EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105310/2020

Hearing Held by Cloud Video Platform (CVP)on 1-5 March 2021

Panel Members: Employment Judge O'Donnell,
Ms P McColl
Mr W Muir

Mr M Quinn	**Claimant** **In Person**
D E Product Labels Limited	**Respondent** **Represented by** **Mr Robertson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

1) The Claimant was not subject to a detriment contrary to s47B of the Employment Rights Act 1996 because he made a protected disclosure. This claim is hereby dismissed.

2) The Claimant was not unfairly dismissed in terms of either s98 or s103A of the Employment Rights Act 1996. The claims of unfair dismissal are hereby dismissed.

REASONS

Introduction

1. The Claimant has brought the following complaints:-

    a. Detriment for making a public interest disclosure contrary to s47B of the Employment Rights Act 1996 (ERA).

    b. Automatically unfair dismissal under s103A ERA (public interest disclosure).

    c. Unfair dismissal under ss94 & 98 ERA.

2. The Respondent resists the claims. They argue that the Claimant did not make a protected disclosure as defined in s43A ERA. In any event, they deny that the Claimant was subject to any detriment for making any disclosure and that the main or principal reason for his dismissal was not any disclosure which the Claimant may have made. Rather, they say that the Claimant was fairly dismissed by way of redundancy.

Case management issues

3. At the outset of the hearing, there was a discussion as to which party would lead evidence first given that the burden of proof lay with the Claimant in the detriment claim and with the Respondent for the unfair dismissal claim. Mr Robertson for the Respondent had suggested the Claimant go first as he needed to show that there was a protected disclosure and the Claimant had no issue with that. The Claimant, therefore, led evidence first.

4. There was a request from the Claimant for further documents to be provided by the Respondent and added to the bundle. The first of these were his appraisal documents. The Respondent had no issue with providing these under explanation that the 2020 appraisal for all staff had not been completed due to the pandemic. These were provided to the Claimant and the Tribunal, being added as document 16 in the joint bundle.

5. The second document was what the Claimant described as a "notification of contravention" from the Health & Safety Executive. There were already HSE documents in the bundle which are available publicly but the document which the Claimant sought was not one which was within the public domain. The Respondent's initial position was that they had no further documents from the HSE in their possession. However, after further investigations were made, a document was found which they considered might be the document to which the Claimant referred. This was provided to the Claimant for review and, on his confirmation that this was the document sought, it was added to the bundle as document 17.

Evidence

6. The Tribunal heard evidence from the following witnesses:-

   a. The Claimant.

   b. Dylan Ferguson (DF), a fellow employee of the Claimant. Mr Ferguson's evidence was interposed between the Claimant's evidence-in-chief and his cross-examination as Mr Ferguson was only available on the first day of the hearing and there was a risk that the Claimant's evidence would not finish on the first day in sufficient time for Mr Ferguson to be heard.

   c. David Edwards (DE), the Respondent's managing director.

   d. Kerry Hyslop (KH), head of HR for HR Services Scotland (HRSS) who was contracted by the Respondent to conduct the redundancy consultation exercise.

7. There was an agreed bundle of documents prepared by the parties. The bundle had numbered documents with page numbers for each document rather than consecutive page numbers for the whole bundle. Where documents are referred to below then the document number will be given followed by the page number within that document where reference to a specific page is required. So, for example, a reference to B1.10 is a reference to the tenth page of the first document.

8. There were some facts that were not agreed between the parties but these were not fundamental to the Tribunal's determination. For example, there was a dispute as to the time at which DE arrived at the Respondent's premises on 23 March 2020 but this had no bearing on the issues to be determined.

9. The Tribunal did consider that all the witnesses sought to be truthful in their evidence and any discrepancies in their evidence was due to differing recollections given the passage of time since the events.

10. There were two issues which arose during the Claimant's evidence which can, broadly, be described as relating to the admissibility of certain evidence.

11. First, during his evidence-in-chief, the Claimant started to speak about seeking advice from a solicitor. The Judge stopped the Claimant before he said more than that he had sought advice and explained to him that any instructions he gave to his solicitor or advice received from them was subject to legal privilege. It was explained to him that this meant he could not be compelled to give evidence about such matters but that if he did then he would be considered to have waived this privilege and Mr Robertson, for the Respondent, could then ask questions about the discussion between the Claimant and his solicitor insofar as these were relevant. In the event, the Claimant was only seeking to state the fact that he contacted a solicitor in outlining the chronology of the case.

12. The second issue related to what is commonly referred to as a "protected conversation" held on 3 June 2020 between the Claimant and representatives of HRSS acting on behalf of the Respondent. The fact of this conversation arose in both the Claimant's evidence-in-chief and cross-examination. The Tribunal raised with parties the question of whether evidence about this was admissible in terms of s111A ERA. Mr Robertson, on being asked by the Tribunal, confirmed that he was asking questions in cross about this discussion for the purposes of the s47B ERA claim.

13. On the basis that s111A only relates to the admissibility of evidence about pre-termination negotiations in unfair dismissal claims (and so would not cover the s47B claim) and contains a specific exclusion at s111A(3) which would encompass the s103A claim then the Tribunal considered that evidence about the discussion on 3 June 2020 would be admissible. In the event, parties did not lead evidence as to what was specifically discussed as regards possible settlement and the evidence related to the fact of the discussion and the process followed in relation to it.

