EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr W G A Jasper	AND	Moo Free Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT **ON** 14 May 2021

BY VHS VIDEO PLATFORM

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: **In person**
For the Respondent: **Mr J Heard of Counsel**

JUDGMENT

The judgment of the tribunal is that:

1. This Tribunal does not have jurisdiction to entertain the claimant's freestanding claim relating to an alleged breach of his human rights, and no such claim may be pursued; and
2. The claimant's claim for discrimination on the grounds of his alleged philosophical belief is struck out because it has no reasonable prospect of success; and
3. The claimant's claims for detriment and/or dismissal arising from protected public interest disclosures are also struck out because they have no reasonable prospect of success.

RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant's remaining claims should be struck out on the grounds that they have no reasonable prospect of success, or whether the claimant should be ordered to pay a deposit as a condition of continuing with the claim(s) because they have little reasonable prospect of success.

2. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by VHS Video Platform. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 125 pages, the contents of which I have recorded. The order made is described at the end of these reasons.

3. In this case the claimant Mr William Jasper originally brought a number of claims, but following a case management preliminary hearing and subsequent case management order of Employment Judge Goraj dated 4 February 2021 ("the CMO") the claimant's three remaining claims are these: (i) a freestanding claim in respect of an alleged breach of his human rights; (ii) a claim for direct discrimination on the grounds of his philosophical belief; and (iii) detriment and/or unfair dismissal said to have arisen from having made protected public interest disclosures. The claims are all denied by the respondent.

4. I have considered the grounds of application and the response submitted by the parties. I have considered the oral and documentary evidence which it is proposed will be adduced at the main hearing. I have also listened to the factual and legal submissions made by and on behalf of the respective parties. I have not heard any oral evidence, and I do not make findings of fact as such, but my conclusions based on my consideration of the above are as follows.

5. The respondent is a family owned company specialising in the manufacture of dairy free, gluten free, soya free and vegan chocolates. It has a total of 45 employees. The claimant was employed as a multiskilled maintenance engineer from 2 July 2018 until his dismissal with immediate effect on 16 April 2020.

6. During February 2020 the respondent reviewed its contracts of employment and wished to standardise these across its organisation. The respondent issued all of its employees with a proposed new contract of employment on or about 28 February 2020. This included a provision which purported to allow the respondent to vary the terms of the new contract, and the claimant objected to this. He refused to sign the proposed new contract of employment and remained on his existing terms.

7. Meanwhile the Covid-19 pandemic began to have effect and the respondent took advantage of the Government's furlough scheme. On 24 March 2020 the claimant signed an Agreement for Furlough Leave whereby he received 80% of his salary on the basis that he would not be required to come to work, although the agreement included a provision which entitled the respondent to cancel the furlough leave and require the claimant to return. It also included a provision under Clause 4 suggesting that the respondent would be entitled to place the claimant on short term work or lay off without pay (except for statutory guarantee payments) in the event of insufficient work then being available. It seems that the claimant also objected to this provision (Clause 4), although he did sign that agreement

8. The respondent then had cause to recall some of its staff from furlough leave because of a new product, and this involved the claimant because of his skills and experience on the production process. On 26 March 2020 the respondent asked the claimant to return to work on 6, 7 and 8 April 2020. The claimant accepts that this request was made because of his expertise in the production process, but he declined to do so. On 6 April 2020 the respondent's CEO Mrs Andrea Jessop emailed the claimant to say that she had been informed by Mr Simon March, the Engineering Manager, that he the claimant was "not happy with the new contracts" and suggesting that the matter was not urgent and that his concerns could be discussed when he returned to work.

9. The claimant then exercised a formal grievance on 8 April 2020 in which he objected to the new contract of employment and in particular the right of the respondent to vary its terms; and also objecting to clause 4 of the Agreement for Furlough Leave. His grievance was acknowledged, and he was informed that the meeting would be arranged as soon as people were able to return to work. The respondent also appointed Ms Bidgood, an independent HR consultant, to investigate the grievance and invited the claimant to direct any queries to her. The claimant then wrote to Ms Bidgood on 14 April 2020 objecting to the proposed changes in his terms and conditions of employment; suggesting that the respondent had failed to be open and honest and that it had failed to draw attention to the proposed changes; objecting to clause 4 of the Agreement for Furlough Leave; and objecting to the timescale for imposition of the new contract and a general lack of consultation.

