EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104216/2020 and 4104222/2020

Heard in Dundee by means of CVP on 17, 18, 19 May and 4 June 2021

Employment Judge J Young
Tribunal Member W Canning
Tribunal Member J Copland

Mr John Brown	**First Claimant** **Represented by:** **Mr Jay Lawson,** **Solicitor**
Mr Brian Hoggins	**Second Claimant** **Represented by:** **Mr Jay Lawson,** **Solicitor**
Sips Eco Panel Systems Limited	**Respondent** **Represented by:** **Ms Donna Reynolds,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the first and Second claimants were not unfairly dismissed under s103A of the Employment Rights Act 1996.

REASONS

Introduction

1. The first and second claimants each presented claims to the Employment Tribunal on 6 August 2020 complaining of automatic unfair dismissal contrary to section 103A of the Employment Rights Act 1996 (ERA). They maintained that they had concerns over the working arrangements at the respondent factory on a return to work after furlough on 4 May 2020; they raised health and safety concerns on 5 May 2020 which were asserted to be protected and qualifying disclosure under section 43B(1)(b) and (d) of ERA; and on 7 May 2020 were dismissed for alleged gross misconduct which was not the genuine reason for dismissal but because they had made protected disclosures.

2. The respondent denied the claims. In particular it was denied that either of the claimants made a protected disclosure but that the claimants simply did not wish to come into work out of a desire to remain on furlough. In any event it was stated that both first and second claimants were dismissed for health and safety breaches in not complying with the measures put in place to combat Covid infection and allow employees a safe return to work.

3. By order of 12 November 2020 the claims were combined to be considered together. In this Judgment reference to “the claimants” is a reference to both.

Documentation

4. The parties had helpfully liaised in providing a Joint Inventory of Productions paginated 1-254. Additional productions were allowed in the course of the hearing paginated 255-280. Reference to productions in this case are to the paginated numbers J1-280.

The hearing

5. At the hearing evidence was given by the claimants; Patrick Queen who had been Managing Director of the respondent for approximately five years; and Nicola Young, Deputy General Manager who had been employed by the respondent for approximately 10 years.

Orders of the Tribunal

6. Various orders had been made by the Tribunal as follows:-

(i) On 17 December 2020 the Tribunal had made an order on the respondent to provide documents (J70/71) which had been responded to on 31 December 2020 (J74/75) with the documents produced (J77/174)

(ii) By order of 17 December 2020 the Tribunal ordered the respondent to provide further information (J72/73) and that order was responded to on 31 December 2020 (J175/176).

Issues for the Tribunal

7. The parties had not provided an agreed list of issues. However the issues for the Tribunal were:-

(i) Whether the claimants had made disclosures which were qualifying disclosures under section 43B(b) and (d) of ERA.

(ii) In particular whether any disclosure contained sufficient factual content and specification which tended to show that the respondent had failed, was failing or was likely to fail, to comply with a legal obligation and/or the health and safety of any person had been or was being endangered or was likely to be endangered.

(iii) Whether the claimants had a reasonable belief that the respondent had failed, was failing or was likely to fail to comply with a legal obligation and/or health and safety of any person.

(iv) If so, was the disclosure made in the public interest.

(v) If a qualifying disclosure was made was the principal reason for dismissal that the claimants had made those qualifying disclosures.

(vi) If the principal reason for the dismissal was the making of the qualifying disclosures what compensation should be awarded to the

claimants by way of remedy taking into account the obligation on the claimants to mitigate their loss and the impact of s123(6A) of ERA.

8. From the documents and the information provided, admissions made and relevant evidence led the Tribunal were able to make findings on the issues. Given the nature of the complaint and that many matters were in dispute a certain rehearsal of the evidence is inevitable.

Findings

General

9. The respondent is engaged in the design and manufacture of affordable homes and commercial premises of four main types provided mainly in the education/health service and leisure sector. They have been in operation for approximately 20 years. Their design is based on structural insulated panels (SIP). These panels are manufactured under factory-controlled conditions and can be custom designed. The respondent seeks to recycle 100% of any waste material. Electricity is supplied by offshore wind and they maintain that very little energy is used during the manufacturing process to give strong eco credentials.

10. The claimants were each employed by the respondent as Production Operators. The first claimant had continuous employment in the period from 1 November 2019 until that employment was terminated with effect from 7 May 2020. The second claimant had continuous employment in the period from 23 September 2019 until that employment was terminated with effect from 7 May 2020.

11. The claimants' duties were all concerned with the manufacture of SIP and recycling of waste material. They operated in different areas of the factory depending on the nature of the task in hand but very often worked on the "recycle saw" in shed 6 of the factory premises.

12. The claimants had worked together before commencing employment with the respondent. They worked together in a "*pallet company*" in Burntisland for approximately 2 years before being made redundant around November 2018.

13. The claimants were employed under the same terms and conditions of employment (J77/110). They were subject to the same disciplinary procedure (J111) and the same "whistleblowing procedure" (J112/113).

14. The claimants denied receipt of the Employee Handbook and Health and Safety Policy (J135/173). The respondent indicated that all employees were provided with a copy of the Handbook. The Tribunal did not consider it was necessary to resolve that particular issue in the context of the claims made.

Health and Safety issues

15. The claimants had each completed certain induction procedures including being advised of "*Safe Work Procedure"* which advised of procedures to be followed regarding the operation of machinery including the wearing of "*all PPE provided" being identified as "Ear protection/Safety Glasses/Safety shoes/Gloves".* The safe work procedure issued to the claimants included the "*Warning notice"* that "*anyone found working outwith these guidelines may be suspended and appropriate disciplinary action taken"* (J127/128).

16. The claimants accepted that there was a rule that they should not use mobile phones within the manufacturing areas of the factory premises.