Findings in fact

14. The Tribunal made the following relevant findings in fact.

15. The Respondent is a printing business which mainly prints adhesive labels and cardboard sleeves. The vast majority of their work is for businesses in the food industry. They operate from two buildings on the same site in Coatbridge. They have approximately 10 staff at any given time.

16. The Claimant started working for the Respondent as a printer on 31 May 2012. Towards the end of 2015 or start of 2016, he was promoted to the role of print supervisor. When the Respondent moved to their current premises at the end of 2017 and start of 2018, the Claimant was promoted to the role of production manager.

17. The role of production manager involved organising the production schedule, the training and supervising of staff, the maintenance of the machines used by the Respondent and health and safety issue. The Claimant would also work on the printing machines.

18. On the evening of 22 March 2020, the Prime Minister announced that the UK would be going into a period of "lockdown" as part of the measures being deployed to deal with the coronavirus pandemic and protect the NHS. The population was being asked to remain at home and not go out to work or for other reasons unless it was essential. Only essential businesses were to remain open.

19. On 23 March 2020, the Respondent's business opened as normal and the Claimant along with other staff attended work. On the morning of 23 March, DE made contact with the Respondent's five main customers, all of them in the food industry, in order to find out what they were doing in relation to the lockdown. These customers were all considered to be essential businesses given their involvement in food production and they informed DE that they considered the Respondent to be an essential supplier to them.

20. DE also contacted his accountant that morning to find out about the furlough scheme that had been announced by the Government.

21. During the course of the morning, DE was approached by the Claimant about the steps being taken to deal with the lockdown. The Claimant expressed concerns about the business remaining open. During that discussion, the Claimant stated to DE that there were two members of staff with underlying health conditions, one with asthma and one with a blood disorder.

22. After speaking to customers and his accountant, DE took the decision to keep the business open as an essential supplier to essential businesses. He spoke to the operations manager, Tracey Robertson, and asked her to order hand sanitiser and additional latex gloves (the Respondent already had a supply of these for use in normal times but DE wanted more given the increased usage likely during the pandemic)

23. DE held what was described as a “town hall” meeting with the rest of the staff in the afternoon of 23 March in which he explained that the business was staying open and the reasons for that. He explained that if anyone needed to self-isolate for two weeks then they could do so and that they would be paid Statutory Sick Pay.

24. The Tribunal noted that there was some confusion between the witnesses in relation to the terms “self-isolate” and “shield” which were used interchangeably at times. The term “self-isolate” has been used in the media and advice to the public in the context of the pandemic to describe what should be done by someone who has symptoms of Covid-19 to keep themselves separate from others for a period of two weeks to limit the spread of the virus. On the other hand, “shielding” has been used as a term to describe those with underlying health conditions (and those in the same household as such people) keeping themselves separate from others to avoid catching the virus. On occasion, during evidence, witnesses used the term “self-isolate” in circumstances when “shielding” was what was actually being described.

25. The Claimant continued to attend work after 23 March 2020 and the Respondent continued to operate.

26. On 30 April 2020, the Claimant approached DE to advise him that one of his sons (DE thought it was one son when giving evidence but it was the other) had symptoms of Covid-19 and was to be tested to confirm if this was the case. The Claimant indicated that he may need to self-isolate. DE asked the Claimant not to disclose this to other employees until the test had been done and the results confirmed.

27. In the event, the Claimant’s son improved overnight and his temperature came down. No test for Covid-19 was done and the Claimant continued to work as normal.

28. From around the middle of March 2020, DE had been looking at ways of reducing costs. The business required to recruit two members of staff, one in the office and one in sales. It had also purchased a new machine and was in the process of purchasing a further machine.

29. Over time, DE came to the view that the role of production manager could be removed and the duties of that role could be re-distributed. He had taken on some duties relating to stock rotation from December 2019 which had previously been done by the Claimant. The Respondent also used external consultants for issues around health and safety. DE considered that the work done by the Claimant could be taken on by him, the operations manager, the external consultants and other staff in relation to the actual printing work done. This would save the business the cost of the salary for the production manager post which could then be used to fund office and sales roles which DE felt that the business needed more.

30. DE's views on this crystallised towards the start of May 2020 when he concluded that the role of production manager could be removed.

31. The Respondent did not have an HR department or anyone with a dedicated HR function. It contracted with an external HR company, HR Services Scotland (HRSS), and they were asked to carry out the redundancy consultation process which would arise from the deletion of the production manager role.

32. On 3 June 2020, DE met with representatives of HRSS, KH and Andrew Purdon (managing director), to discuss the planned restructure of the Respondent that would remove the role of production manager. It was explained by DE that this was a measure intended to save costs. There was no discussion at this meeting, or at any other time, of what was said by the Claimant to DE in 23 March 2020.

33. After this meeting, DE met with the Claimant to explain that his post was at risk of redundancy and that HRSS would now be meeting with the Claimant. DE then left the room and the Claimant met with Mr Purdon and KH. They held a protected conversation with the Claimant.

34. At the end of this conversation, the Claimant left the room accompanied by Mr Purdon. KH remained in the room. The Claimant was asked by Mr Purdon to hand over his keys to the Respondent's premises and was asked not to attend the workplace for a period of 10 days. This is a standard practice by HRSS after a protected conversation to give the affected employee the opportunity to consider any proposals made during that conversation and take legal advice. However, there was no evidence that this was explained to the Claimant on 3 June 2020.

35. In the event, the Claimant did not take up the proposals made during the protected conversation and so the redundancy consultation process commenced.