10. There was an exchange of emails between the claimant and Ms Bidgood on 15 April 2020. At 17:45 the claimant asked her to confirm that she had a copy of his signed contract of employment and original job offer. She responded at 18:19 to the effect that she would login to the respondent's HR files in the morning and send it over. The claimant then responded at 18:35 to this effect: "WTF really you sent an email on 15 April 2020 at 11:50 am stating that YOU don't have access to the Moo Free email address. ARE YOU WASTING MY TIME?"

11. Immediately afterwards Ms Bidgood spoke to Mrs Jessop and complained about the claimant's conduct. Mrs Jessop formed the view that the claimant's actions were unacceptable and amounted to bullying and harassment of Ms Bidgood. She decided to dismiss the claimant with immediate effect on 16 April 2020, and she paid him one week's pay in lieu of notice. The letter confirmed that the reason for the dismissal was that the claimant's language and comments towards Ms Bidgood were completely unacceptable, and that the respondent did not tolerate bullying or harassment of any kind.

12. The claimant was offered the right of appeal and did so by letter dated 17 April 2020. An independent HR adviser namely Ms Blackwood was appointed to deal with his appeal, and by letter dated 6 May 2020 she decided to uphold the original decision to dismiss, and rejected the appeal.

13. Following the earlier CMO the claimant was ordered to provide further information of his alleged protected public interest disclosures, and having provided that information, the claimant confirmed today at this hearing that he relies on the following disclosures. The matters of which he complained fall into two categories: first, he challenged the imposition of the new contract and the proposed change of conditions, which was not by mutual agreement, which included clause 4 of the Agreement for Furlough Leave; and secondly, he challenged the requirement for him to return to work on 6, 7 and 8 April 2020 because of the operation of the furlough scheme and his absence on that scheme.

14. The two disclosures relied upon under the first category (challenging the new contract) are these:

15. Disclosure 1: a text to Simon March on 24 March 2020 at 6:44 pm stating: "Hello please inform all that I am still working to my original and jointly signed contract. Regards. Alan". The claimant makes the point that the email from Mrs Jessop on 6 April 2020 referred to above is consistent with that disclosure, because she confirms that Mr March told her he was not happy with the new proposed contract.

16. Disclosure 2: an email to Simon March on 26 March 2020 at 5:55 pm stating: "Should I come back on 6 April as verbally requested, how does this effect this condition? Please give me your written response. Kind regards. Alan."

17. The four disclosures relied upon under the second category (challenging the requirement for him to return to work on 6, 7 and 8 April 2020) are these:

18. Disclosure 3: a text message to Mr Simon March on 26 March 2020: 3:22 pm stating: "Trust just read the letter that was just placed under my nose and said to sign THERE is NO mention of the 20% top up OR the Duration of payment. All that I can see is the government basic payment smells a bit bad to me please tell me I'm wrong? Big dog."

19. Disclosure 4: a text message to another manager Darren Rivers on 26 March 2020 at 3:22 pm stating: "Hello Darren, Simon has said that I need to return to work on 6 April is this correct? Does this mean that my furlough leave is over? Please urgently advise as I will not breach the terms listed in the AGREEMENT FOR FURLOUGH LEAVE without written confirmation from MOOFREE."

20. Disclosure 5: a post which the claimant put up on the respondent's Kudos platform (available to all employees) in which he said of Mr Darren Rivers: "stay at home, protect the NHS and save lives, I fully support your words."

21. Disclosure 6: is a repeat of disclosure 2, namely the email to Simon March on 26 March 2020 at 5:55 pm stating: "Should I come back on 6 April as verbally requested, how does this effect this condition? Please give me your written response. Kind regards. Alan."

22. The claimant suggests that three other text messages on the afternoon of 26 March 2020 are relevant (in connection with his alleged philosophical belief). After he had sent the text referred to as Disclosure 4 above, Mr Rivers replied: "Hi Alan, no it doesn't your will restart after the last day you worked so the Thursday it will start again". The claimant replied with three short messages as follows: "Your message is incoherent please send a full message" and "Ethical please" and "Trust?"

23. Finally, the claimant has disputed that his email to Ms Bidgood which led to his dismissal was in any way offensive. In particular, he persists in his claim that "WTF" is an abbreviation for "What The Furlough". The respondent makes the point that WTF is an abbreviation which is widely used and means "What The Fuck", and it is simply farcical for the claimant to suggest otherwise. For the record I agree with the respondent's assertion to that effect. In any event, despite the claimant trying to pretend that he meant something different, it is clear that Ms Bidgood found his email offensive and distressing, containing as it did a combination of the phrase WTF, and capital letters which were taken to be shouting and abuse. Mrs Jessop clearly agreed with that view, and she decided to dismiss the claimant.

24. The claimant presented these proceedings on 29 Mayd 2020. His claims for age discrimination, race discrimination, for breach of contract in respect of notice pay, and for other monetary payments have all since been dismissed on withdrawal by the claimant. As noted above, following the CMO his three remaining claims are these: (i) a freestanding claim in respect of an alleged breach of his human rights; (ii) a claim for direct discrimination on the grounds of his philosophical belief; and (iii) detriment and/or unfair dismissal said to have arisen from having made protected public interest disclosures

25. Having established the above facts, I now apply the law.

26. <u>The Law:</u>

27. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules".

28. Rule 37(1) provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds: (a) it is scandalous, or vexatious, or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

29. Rule 39 provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Under Rule 39(2) the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

30. In the first place, the Employment Tribunal does not have jurisdiction to consider any claim for alleged breach of human rights as a stand-alone claim in its own right.

31. This is a claim alleging direct discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 (“the EqA”). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is religion or belief, as set out in sections 4 and 10 of the EqA. The specific religion or belief relied upon is a philosophical belief that there should be mutual trust and confidence between an employer and an employee.

32. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

33. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

34. The provisions relating to protected public interest disclosures are in the Employment Rights Act 1996 (“the Act”).

35. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that 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.

36. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it 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.

37. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

38. Under section 47B of the Act, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

39. Under section 48(2) of the Act, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

40. I have considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

41. I have considered the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC; Nagarajan v London Regional Transport [1999] IRLR 572 HL; Grainger plc v Nicholson [2010] ICR 360; Gray v Mulberry Company (Design) Ltd UKEAT/00040/17; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; Fecitt and Ors v NHS Manchester [2012] ICR 372 CA Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ. Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8 Parsons v Airplus International Limited EAT IDS Brief 1087 Feb 2018 Ibrahim v HCA International Ltd [2019] EWCA Civ 2007. North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA; Anyanwu v South Bank Students' Union [2001] IRLR 305 HL; Jaffrey v Department of the Environment, Transport and the Regions [2002]IRLR 688 EAT; Tayside Public Transport v Reilly [2012] IRLR 755 CS; and Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA; Eastman v Tesco Stores Ltd EAT 0143/12; Balls v Downham Market High School & College [2011] IRLR 217 EAT.

42. Rule 37 – Strike Out:

43. In Balls v Downham Market High School & College [2011] IRLR 217 the EAT held that the tribunal must consider whether, on careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. It is a high test. The test is not whether the claim is likely to fail, or whether it is possible that the claim will fail.

44. As a general principle, discrimination cases should not be struck out except in the clearest circumstances. In Anyanwu v South Bank Students' Union [2001] IRLR 305 HL, Lord Steyn stated at para 24: "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plain cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest". Nonetheless Anyanwu confirms that in a case where the core of facts is undisputed, or in a "plain and obvious case", the Tribunal may properly strike out a claim.

45. In addition, Anyanwu is not of itself to be taken as a fetter on the tribunal's discretion. In Jaffrey v Department of the Environment, Transport and the Regions [2002]IRLR 688 EAT Mr Recorder Langstaff QC as he then was stated: "Although the power to strike out a claim is one which should be exercised sparingly, and although full regard must be had to the words of Lord Steyn in Anyanwu v South Bank Students' Union [2001] UKHL 14 at paragraph 24, that there is a high public interest which should bias a tribunal in favour of a claim being examined on the merits or demerits of its particular facts, if a tribunal reached a tenable view that the case cannot succeed, then it had a discretion to strike out a claim …"

46. In this context public interest disclosure cases are to be considered in the same way as discrimination cases (North Glamorgan NHS Trust v Ezsias)

47. Direct Discrimination Claim:

48. I deal first with the claimant's claim for direct discrimination on the grounds of his religion or belief. The belief relied upon is said to be a philosophical belief that there should be mutual trust and confidence between an employer and employee. It is of course an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20. However, the fact that there is such an implied term does not of itself mean that it is a philosophical belief.

49. The claimant complains of less favourable treatment and direct discrimination under section 13 EqA. There are three matters complained of (which are mirrored in the public interest disclosure claim below) and these are: the

imposition of a new contract of employment with new terms and conditions; requiring him to return from furlough leave; and dismissing him.

50. Guidance as to the meaning of philosophical belief was given by the EAT in Grainger plc v Nicholson. In order to qualify as a belief such as to become a protected characteristic under the EqA, (i) the belief must be genuinely held; (ii) it must be a belief, not an opinion or viewpoint based on the present state of information available; (iii) it must be a belief as to a weighty and substantial aspect of human life and behaviour; (iv) it must attain a certain level of cogency, seriousness, cohesion and importance; (v) it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

51. In Gray v Mulberry Company (Design) Ltd the EAT stated: "The proper approach to the Grainger criteria (and in particular to the fourth Grainger criterion) is simply to ensure that the bar is not set too high, and that too much is not demanded, in terms of threshold requirements, of those professing to have philosophical beliefs … Setting that bar at "more than merely trivial" might be apt in assessing seriousness and importance but it is less apt in assessing cogency and coherence … In an application of the Grainger criteria, and the fourth Grainger criterion in particular, the focus should be on the manifestation of the belief.

52. The claimant asserts that he believes that everyone should be treated with mutual trust and respect, and that the respondent prides itself on being an ethical company, and that he believes he was not treated with sufficient mutual trust and confidence when he challenged the imposition of a new contract and the working of the furlough scheme. He also refers to his three text messages on the afternoon of 26 March 2020 as follows: "Your message is incoherent please send a full message" and "Ethical please" and "Trust?" As evidence of his concerns in this respect at that time.

53. The respondent asserts that the claimant has insufficient service to complain generally of unfair dismissal, and his claims are an obvious attempt to substitute inappropriate and unsupportable claims in circumstances where he cannot pursue a claim for general unfairness. It asserts that he has four insurmountable problems with regard to the claim for direct discrimination on the grounds of religion or belief. These are: (i) there is no such philosophical belief; (ii) secondly and in any event the claimant did not hold it; (iii) thirdly he was not dismissed on the grounds of the alleged philosophical belief; and (iv) fourthly there is no actual comparator relied upon, and it is simply not the case that a hypothetical comparator (that is to say someone not holding the alleged philosophical belief and who wrote exactly the same offensive email to Ms Bidgood) would not have been dismissed in the same circumstances.

54. Dealing specifically with the criteria identified in Grainger, the first is that the belief must be genuinely held. The respondent makes the point that if the claimant generally held a philosophical belief that all parties should apply

mutual trust and confidence in their dealings related to their employment, then he simply would not have sent the email which resulted in his dismissal. It was an abusive email and it shows that he did not generally hold that belief. I agree with that contention.

55. The second criterion in Grainger is that it must be a belief and not an opinion or viewpoint based on the present state of information available. The claimant's argument that an implied term of this nature should apply (which is settled law in any event), does not in my judgment amount to a philosophical belief. In my judgment the claimant cannot satisfy this test.

56. The third criterion in Grainger is that it must be a belief as to a weighty and substantial aspect of human life and behaviour. The respondent asserts that the belief relied upon by the claimant is just too narrow and only exists in the employment context. It is a narrow subset and cannot be a belief relating to a weighty and substantial aspect of human life and behaviour. I agree with that contention as well.

57. The fourth criterion in Grainger is that it must attain a certain level of cogency, seriousness, cohesion and importance. The respondent asserts that the mere repetition of a legal principle relating to the implied term is not akin to a religious belief, and it does not attain a sufficiently certain or serious level of cohesion importance. The claimant did not consider it to be of sufficient cogency, seriousness cohesion and importance to inform his employer about that belief (there is no mention of it in any of the claimant's communications), and in any event it was a belief which he did not practise as can be seen from the email which led to his dismissal. I agree with that contention as well.

58. The respondent makes no observation and no admission about the fifth criterion in Grainger.

59. In my judgment the claimant's repetition of the legal principle that there should be implied trust and confidence between an employer and employee does not amount to a philosophical belief such as to bring the claimant's claim within the wording of section 10 of the EqA.

60. In any event, in order to succeed in this claim the claimant would also have to prove that he was subjected to the less favourable treatment of which he complains in this respect (proposed changes to his terms and conditions of employment; requiring him to return to work from furlough leave; and/or dismissing him) because he held this purported philosophical belief. In my judgment the claimant cannot satisfy this test. There is no evidence in any of his communications that he informed the respondent that he held this purported philosophical belief. The first alleged detriment of the introduction of the new contracts of employment was applied to all members of staff and cannot be said to be applied to the claimant in isolation because of his alleged philosophical belief. The second alleged detriment of being called back to work from furlough leave was on the claimant's own admission because of his

expertise in the production process, and it was not because of his purported belief. Finally, the claimant's dismissal clearly resulted from his email of 15 April 2020 to Ms Bidgood. There is no suggestion that Mrs Jessop knew about the claimant's purported philosophical belief and/or made a decision to dismiss him because of it. In any event there is no actual comparator to whom the claimant can point who was in identical circumstances (in other words having sent a similarly offensive email) and yet who was not dismissed because he or she did not hold the philosophical belief relied upon. In addition, the burden of proof would be upon the claimant to show that a hypothetical comparator in the same circumstances would not also have been dismissed.

61. The claimant therefore has a number of insurmountable difficulties with regard to this claim, and in my judgment, it has no reasonable prospect of success. I therefore strike out this claim pursuant to Rule 37(1)(a).

62. Whistleblowing Claim - Protected Public Interest Disclosures:

63. The statutory framework and case law concerning protected disclosures was helpfully summarised by HHJ Eady QC in Parsons v Airplus International Limited UKEAT/0111/17 from paragraph 23: "[23] As to whether or not a disclosure is a protected disclosure, the following points can be made - This is a matter to be determined objectively; see paragraph 80 of Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.

64. [24] "As for the words "in the public interest", inserted into section 43B(1) of the ERA by the 2013 Act, this phrase was intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld).

65. In whistleblowing claims the test of whether a disclosure was made "in the public interest" is a two-stage test which must not be elided. The claimant must (a) believe at the time that he was making it that the disclosure was in the

public interest, and (b) that belief must be reasonable. See Ibrahim v HCA International Limited [2019] EWCA Civ 2007.

66. I deal first whether the claimant made any protected public interest disclosures.

67. The claimant relies upon five disclosures which are set out above (Disclosure 2 and Disclosure 6 being the same disclosure). As clarified in the CMO and agreed at this hearing, these are disclosures which are said to relate to the respondent taking advantage of vulnerable staff by enforcing detrimental changes to terms and conditions of employment (said to be a breach of a legal obligation pursuant to s 43B(1)(b) of the Act); and secondly to an alleged fraudulent practice by the respondent in requiring the claimant to return to work when on furlough leave (said to be a breach of a legal obligation and/or a criminal offence pursuant to s 43B(1)(a) and (b) of the Act).

68. In my judgment none of the five disclosures relied upon includes any disclosure of information to this effect. Disclosure 1 merely records that the claimant is working to his original contract. It does not give information that there has been a breach of any legal obligation. Disclosure 2 seeks clarification as to whether the claimant should return to work on 6 April 2020 as requested and how that would affect "this condition" presumably meaning his furlough leave. It does not give information that there has been a breach of any legal obligation. Disclosure 3 makes the point that the Agreement for Furlough Leave does not mention the 20% top up for the duration of the payment. Although the claimant says "it smells a bit bad to me" it does not give information that there has been either a criminal offence committed and/or a breach of any legal obligation. Disclosure 4 is a request for confirmation of whether the claimant has to return to work on 6 April 2020 and whether his furlough leave is over because he did not wish to breach the terms in the Agreement for Furlough Leave. It does not give information that there has been the commission of a criminal offence and/or a breach of any legal obligation. Finally, Disclosure 5 merely comments on the fact that the claimant was supporting the actions of Mr Rivers in his support for "stay at home, protect the NHS and save lives." It does not give information that there has been the commission of a criminal offence and/or a breach of any legal obligation. Disclosure 6 is the same as Disclosure 2, and it does not give information that there has been the commission of a criminal offence and/or a breach of any legal obligation.

69. In addition, the respondent makes the point that the matters raised in these alleged disclosures cannot be disclosures which the claimant reasonably believed to have been in the public interest. He is making enquiries only as to his own position with regard to his refusal to accept the proposed new contract of employment, and whether he personally could be required to return to work on 6 April 2020. I agree with that contention

70. In my judgment none of the disclosures relied upon by the claimant satisfies the requirements of ss 43B(1) (in that there was no disclosure in the public

interest) nor ss 43B(1)(a) and (b) of the Act (in that no information was given that there had been the commission of a criminal offence and/or a breach of any legal obligation).

71. The claimant's claims for detriment and/or dismissal having arisen from protected public interest disclosures are in my judgment therefore doomed to failure simply because the claimant did not make any protected public interest disclosures. The claims for detriment and/or dismissal reliant upon protected public interest disclosures therefore have no reasonable prospect of success, and I therefore strike them out under Rule 37(1)(a).

72. In any event there are further insurmountable difficulties with regard to the claimant's claims.

73. The first alleged detriment claim (relating to the issue of new proposed contracts of employment) cannot have been caused by any of the alleged disclosures simply because the new contracts were issued on 28 February 2020, and the first disclosure relied upon was after this on 24 March 2020.

74. The second alleged detriment claim (being required on 26 March 2020 to return to work from furlough leave on 6, 7 and 8 April 2020) was by the claimant's own admission caused by the respondent's need to take advantage of the claimant's expertise on the production line. It was not caused by any of the alleged disclosures.

75. There is therefore no causative link between the alleged disclosures and either of the two detriment claims. In my judgment this is another reason why the detriment claims have no reasonable prospect of success, and I would have struck them out for this reason as well under Rule 37(1)(a).

76. Finally, with regard to the claimant's claim for automatic unfair dismissal under section 103A of the Act (on the basis that the reason or principal reason for his dismissal was the making of the disclosures), it seems clear from the contemporaneous documents that it was the claimant's email of 15 April 2022 to Ms Bidgood which caused his dismissal. His previous enquiries did not do so, and it was only when he sent that abusive email that his employment was terminated with immediate effect. I have no hesitation whatsoever in rejecting his assertion that WTF means "What The Furlough" rather than its commonly understood meaning of "What The Fuck". It was plainly an abusive email. Assuming that Mrs Jessop is able to give evidence that the abusive email was the reason for the dismissal, then that claim is also doomed to failure. If the claimant had made protected public interest disclosures, applying North Glamorgan NHS Trust v Ezsias and Anyanwu v South Bank Students' Union [2001] IRLR 305 HL I would probably have erred on the side of caution and concluded that it would have been more appropriate to proceed to hearing to allow evidence to be heard, and I would probably have issued a Deposit Order on the basis that this claim had little reasonable prospect of success. Nonetheless such a potential claim is clearly very weak. However, in the

absence of any protected public interest disclosures, the claimant cannot rely upon the provisions of section 103A of the Act, and for the reasons explained above this claim is also struck out under Rule 37(1)(a).

Employment Judge N J Roper
Date: 14 May 2021

Judgment and Reasons sent to the Parties: 18 May 2021

FOR THE TRIBUNAL OFFICE