THE INDUSTRIAL TRIBUNALS

CASE REF: 44/17IT

CLAIMANT: **Richard Ferguson**

RESPONDENT: **Argento Contemporary Jewellery Limited**

DECISION

The unanimous decision of the tribunal is as follows:

(1) The claimant did not make protected disclosures therefore the claimant's claims pursuant to Articles 70B and 134A of the Employment Rights (Northern Ireland) Order 1996 as amended, are dismissed.

(2) The claimant's claim for notice pay and other contractual pay is dismissed

Constitution of Tribunal:

Employment Judge: **Employment Judge Knight**

Members: **Mrs J Foster**
Mrs E Gilmartin

Appearances:

The claimant appeared and represented himself.

The respondent was represented by Mr T Warnock, Barrister-at-Law instructed by Johnsons Solicitors.

THE CLAIM

1. The claimant's claims were as follows:

(a) he was subjected to a detriment contrary to Article 70B of the Employment Rights (NI) Order 1996 when his employment performance was reviewed.

(b) he was unfairly dismissed by the respondent and the reason or principal reason for the termination of his employment was that he had made protected disclosures.

(c) breach of contract and/or unlawful deduction from wages for unpaid notice

pay and other contractual pay.

2. The respondent denied that the claimant was unfairly dismissed, that he had made protected disclosures, that the claimant was subjected to a detriment and/or dismissal as a result of making protected disclosures and/or made an unlawful deduction from his wages by way of failure to pay notice pay. The respondent further contended that the claimant did not have the qualifying period of employment to enable him to bring a claim of unfair dismissal, having been employed for just over six weeks ending with the effective date of dismissal.

THE ISSUES

3. The legal and factual issues appended to this decision in this case were agreed by the parties before the hearing and the parties confirmed that these remained the same.

SOURCES OF EVIDENCE

4. The claimant, Richard Ferguson, gave written and oral evidence for the claimant's side. Mr Paddy McGurgan, owner of a right-of-way over the Knockbracken Reservoir site, also attended subject to a witness order served at the request of the claimant to give oral evidence to the tribunal.

5. The claimant had also obtained witness summons to compel the attendance of Mr Holley and Mr Miskelly to give evidence. At the hearing, Counsel for the respondent agreed to call both these witnesses, to afford the claimant the opportunity of cross-examining them.

6. Therefore for the respondent, we had written and oral evidence from:

- David Holley, partner in Johnsons Solicitors who advised the respondent company concerning a right of way dispute with Mr Paddy McGurgan.
- Peter Boyle, Director and shareholder in the respondent company;
- Claire Barnes, HR Manager;
- James Loughrey, Property and Estates Manager;
- Simon McKenna, former Group Operations Director;
- Thomas Dunbar, Facility and Warehouse Manager, who dealt with the disciplinary hearing;
- Emma Filmer-Doyle, Managing Director, who dealt with the appeal; and
- Mr Stephen Miskelly, Partner in Robinson McIlwaine Architects

7. The tribunal had regard to the documentation to which it was referred from the agreed bundle of documents and further documents produced during the course of the Hearing. The tribunal also listened to the recordings made by the claimant of a number of conversations which took place prior to the termination of his employment, the transcripts of which appeared in the bundle. Where there was a

conflict the tribunal preferred the evidence of the respondent's witnesses.

8. During the course of the hearing, a witness came forward having seen press reports of the ongoing proceedings, to inform the respondent that the claimant had made a similar claim of that he had been dismissed for making protected disclosures against a former employer to the Industrial Tribunal which had subsequently settled, and that the High Court had granted injunctions against the claimant in respect of matters arising out of the termination of his former employment. The respondent asked the tribunal to take cognisance of the bare fact of these matters, without objection from the claimant.

THE LAW

9. (1) The Employment Rights (NI) Order 1996 ("the 1996 Order") was amended by the Public Interest Disclosure (NI) Order 1998 to introduce the following rights:

a. The right to workers not to suffer a 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 (Article 70B(1) of the 1996 Order).

b. An employee who is dismissed shall be regarded for the purposes of this Part as automatically unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure (Article 134(A) of the 1996 Order).

(2) A "protected disclosure" is defined by Article 67(A) of the 1996 Order as meaning "a qualifying disclosure (as defined by Article 67B) which is made by a worker in accordance with any of Articles 67C to 67H."

(3) Article 67B (1) of the 1996 Order provides:

> "In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, 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 sub-paragraphs has been, is being or is likely to be deliberately concealed".

(4) Article 67C (1) of the 1996 Order provides that:

> "a qualifying disclosure is made in accordance with this Article if the worker makes the disclosure in good faith—
>
> (a) to his employer ….."

(5) The test as to whether a qualifying disclosure had been made has three distinct elements, each which must be considered in turn:

1) Did the worker disclose information?

2) If so, did the worker believe that the information tended to show at least one of the relevant categories within Article 67B(1) of the 1996 Order?

3) If so was the belief reasonable?

(per Mr Justice Underhill at paragraph 18 in **Easwaran v St George's University of London [2010] UKEAT/0167/10**].