36. In early June 2020, the Claimant requested copies of the Respondent's grievance and whistleblowing policies from KH. She asked DE for copies on the same day; DE sent the grievance policy and then sent the whistleblowing policy at a later date. Before sending these to the Claimant, KH reviewed them to ensure they were up-to-date and, on identifying that they needed revision, she made changes to them. The revised policies were sent to the Claimant by email dated 11 June 2020 (B14) by Lesley Feely of HRSS. These are described as "newly prepared policies" in the email.

37. By letter dated 12 June 2020 (B3), KH wrote to the Claimant notifying him that he was at risk of redundancy. This letter was taken from a suite of templates used by HRSS and was not seen by DE before it was sent. It made reference to the Respondent "downsizing" which was an error arising from the template not being adapted properly according to the circumstances of this case.

38. The letter went on to advise that there would be a 14 day consultation period and explained what would be discussed during the process. The Claimant was invited to attend a meeting with KH on 19 June 2020 to discuss matters. The meeting was to be held remotely by way of the Zoom app.

39. The Claimant and KH met via the Zoom app on 19 June and KH wrote to the Claimant by way of letter dated 23 June 2020 (B5). No separate minute of the meeting was prepared as KH considered that the letter set out what was discussed in sufficient detail.

    a. The meeting began by KH explaining that the risk of redundancy arose from an organisational restructure and that the meeting would give the Claimant the opportunity to make suggestions as to how redundancy could be avoided.

    b. The Claimant asked for more information as to how his role had come to be placed at risk of redundancy and KH undertook to provide this.

    c. The Claimant went on to challenge the assertion made in the letter of 19 June regarding downsizing. As noted above, the reference to downsizing was an error and so the Claimant had been led into seeking to address what was ultimately a red herring.

    d. The Claimant explained that he was the most skilled person in the production side of the business, responsible for training and the only person who could operate certain machines.

    e. Reference was made by the Claimant to an advert online for an office support role within the Respondent (B13). This was made in the context of the Claimant's challenge to the issue of downsizing as opposed to being a role that he could fill. The closing date for applications for this vacancy was 19 June 2020.

f. The Claimant also made reference to recruitment being carried out in the production side of the business. No specific jobs or candidates were given and, before the Tribunal, no evidence was led which established that the Respondent was filling roles in the production side of the business in June 2020.

g. The Claimant went on to raise issues around a grievance he said he raised in December 2019. This relates to issues around a lack of stock being available around this time and which led to DE taking over the responsibility for stock rotation from the Claimant.

h. The Claimant also raised the concerns he expressed to DE on 23 March 2020 regarding health and safety. He alleged that his concerns had not been taken seriously and that he had been left to deal with matters himself. He was asked if he wished to elaborate further and he declined to do so. No reference was made to the disclosure of the underlying health conditions of other employees.

i. The Claimant subsequently emailed KH a written note of his issues (B7) and she undertook to discuss these with the Respondent.

j. A further and final consultation meeting was arranged by way of Zoom for 26 June 2020.

40. After the meeting, KH spoke to DE regarding the issues raised by the Claimant. In relation to the issue of the vacant office support role, DE considered whether this was a role which the Claimant could do. He came to the view that the Claimant would need further training to be able to do the role and that the business required someone who could take on the work involved from the start.

41. The Claimant met with KH by way of a Zoom meeting on 26 June 2020. Minutes of the meeting are at B6:-

a) It was explained to the Claimant that the business had decided to restructure and that it no longer required a production manager role. The tasks of that role were to be done by the operations manager.

b) The Claimant asked about the purchase of new machines and the fact that the business was undergoing growth. KH replied that the business was restructuring and was focussing on generating revenue in specific areas with steps being taken now, and in the future, to increase savings and create efficiencies.

c) In response to the Claimant's comment that he was the most skilled person in production, KH replied that it was the production manager role that was in scope for redundancy and not one of a printer.

d) The Claimant raised the vacant office role and asked why he had not been offered this. KH replied that it was considered that he did not have the necessary skill set and that it was a much lower salary. KH went to deal with the assertion from the Claimant that the Respondent was recruiting production roles and informed him that there were no live adverts for any such roles and no recruitment in this area.

e) The Claimant raised the issue of the grievance in December 2019. KH replied that the business did not consider that a formal grievance was raised at the time.

f) The Claimant also stated that he felt he was being selected for raising health and safety issues in March 2020. KH replied that the Respondent refuted this and had taken all necessary steps to protect health and safety in relation to the pandemic.

42. By letter dated 29 June 2020 (B8), sent in the name of DE but on HRSS headed paper, it was confirmed that the Claimant was being made redundant and giving him notice that his employment would terminate on 25 August 2020. The letter set out the payments due on termination and when they would be paid. It also outlined the Claimant's right of appeal.

43. It is common ground between the parties that the Claimant did appeal the decision but neither party could find a copy of his letter of appeal.

44. The appeal was heard by Angela Millar, deputy head of HR for HRSS, on 17 July 2020. Ms Millar is junior to KH in the hierarchy within HRSS.

45. The outcome of the appeal was communicated to the Claimant by letter dated 22 July 2020 (B4). In this letter, it was confirmed that the term "downsizing" was used in error in the letter at B5 but that the redundancy still arises because of the restructuring. It goes on to state that the only vacant roles at the time were the office support role and a sales role but that the Respondent did not consider that the Claimant had the necessary skills to fill those roles.

46. In or around August 2020, DE had a meeting with a Paul McLaren who was a friend of DF and had expressed an interest in working for the Respondent. There was no vacancy at the time and DE met with Mr McLaren to see if he would be a suitable person if a vacancy came up for a printer in the future. No job offer was made to Mr McLaren at that time.

47. The Respondent did recruit a printer in November 2020. This post was filled by someone other than Mr McLaren.

Claimant's submissions

48. The Claimant made the following submissions.

49. He relied on what was said in the ET1 and, in particular, the law as set out in the pleadings.

50. He made the disclosure on 23 March 2020 and he disclosed concerns regarding the health and safety of staff being at risk because of the way in which the Respondent was dealing with Covid. It was failing in its obligation to protect staff.

51. As a result of making this disclosure he was isolated in the workplace and was asked to leave the business on 3 June 2020.

52. Mr Edwards admitted planning the redundancy in March 2020. The Claimant was the only person made redundant.

53. The contradictions in the letters from HRSS prove this as did the newly created policies.

54. He could have remained in the business in one of the jobs which had been advertised.

55. This whole thing had damaged his confidence and had caused sleeplessness and stress. He was given no support by the Respondent to find a new job during the pandemic.

56. In rebuttal of a point raised in the Respondent's submission, the Claimant argued that he had done a health and safety course to get a certificate in that which he considered would help him secure employment.

Respondent's submissions

57. The Respondent's agent made the following submissions.

58. Mr Robertson started by setting out certain facts which appeared to be agreed relating to dates of employment, the Claimant's employment history and the dates of meetings and letters in the redundancy process. He then went on to set out matters which were in dispute relating to events around what was discussed on 23 March 2020 and other dates concerning the pandemic and steps being taken by the Respondent.

59. Although the Claimant is representing himself, it must be remembered that his claims were formed by lawyers acting on his instructions. Mr Robertson went on to set out the claims being pursued.

60. Starting with the issue of the protected disclosure, it was submitted that the purpose of the legislation is to provide protection to employees if certain criteria are met. In particular, there are four requirements which must be met for there to be a qualifying disclosure; there must be sufficient disclosure of information; it must relate to specific types of matter set out in statute; there must be a reasonable belief that the information tends to show the relevant failing; it must be in the public interest.

61. In relation to the first requirement of the need for a disclosure of information, reference was made to the case of *Kilraine* (below). Mr Robertson drew the Tribunal's attention to paragraph 4 of the ET1 paper apart and that the Claimant had stated that the disclosure was not restricted to what was said in this paragraph. These did not relate to either the "town hall" meeting or the meeting in the office; it was another discussion between the Claimant and DE at which it was said the disclosure was made. It was denied by DE that this discussion took place and the Claimant's position contradicts the ET1. There was no specification about this meeting and the Claimant had an obligation to set this out. It was submitted that the Claimant's evidence could not be relied upon and that the Tribunal should find that there was no disclosure of information.

62. Turning to the second requirement, it was pointed out that the Claimant relies on the disclosure tending to show either a breach of a legal obligation or a danger to health and safety. Reference was made to the case of *Blackbay Ventures Ltd* UKEAT/0449/12 as authority that where a breach of legal obligation is asserted then the source of the obligation must be identified and that the Claimant had not done so in this case. As regards the health and safety allegation, the Claimant had been unable to specify what the breach was other than a vague reference to the duty of care and the question of people being allowed to shield. It was submitted that this was not specific enough and that it was factually inaccurate as the evidence of DE was that people did have the opportunity to self-isolate. Mr Robertson made reference to the documents added to the bundle relating to health and safety matters (B17) but submitted that these were not relevant as they were not connected to the issues about which the Claimant says he made a disclosure. The disclosure, if there was one, did not, therefore, fall into one of the categories in s43B(1) ERA.

63. In relation to the third requirement, it was submitted that the Claimant had failed to show that he had a reasonable belief that his disclosure tended to show the relevant failure. The Claimant may have been unhappy that the business had not shut during lockdown but this does not amount to reasonable belief.

64. Finally, in relation to the fourth requirement, it was submitted that the Claimant had not shown a reasonable belief that any disclosure was in the public interest.

65. If the Tribunal did find that these requirements were met and there was a qualifying disclosure then it was accepted by the Respondent that this would be a protected disclosure as it had been made to the Claimant's employer.

66. Turning to the detriment claim, Mr Robertson stated that the term "detriment" is not defined in the statute and that the *Shamoon* case (below) provides the test. The alleged detriment is set out in the ET1 as being in three parts. Reference was made to the case of *NHS Manchester v Fecitt* and that it must be shown that any protected disclosure materially influences the treatment. It was submitted that the evidence of DE and KH is clear as regards why certain things were done and that the Claimant has not shown that any disclosure had any significant influence on what he says were detriments.

67. In particular, it was submitted that the Claimant accepted that normal communication continued with DE and TR and there was no evidence that he was isolated. Further, the decision to remove his keys was one taken by HRSS as part of a standard process they followed in such cases.

68. It was submitted that there was no detriment in these circumstances.

69. In relation to the s103A claim, the questions for the Tribunal were what was the main or principal reason for the Claimant's dismissal and whether this was the disclosure. The reason for dismissal requires an inquiry into what was in DE's mind at the time which caused him to decide to dismiss and it was submitted that this was not the disclosure. Reference was made to the case of *Kuzel* (below) and that the burden of proving the reason for dismissal lay with the Respondent where the Claimant had the necessary service. In this case, the Respondent had proved that redundancy was the reason for dismissal and this was a potentially fair reason.

70. Mr Robertson then set out the relevant law in relation to the "ordinary" unfair dismissal claim, both statutory provisions and case law. For the sake of brevity, the Tribunal does not propose to set this out in detail especially given that many of the cases to which they were referred are well-known and frequently referred cases such as *Williams v Compair Maxim* and *Polkey*.

71. It was submitted that the Respondent did warn the Claimant that he was at risk of redundancy and consult with him. This was a case where there was a pool of one and so there was no need to apply a selection criteria.

72. In relation to alternative employment, there was no obligation to create a post nor was there an obligation to provide a role which is unsuitable. It was submitted that DE had explained why the admin post was not considered suitable for the Claimant and that this was the only vacant post at the time. There was no evidence that a printer role existed at the time of the consultation process and there was only an appointment to such a role sometime after the Claimant's employment ended. Although it was not argued by the Claimant, Mr Robertson did address the question of "bumping" another employee to create a vacant role for the Claimant and submitted there was no obligation to do so.

73. It was, therefore, submitted that a fair redundancy dismissal had taken place.

74. Mr Robertson then set out an *esto* position regarding the potentially fair reason being "some other substantial reason" that there was a sound business reason for the reorganisation.

75. The submissions for the Respondent concluded by addressing the Claimant's schedule of loss. The dates and pay used were agreed but not the period of future loss. The Respondent disputed the amount of pension contribution and submitted that the Claimant had not led evidence regarding the cost and benefit of the course claimed as expenses. Finally, if some procedural error was found then compensation should be reduced in line with the *Polkey* reduction.

Relevant Law

76. Section 103A of the Employment Rights Act 1996 (ERA) deems any dismissal to be unfair where the reason for the dismissal is that the employee made a "protected disclosure".

77. Section 47B ERA makes it unlawful for a worker to be subject to a detriment on the grounds that the worker made a "protected disclosure".

78. A disclosure is a protected disclosure if it meets the definition set out in s43A ERA read with ss43B-H:-

43A Meaning of 'protected disclosure'

In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections 43C to 43H.

43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

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

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

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

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

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

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

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).]

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

79. In order to be a qualifying disclosure, any communication must have sufficient factual content capable of tending to show one of the matters listed in s43B(1) and a mere allegation is not enough (*Kilraine v Wandsworth LBS* [2018] ICR 1850).

80. The factual accuracy of the allegations is not determinative of whether one of the relevant failures listed in s43B has been or is likely to occur but can be an important tool in deciding whether the worker had a reasonable belief that the disclosure tended to show a relevant failure (*Darnton v University of Surrey [2003] ICR 615).* The term “likely” in this context requires more than a possibility or risk of a relevant failure (*Kraus v Penna Plc* [2004] IRLR 260).

81. Any belief on the part of the worker must be genuinely and reasonably held at the time at which the disclosure is made (*Kilraine*).

82. In determining whether any disclosure is in the public interest, the Court of Appeal in *Chesterton Global Ltd v Nurmohamed [2018] ICR 731* set out factors which should be considered:-

a. The number of people whose interests are served by the disclosure.

b. The nature of the interests affected and the extent to which they were affected by the wrongdoing disclosed.

c. The nature of the wrongdoing disclosed.

d. The identity of the alleged wrongdoer.

83. The question of whether there is a detriment requires the Tribunal to determine whether "by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

84. It was held in *Maund v Penwith District Council* [1984] IRLR 24 that the burden of proof regarding the reason for dismissal lies with the employer unless the employee does not have the requisite length of service to pursue a claim of "ordinary" unfair dismissal. If that is the case then the onus is on the employee.

85. The question of how the Tribunal should approach the burden of proof in relation to the reason for dismissal in cases involving claims of both "ordinary" and

automatically unfair dismissal (in particular, whether the Tribunal should find the automatically unfair reason proven if the employer does not discharge the burden of showing a potentially fair reason) was addressed in *Kuzel v Roche Products Ltd [2008] IRLR 530* by Mummery, LJ:-

"The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced led by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

86. The test for “ordinary” unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

87. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is redundancy.

88. Redundancy is defined in s139 ERA and, for the purposes of this claim, the relevant definition would that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished.

89. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. It is worth noting that there is a neutral burden of proof in relation to this part of the test.

90. In assessing the fairness of a dismissal on the grounds of redundancy, the first question is whether there has been a proper pool of employees from which selection for redundancy is made.

91. The principles to be applied by the Tribunal in assessing whether a proper pool for selection has been used are set out by Silber J at para 31 of *Capita Hartshead Ltd v Byard* [*2012] IRLR 814*:-

"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that

(a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83);

(b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);

(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan EAT/663/94);

(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to

determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

92. The Tribunal would then, normally, go on to consider the fairness of the selection criteria applied to the pool. The Tribunal are not entitled to substitute their own criteria for those of the employer and are simply to assess the fairness of the criteria used.

93. In cases where there is a pool of one then there is a low threshold for the employer to meet in applying a criteria as there is only one choice available.

94. In relation to the obligation to consult, the current state of the law in relation was summarised by the EAT in *Mugford v Midland Bank* [1997] IRLR 208 at paragraph 41:-

Having considered the authorities, we would summarise the position as follows:

(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

> *(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.*

95. There is a requirement on an employer to make efforts to find alternative employment for a redundant employee (*Vokes Ltd v Bear* [1973] IRLR 363). However, this duty is only to take reasonable steps and not every conceivable step to find alternative employment (*Quinton Hazell Ltd v Earl* [1976] IRLR 296).

96. The duty does not, in particular, require an employer to "bump" another employee out of their job in order to create a vacancy for a redundant employee (*Byrne v Arvin Meritor LUS (UK) Ltd* UKEAT/0239/02). As Burton P put it in that case:-

> *"The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to "bump", or even consider "bumping". The issue is what a reasonable employer would do in the circumstances, and, in particular, by way of consideration by the Tribunal, whether what the employer did do was within the reasonable band of responses of a reasonable employer?"*

97. In considering whether dismissal fair then the Tribunal requires to apply the well-known "band of reasonable responses" test. The Tribunal must not substitute its own decision as to would have dismissed the Claimant and, rather, it must assess whether dismissal fell within a reasonable band of options available to the employer.

98. The band of reasonable responses test does not apply just to the decision to dismiss but also to matters of process in a redundancy case such as consultation, selection criteria and alternative employment (see the cases of *Byard* and *Earl* above and also *Sainsbury's Supermarket v Hitt* [2003] IRLR 30).

Decision

99. The Tribunal considered that there were three broad issues to be addressed in considering the substantive merits of the claims; whether the Claimant had made a protected disclosure; whether the Claimant had been subject to a detriment because he had made the protected disclosure in question; whether the Claimant had been unfairly dismissed. If the Tribunal found in the Claimant's favour on these issues in terms on which it could conclude that the Respondent had acted unlawfully then the fourth issue of remedy would arise.

Was there a protected disclosure?

100. The first question for the Tribunal was whether the communication on which the Claimant relied as his protected disclosure contained a disclosure of information and, if so, what information was disclosed.

101. The Claimant relied on what he said to DE on 23 March 2020 as amounting to a protected disclosure.

102. The Tribunal found it very difficult to identify from the evidence it heard what information, as opposed to concerns, that the Claimant disclosed on 23 March 2020. The Tribunal considered that the Claimant had fallen into the common trap in cases such as this of confusing or conflating concerns or allegations with information. It was clear to the Tribunal that the Claimant had raised issues with DE about health and safety in the context of the business staying open during the pandemic but the Tribunal did not consider that this amounted to a disclosure of information, particularly when applying the principles in *Kilraine*.

103. However, the Tribunal did find that there was a disclosure of information by the Claimant in respect of the health conditions of other employees. The Claimant did disclose to DE that there were two employees who had underlying health conditions such as asthma. The Tribunal finds that this was the only disclosure of information, as opposed to allegations or concerns, made on 23 March 2020 and so it is only this which is capable of forming the basis of any protected disclosure.

104. The next question is whether this information showed or tended to show one of the relevant failures listed in s43B(1). The Claimant's case was advanced on the basis that the information tended to show either s43B(1)(b) or (d) (that is, a failure to comply with a legal obligation or that the health and safety of an individual had been, was being or was likely to be endangered.

105. The Tribunal considered that the disclosure of the underlying health conditions of other employees is not capable of falling within s43B(1)(b); the mere disclosure of this information does not, in itself, tend to show that the Respondent was failing in its legal obligations even in the context in which it arose during discussions relating to the pandemic.

106. On the other hand, the Tribunal does consider that this disclosure does fall within s43B(1)(d) as the information does tend to show that the health and safety of these employees is likely to be endangered in the context of discussions about a global pandemic involving a respiratory disease at a time at which the country was going into lockdown and those with underlying health conditions were being advised to shield themselves.

107. The Tribunal then has to turn to the question of whether the Claimant reasonably believed that the information he was disclosing tended to show the relevant failure.

108. In determining this question, the Tribunal took account of what would have been known at the time about the pandemic and, in particular, the nature of the disease and the steps being taken by the UK and Scottish governments to manage its effects such as lockdown, shielding and self-isolation. The Tribunal considers that the Claimant would reasonably have believed that disclosing to DE that there were staff with underlying health conditions tended to show that the health and safety of such staff was likely to be endangered given what was known at the time about the higher risks to such individuals in relation to the pandemic.

109. The final question was whether the Claimant had a reasonable belief that his disclosure was in the public interest. Again, this has to be considered in the context of what was known about the pandemic at the time and, in particular, both the need to protect those at higher risk from the pandemic and also to protect the resources of the NHS from being overwhelmed by too many people needing treatment for the effects of the Covid virus.

110. Although the Respondent is a private business, the issues around health of its employees went beyond just the effects on the business and this was part of a broader public health issue.

111. The Tribunal finds that the Claimant had no private interest in disclosing the information in question.

112. The Tribunal, therefore, finds that the Claimant did reasonably believe that this information was in the public interest.

113. In these circumstances, the Tribunal finds that the information disclosed by the Claimant on 23 March 2020 did amount to a qualifying disclosure as defined in s43B ERA and, given the concession by the Respondent that the disclosure was made to them in accordance with s43C, it was, therefore, a protected disclosure as defined in s43A.

Was the Claimant subject to a detriment because he made the disclosure?

114. This issue can be separated into two sub-issues; whether the conduct of the Respondent relied on by the Claimant amounts to a detriment; whether the Claimant had been subject to any such detriment because he had made the disclosure in question.

115. The Claimant relied on two detriments; a lack of communication from DE after the disclosure was made and being isolated at work; being asked to hand in his keys and not to return to the workplace after the meeting with HRSS on 3 June 2020.

116. The Tribunal considered that it did not hear sufficient evidence for it to conclude that there had been a lack of communication from DE after 23 March 2020 and that the Claimant had been isolated in the workplace. The Claimant did not lead any evidence from which the Tribunal could make any findings in fact that the conduct of DE (or any others) had changed after 23 March to any degree, let alone to the degree necessary for the test in *Shamoon* to be met and for the Tribunal to find there had been a detriment.

117. The Tribunal, therefore, holds that the Claimant was not subject to the detriment of a lack of communication and isolation.

118. On the other hand, the Tribunal does consider that the removal of the Claimant's keys and him being asked to not return to the workplace after the meeting with HRSS on 3 June 2020 is capable of amounting to a detriment.

119. The Tribunal considers that a reasonable worker, after a meeting in which they were told they were at risk of redundancy and at which a protected conversation took place, would believe that they were being disadvantaged by being asked to return their keys and not come back to the workplace. On the face of it, this would suggest to any reasonable worker that they were being excluded from the workplace and that, potentially, their continued employment was in serious peril.

120. In the Tribunal's view, there would need to be a very clear and cogent explanation given to the worker at the time which reassures them that they are not being disadvantaged for any such impression to be dispelled.

121. In this case, the explanation is that this is a standard practice carried out by HRSS to give a worker space to consider what was said in the protected conversation and give them the opportunity to take legal advice. The Tribunal considers that this would be an explanation which would provide the necessary reassurance to a reasonable worker such as to dispel the impression that they were being disadvantaged.

122. However, in this case, there was no evidence that the Claimant was given this explanation. It was not put to him in cross-examination that he had had the reasons for returning his keys explained to him in these terms. Further, it was Mr Purdon of HRSS and not KH who went with the Claimant to collect the keys; KH could not, therefore, give any direct evidence as to what was explained to the Claimant and Mr Purdon did not give evidence at all. There was, therefore, no evidence that the reasons why the Claimant was asked to return his keys and remain absent from the workplace was ever explained to him.

123. In these circumstances, the Tribunal finds that the Claimant was subject to a detriment in being asked to return his keys and not return to the workplace after the meetings on 3 June 2020. The Tribunal considers that a reasonable worker would consider that they were being disadvantaged by such matters in the absence of an explanation why this was being done.

124. The final question is whether the treatment which is said to amount to a detriment was done because the Claimant made the protected disclosure.

125. This issue hinges on the extent to which the representatives of HRSS knew that the Claimant had made the disclosure when they asked for his keys and asked him not to return from the workplace.

126. It was the undisputed and unchallenged evidence of KH that this was a standard practice of HRSS in cases where they had had a protected conversation with an employee. Further, it was her undisputed and unchallenged evidence that there had been no discussion of any disclosure made by the Claimant between her, Mr Purdon and DE. The Tribunal finds that she and Mr Purdon had no knowledge of the disclosure which the Tribunal has found that the Claimant made on 23 March 2020.

127. Logically, someone cannot make a decision for a reason that is not within their knowledge and so the Tribunal holds that the Claimant was not asked to return his keys and not return to the workplace because he had made a protected disclosure.

128.

129. The Tribunal, therefore, dismisses the claim under s47B ERA because there was no evidence that the Claimant had been subject to the detriment of a lack of communication and isolation and that, although the Claimant had been subject to a detriment in being asked to return his keys and not return to the workplace on 3 June 2020, this was not done because he had made a protected disclosure.

Unfair dismissal

130. The first question for the Tribunal is the reason for dismissal. In particular, whether there was a potentially fair reason and, if not, whether the reason or principal reason for dismissal was the Claimant's protected disclosure.

131. In this regard, the Tribunal bears in mind that, given that the Claimant has the requisite length of service to pursue an "ordinary" unfair dismissal claim, the burden of proof lies on the Respondent to show that there is a potentially fair reason for dismissal applying the principles set out in *Maund* and *Kuzel*

132. On the face of it, there are facts which show that there was a redundancy situation. There was no evidence to contradict what was said by DE that the duties carried out by the Claimant were re-distributed between DE and others leading to the role of production manager no longer being required. Further, DE gave a clear and cogent explanation why he decided to make these changes and this was not the subject of any real dispute. In these circumstances, there certainly appears to be a reduction in the requirement of the Respondent for employees to carry out work of a particular kind.

133. The Tribunal considered whether there was any evidence which undermined this position and suggested that the apparent redundancy situation was a sham. In this regard, the Tribunal bore in mind that, for the purposes of the claim under s103A ERA, the question was whether the main or principal reason was the disclosure which the Tribunal found had been made.

134. The Tribunal took account of the fact that two months had passed between the disclosure and the start of the redundancy process. There was, therefore, no real proximity between the two events that might suggest a link.

135. There was also no evidence that any new role had been created to carry out the duties which the Claimant had in the role of production manager. There was, therefore, no evidence that the redundancy had been a sham.

136. The Claimant, both in the consultation process and before the Tribunal, raised issues around the initial consultation letter making reference to the Respondent downsizing when, in fact, it was not doing so and was buying new machines and increasing its capacity. Although the Tribunal was very surprised that KH would not have shown the letter in question to DE for his approval before sending it to the Claimant, it had no reason to doubt her explanation that the term downsizing had been used in error as she had used a template letter which had not been correctly revised to reflect the position in this case. This is one of the common pitfalls in using template letters and it is not such an unusual occurrence that would cause the Tribunal to question KH's explanation.