17. The second claimant confirmed that he had the use of a locker when he commenced employment and also received PPE by way of hi-vis vest, gloves, shoes and safety glasses and that these should be worn when working. The first claimant initially indicated that he had not been supplied with certain PPE but accepted that in the first week he was there he had received a hi-vis vest, safety glasses and gloves. He also stated he had not been provided with a locker. The claimants indicated that PPE was not always available but that was disputed. The respondent position was that all workers were provided with ear defenders, safety glasses, a tape measure, hi-vis vest, boots and a fleece jacket for the colder weather. This material was kept in a store accessed by the team leaders who would hand out protective equipment as required. If the team leader spotted that they were low of any particular item then they would arrange for a purchase to be made. There were 24 lockers outside the canteen area

and each worker was assigned a locker. When they finished a shift the PPE equipment should be taken to the locker so that working areas were kept clear for the next shift.

18. The Tribunal were satisfied that each claimant had a locker and was able to keep PPE equipment in that locker and that all employees required to be in the factory with PPE and would not be allowed to work there had they not been wearing the appropriate PPE.

Dismissal of employee in March 2020.

19. There was evidence given on the dismissal of an employee of the respondent just before "furlough" arrangements commenced around 20 March 2020. The incident was relied upon by the claimants in indicating that had they raised concerns regarding health and safety issues at a later stage then they would have been "*seen as troublemakers*" and dismissed.

20. The incident took place at a production meeting in the canteen area. The claimants advised that an employee had raised health and safety issues in the factory and the meeting had become very heated between him and Mr Queen resulting in the employee being told to leave. The claimants' position was that *"everyone*" was then concerned that if they spoke up on such issues then they would be perceived as troublemakers.

21. The respondent's explanation was very different. Mr Queen advised that this meeting discussed overtime and the discussion quickly become heated. There was mention of the number of times the employee had been absent albeit only employed for a short time. As a result of his aggressive behaviour he was told to leave. Approximately two days later he asked if he could have his job back but he was not re-employed. Ms Young could not recall the basis of the individual becoming aggressive but the meeting was about "*who could work what and when"* as regards overtime and production issues in the factory. The individual concerned had come forward to "*face off with Pat as if having a square go*" and because of that threatening behaviour was asked to go.

22. On balance the Tribunal considered that this incident and the dismissal of the employee was because he became aggressive and threatening rather than because he had raised an issue of health and safety

Working arrangements

23. At the material time the respondent employed 15 people in the factory on production and 15 in the office on administration.

24. The factory is split into five areas or sheds 3-7 of approximately 10,000 square feet each (measuring approximately 50 metres × 20 metres). Each shed has items of machinery located within it. The respondent also occupied a *"factory next door for storage".* The photographs of the factory sheds 3-7 (J255/260) showed the space available for employees and the layout of the sheds. The 15 employees were spread across the sheds and accordingly were in a great deal of surrounding space.

25. There were five Team Leaders. They comprised John Easton as Senior Team Leader who had been employed with the respondent for approximately 13 years and covered all areas of the factory; Mark Rae who had been employed for approximately 10 years and was usually found within shed 7 (although would go to other areas to liaise on materials); Ian Dall who had been employed for about two years and generally covered shed 4 ; Phil Smith who had been employed for about seven years and was usually located in shed 5; and Maurice Gordon who had been Team Leader for about 3.5 years with a reach across all areas. He was also a trained Carpenter.

Furlough

26. Due to the impact of coronavirus the claimants were placed on furlough under the Coronavirus Job Retention Scheme. The claimants received letters advising of an intention to vary their employment contracts and treat them as furloughed workers with an entitlement to 80% of salary as from 23 March 2020 (J208/215) which they accepted. All factory production workers were furloughed under this scheme save for Maurice Gordon who attended work for purposes of security; to ensure alarms were kept maintained; and also to carry out small maintenance work.

27. By the end of April 2020 it was possible for manufacturing to resume. The respondent considered what measures should be put in place to enable a safe return to working. The measures they sought to put in place were to ensure that every entry and exit had pump action hand sanitisers; that the premises were adequately covered by signage which advised it was a "*Covid site*" and that employees should comply with the "*two metre distancing"* rule; Anti-viral sprays were made available at workstations; and marks were placed on the floors of the factory units to mark out two metre distancing.

28. By letters of 24 April 2020 employees were advised that the furlough period for all staff would end on Thursday 30 April 2020. The factory would be closed on 1 May 2020 with staff requiring to return to work on Monday 4 May 2020 (J132). The letter stated that the safety of the workforce was "*paramount*" and that "*social distancing and responsible hygiene would be enforced in line with government and manufacturing industry guidelines*". There would be an increased frequency of cleaning procedures including pausing production in the day to allow workstation cleaning to take effect. The employees were advised that measures would be issued in writing in advance of the proposed start date and that all staff would resume payment at 100% of salary from 1 May 2020. The claimants were emailed the notification regarding return to work (J131 and J133).

29. By letter of 1 May 2020 employees including the claimants were advised of the measures that would be put in place in respect of their return to work on Monday 4 May 2020. The letter advised that increased protective measures had been put in place and that attention should be paid to the "*visible notifications and guidance displayed throughout the factory".* In addition *"policies*" were set out which *"must be followed at all times for the safety of the entire workforce".* These were:-

    - *"Social Distancing is in place, staff must maintain a 2m distance from each other on the premises.*
    - *Please pay attention to the signage throughout the factory regarding COVID-19 guidance and procedure.*
    - *Masks & Gloves are being provided and must be worn at all times.*

- *PPE is held in the store cupboard and can be collected from your team leader.*
- *Goggles must be worn at all work stations.*
- *All work stations MUST be cleaned down and sanitised at the beginning and end of each use.*
- *Social distancing must also be maintained outside the building with no congregating allowed outside the door by the canteen or anywhere else on the campus.*
- *Smoking is not permitted on the site. Smokers must leave the grounds to smoke.*
- *Staff are required to regularly wash their hands for a minimum of 20 seconds. Please refer to the signage in the washrooms, canteen & factory floor for guidance.*
- *Parking is permitted, but please allow a 2meter distance between cars.*
- *All staff must adhere to this strict guidance for the safety and wellbeing of the Sips Eco community."*

30. The first claimant advised that on receipt of this information on return to he was *"surprised going back so soon – things were serious – concerned about going back so quick – not feel right to be going back"* However he made a return to work on 4 May 2020.