(6) Article 140 of the 1996 Order provides that in cases where the reason (or, if more than one, the principal reason) for dismissal is the conduct of an employee, an industrial tribunal does not have jurisdiction to hear a complaint of unfair dismissal, "unless an employee has been continuously employed for a period of not less than one year ending with the effective date of termination".

(7) There is however no minimum qualifying period where the reason or if more than one the principal reason is that the employee has made a protected disclosure. As in the present case, the onus is on an employee, who does not have sufficient qualifying period to claim unfair dismissal, to establish that the tribunal has jurisdiction to hear the claim. This can be done only if the employee can show that the reason for dismissal is one of those automatically unfair reasons where no qualifying period is required. Accordingly, where the reason had to be established to confer jurisdiction on the tribunal, the onus is on the employee (**Maund v Penwith District Council [1984] IRLR24.)** This principle was applied in **Kuzel v Roche Products Ltd [2008] IRLR 530** where the Court of Appeal approved the following analysis of the proper approach to the burden of proof in such a claim:

(1) Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason?

(2) If so, has the employer proved his reason for dismissal?

(3) If not, has the employer disproved the [Article 134A] reason advanced by the claimant?

(4) If not, dismissal is for the [Article 134A] reason.

(8) In order to qualify as a protected disclosure there must be the disclosure of *information* as such. In the case of **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38**, it was held by the EAT that it is not sufficient that the claimant has simply made *allegations* about the wrongdoer (especially where the claimed whistleblowing occurs within the claimant's own employment, as part of a dispute with his or her employer), there must be the "conveying of facts". This is however a fact sensitive issue to be decided by the tribunal.

(9) The tribunal gave consideration to the following cases: **Easwaran v St George's University of London [2010] UKEAT/0167/10]; Maund v Penwith District Council [1984] IRLR24; Kuzel v Roche Products Ltd [2008] IRLR 530; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR /38; The Learning Trust and Others v Marshall [2012] UKEAT/11; Kilraine v London Borough of Wandsworth [2016] IRLR 422; Korashi v Abertawe Bro Morgannwyg University Local Area Health Board[EAT/0424/09,12/09/11; Fincham v HM Prison Service UKEAT/0991/01 (3 December 2001, unreported); Blackbay Ventures Ltd v Gahir [2014] IRLR 416; Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT; Boulding v Land Securities Trillium (Media Services) Ltd UKEAT /0023/06 93 May 2006 unreported); Babula v Waltham Forest College [2007] EWCA Civ 174; Darnton v University of Surrey [2003] ICR 615; Pinnington v Swansea City Council and anor [2005] EWCA Civ 1180; NHS Manchester v Fecitt and Ors [2011] EWCA Civ 1190.**

FINDINGS OF FACT

10. The tribunal found the following relevant facts to be proven on a balance of probabilities:

(1) The claimant, Mr Richard Ferguson was employed by the respondent as Project and Business Development Manager from 9 August 2016 until 23 September 2016 when he was dismissed summarily for gross misconduct. The claimant's tenure was for a one year fixed term with the possibility of being made permanent depending on performance. The contract was subject to a six month probationary period and was terminable by the respondent prior to the expiry of the fixed term by giving two weeks' notice. The contract specified that in cases of gross misconduct termination would be immediate without notice.

(2) His role was primarily to research, develop and manage a number of business projects which included the establishment of a new outdoor leisure facility at the Knockbracken reservoir site, a campsite at the reservoir, the development of a gin distillery and the Belfast Kayaking Academy in East Belfast. He reported to Mr Boyle and Mr McKenna.

(3) The claimant spent the first week or so of his employment with Mr McKenna who introduced him to the office and his colleagues and explained the company background and structure. The claimant was expected to keep in touch by telephone or in person. Responsibility for development of the new outdoor leisure facility at Knockbracken reservoir was handed over to the claimant around 12 August 2016 at a meeting with Mr Boyle and Mr

Loughrey.

(4) The reservoir site had been recently purchased by the Argento Directors' Pension Fund. A major health and safety concern was to secure the boundary to prevent members of the public trespassing on to the property. During July/August 2016 the respondent company became aware of teenagers drinking on the site and swimming in the open reservoir. The Insurers stipulated as a condition of insuring the property that all reasonable steps should be taken as a matter of urgency to secure the site boundary and to reduce the risk of harm or accident. It was a priority for Mr Boyle to secure the boundaries as he believed that he could personally be held criminally and civilly liable in the event of such an accident.

(5) Prior to the claimant taking up his post, Mr Loughrey had been in discussions with Mr McGurgan who had a right of way across the site to access his privately owned residence from an entrance from the Saintfield Road. There had already been discussions with Mr McGurgan about securing the site but a dispute arose when without giving him advance warning the respondent commenced work to erect a gate across the entrance. Mr Loughrey had apologised to Mr McGurgan for this discourtesy and sought to reassure him that it was not intended to infringe his access to and from his property. It appears that there ensued tentative but positive discussions about the possibility of installing an automated gate entry system but that progress was very slow.

(6) The history of these negotiations was explained to the claimant at the meeting on 12 August 2016 and Mr Loughrey gave the claimant Mr McGurgan's contact details to take the matter forward with him. At the same meeting Mr Boyle asked the claimant in the meantime to buy a padlock for the gate to secure the site and to give Mr McGurgan a key. Mr Boyle's understanding of the legal position was that closing and locking the gate would not interfere with Mr McGurgan's enjoyment of his right of way, provided that he was given a key. In his closing submissions to the tribunal, the claimant conceded that "to put a padlock onto a shared access gate and to issue the other party with the key would be in breach of no laws and would not normally cause any concerns to anyone".

(7) Instead of contacting Mr McGurgan directly, the claimant asked a mutual friend to inform him that the claimant was now managing the reservoir project and that he would do his best to develop a good working relationship to ensure that he was happy with developments at the site. Over the next few days the claimant tried without success to phone Mr McGurgan, to set up another meeting. He eventually called unannounced to Mr McGurgan's shop on Royal Avenue, Belfast and during a "brief conversation" set up a meeting for 5.00 pm on 23 August 2016 at the reservoir to discuss the proposals for the gate. Mr McGurgan later called the respondent to cancel this meeting.

(8) Throughout 23 August 2016, the claimant sent texts and made telephone calls to Mr McGurgan in an attempt to reschedule a meeting. When contact was made, Mr McGurgan told the claimant that he did not want a gate to be erected at the entrance and that he wanted the matter to be dealt with through his solicitors. Mr McGurgan subsequently informed Mr Loughrey that he had been irritated when he received a message from a friend on

Facebook informing him that Mr Loughrey was no longer looking after the project and of the claimant's intention to contact him. Mr McGurgan felt that the claimant had handled matters unprofessionally in discussing his private business with a third party instead of contacting him directly.

(9) The claimant relayed his conversation with Mr McGurgan to Mr McKenna. Mr Boyle was away on holiday on that date. On Mr McKenna's advice, the claimant contacted Mr Holley, a partner in Johnsons Solicitors, instructed to advise the respondent about the right of way issues. Mr Holley told the claimant that he would wait to hear from Mr McGurgan's solicitors and he advised that in the meantime no further action should be taken in relation to the gate so as not to jeopardise the ongoing negotiations.

(10) On 30 August 2016, the claimant attended a meeting with Mr Boyle at the respondent's Royal Avenue office and a conference call was placed with Paul Heaney and Frank Cullen of Mercury Security Management Ltd to discuss specifications for the fitting of an automated gate to the site entrance. Mr Boyle indicated at the meeting that the works could not commence without the agreement of Mr McGurgan. Mr Boyle confirmed that he again instructed the claimant to purchase a padlock for the gate to secure it in the meantime but firmly denied telling him not to give Mr McGurgan a key so that he would be locked into or out of his property. The tribunal did not find credible the claimant's evidence that Mr Boyle instructed him to lock Mr McGurgan out of his property by not giving him a key. The tribunal did not accept the claimant's evidence that after the call ended, he told Mr Boyle that his instruction would lead to a potential breach of health and safety regulations and was also potentially illegal.

(11) The next day, Mr Boyle telephoned the claimant for an update and insisted that he should purchase a padlock for the gate. It is clear that at this point Mr Boyle was annoyed that to date the claimant had still not followed his instruction and that the boundary had still not been secured. The tribunal accepts on a balance of probabilities that the claimant informed Mr Boyle that he was not comfortable with this instruction as he felt the best way forward would be to let Mr Holley pursue a solution with Mr McGurgan's solicitor, however it did not accept the claimant's evidence that Mr Boyle told him not to give Mr McGurgan a key or that if he did not do so he would be out of a job. Afterwards the claimant again contacted Mr Holley about this conversation. Mr Holley had no recollection that the claimant had told him of an instruction by Mr Boyle not to give Mr McGurgan a key, which he said that would have been "entirely extraordinary". Mr Holley contacted Mr Boyle and advised him not to close and padlock the gate at that juncture but to let ongoing negotiations with Mr McGurgan's solicitors take their course. Mr Boyle was not entirely happy with this advice but nevertheless emailed the claimant on 31 August 2016 (1.52 pm) to "hold fire on the padlock. David Holley wants more time."

(12) Also on 31 August, the claimant attended a meeting in the offices of Robinson McIlwaine Architects (RMI) with Mr Boyle, Mr Miskelly of RMI and Mr Tom Stokes, a planning consultant, held with the purpose of getting the reservoir project up and running, discussing a new planning application and public consultation and introducing the claimant as he had recently taken charge of the project. Mr Stokes had had dealings with the previous owner of

the site having prepared plans for a residential development, which involved in filling the reservoir. Mr Stokes apparently brought a file with him which the claimant surmised contained confidential information which might be of use to Mr Boyle if he decided not to proceed with the outdoor leisure project. The contents of the file were not revealed during the meeting. The claimant told the tribunal that although no payment was openly discussed, there was *"an undertone that Tom expected payment if this information was shared with Pete Boyle."* The tribunal did not consider that there was any basis which would have permitted the claimant to reach this conclusion. In relation to his suggestion that *"it was clear that Mr Miskelly was uncomfortable with this conversation",* Mr Miskelly had no recollection that there was any reference made by Mr Stokes to "confidential information". In any event he did not consider that that the information imparted by him was confidential in nature. Mr Miskelly denied at the time thinking that there was anything untoward about the conversation or feeling any discomfort, as was alleged by the claimant. In his view Mr Stokes was simply trying to impress his new client, Mr Boyle, with his familiarity with the site. The claimant also told the tribunal that Mr Boyle had asked him not to record any reference to Mr Stokes' file in the minutes of the meeting and that he had responded to Mr Boyle that he was "not comfortable with this or the nature of the conversation". He further alleged that Mr Boyle had said that he should "do it or leave". Mr Boyle denied that that any such conversation had taken place and had said that the claimant had not been asked to make a minute of the meeting. He had been unaware that the claimant had made any notes until the claimant emailed them to him afterwards. Mr Miskelly who was present had no recollection of any such instruction being given by Mr Boyle. The tribunal found the claimant's account of this meeting to be completely lacking in credibility. The claimant's own notes make no reference to these matters and found his explanation that this in itself was proof that the instruction had been given to be self-serving in the extreme.

(13) On 1 September 2016 Claire Barnes had emailed Mr McKenna, Group Operations Director, in response to a request by him for information about the claimant's contract of employment. This request was precipitated by general concerns raised relating to the claimant's demeanour and attitude including that sometimes he could not be located during working hours. She confirmed to Mr McKenna that the claimant was on "a one year fixed term contract, which can be ended sooner, with a 6 month probation period". She provided him with extracts from the claimant's terms and conditions of employment relating to the fixed term, the probationary period and the amount of notice that had to be given to terminate his contract of employment. She highlighted that a fair dismissal procedure would have to be followed and asked him to let her know how he wished to proceed. It is clear at this stage that Mr McKenna was had within his contemplation the possibility of terminating the claimant's contract of employment for performance related reasons.

(14) On 7 September 2016, the claimant and Mr Boyle travelled together to a site meeting with Mr Miskelly at Knockbracken reservoir. During the journey the claimant asked Mr Boyle for feedback on his performance so far. The claimant acknowledged that Mr Boyle raised concerns in relation to his "lack of focus" but claimed that Mr Boyle indicated that he was generally happy with the way he was carrying out his work. There was evidence before the

tribunal that previously concerns had been raised within the company about the claimant's attitude and because sometimes he could not be located. This was disputed by Mr Boyle. The tribunal accepted Mr Boyle's evidence that he informed the claimant that he was dissatisfied with the claimant's work and that he wanted him to base himself at a desk, research the business ideas and prepare fact based reports and costed business plans. He told the claimant that he should focus on what he was being asked to do instead of going off on tangent and that his main focus was to be the water sports facility, camping sites and gin distilling.

(15) During the site visit Mr Boyle again asked the claimant to secure the Saintfield Road entrance by placing a padlock on the gate. The tribunal did not accept the claimant's evidence that Mr Boyle again instructed him *"to lock Paddy McGurgan into/out of his property and to give the key to Pete so that Paddy would have to beg him for a key or to get access through this gate*". Mr Miskelly who according to the claimant was present at the time, had no recollection of this conversation, or as was also claimed, that he told Mr Boyle that he did not think this was appropriate as it potentially breached health and safety laws and was potentially illegal due to the fact that Mr McGurgan had a legal right of way over the property.

(16) The claimant did not ever purchase a lock or place it on the entrance gate. In fact at no stage was the gate closed or padlocked prior to an agreement which was eventually reached between the respondent and Mr McGurgan, through their respective solicitors, some months later.

(17) The next day the claimant apparently worked from home but did not ring either Mr McKenna or Mr Boyle to inform them of this fact. As Mr Boyle did not know the claimant's whereabouts, he rang Ms Barnes, the HR Manager, following consultation with Mr McKenna, and asked her to start the process for holding a formal meeting to review his contract of employment. Ms Barnes' contemporaneous memo of her conversation with Mr Boyle on 8 September 2016 confirmed that he expressed concerns that the claimant was not suitable for the role, he was not researching or presenting business cases or delivering on what he had been asked to do and that he was not confident that the claimant would represent him in meetings with external contacts and that there was a need to review.

(18) On 9 September 2016 Ms Barnes telephoned the claimant and informed him that the respondent was considering terminating his contract as it felt he was unsuitable for his role. She explained that he would receive a letter inviting him to a performance review. A follow up letter was sent to him dated 9 September 2016 inviting him to attend a meeting on 13 September 2016 at 2pm in the Corn Market Office to discuss a proposal to terminate his employment and that he would be given an opportunity to put forward his account. The meeting was to be chaired by Mr McKenna with Claire Barnes in attendance. Ms Barnes told the tribunal that termination of the claimant's contract was not a foregone conclusion.

(19) During the conversation with Claire Barnes the claimant expressed his view that his dismissal was a foregone conclusion. Ms Barnes tried to reassure the claimant that no decision had been made and offered to let him take the rest of the afternoon off to prepare for the meeting. She told the tribunal that

previously in other similar cases the respondent had issued the employee concerned with a performance action plan as an alternative to dismissal.

(20) Later that afternoon the claimant attended at the Ormiston House site where he met Mr Boyle. Mr Boyle refused to engage in a conversation with the claimant about the call from Ms Barnes and told him that he should attend the review meeting next Tuesday and that no decision had been made. It appears that the claimant then pressed Mr Boyle to take a book which he later said was given on loan. The tribunal did not accept that the claimant on this occasion told Mr Boyle that his request to put the padlock on Mr McGurgan's entrance gate was inappropriate, a breach of health and safety laws and was potentially illegal; or that Mr Boyle responded that he did not care and his decision was made. The tribunal did not accept the claimant's evidence that Mr Boyle asked the claimant to call at his home close to Ormiston House on Monday morning before work.

(21) After this encounter, the claimant then attended at Ms Barnes' office at the Connsbrook Avenue site at approximately 4.00 pm to 4.15pm. She asked the claimant to wait outside for her as she was involved in a meeting. The claimant appeared agitated, said that was him "done", that he was "out of here" and he placed his laptop, folder and mobile phone on top of the filing cabinet in Ms Barnes office and left the building. Ms Barnes followed him outside and advised him to take time to prepare for the meeting on Tuesday. She tried to reassure him that no decision had yet been made. As he left the premised he approached Mr McKenna who was sitting in his car in the car park. He told Mr McKenna that he felt the decision had already been made and that he had "left his stuff off". Mr McKenna informed him that no decision had been made and that the performance review meeting had been arranged to discuss issues of concern. The claimant was so agitated that Mr McKenna instructed him to take the next few days of work so that he could calm down and prepare for the meeting on 13 September 2016.

(22) On the evening of 9 September 2016 and during Saturday 10 September 2016 the claimant sent a number of emails to Ms Barnes and Mr McKenna requesting documentation from his work. The claimant alleged that he received a telephone call from Mr McKenna from a withheld number asking him to attend at the Connsbrook Avenue office on Monday morning to collect his work mobile phone and laptop.

(23) On Monday 12 September 2016 at approximately 8.38 am the claimant attended at Mr Boyle's home. Mr Boyle answered the door, still in his pyjamas and getting his children ready for school. The claimant said that he had called to collect his book and to see if Mr Boyle had had any further thoughts over the weekend about the way forward. Mr Boyle was shocked that the claimant had called to his home and told him that he should not be there. Mr Boyle had not invited him there. He returned the book to the claimant, said that he would see him at work, and asked him to leave and not to come to his house again. The claimant taped this conversation without Mr Boyle's knowledge or permission.

(24) The claimant then called at the Connsbrook Avenue site ostensibly to collect his laptop and telephone. Mr McKenna arrived shortly afterwards having already been informed that the claimant had attended at Mr Boyle's home

earlier that morning. Mr McKenna did not expect to see the claimant, given his instruction not to return to work until the performance review meeting. A conversation ensued which was also covertly recorded by the claimant. Mr McKenna asked the claimant what he was doing there and why he had visited Mr Boyle's home earlier that morning. The claimant told him that he was there to collect his laptop and telephone. Mr McKenna informed him that these would be sent out to him as Ms Barnes had not arrived into work at that point. Mr McKenna escorted the claimant out of the offices and a heated discussion took place between the two men in the car park. The claimant suggested that the termination of his employment was a forgone conclusion that Mr McKenna had chosen to back Mr Boyle, that it was "immoral and unethical" and that Mr McKenna had pretended to be his friend. Mr McKenna alleged that the claimant then called him a "vindictive charlatan" at which he told the claimant not to talk to him like that again and ordered him off the property. Mr McKenna admitted that he was extremely annoyed by this comment which he felt showed a total lack of respect and was not conduct expected from a member of the management team. The tribunal considered that this was indicative of a breakdown of the employment relationship at this point.

(25) The claimant denied that he had called Mr McKenna a vindictive charlatan, however Mr Loughrey told the tribunal that shortly afterwards he returned a telephone call from the claimant and during this conversation, the claimant had recounted his exchange with Mr McKenna and admitted that that he had called him a charlatan.

(26) Following these events, the probationary review meeting was put on hold and Ms Barnes wrote to the claimant advising him that he was suspended from duty pending an investigation into his conduct in the workplace on 12 September 2016 concerning allegations that he had called Mr McKenna a vindictive charlatan and had attended Mr Boyle's home on the morning that morning. On the same date a letter was sent to the claimant inviting him to attend a disciplinary meeting to answer charges of gross misconduct related to his behaviour earlier that day when he attended at Mr Boyle's home and at Connsbrook Avenue contrary to an instruction issued to him on 9 September 2016 by Mr McKenna and in calling Mr McKenna a charlatan. He was informed that his behaviour was considered "inappropriate and irrational and that the gravity of conduct was such that company believes that the trust and confidence placed in him as Project and Business Developer Manager has been completely undermined". The claimant was provided with a copy of a witness statements of Mr McKenna and Mr Loughrey and the disciplinary rules and procedures. The claimant was notified with right to be accompanied at the disciplinary meeting and was informed that the outcome of the disciplinary hearing could result in a summary dismissal in accordance with the company's disciplinary procedure. Subsequently the claimant was also provided with the witness statement of Mr Boyle dated 14 September 2016.

(27) The disciplinary hearing was reconvened for 21 September 2016 so that the claimant could be accompanied by his Trade Union representative, Mr Nigel Gregg of Unite the Union. The disciplinary meeting was conducted by Mr Tommy Dunbar, Argento Fulfilment & Facilities Manager with Ms Barnes in attendance as a notetaker. Mr Dunbar had previously received advice from

Ms Barnes about how the meeting should be conducted. During the disciplinary hearing the claimant alleged that he had received a telephone call on 10 September 2016 from Mr McKenna asking him to attend the office on Monday morning to collect his laptop and phone. He denied having called Mr McKenna a vindictive charlatan and stated that he had been requested by Mr Boyle on 9 September 2016 to attend his home on the morning of 12 September 2016 before work. He read a prepared statement to the meeting and alleged that the evidence against him was untrue and that the true reason for the disciplinary process was to remove him from his position due to protected disclosures he had previously made to Mr Boyle, Mr McKenna and Mr Holley and he believed that the outcome of the disciplinary hearing was pre-determined.

(28) Mr Dunbar asked the claimant to provide further information about his allegations that he had made a number of protected disclosures but the claimant refused to do so allegedly on the advice on his Trade Union representative. Mr Dunbar also sought clarification from the claimant if he was acknowledging that his behaviour had been inappropriate. At this the claimant became very heated and aggressive. He stood up and pointed at Mr Dunbar saying, "Tommy do not put words into my mouth, son". Mr Dunbar adjourned the meeting at this point and the claimant left the building for a smoke. When the meeting was reconvened Mr Dunbar apologised to the claimant if he felt that he was trying to put words in his mouth but confirmed that he was simply trying to clarify the claimant's account. The claimant again became heated and told Mr Dunbar "Don't do that again, if you ever twist my words again this will be the shortest meeting you were ever at". The tribunal accepted that Mr Dunbar genuinely felt intimidated and bullied by the claimant's threating and aggressive behaviour and attitude towards him during the meeting. After considering the evidence Mr Dunbar formed the view that the claimant had called Mr McKenna a vindictive charlatan which he considered to be gross misconduct. He believed that this had caused a significant breach of trust and confidence in the claimant in his position as Project and Business Development Manager and that the appropriate penalty was summary dismissal as he was not able to find any sufficiently mitigating circumstances to warrant a lesser penalty in respect of this charge. In relation to the remaining two charges it was felt that his conduct had been unacceptable and that it would have been deemed appropriate formally to warn him in writing about his conduct.

(29) The claimant appealed against his dismissal and had his appeal letter dated 30 September 2016 to be served by a process server on Mr Boyle's wife, Mrs Ciara Boyle, also a Director of the respondent company, at their home address as well as at the respondent's registered address. Ms Barnes wrote to the claimant on 3 October 2016 requesting him not to write to Mrs Boyle with regard to this matter and that any correspondence should be directed to her in first instance as HR Manager. The grounds for appeal included that the claimant had fresh evidence that the statements made by Mr Boyle and Mr McKenna were untrue, that he had been treated unfairly at the disciplinary hearing and that his dismissal was predetermined and disproportionate. He also stated that he had made protected disclosures to Mr McKenna, Mr Boyle, Mr Holley and others.

(30) On 10 October 2016 the company advertised the position of Business

Development Executive which had similar responsibilities to the claimant's post.

(31) An appeal hearing was arranged for 12 October 2016 and was conducted by Ms Emma Filmer-Doyle, the respondent's Managing Director. Ms Barnes was again present as notetaker and the claimant was accompanied by Mr George Brash of Unite the Union.

(32) During the appeal hearing the claimant produced a typed transcript of conversations he said he had with Mr Boyle and Mr McKenna on 12 September 2016. Mr Brash expressed disapproval of the claimant's actions in covertly recording the conversations. The claimant told Mr Filmer-Doyle that he did not have the recordings with him as he had left them in his wife's car in Dublin. Ms Filmer-Doyle said that she would allow him until Friday 14 October 2016 to provide the recordings so that she could listen to and take them into consideration before reaching her decision. The claimant also submitted at the appeal that he believed that Mr Boyle wanted him out of the company because he had made protected disclosures on 7 September 2016 and on 31 August 2016 in the RMI offices. He stated that he believed that the outcome of both the disciplinary hearing and the appeal were predetermined. He advised that Mr Boyle must have forgotten that he had invited him to come to his home on 12 September 2016. He stated that the tapes would confirm that he had not called Mr McKenna a charlatan or that he had used threatening behaviour. He submitted that the reasons for his dismissal were inconsistent and that the penalty was disproportionate.

(33) Ms Filmer-Doyle listened to two recordings which she had received from the claimant by dropbox on 14 October 2016. One was of the conversation between the claimant and Mr Boyle at the latter's home and the other was of his exchange with Mr McKenna. Ms Filmer-Boyle concluded that the conversation was staged for the recording. At the hearing Ms Filmer-Doyle accepted that on the recording it was not possible to hear the claimant calling Mr McKenna a charlatan. She thought that something had been removed from the recording although she did not investigate this further.

(34) On 18 October 2016, Ms Filmer-Doyle wrote to the claimant to notify him of the outcome of the appeal which was to uphold Mr Dunbar's decision to dismiss him. She advised that she considered the recordings to be inconclusive and neither supported nor adversely affected his position and that there were concerns as to why the recordings were not made known during the disciplinary hearing. She stated that the respondent *"fail to see what protective disclosure has been made or why it is relevant; it relates in no way to the reason for your dismissal in any event".* This decision was final and there was no further right of appeal. The claimant was paid all sums due up until the date of termination of his employment but was not paid notice pay as he had been dismissed for gross misconduct.

CONCLUSIONS

11. On the basis of the facts found the tribunal concludes as follows:

(1) In the present case the claimant has alleged that he was subjected to a detriment when it was decided to hold a meeting to review his performance

and that he was unfairly dismissed because he had made protected disclosures on 30 August 2016, 31 August 2016 and 7 September 2016 of information which in his reasonable belief tended to show matters which fell within categories Article 67B (1) (a) (b) and (d). The respondent has disputed that the claimant has made any protected disclosure and contends that these allegations have been fabricated by him because otherwise he does not have the qualifying service period to bring a complaint of unfair dismissal. As the claimant had just over six weeks' service at the effective date of dismissal the onus was on him to show, with regard to the claim of unfair dismissal that the tribunal has jurisdiction to hear his claim.

(2) The tribunal therefore considered the issue of whether the claimant made qualifying disclosures, as was alleged by him. The claimant's case was that on 30 August 2016 and 7 September 2016, he made "protected disclosures to Mr Boyle in relation to breaches of health and safety of others and further breaches of the law, in terms of illegally blocking a right of way, which Mr Boyle had ordered the claimant to commit". The tribunal has found as a fact that on no occasion did Mr Boyle instruct the claimant to contravene Mr McGurgan's right of way by locking the gate and not giving him a key. It follows therefore that the claimant could not have made the disclosures in the terms alleged by him on 30 August 2016 and 7 September 2016 and indeed the tribunal has found as a fact that the claimant did not make the disclosures as has been alleged. Insofar as the claimant may have expressed misgivings to Mr Boyle about his instruction to padlock the gate, the claimant has accepted that this instruction in itself would not have breached the right of way. Accordingly the tribunal does not accept that the claimant genuinely believed that this tended to show any of the relevant categories in Article 67B (1). The claimant's case was that on 31 August 2016 he made a protected disclosure to Mr Boyle in terms of potential theft to intellectual property, which he had discussed with Tom Stokes. The tribunal considers on the claimant's own account that there would have been no rational basis for his subsequent allegation of potential theft of intellectual property. The tribunal has found that there was in fact no such discussion as was alleged by the claimant between Mr Boyle and Mr Stokes and further, that at the time Mr Boyle did not instruct the claimant not to include any reference to Mr Stokes' file in the record of the meeting. It therefore follows that the claimant could not have made the disclosure on that occasion that he was uncomfortable with the conversation, as is alleged by him.

(3) In these circumstances, the tribunal determines that the claimant did not make any protected disclosures and therefore his claims pursuant to Articles 70B(1) and Article 134 (A) of the 1996 Order are therefore dismissed.

(4) The claimant is not entitled to notice pay as he was dismissed without notice for gross misconduct and his claim for notice pay is therefore dismissed.

Employment Judge:

Date and place of hearing: 25-29 September 2017, Belfast.

Date decision recorded in register and issued to parties:

CASE REF: 44/17 IT

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS AND THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

RICHARD FERGUSON

CLAIMANT

AND

ARGENTO CONTEMPORARY JEWELLERY LIMITED

RESPONDENT

LEGAL AND FACTUAL ISSUES

LEGAL ISSUES

1. Whether the Claimant made protected disclosures within the meaning of:

   (a) Article 67B(1)(a) of the Employment Rights (Northern Ireland) Order 1996 and/or;
   (b) Article 67B(1)(b) of the Employment Rights (Northern Ireland) Order 1996 and/or;
   (c) Article 67B(1)(d) of the Employment Rights (Northern Ireland) Order 1996 and/or;
   (d) Article 67B(1)(f) of the Employment Rights (Northern Ireland Order 1996,

2. Did the Claimant hold a reasonable belief that the information disclosed tended to show one or more of the matters listed at 1(a) to (d) had occurred?

3. Did the Claimant make any such disclosures in good faith?

4. Whether the Claimant was subjected to detriment as a result of making protected disclosures contrary to Article 70B of the Employment Rights (NI) Order 1996?

5. Was the reason or the principal reason the Claimant was dismissed due to him having made a protected disclosure contrary to Article 134A of the Employment Rights (NI) Order 1996?

6. Is the Claimant entitled to any notice pay and has there been an unlawful deduction/breach of contract in this regard?

7. Has the Respondent paid the Claimant all that he was due upon termination of employment and has there been an unlawful deduction/breach of contract in this regard?

8. If the Tribunal has jurisdiction to hear the Claimant's complaint of unfair dismissal, was the Respondent's reason to dismiss the Claimant on the grounds of gross misconduct (a) substantively fair; (b) procedurally fair?

FACTUAL ISSUES

1. Why was the Claimant dismissed?

2. Did the Respondent have good cause to dismiss the Claimant?

3. Was the Claimant guilty of gross misconduct?

4. What disclosures does the Claimant rely upon as amounting to protected disclosures?

5. Where, when and to whom were the disclosures made?

6. What was the precise content of the disclosures?

7. Did the Claimant make disclosures in in relation to the Knockbracken Reservoir and a Mr. Paddy McGurgan?

8. Did the Claimant make disclosures in in relation to an alleged breach of intellectual property?

9. What took place at the meeting of 31st August 2016 with Tom Stokes to discuss planning and development of the reservoir?

10. When did the Claimant first claim that he made protected disclosures?

11. Were the protected disclosures the Claimant claims he made the reason for the Respondent's decision to instigate a review of the Claimant's probation?

12. In what way had the Claimant been found unsuitable for the role and specifically how had he failed in 'researching/presenting the business cases or delivering on what the CEO had asked for appropriately', which the Respondent claims led it to schedule a review of the Claimant's probation?

13. Did Simon McKenna, Pete Boyle or any member of HR Staff, ever provide any feedback or enter into any discussion with the Claimant about the quality of his work or his performance?

14. If so, what was the nature of this feedback or discussion?

15. How did the Claimant act on any feedback or direction given in these discussions?

16. If relevant and not privileged did the Claimant have a phone call with David Holley of Johnsons Solicitors on or around 24 August 2016 and again on 31 August 2016 regarding Mr Paddy McGurgan and Knockbracken Reservoir?

17. If relevant and not privileged what was the content of these conversations?

18. Was the Claimant subjected to detriment by the Respondent? If so:

    (a) What was the nature of the detriment?
    (b) Who was responsible for the detriment?
    (c) What was the reason for the detriment?

19. Was the Claimant on a probationary period at the time of dismissal?

20. Was the Claimant written to on 9th September 2016 by the Respondent with regards to concerns that the Respondent had regarding the Claimant's researching and presentation of business cases and concerns regarding the delivery by the Claimant of what was expected from him in his role for the Respondent?

21. Did the Claimant have a conversation on 9th September 2016 with Claire Barnes (HR Manager) after receiving the letter and if so what was the content of the conversation?

22. Did the Claimant then return to the Company's premises and put his computer and phone down on a desk in the HR Office in the presence of HR Manager, Ms Barnes?
23. What was the content of the interaction between the Claimant and Ms Barnes at this time?

24. Did the Claimant approach Mr McKenna in the yard outside the Company's premises on 9 September 2016?

25. What was the content of the interaction between the Claimant and Mr McKenna at this time?

26. Did Mr. McKenna advise the Claimant to take paid leave until the meeting on Tuesday 13th September 2016, allowing time to prepare for the meeting and to calm himself?

27. Did the Claimant later attend with the Managing Director, Mr. Boyle, at Ormiston House and attempt to address the Managing Director on the planned meeting and the Claimant's employment?

28. If so what was the content of the interaction?

29. Did Mr. Boyle indicate that matters could be discussed at the planned meeting on Tuesday 13th September 2016.

30. Did the Claimant attend at the Managing Director's home address between 0820 and 0830 on Monday 12th September 2016? If so, what happened?

31. Did the Claimant then attend at the offices of the Respondent and have an interaction with Mr. McKenna? If so what was the content of that interaction?

32. Was the Claimant was asked to leave the premises?

33. Did the Claimant call Simon McKenna a "Vindictive Charlatan" on 12 September 2016?

34. Was the Claimant later written to on the 19th September by the Respondent and if so why and what was the content of the letter?

35. What took place at the disciplinary meeting of 21st September 2016?

36. Why did Mr. Tommy Dunbar (Argento Fulfilment and Facilities Manager) decide to dismiss the Claimant?

37. Was the decision to dismiss the Claimant pre-determined prior to the disciplinary hearing?

38. Why was the Claimant's appeal not upheld by Emma Filmer, Managing Director?

39. On what basis in its Appeal Hearing decision, did the Respondent believe that the voice recording produced by the Claimant of the conversation between himself and Simon McKenna on 12 September 2016 was inconclusive in proving whether or not the Claimant had called Simon McKenna a "Vindictive Charlatan"?

40. Was the decision to uphold the decision to dismiss the Claimant at the appeal hearing pre-determined?

41. Did the Respondent publically advertise to replace the Claimant's position in the company prior to the appeal hearing being heard?

If the Claimant is successful in his claim:

42. Has the Claimant suffered any loss? If so, what is the level of loss?

43. Has the Claimant suffered injury to feelings? If so what is the appropriate level of award?

44. Has the Claimant mitigated any loss?

END