137. The Tribunal does not draw any adverse inference from this and certainly does not consider that this error undermines the ostensible reason for the Claimant's dismissal being redundancy. It can understand why the Claimant gained the impression that what was being said about downsizing was at odds with what was happening but, ultimately, this was a red herring created by the erroneous reference to downsizing in the very first letter in the consultation process.

138. The Claimant also made reference to the fact that the online job advert at B13 was taken down after he raised this with KH. However, on the face of that document, the closing date for applications for this vacancy was 19 June 2020 (the same date as the meeting with KH where it was raised) so it is not surprising that it was taken down and the Tribunal draw no adverse inference from this.

139. Looking at the evidence as a whole, there was little or no evidence that the Claimant's dismissal was for anything other than redundancy. There is certainly insufficient evidence to outweigh the clear and cogent explanation from DE as to how he came to the view that the production manager role was not required anymore.

140. The Tribunal, therefore, finds that the Respondent has discharged the burden of proof and shown that, on the balance of probabilities, the reason for the Claimant's dismissal was the potentially fair reason of redundancy.

141. This finding is sufficient to dispose of the claim under s103A ERA because it means that the main or principal reason for dismissal was not one which fell within the scope of that section. The claim under s103A ERA is hereby dismissed.

142. Having found that there is a potentially fair reason for dismissal, the Tribunal turns its attention to the question of whether the dismissal was fair in terms of s98(4) ERA.

143. The first consideration is the pool for selection and the application of a selection criteria to that pool. In this case, there was a "pool of one" and the Tribunal was satisfied that, applying the principles in the *Byard* case, it was within the reasonable range of conduct for such a pool to be used in circumstances where it was only the Claimant's role that was at risk of redundancy.

144. Further, there being a "pool of one", the issue of a selection criteria does not arise in any meaningful way. The Tribunal does not consider that it would be beyond the reasonable range of responses for an employer to have no real selection criteria when there is no real selection to make.

145. The second consideration under s98(4) is the issue of consultation and the procedure followed by the Respondent (by way of HRSS). This is case where it cannot be said that there was no consultation at all and it did appear to the Tribunal that it was meaningful as far as that was possible in the circumstances of the case. It was certainly the case that the Claimant was given the opportunity to raise issues about the redundancy and he was given a response to those. It cannot be said that the Respondent did not engage with the Claimant in relation to the redundancy process.

146. The Tribunal did, however, have concerns in relation to two issues relating to the consultation to which it gave particular consideration.

147. First, the Tribunal did not consider that it was good practice for the appeal to have been heard by a more junior person at HRSS than the person making the decision to dismiss. Such circumstances risk creating the impression that there is no real prospect of the original decision being over-turned. It may, in fact, be that best practice would have been for DE himself to hear the appeal as, ultimately, he had the final say in whether the Claimant was made redundant.

148. However, the Tribunal reminded itself that it was not for them to substitute their own decision as to what they would have done and the question for them is whether what was done was within the reasonable band of responses. In the circumstances, the Tribunal could not conclude that what was done was not within the reasonable band. In particular, there was no evidence, and it was not argued by the Claimant, that the appeal was not a genuine and proper consideration of the grounds of appeal advanced by him.

149. The second concern in relation to the consultation overlaps with the third issue for the Tribunal to consider in terms of s98(4), that is, alternative employment. It, therefore, makes sense to address these as a whole.

150. The Tribunal finds that there was no printer vacancy available at the time of the Claimant's dismissal. Neither was there any obligation on the Respondent to create one or to "bump" another employee to create a vacancy for the Claimant.

151. The Tribunal draws no adverse inference from the fact that someone was employed as a printer in November 2020 given that this was sometime after the Claimant's dismissal. Further, the Tribunal does not find anything unusual in DE meeting with Paul McLaren to discuss the possibility of him coming to work for the Respondent in the event that there is a vacancy; this is nothing more than good, and indeed common, practice of a business seeking to ensure that they can fill vacancies if and when those arise.

152. The only vacancy which existed at the time of the Claimant's dismissal was the office administrator role. The Tribunal accepts the evidence from DE that this was different in terms of duties from what the Claimant had done as production manager. It was clear that DE had applied his mind to the question of whether the Claimant could fill this vacancy but had concluded that he could not without the need for training and that the Respondent needed someone to be able to take up this role and perform the duties from day one. The Tribunal does not consider that this conclusion was out with the band of reasonable responses.

153. The concern that the Tribunal had about this element of the consultation process is that it would have been good practice for there to have been a more detailed discussion with the Claimant about the role and whether he could have performed it. It would certainly have been good practice to have discussed the issue of salary with him rather than assuming he would not have accepted the drop in earnings.

154. However, again, the Tribunal reminds itself that it is not for it to substitute what it would have done but, rather, to determine whether what was done was within the band of reasonable responses. In circumstances, where DE had applied his mind to the question of whether the Claimant could do the job and, based on his knowledge, concluded that he could not do so without training (which did not meet the Respondent's requirements) then it cannot be said that the consultation was such that it was out with the band of reasonable responses.

155. The Tribunal, therefore, finds that there was a fair consultation process and that the Respondent had not acted unfairly in relation to the issue of alternative employment.

156. In these circumstances, the Tribunal finds that the Claimant's dismissal was not unfair and the claim of "ordinary" unfair dismissal is hereby dismissed

Employment Judge: Peter O'Donnell
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and copied to parties