31. The second claimant advised that when he received the letter of 1 May 2020 he was anxious things would be followed – *"pandemic was intense. Not sure all would be followed."*

32. The claimants travelled together by car to work on 4 May 2020. It was explained that the first claimant's car was "*not working"* at that time.

Introductory meeting at car park

33. There were slightly different versions of events in relation to arrival at work and a meeting with Mr Queen in the car park prior to commencement of the working day on 4 May 2020.

34. The claimants' position was that they did meet with Mr Queen at that time but it was simply a "*welcome back to work*" without any further details that they could recall.

35. Mr Queen however indicated that he had met with all production operatives including the claimants at the canteen door. He did welcome the workforce back but also pointed out that there were various signs around the factory premises and that the workforce should comply with the guidance as regards social distancing and the wearing of PPE including masks. His position was that he referred to the precautions outlined in the letter of 1 May 2020 simply to emphasise that the respondent wished them to be safe. This was an informal briefing as he did not consider there was any need to be forceful.

36. The Tribunal found that there was a meeting of production workers prior to entry to the factory premises on the morning of 4 May 2020. There was an informal briefing given by Mr Queen to welcome back the operatives and that he emphasised the measures that were in place. Given that he was not saying anything new to employees beyond what had been stated in the notifications given it was of no great moment that the claimants had no particular recollection of what was said at that time.

Measures in place on 4 May 2020

37. There was a difference in evidence as regards to the measures in place and behaviours on 4 May 2020 at the premises.

38. There appeared no dispute that there were signs around the premises advising of the need for social distancing, the washing of hands and hygiene procedures to be followed in that respect and that there was a notice saying that only one person should be in the toilet at the one time.

39. The first claimant's position was that there was no PPE provided and that he had to *"go and ask for PPE"*. He asked one of the team leaders and he was given a mask *"but no gloves or goggles"*. He stated that *"more than half there were not wearing PPE at all"* and that there were no "*goggles*" provided. He advised that there was no anti-viral spray product to sanitise the workstations and neither had the workstations been

sanitised. He advised that the *"vast majority of processes told were to be in place were not put in place"* and that he felt *"in a place where workers were putting themselves and others at risk"*. It was a stressful time as he was *"at work and not being protected"*. He stated that he asked *"more than once"* and was told *"no gloves and goggles – didn't go any further – concerned if approached told to leave premises"* due to the incident with the individual who had been told to leave the premises prior to furlough.

40. He advised that social distancing was *"definitely not"* being observed and that he saw the *"director approach people without PPE and within two metres distance".*

41. He denied any suggestion that he wished to be returned to furlough and that he had *"repeatedly asked"* Mr Queen about that.

42. The second claimant advised that he been given a mask and that he had gloves and *"safety specs*". He did not regard these as *"goggles"*. He denied that there were any sanitisers given or that he was told they were available. He saw the *"MD without a mask"* and *"others not at two metres"* which *"worried him"*. He did not raise these concerns as he was scared he would be "*sacked on the spot"* as had happened to the individual before furlough.

43. From what he could see there were *"no masks and not distancing"* and that he was *"put at risk by this in catching and spreading Covid-19".*

44. He did not see any cleaning of machines being done and there was no product in any event to clean his workstations.

45. He advised that he had also looked at the government web page and did not consider that the respondent was one of the permitted manufacturers allowed to be working.

46. The position of Mr Queen was that there was a plentiful supply of PPE for employees returning to work on 4 May 2020. It was purchased on a regular basis. The purchase order of 11 March 2020 (J279/280) demonstrated purchases of PPE at that time. The PPE was used all over the factory and that included safety glasses or "*goggles*".

47. Mr Queen advised that all the measures listed in the letter of 1 May 2020 (J129) were put in place. He had been in the factory the previous week to ensure that measures were in place. All appropriate signage had been put up. The factory had more than adequate space for people to keep a two metre distance. Hand sanitisers were placed around the factory premises and each workstation had a spray for wiping down the machinery at the end of the shift.

48. The employees would be allowed 15 minutes before the end of their shift to clean down the workspace and make it all *"clean and tidy"*, ready for the next shift. He could see that individuals were wearing their masks. There was no occasion when he entered the factory workplace without wearing a mask and if he went to a workstation he wore gloves. Only in his office alone did he take his mask off.

49. There was no occasion when he stood closer to anyone than two metres and denied that he had been closer to the first claimant or any other employee that day.

50. There was no complaint made by team leaders to him of any breach of the measures that had been put in place.

51. He accepted that the use of the word *"goggles"* was a reference to safety spectacles or glasses which had always been in place and used by the employees.

52. Three types of hand sanitisers had been placed around the factory and canteen area being (1) those attached on walls, (2) those free standing placed on desks (3) anti viral spray cans available for spraying machines.

53. The team leaders had handed out masks and if any employees required gloves or spectacles (goggles) they were provided. He knew this was done because *"I was there".*

54. In the course of that day he recalled conversations with each of the claimants both of whom wanted to be put back on furlough. He advised that the claimants "*could not understand why they could not continue on furlough. They seemed to have childcare issues".* Mr Queen said he sympathised but was not able to place people on furlough for that reason.

He thought one of the claimants had mentioned "*something regarding regulations about manufacturing but they were only interested in furlough"* on the basis that the respondent would be reimbursed furlough payments from the Government scheme.

55. He also advised that he been had told that the claimants had sought to encourage others to *"lobby him "* to return to a furlough arrangement.

56. He maintained that he had cause to speak to the claimants in the course of the day as they were not wearing masks at a certain point. One of the team leaders said that they had been in and out of the toilets together and he also spoke to them about that.

57. He also maintained that he had seen masks lying on the claimant's workstation and had taken a photograph of that on his phone and shown that to the claimants. They said they had taken the masks off to "*use the toilet"* and were advised that they should use the masks at all times. Later on he saw that they were wearing masks. He had deleted these photographs on his phone at a later stage and no photographs were produced of that incident.

Decision not to return to work

58. The claimants sent emails to the respondent on the morning of 5 May 2020.

59. The first claimant sent an email at 8.21 to Mr Queen stating:-

> *"Dear Pat*
>
> *I am writing to inform you of my intention not to attend work today. Although I was extremely keen to get back to work I felt that when I attended work yesterday, I was not adequately protected from the possibility of contracting coronavirus. I did not experience the measures which I read about in the email from you, the PPE and social distancing was not enforced and cleaning of workstations was not carried out as stated in the email. I feel the management needs to enforce this as nobody at work kept their distance. I felt exposed and uneasy at how I believed I was putting my health and safety at risk by being at work yesterday. I sympathise with the company in this*

exceedingly difficult situation. However I need to think of the danger cross contamination could pose to my partner who has underlying health problems and my three-year-old son. Can I respectfully request a copy of the government guidelines stating we should have been returning to work in order for me to mitigate any danger to myself please. I am sorry if the stance I am taking causes you any problems but I hope you understand I must think of the safety of my family. Please allow me to stay (on) furlough into the near future when precautions are in place and I can work without this anxiety. I enjoy and indeed value my career at Sips so trust you will understand my worries and keep me as an employee in order that I can continue taking care of my family."

60. The email by the second claimant stated:-

"Hello my name is Brian Hoggins I won't be into work as I feel for my health and safety that coronavirus guidelines weren't followed correctly. The two metre rule was not enforced, there was no time for cleaning done and we didn't receive goggles as per email. Have been on Scottish Government's web page and we are not one of the 13 critical national infrastructure sectors.
I am also looking after my son as his mum is working in the NHS. I tried to leave him with my mum yesterday but it's not plausible."

61. Neither of the claimants attended work on 5 May 2020.

Action by the respondent

62. The respondent knew that the factory could open for manufacturing purposes. That was allowed by the government guidelines at the time. Indeed as they carried out work for the NHS it may have been possible to have continued working rather than closing between 23 March/end of April 2020. That was not challenged.

63. Mr Queen indicated that he knew from his own observations that the measures outlined in the letter of 1 May 2020 had been put in place. He was aware that masks had been supplied and other items of PPE were available. He had provided hand and pump sanitisers throughout the

premises and anti-viral product for cleaning down machines. He could see that there had been compliance form employees apart from the instances when he had required to speak to the claimants.

64. It was an issue for the team leaders as to when production would be paused in order that cleaning could take place but there was no issue that time would be allowed.

65. His observation was that people were keeping to the two metre distancing and there were plenty of notices around which advised that should be the case.

66. He made enquiry of his team leaders. He stated that he had sought advice from Ian Dall and Phil Smith and Maurice Gordon. He was questioned on the order to provide information (J73) wherein at paragraph 5 the respondent had been asked about the investigation claimed to have been undertaken and the *"names of all employees spoken to by the MD to include details of where, when and how the interviews took place"*. The response to that order (J175) indicated that the interviews had taken place on 5 May 2020 and that Mr Queen had *"interviewed Phil Smith and Ian Dall"*. There was no reference to any discussion with Maurice Gordon. Mr Queen advised that the two individuals Ian Dall and Phil Smith were the main people involved and he accepted that he had not mentioned Maurice Gordon and that was an inadvertent mistake.

67. The position of Mr Queen was that the enquiry of the team leaders had elicited information about the behaviour of the claimants on 4 May 2020 which led him to believe that they had not been adhering to the measures put in place in certain respects and so wrote to the claimants in terms of letters dated 7 May 2020. The letters were in exactly the same terms (J116 and 117).

68. The letters stated:-

> *"Further to your email, management have investigated the claims. Your line manager & team leaders have been interviewed in addition to other relevant factory personnel. CCTV which is present across the factory has also been reviewed.*

It has been confirmed that you were indeed provided with the required PPE. However, it has also been evidenced that some of this used PPE was just left on the workstation at the end of the shift, which is unacceptable and a risk to other staff.

It has also been confirmed that you were not complying with social distancing and were observed congregating and chatting repeatedly at an unsafe distance without your PPE on, with your colleague who operates the recycling station. Despite being told by management during the COVID-19 induction talk on Monday 4th May, prior to entering the factory, that only one person was permitted to use the toilets at one time, you were found to be disregarding this instruction by your team leader and reprimanded.

Despite there being products available, you did not clean your workstation before or after use.

In addition to these breaches, you were also found to be using your mobile phone in the factory. As you are aware and as the clear signage throughout the premises states, mobile phones are not to be used in the factory.

There are clear and present COVID-19 signs and notices around the premises clearly stating what is expected by Sips Eco for the good of the whole Sips Eco community.

During this investigation, it has also been brought to management's attention that without good reason or notifying your manager, you left your shift at lunchtime prior to the shut down and didn't return to work.

As you are aware you have been paid in full for this day which you did not work.

Due to the findings above, we have no choice but to terminate your employment with immediate effect. Your P45 will be issued in due course."

69. The claimants denied the claims set out in the letter of 7 May. Each sent a response to the respondent. The first claimant responded by email of 12 May 2020 (J225/226).

70. He advised that if the CCTV was checked then Mr Queen *"would see people including yourself not wearing PPE and protecting other people*

from the possibility of contracting coronavirus …" and that he himself *"came within two metres of me while I was waiting for the recycling machine to heat up and asked what was happening"*. He also stated that workers and other senior staff did not social distance. He also stated that there was a *"false accusation"* concerning the use of toilet facilities and gave an explanation as to what had happened. He stated the charge that he left work prior to lockdown without informing his manager was wholly untrue and that he himself spoke to Mr Queen to advise that he was going home until he was able to work safely. He had sought the advice of ACAS who had *"informed me that proper procedures were not adhered to in my case"* and that *"a fair procedure must be followed when dismissing someone from work"*. He considered he had been unfairly treated and constructively dismissed due to the fact that *"I highlighted a health and safety concern of the company"*. He sought payment until *"such time as my contract expires"* and notice and holiday pay and compensation.

71. The second claimant responded by letter also of 12 May 2020 (J223/224). He also denied the matters raised in the letter from the respondent of 7 May 2020. He stated that he had adhered to social distancing and that he had not been invited to any induction talk. He had not been issued with goggles and he had not left any PPE on the premises. He stated that his mask was *"still in my car".*

72. He denied that he had any knowledge of attempting to use the toilet when someone was already there and received no reprimand from a team leader.

73. He stated that when he arrived at work he found the workstation area to be *"covered in mould and bird droppings"* which the claimants removed. He denied he had ever brought his mobile phone into the workplace and always left it in his car and checked it during breaks.

74. He had not left his shift on 23 March 2020 early without permission. He had discussed concerns with his supervisor on that day who was fully aware that he was leaving the premises due to concerns on coronavirus.

75. He advised that he had a *"statutory right to feel safe and protected at work and reserve the right to leave my place of work when I feel my health and safety is being compromised".*

76. He also felt that he had been unfairly treated and constructively dismissed in highlighting concerns to the company and also requested details of payments due and compensation.

77. Mr Queen advised that he asked only the team leaders of their reaction to the emails received from the claimants of 5 May 2020 and that the information on alleged breaches by the claimants came from the team leaders. None of the team leaders gave evidence.

78. He advised that photographs had been taken either late on 4 May or 5 May 2020 allegedly showing PPE left by the claimants on their workstations.(J218/220)

79. He accepted that if the claimants had left early on 23 March as was alleged by one of the team leaders then he had not taken any disciplinary action in that respect.

80. He accepted that no formal discipline had been taken against the first claimant who it was alleged had been spoken to for not wearing a mask.

81. He advised that a tall can of 10 inches or so was placed beside machines for cleaning them and a "*jar for hands"*. On every door there were hand pump sanitisers.

82. He advised that the team leaders had told him that they had enforced the rules and that they were being obeyed by the employees in the work areas.

83. He advised that the CCTV he had viewed had been recorded over and was no longer available. He had only viewed the CCTV in the area of the claimant's workstation and not for other areas as they were being renovated and the CCTV not in operation on these other areas.

84. He had been told by Mr Dall and Mr Smith that the claimants had been reprimanded for use of the toilets.

85. He had also believed the team leader who had reported that the claimants had been using their mobile phones. He had not seen that himself.

86. He had been told by Maurice Gordon or J Easton that the claimants had left early that day. He confirmed he would have expected the team leaders to know if they had left early.

87. On many occasions in evidence Mr Queen repeated his belief that the claimants had contrived this situation so they could "*go on furlough or look after their children and make a claim for compensation*". He was clearly irritated when he came to respond with the letters of 7 May 2020 in that the claimants were "*accusing us of not providing PPE"* and *"they had made false allegations."*

88. On the issue of child care the Tribunal did consider on the evidence that was a concern. Each had young children at home. The second respondent in particular had a son at home with the school being closed and his wife required to work in the NHS. He had tried leaving his son with his mother but that was difficult.

89. There was no further communication between the parties after the letters of 7 May 2020.

Event subsequent to termination of employment

90. The first claimant's net weekly wage at termination of employment amounted to £305.38 per week. He was paid to end of May 2020 by the respondent. The claimant also contributed to a Nest pension (J180/191). The documents showed contribution by the employer and the first claimant on the monthly basis from January 2020 through to June 2020.

91. He was in receipt of Universal Credit and between 26 May 2020 – 23 October 2020 received £2231.81 (J239). He had applied for a number of employment opportunities since termination (J240/250) He had made application in the local areas until August 2020 and then had widened his search into North-East England.

92. He had secured a position just before Christmas 2020 but a large fire had closed the factory down and he had only worked a half day shift. The rate of pay on that occasion was £11 per hour.

93. He had commenced new employment as from 4 May 2021 with take home pay running at the rate of £340/£350 per week. He had received one pay slip to the date of the hearing.

94. The second claimant's gross (weekly) wage amounted to £346.15 also giving him a net (weekly) wage of £305.38. He also had a NEST pension entitlement and contribution records were produced for the period 6 February-5 July 2020 (J193/197).

95. He had been in receipt of Jobseeker's Allowance in the sum of £74.35 per week between 7 May 2020-November 2020 (J237). He had intimated his CV to various local concerns starting 7 September 2020. He had also commenced training through Kingdom Works for CSCS and forklift operation. He had completed that training in November 2020.

96. He was asked why he had not applied for the jobs that had been sought by the first claimant and said that he *"never saw that"*. He was asked if he had not looked for work before September 2020 because he had been *"caring for his son"* and indicated that he *"was caring but that was not the reason"*. He had gained labouring work (which required CSCS) from 20 November 2020 through an agency and produced appropriate wage slips (J262/268).

97. Pension contribution for each claimant was at the rate of 3% of the qualifying sum of their gross weekly wage. The qualifying sum was £120 and so the pension loss was put at £6.78 per week for each claimant.

Submissions

98. The Tribunal were grateful for the careful submissions made by the parties. No discourtesy is intended in making a summary.

For the claimant

99. It was submitted that the claimants' evidence was to be preferred on credibility. Mr Queen had tended to be repetitive and in answer to the formal order as to who he had spoken to in his investigation it was clear that he had given an incorrect answer. Additionally in relation to photographs which were said to be of the workstations he was unreliable in stating they had been taken on 4 May and then 5 May 2020. While Ms Young was reliable she was of little assistance on the issues in play. The claimants' evidence on dismissal of an individual prior to furlough because he had raised issues on health and safety was enhanced by the fact that the claimants had been dismissed once they raised issues on health and safety.

100. The claimants required to rely on a qualifying disclosure as defined under section 43B(b) and (d) of ERA. Guidance was contained in ***Black Bay Ventures Ltd v Gahir*** [2014] IRLR 416. The emails at J114 and 115 were relied upon as the qualifying disclosures.

101. It was submitted that he first claimant's disclosure (J115) contained sufficient information that measures were not being enforced namely on wearing of PPE; social distancing and workstations not being cleaned and sanitised as stated by the respondent (J129).

102. That information was sufficient for the email to be considered as a protected disclosure that the health and/or safety of an individual was likely to be at risk. Also, that the respondent had not complied with their legal duties. The health and safety risks were clear given the worldwide pandemic at the time of the disclosures. The claimants had a fear for others, themselves and their families.

103. The failure to enforce was a potential failure to comply with a legal obligation under the Health Protection (Coronavirus) (Restriction) (Scotland) Regulation 2020 Section 4.

104. It was submitted that the first claimant had a reasonable belief in the disclosures made. It was submitted that the evidence given by him was credible and reliable. It was important to note that the claimant did not need to be correct about the disclosures being made simply that he had a reasonable belief that they were true. He had given evidence of how he

saw multiple employees and team leaders not wearing PPE and indeed saw Mr Queen not wearing PPE.

105. That was also true of the social distancing rule not being enforced. The respondent had stated that there were markings on the floor in the factory. However it was clear from the photographs submitted that these two metre distancing lines were not in place.

106. There had been an attempt to show that the claimants colluded with each other but there was no evidence that there was any contact between the claimants outside of work.

107. The pictures of the workstations did not show cleaning products beside them albeit it had been stated there was many products available.

108. There was an attempt to show that the disclosures were made out of self interest in wishing to go on furlough but that had not been made out. The issue was that the claimant had witnessed breaches in health and safety provisions.

109. As far as the second claimant was concerned again his email to the respondent (J114) made out that the social distancing rule was not being enforced; no time for cleaning workstations; he had not received goggles and the respondent had reopened in contravention of the Scottish Government guidance on critical infrastructure.

110. Again it was maintained that these issues were ones which would impact on health and safety and that they had not complied with the legal obligations under section 4 of the Health Protection (Coronavirus) (Restriction) (Scotland) Regulation 2020.

111. It was submitted that the second claimant's evidence should be relied upon to show that the social distancing rule was not being adhered to and enforced; that workstations were not being cleaned; sanitising products not being provided; or goggles not being provided. It was maintained that this claimant had a reasonable belief that he would be supplied with goggles which were different from safety spectacles.

112. While it was attempted to maintain that this claimant was wanting to stay at home with his son that was not the case as he could have used his mother for childcare or a local hub for childcare had he continued to work.

113. It was submitted that the reason for dismissal in each case was simply retaliation by Mr Queen to the claimants making the protected disclosures on 5 May 2020.

114. The dismissal letters were *"word for word identical"*. Mr Queen stated that the alleged misconduct by the claimant had been dealt with on 4 May but then when he received the emails of 5 May he went on to dismiss both claimants.

115. The evidence of Mr Queen in relation to investigation was very unsatisfactory. Reliance was again placed on the formal order and the response to that being inadequate. Also, the photographs produced and the unreliability of the evidence around those photographs was further reason why the allegations against the claimants in breaching regulations should not be accepted. No photograph was produced which had allegedly been shown to the claimant. Neither was it the case that the claimants had been reprimanded by team leaders. No evidence had been given from any witness who had administered a reprimand. There was simply no basis for saying that the claimants had used their mobile phone in the premises. No disciplinary procedure at all had been conducted.

116. Mr Queen was of the view that the claims were being manufactured but they came from the claimants as a result of being dismissed because they had made qualifying disclosures. It was only necessary for the claimants to show that was the principal reason for dismissal and that had been made out in this case. The allegations against the claimants in the letter of dismissal were untrue and only there to justify dismissal. The real reason was because Mr Queen was irate at receiving the emails of 5 May 2020.

117. Both claimants sought compensation by way of remedy.

118. So far as the first claimant was concerned he had gained employment for one day around 7 December 2020 but the factory had burnt down and that

employment did not continue. It was submitted this did not break any chain of causation.

119. A calculation of loss was put at £14,963.62 being compensation in the period 1 June 2020 to 7 May 2021 plus pension loss of 49 weeks at the rate of £6.78 per week of £332.22. Benefits he had received had been disclosed (J239).

120. In so far as the second claimant was concerned he had gained agency work on 23 November 2020 and between 23 November 2020 and 7 May 2021 had earned a total of £5094.87. His average weekly earnings over that period was therefore £221.52.

121. The compensatory award should therefore be made up of:-

Loss 1 June 2020 – 23 November 2020 = 25 weeks at £305.38 = £7634.50

Loss in the period 23 November 2020 – 7 May 2021 due to a differential of £83.86 was calculated at 23 weeks × £83.86 = £1928.78.

The second claimant should receive in addition the same pension loss of £332.22.

122. There was sufficient evidence to show that each party had sought to mitigate their loss. It had to be borne in mind that the pandemic had made work extremely scarce.

For the respondent

123. The respondent submitted that the evidence given by Mr Queen should be preferred to the evidence given by the claimants. He was willing to concede matters that should be conceded or did not necessarily further the respondent's defence. He had been frank in advising that he had spoken to three and not two individuals in the investigation he had conducted into the claimants' assertions. His explanation was credible namely that there was little contribution from the third person. There was no dispute that the claimants were not shown the photographs included within the bundle. He had taken photographs on his phone which he had

shown the claimants on the day in question which had subsequently been deleted.

124. The claimants had asserted that prior to the factory closing they had worked without PPE and were anxious about returning. Yet they had raised no concerns about PPE at any time prior to furlough and neither did they raise any concerns when they made a return to work on 4 May 2020. The first claimant had given evidence in chief that he had spoken to a team leader immediately before the closure of the factory about his concerns and left early however later he had said he had spoken to Mr Queen about the matter. While the claimants asserted they did not want to be at home and wished to be working the evidence provided in support of their efforts to find work did not support that position.

125. The second claimant referred to *"we"* in the course of his evidence as he did in his letter of 12 May 2020. It was submitted that the claimants had been acting in concert. The claimants were colleagues and friends and had travelled to and from work together. They shared views and both sent emails within minutes of each other on 5 May 2020 stating they were not returning to work and giving substantially the same reasons. The claimants sent emails on 12 May 2020 after they sought advice from ACAS in substantially the same terms. It was submitted that the claimants had an interest in ensuring that their positions matched and the Tribunal was not getting an independent version of events.

126. In so far as there were issues in dispute then it was submitted:–

- Both the claimants had lockers and the claimants were required to store their PPE in their lockers when not in use
- Each team leader had a responsibility to oversee and supervise all areas of the factory rather than just one area
- There was no dismissal of an employee before the factory closure for raising health and safety concerns. Dismissal was because of concerns over abusive and aggressive behaviour.
- There was sufficient PPE for all factory employees which was high visibility vests, ear plugs, safety glasses, gloves and masks. An

order was placed in March 2020 and the items were within the factory when it reopened.

- While the claimants denied there were handheld spray sanitisers at workstations they did not dispute there were automatic sanitisers throughout the factory. It was not credible that the respondent would not have provided sanitiser product for cleaning the workstations.

- It is a disciplinary offence if PPE is not worn and it lacked credibility to suggest that the respondent had not provided appropriate PPE.
- No factory employee had ever been issued with "goggles" if that was meant to differentiate from the safety glasses issued. The wearing of "goggles" was not a measure to protect against the possibility of catching coronavirus. The claimants well knew what was meant by the use of the word "goggles" as meaning safety glasses which they had been provided with.
- Mr Queen had observed PPE lying on the claimants' workstation and took photographs and showed the images to the claimants. He then deleted the photographs as he considered the matter had been resolved.
- The respondent's position was that both claimants wanted to be on furlough and had approached Mr Queen on that matter. The emails of 5 May 2020 support that position by making reference to furlough.
- It was a matter for the claimants to wipe down their machines at the end of the day. That was not an arduous task.
- The respondent disciplinary procedure allowed them to depart from investigative procedures where an employee has less than two years' service.
- Mr Queen had no reason to disbelieve his team leaders who had nothing to gain from advising him of the claimants' behaviour.

127. It was submitted that the burden of proof was on the claimants to show that they had made a protected disclosure. In this case it was submitted that the first claimant's email did not have sufficient factual content and specification to disclose "information". It was an allegation that there were no enforcement measures without adding anything more.

128. The second claimant's email did not have sufficient factual content and specification but simply voiced a concern for his health and safety. Again, an opinion was being expressed.

129. In any event, neither had stated in their emails any concern to the wider population. They talked of the risk which was posed to them.

130. It was also submitted that the claimants had not made it clear the legal obligation relied upon. Reference had been made to the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020. The respondent had complied with those obligations.

131. It was submitted that the claimants could not have had a reasonable belief that the information tended to show one of the relevant failures. In this case measures had been put in place for distancing, hand sanitisation, cleaning of workstations and the like, the claimants could not have reasonably believed that there was a risk to health and safety. It was the respondent's position that neither claimant had a belief which was objectively reasonable. The requirement to wear safety glasses and gloves and hi-vis vests existed before the re-opening of the factory. That was unrelated to the coronavirus. The claimants were supplied with masks and they themselves maintained that they kept a two metre distance from everyone. At best only on one occasion had Mr Queen (if the claimants' evidence was accepted) come within two metres of the first claimant before he moved away. In the circumstances, there could be no reasonable belief that there was a breach of a legal obligation or risk to health and safety.

132. It was also submitted that the disclosures were not "in the public interest". Reference was made to the case of ***Chesterton Global Limited v Nurmohamad*** [2017] EWCA civ 979 wherein the Court of Appeal gave guidance on this issue. In this case it was maintained that the disclosure was not made in the public interest but in the interests of the claimants being put on furlough and able to stay at home.

133. It was submitted that the reason or the primary reason for the claimant's dismissal related to their own breaches as set out in the dismissal letter of 7 May 2020. In the alternative it was the false allegations made by the

claimants in their emails of 5 May 2020. The respondent conducted an investigation and found no evidence to substantiate the allegations but uncovered repeated failures on the claimants' behalf to adhere to the respondent's rules.

134. So far as remedy was concerned good faith remained relevant to that issue. And in this case it was maintained that the disclosure was made to put pressure on the employer (if it was a disclosure). The emails were simply to pressure the employer to put the claimants on furlough.

