 (4). That said, the Claimant expressed no confusion as to the matters which he faced at the disciplinary hearing and admitted the misconduct alleged in respect of the events of 29 September before Mr Bradley. The rest of the allegations were based upon the Claimant's emails which had followed. But the lack of a robust and well documented process did not alter the reason for the Claimant's dismissal, which had nothing to do with the fact of his disclosures.

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Employment Judge Livesey
Date 6 June 2024

REASONS SENT TO THE PARTIES ON
26 June 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE