EMPLOYMENT TRIBUNALS

Claimant: Mr B Griffiths

Respondent: Joseph Gallagher Limited

HELD AT: Sheffield **ON:** 16, 17, 18, 19 and 20 April 2018

BEFORE: Employment Judge Little
Mr A Senior
Ms S D Sharma

REPRESENTATION:

Claimant: Mr J McHugh of Counsel (instructed by Thompsons Solicitors)
Respondent: Mr F McCombie of Counsel (Direct Access)

JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. The complaint brought under the Employment Relations Act 1999 section 11 is dismissed on withdrawal.
2. The complaint of unfair dismissal contrary to Employment Rights Act 1996 section 103A succeeds.
3. The parties having reached agreement in terms of remedy meant that the Tribunal was not required to adjudicate on that issue.

REASONS

1. These reasons were requested by the respondent's counsel at the end of the hearing.

2. **The complaints**

   In a claim form presented on 21 September 2017 Mr Griffiths complained that he had been unfairly dismissed because the reason or principal reason for his dismissal had been protected disclosures which the claimant contended he had made.

   There was a second complaint namely that the respondent had breached the right to be accompanied at a disciplinary hearing (specifically an appeal hearing). That complaint was brought under the Employment Relations Act 1999 section 11. However at the conclusion of evidence Mr McHugh informed us that the claimant was not pursuing that complaint – hence it's dismissal on withdrawal.

3. **The relevant issues**

   These were agreed with the parties at the beginning of the hearing to be as follows:-

   3.1. Did the claimant make one or more of the alleged qualifying protected disclosures?

   The respondent disputed that any qualifying disclosures had been made and contended that the matters which the claimant had raised and discussed with his line manager, Mr Matt Waterson, had been nothing more than ordinary day to day matters arising out of the work being undertaken on various sites.

   The respondent did not dispute that if the claimant satisfied the other requirements within the statutory definition that he would have had a reasonable belief in the public interest of the matters disclosed.

   As the hearing progressed it became apparent that the focus of the respondent's defence as put before us was in relation to reasonable belief in what the disclosure tended to show and on the issue of likelihood.

   3.2. If the claimant had made one or more qualifying protected disclosures were those disclosures the reason or principal reason for his dismissal?

   We noted that as the claimant did not have sufficient length of service to bring an ordinary unfair dismissal complaint, the burden of proof was on him to show that the reason for dismissal was the proscribed reason he alleged (see **Smith** v **Hayle Town Council**).

4. **Evidence**

   The claimant has given evidence but called no other witnesses.

   The respondent's evidence has been given by Matthew Waterson (formerly the respondent's directional drilling manager and the claimant's line manager); Mark McGeady (contract director); Antony Matheson (group commercial director) and Ms Pauline Wilkes (an external HR consultant).

5. **Documents**

The Tribunal have had a trial bundle before them comprising 541 pages.

6. **Facts**

6.1. The claimant's employment commenced on 14 December 2016. The claimant was subject to a three month probationary period during which his employment could have been terminated by the giving of statutory notice only. Thereafter the claimant was entitled to a minimum of one month's notice. The claimant's job title was operations manager and he was to work in the trenchless construction division of the respondent civil engineers.

6.2. In February 2017 the claimant was in charge of a job at Broughton near Cockermouth which involved horizontal directional drilling under the River Derwent.

6.3. The claimant contends that in the period from 8 February 2017 to 16 February 2017 he made four qualifying protected disclosures (within the meaning given to that term by the Employment Rights Act 1996 section 43B). Those were all in respect of matters said to arise from the Broughton job. The claimant contends that he made those disclosures to Mr Waterson.

6.4. On 21 February 2017 the claimant went to another job which was at Malvern College, Worcester. The claimant contends that on 7 March 2017 he made a further protected disclosure about safety or environmental concerns related to that job. Again that alleged disclosure was made to Mr Waterson.

6.5. Later in March the claimant was at a site at Aller near Taunton. The claimant contends that he made a sixth protected disclosure in relation to the use of water from fire hydrants in relation to that job.

6.6. The seventh and final alleged protected disclosure was made during the course of a site visit to Aller by Mr Waterson on 28 March 2017. The claimant says that this disclosure was the reiteration of the earlier six disclosures.

6.7. In April 2017 the claimant was working at a site called Jubilee Bridge which involved installing a sewer pipe under the River Avon. There was disagreement between the claimant and Mr Waterson as to the size of the drilling machine required. The claimant does not contend that this was a protected disclosure.

6.8. On 8 May 2017 Mr Waterson telephone the claimant to inform him that he was dismissed. Subsequently the claimant received a letter of the same date which confirmed that the claimant's employment was to end. The effective date of termination was to be 8 June 2017 and the claimant was required to work his notice although if what was described as "outstanding items" were completed then any remaining notice period would be paid in lieu. The claimant's last day at work was probably 11 May 2017.

6.9. The letter of dismissal (page 384 in the bundle) which had been drafted by Mr Matheson and signed by somebody else on behalf of Mr Waterson, did not give any reason for the termination.

6.10. In it's response to this claim, the reason given by the respondent for dismissal is "it was just not working out". There is no reference in the

response to the alleged shortcomings of the claimant in terms of communication or the completion of paperwork, such as daily site diary entries. However such matters have been raised in the respondent's evidence before us to explain the reason for the dismissal. We remind ourselves that there is no burden of proof in this type of case on the respondent to show what the reason for dismissal was.

6.11. On 24 May the claimant submitted an appeal against dismissal to Mr McGeady (in the trial bundle at pages 405 to 415). At that stage the claimant thought that Mr McGeady would be dealing with the appeal.

6.12. The claimant sent a copy of that letter to Mr J Gallagher, the group chairman, on 26 May 2017 (see page 416 to 417).

6.13. In the event the respondent appointed Ms Wilkes, an external HR consultant with Fitzpatrick Wilkes and Co (HR and Employment Law Specialists) to conduct the appeal.

6.14. There was an appeal hearing on 13 June 2017. The minutes are at pages 422 to 424. The claimant was accompanied by a Mr Chris Weldon of Unite the Union. Ms Wilkes identified the issues she had to deal with as whether the claimant had what she described as "protected status" at the time of his dismissal – that is whether he had made protected disclosures – and whether if he had, was the dismissal unfair? Unusually therefore this was not really an appeal in respect of a summary dismissal for an un-notified reason, which is what had occurred, but rather a relatively informal enquiry into the matters which we are now seized of.

6.15. In a document dated 26 June 2017 the claimant provided further and better particulars of what he described as his complaint of whistle blowing against the company (page 425 to 434). That document was sent to Ms Wilkes. In it the claimant is highly critical of Mr Waterson and reference is made to a job at an A Winning site, which does not appear to be an alleged protected disclosure. However references are made to the Malvern College and Aller jobs. There is little or no evidence before us that Ms Wilkes carried out any significant investigation following the receipt of this additional information. In fact it is uncertain what investigation at all was carried out.

6.16. On 18 July 2017 Ms Wilkes wrote to the claimant (page 444 to 446). She concluded that there was no evidence that whistle blowing had occurred between 28 March 2017 and 8 May 2017. She concluded that Mr Griffiths had not been able to evidence that he actually did whistle blow before his dismissal or that that was the reason for his dismissal. Ms Wilkes described the claimant's letter of 26 May 2017 to Mr Gallagher as a potential whistle blowing letter, but that was during his notice period. The criteria for protected status had she said not been satisfied and so the appeal failed.

7. **The parties' closing submissions**

Both counsel provided us with written submissions and made oral submissions to us.

8. **The relevant law**

The Employment Rights Act 1996 section 43B defines a qualifying disclosure as "any disclosure of information which, in the reasonable belief of the worker

making the disclosure, is made in the public interest and tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, …

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

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

In relation to reasonable belief, we instruct ourselves that this is essentially a subjective question so the focus is on what the worker believed rather than what anyone else might have believed in the same circumstances. However there has to be some substantial basis for the worker's belief.

We have been referred by Mr McHugh to the case of **Korashi v Abertawe Bro Morgannwg University Local Health Board**. There within the Judgment of the EAT the following passage appears:

> "*What is required is a belief. Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold. No doubt because of that Parliament inserted a filter which is the word "reasonable"*

The EAT went on to state that this meant that the personal circumstances facing the relevant person at the time had to be considered. If the whistle blower was an "insider" who was more informed about the goings on of the organisation, that insight entitled their views to respect. The question reverted to what a person in their position would reasonably believe to be wrong doing.

With regard to the particular meaning of "likely" within the definition, we instruct ourselves that the leading authority remains **Kraus v Penna Plc** [2004] IRLR 260 where the EAT held that the word should be construed as "requiring more than a possibility or a risk but rather that it was probable or more probable than not that the employer would fail to comply with the relevant legal obligation.

9. **Our conclusions**

9.1. <u>The first alleged protected disclosure – Broughton Site 8 February 2017</u>

9.1.1. The claimant contends that following a bore collapse or frac-out whilst drilling under the Derwent River he feared that the river would be polluted and telephoned Mr Waterson for a revised bore plan so that there could be a deeper drill. When being cross-examined the claimant said that he was not just explaining a work situation to Mr Waterson but was pointing out that if there was no revised bore plan there was a risk of further pollution to the river. The claimant was taken to the daily site diary for that day which he had completed (page 253) - where the relevant part of the entry is:

"Stop! Due to frac-out in river Utilergy on site at the time – all drilling works stopped/fluid in river minimal."

9.1.2. The claimant explained to us that the reference to 'minimal' was because they had stopped drilling – they had reacted to the problem.

The claimant contended that there had been damage – pollution – because minimal meant between 2000 and 4000 litres.

9.1.3. In Mr Waterson's witness statements he maintains that the drilling additive (Pure Bore) was biodegradable and so there was no toxic risk. In paragraph 12 of his witness statement he says that the claimant was not communicating to him that there was any environmental or safety risk. However in cross-examination Mr Waterson accepted that the claimant had referred to the possibility of pollution of the Derwent River.

9.1.4. Having regard to that admission, we are satisfied that the claimant had disclosed relevant information.

9.1.5. We then need to consider whether the claimant had a reasonable belief that the environment had been or was likely to be damaged. In the circumstances of this incident, the claimant knew that there had been an escape. There remained the question of whether it was likely that that would cause pollution. In paragraph 7 of Mr McCombie's closing submissions for the respondent there is a helpful summary of the way the claimant explains his reasonable belief. In those submissions Mr McCombie goes on to point out that there is no objective evidence about the harmfulness of the drilling fluid, nor that contaminated ground might make the slurry toxic. His submissions continued to state that "we simply don't know if and how the (presumably highly diluted) additive would be deemed to affect eg aquatic life".

9.1.6. However in our judgment it is not necessary for us to know that.

9.1.7. Applying the broadly objective test tempered by the requirement of reasonableness, we take into account the claimant's 30 plus years experience in trenchless construction and his seniority and overall responsibility for what happened on this site in respect of which he was in charge. Taking those matters into account we are satisfied that he possessed the requisite reasonable belief in the likelihood of pollution occurring.

9.2. <u>Second alleged disclosure – Broughton Site – 9 February 2017</u>

9.2.1. The claimant says that on this date he reported to Mr Waterson that because of the ground conditions there was a risk of damaging the drill rig or losing tooling and so a further risk of frac-outs. In cross-examination the claimant was taken to an email exchange between himself and Mr Waterson on 9 February 2017 (pages 317 to 318) where the claimant informed Mr Waterson that the drill manufacturer, Vermeer, had given certain advice as to the appropriate drill heads. The claimant referred to the possibility of problems with flow/returns. However there is no mention of the risk of frac-outs. The claimant responded to this in cross-examination by confirming that environmental damage was likely if tooling issues were not addressed and he sought to maintain that there was a reference to frac-outs in his email – although clearly that is not the case.

9.2.2. Mr Waterson's evidence was that all that had taken place between the two on this occasion was a discussion about the practicalities of the job and the necessary equipment. In cross-examination Mr Waterson

initially accepted that the claimant had referred to the risk of more frac-outs. However he then changed his mind saying that the introduction of a larger rig would not have had any bearing on frac-outs. Further he denied that any reference to damage to the rig had been understood as a health and safety issue.

9.2.3. Here it is less clear what information was given to Mr Waterson. Such documentary evidence as there is does not assist the claimant. However the claimant is adamant that he referred to the risk of another frac-out and he has not waivered from that. In comparison Mr Waterson in cross-examination, as we have noted, initially agreed that the claimant had referred to the risk of further frac-outs but then changed that evidence. In these circumstances on balance we prefer the claimant's evidence. Subject to the observation that in this case the claimant was referring to something which was likely as opposed to something that actually happened, our reasoning with regard to reasonable belief and likelihood which we give in relation to disclosure one applies equally here. Accordingly we find this to be a further qualifying protected disclosure.

9.3. Third alleged protected disclosure – Broughton site – 14 February 2017

9.3.1. On this date damage had been caused to a reamer. The claimant tried to obtain a replacement part but that was not immediately available. The claimant says that he contacted Mr Waterson who told him to proceed with the reaming work but at a slower pace. The claimant says that he told Mr Waterson that if that was done there was a risk of bore collapse with the further risk of pollution. In cross-examination the claimant maintains that he had told Mr Waterson of the environmental risk but was instructed to carry on with the work.

9.3.2. In Mr Waterson's witness statement at paragraph 18 he acknowledges that the damage to the equipment meant that trailing rods could not be installed during the reaming process. He said that it had been a commercial decision to continue. He stated that this state of affairs did not make pollution likely to occur. It was pointed out to Mr Waterson during his cross-examination that in paragraph 18 of his witness statement he made no denial that the claimant had referred to pollution. However Mr Waterson maintained that the claimant had said nothing about pollution. He had not thought it relevant to deal with that specific allegation in paragraph 18 of his witness statement. He acknowledged that he probably should have specifically said that the claimant had not referred to pollution.

9.3.3. Again we have little corroborative evidence. However having regard to the deficiencies in Mr Waterson's evidence (paragraph 18 of his witness statement) we again on balance prefer the claimant's evidence. Our finding in relation to reasonable belief and likelihood apply equally here too. Accordingly this is a further qualifying protected disclosure.

9.4. Fourth alleged protected disclosure – Broughton site – 15 February 2017

9.4.1. On this date the drill rig began to leak drilling fluid out of the mud pump. The claimant describes fluids spewing out on to the roadside and down

into the river. On reporting the matter to Mr Waterson the claimant says that he was told to manage the escaping fluid by the use of sand bags. The claimant sent Mr Waterson an email (page 509) in which he said that before the drill rig went out to another job it would have to have its pump prepared properly. He referred to a quick repair which had been done on site by the manufacturer, but the problem had got worse as "the fluids are running at a constant rate out of the pump housing making a huge mess, we are having to contain the fluids with sand bags to prevent them entering the surface water run off into the river."

9.4.2. Mr Waterson's email in reply suggests that the rig should be collected promptly so that the manufacturer could repair it but "if not we will have to manage the fluids at Malvern". Malvern was to be the site of the next job.

9.4.3. The claimant replied to Mr Waterson (page 510) commenting that it did not look good "all the fluids everywhere and the rig surrounded with sand bags for containment preventing further fluids reaching the river". In cross-examination the claimant contended that in a telephone call to Mr Waterson around this time he had specifically referred to environmental issues. He maintained that the use of sand bags was not standard and the rig should have been shut down and taken for repairs. He maintained that it was more than just an operational problem. He believed that Mr Waterson was prepared to take the risk of pollution or injury. The claimant was not simply complaining about being overruled by Mr Waterson.

9.4.4. In cross-examination the claimant was also referred to his email to Mr Waterson of 16 February 2017 (page 324) where he wrote:

> *"I hope your (sic) sitting down. This job has gone totally belly up. We managed to get the 16" reamer across to the rig side".*

The claimant then relates further technical problems. He goes on to refer to delays which were concerning him as to the stability of the bore. He referred to "the wrong decision has been taken to attempt the same with the bigger reamer in order to keep the job moving, we should have bit the bullet and waited for the new crossover to be delivered and re-trail the rods (hindsight is wonderful thing (sic))".

9.4.5. Mr Waterson replied to that email on the same date (page 323) saying that the claimant should not take any chances in the future with that type of ground. In cross-examination the claimant said that it had been Mr Waterson's decision to continue at a slow pace not his own. Mr Waterson's evidence (paragraph 21) was that it had been the claimant's decision to continue with the second reaming rather than wait for the replacement part.

9.4.6. There is the risk of being distracted by the question of who was responsible for the difficulties at the Broughton site. However concentrating on relevant matters we have noted that in the claimant's email he makes reference to the prevention of further fluids reaching the river. We are satisfied that this was a disclosure of information and again one made with a reasonable belief that environmental damage

was likely. We therefore find it to be a further qualifying protected disclosure.

9.5. Fifth alleged protected disclosure – Malvern College – 7 June 2017

9.5.1. This job involved the installation of a pipe for the supply of fresh water. A pipe end protector had become dislodged which resulted in slurry flowing down the newly installed pipe. The claimant thought that the best course of action would be to flush out the slurry before any further drilling took place. However the client wanted the drilling to continue. The claimant's evidence is that during a telephone conversation with Mr Waterson on 7 March the claimant said that as the pipe was contaminated they should concentrate on cleaning it out rather than continuing to lengthen the pipe work. Although it is not referred to in the relevant part of the claimant's witness statement (paragraph 30), he said in cross-examination that if the pipe was not cleaned out promptly there was the risk of the slurry hardening and so remaining in place and then subsequently contaminating the freshwater supply.

9.5.2. There appears to be no clear evidence from the claimant that he referred to health and safety issues in this conversation with Mr Waterson. Instead it seems that the claimant was complaining that technically and practically it would be more difficult and time consuming to clean the pipe out at a later date rather than immediately. Here we find that the actual concerns being expressed by the claimant at the time were in relation to the practicalities of cleaning the pipe. Whilst the claimant in cross-examination has referred to the risk of the freshwater supply being contaminated we are satisfied that that is not what he was saying at the time. We therefore find that this was not a qualifying protected disclosure.

9.6. Sixth alleged protected disclosure – Aller (Taunton) – 28 March 2017

9.6.1. Wessex Water were the client for this job. It was not possible for drilling to commence until a water supply was connected and there was some delay with this. The claimant's evidence is that on 22 March and unknown to him at the time, his team had drawn some 10,000 litres of water from a fire hydrant. That had led to a dramatic loss of water pressure in the nearby village. That alerted the attention of Wessex Water. The claimant's evidence was that his foreman driller had sought to cover that up by saying to Wessex Water, untruthfully, that the respondent's water tankers had arrived on site full.

9.6.2. The claimant says that once Wessex Water had left he told his team that what they had done was a criminal offence for which the company could be prosecuted.

9.6.3. The claimant's evidence is that he was then told by his team that it had been Mr Waterson who had told them to get the water from the village so that drilling could start.

9.6.4. On the same day (22 March) the claimant sent an email to Mr Waterson (page 333). He wrote:

> "*We drew water from the hydrant to fill the tanks and the pressure in the village dropped severely (I have told the contractor we arrived with full tanks)*".

He went on to say that Wessex Water would be connecting a water supply the following day.

9.6.5. The claimant's evidence is that when Mr Waterson visited the site on 28 March he confirmed that he had given the instruction to get water from the village. The claimant says that he reminded Mr Waterson that taking water from the hydrant was a criminal offence and that there was also the risk of discolouration or contamination of the public water supply (paragraph 44 of his witness statement). In cross-examination the claimant contended that prior to meeting Mr Waterson on 28 March he had telephoned him to say that a criminal offence had been committed. In cross-examination it was pointed out to the claimant that there was no reference to that in his witness statement. The claimant said that he must have forgotten to put it in. However he was adamant that he had mentioned a criminal offence at the 28 March meeting.

9.6.6. Mr Waterson's evidence was that on visiting the site his concern was that the drilling rig had been positioned too close to the stream. During cross-examination Mr Waterson accepted that taking water from the hydrant would be a criminal offence and so when the claimant told him that the crew had done that he knew that they had committed a criminal offence. However he could not remember a phone call from the claimant referring to a criminal offence. Nor did he recall the claimant raising the hydrant issue at the 28 March site meeting. He denied that he had given any instruction to get water from the village. He did not recollect the claimant referring to the risk of criminal prosecution. Nor did he recall mention being made of the risk of discolouration. He accepted that he was annoyed with the claimant because he had not got his laptop or the job file on site. He denied that the claimant had made any reference to taking up an offer to contact Mr Gallagher (the group chairman) or that he had responded to that by saying "Oh, I see you are a whistle blower". Mr Waterson also denied that there had been any discussion about the claimant's alleged earlier disclosures. That discussion had not taken place.

9.6.7. We accept that, in terms, the claimant's email of 22 March 2017 did not refer to a criminal offence. However we are satisfied that as Mr Waterson was informed in that email that water had been drawn from a hydrant and further that the official supply would not be provided until the following day, Mr Waterson would, as he acknowledges obviously realise that he was being told that a criminal offence had been committed. We were not impressed by Mr Waterson's attempts to back pedal subsequently in his cross-examination by suggesting that at the material time a licence might have been granted for use of the fire hydrant. We find that reasonable belief obviously existed as there is no dispute that taking water from the fire hydrant without permission was a criminal offence. We therefore find that this was a further qualifying protected disclosure.

9.7. <u>The seventh protected disclosure</u>

9.7.1. We have some doubt as to whether, as the claimant alleges, he reiterated the earlier disclosures to Mr Waterson at the 28 March meeting. However as we have found five of those six disclosures to be qualified disclosures that is a fairly academic point.

10. **Was the reason or principal reason for the dismissal the making of the protected disclosures?**

10.1. We remind ourselves that the burden of proof is on the claimant to establish this on the balance of probabilities. Accordingly the respondent does not have to prove the reason for dismissal. However in this type of case the respondent will have to give some explanation of why it dismissed.

10.2. The starting point is the letter of dismissal. We should add that we find that Mr Waterson was in effect the dismissing officer. His letter gives no reason whatsoever for the dismissal. We have not been offered any explanation for that, although the respondent does say that it did not need to go through a formal capability or disciplinary procedure having regard to the claimant's length of service. Nevertheless one would have expected at least a brief statement of the reason.

10.3. There is then the Response to these proceedings. We are told that this was not prepared by a lawyer, but that does not alter the fact that they are this respondent's response to this claim. As we have noted, the only reference to the reason for dismissal in those grounds of resistance, which run to two pages, is that "it was just not working out." However in Mr Waterson's witness statement there are four pages devoted to an explaination of the reason for dismissal.

10.4. We have been referred to various contemporaneous emails to the claimant which we accept express *some* concern about his performance, particularly with regard to the completion of paperwork. For example page 368, page 369 and page 370. However we consider that those are no more than relatively mild admonishments. There are no warnings or threats of capability or disciplinary proceedings. We also observe that the respondent had at it's disposal the three month probationary period but it chose not to dismiss the claimant during that period.

10.5. We remind ourselves that during the course of Mr McGeady's cross-examination he suggested that the claimant might not have been truthful about his qualifications and experience as set out in his CV. In so far as that was put forward as a further reason for the claimant's dismissal it is a new one.

10.6. We accept Mr McHugh's suggestion that there is something more than a coincidence between the date when the respondent now says it became concerned about the claimant's performance and the date when the claimant began to make his disclosures.

10.7. We have also taken into account the unchallenged content of the Cultural Survey outcome at page 65 of the bundle. This was part of what the respondent calls its LIFE Programme – 'LIFE' being an acronym for "living incident free every day". In that survey outcome reference is made to

"being safe not seen as being career helpful; peer pressure when raising issues; safety depends on whose (sic) watching and no system for reporting or evidence that it is encouraged."

10.8. Finally we take the view that the appeal conducted by Ms Wilkes was wholly unsatisfactory. We accept that she was an external HR consultant but the respondent was prepared to accept her superficial analysis which exonerated the respondent.

10.9. Taking all these matters into account we are satisfied that the claimant has shown on the balance of probability that the reason for his dismissal was the various protected disclosures which he made and accordingly the claim succeeds.

11. **Remedy**

At the beginning of the fifth day at this hearing we were informed by our clerk that the parties were in negotiation. Subsequently we were informed by counsel that they had been able to reach agreement in terms of remedy and in those circumstances obviously we were not required to adjudicate on that matter.

Employment Judge Little

Date: 10th May 2018