135. The claimants were paid up to end May 2020 and in any event compensation should be reduced by 100% on contributory fault. It was submitted that in any event the failures by the claimants in adhering to the rules contributed to their dismissal.

136. It was also maintained that each claimant had failed to mitigate their loss. The first claimant had not applied for a job until 15 June 2020. There were gaps between job applications without any particular explanation. The second application he made in accordance with the schedule produced was to the respondent which rather undermined the list of jobs which he said he had applied for as there was no credibility in a claim that he had made application to the respondent.

137. The first claimant had not made sufficient effort to look for new work in confining his search to jobs near his home. If he had widened his search he would have found work in North of England before he took up employment in May 2021.

138. It was also submitted that the employment gained in December 2020 had broken the chain of causation albeit a fire affected that workplace.

139. The second claimant had not applied for a job until 7 September 2020 some months after the date of dismissal. He then applied for 10 jobs between 7 and 16 September 2020 but there was no evidence of any further search for employment. He commenced employment in November 2020 but could have found a job lot sooner had he applied himself to a search from the time of dismissal.

Discussion

Relevant law

140. Section 103A of ERA provides that:-

> *"An employee who is dismissed shall 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."*

141. In the case of automatic unfairness under section 103A the burden of proving the reason or principal reason remains on the employer unless the claimant lacks the qualifying period of employment (and therefore needs to show that the Tribunal has jurisdiction to hear his or her claim) in which case the burden of proof lies on the employee on ordinary principles (***Maund v Penwyth District Council*** [1984] IRLR 24 and ***Kuzel v Roache Products Limited*** [2008] IRLR 530). In this case each of the claimants lacked the necessary qualifying period of employment.

142. In the context of section 103A it is necessary to distinguish between the question of whether (a) the making of the disclosure was a reason (or principal reason) for the dismissal; and (b) whether the disclosure in question was a protected disclosure within the meaning of the Act (***Beatt v Croydon Health Services NHS Trust*** [2017] IRLR 748). The first question requires *"an inquiry of the conventional kind into what facts or beliefs caused the decision maker to decide to dismiss".* However the second question requires to consider whether a disclosure is to be treated as a protected disclosure and that the question of whether those conditions are satisfied *"in a given case should be a matter for an objective determination by a Tribunal".*

143. Section 43A of ERA provides that in order for there to be a protected disclosure there has to be (a) a *"disclosure"* within the meaning of the act, (b) that disclosure must be a *"qualifying disclosure"* and (c) it must be made by the worker in a manner that accords with a scheme set out at ERA 43C-43H. Each of these requirements must be satisfied if the statutory protection is to be engaged.

144. Section 43B of ERA indicates 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 matters at 43B(a)-(f).

145. This is quite a broad definition in that *"any disclosure of information"* qualifies. However there still must be the disclosure of *"information"* as such and it is not sufficient that a claimant simply makes allegations (***Cavendish Munro Professional Risks Management Limited v Geduld*** [2010] IRLR 38. There it was stated that the ordinary meaning of giving *"information"* is conveying facts. However, subsequent cases and in particular ***Kilraine v London Borough of Wandsworth*** [2018] IRLR 846 indicated that Tribunals should not be *"too easily seduced"* into asking whether a statement is either allegation or information when reality and experience suggests that *"very often information and allegation are intertwined"*. The question is simply whether there has been a disclosure of information. If it is also an allegation "*that is nothing to the point".* Accordingly, a disclosure may contain sufficient information even if it also includes allegation.

146. Also the disclosure has to be considered within its context. Once a disclosure has taken place it is then necessary to consider whether that disclosure can be categorised as "*qualifying*" and that will depend on the nature of the information revealed.

147. It is necessary for the worker making the disclosure to have a *"reasonable belief"* that the disclosure is in the public interest. That does not mean that the information itself has to be actually true. It follows that a disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information to disclose was incorrect (***Darnton v University of Surrey*** [2003] IRLR 133). The test is whether or not the worker/employee had a reasonable belief at the time of making the relevant allegations. However it is always the case that the factual accuracy of allegations may be an important tool in determining whether or not the employee did have such a reasonable belief. The assessment of an individual's state of mind must be based on the facts as understood by him at the time. If an individual is disclosing information that he or she

has received from elsewhere (which is not within his or her direct knowledge) it is not necessary for that individual to have a positive belief in its truth. Where however an individual has direct knowledge of matters then that requires to be weighed in the balance of whether he or she could have had a "*reasonable belief."*

148. The statutory test is also a subjective one. It is the reasonable belief of the worker making the disclosure that is being considered and not whether a hypothetical reasonable worker could have held such a reasonable belief.

149. The disclosure requires to be made *"in the public interest"*. In ***Chesterton Global Limited v Nurmohamad*** [2017] IRLR 837 it was held that it may be that there are a mixture of self interests and public interests in a disclosure and it is for the Tribunal to rule on the facts as to whether there was *"sufficient"* public interest to qualify under the legislation. It is for the Tribunal to consider whether or not a claimant makes a series of allegations which although could have been protected disclosures were in fact only in the individual's own self interest and so would not qualify.

150. Factors which can be a useful tool in deciding if the public interest is engaged are:-

(a) The numbers in the group whose interests the disclosure served.
(b) The nature of the interests affected namely the importance of the interests.
(c) The nature of the wrongdoing disclosed – deliberate wrongdoing may be more likely to be in the public interest than inadvertent wrongdoing.
(d) The identity of the alleged wrongdoer namely how large within the community the wrongdoer may be and consequently how its activities engaged the public interest.

151. The six categories of "*failure"* to which the information must relate so that the disclosure qualifies for protection are:-

(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 and 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.

152. In respect of danger to health and safety there only needs to be the fact or likelihood of endangerment and not any definable legal breach by the employer.

153. An employee wishing to rely on the whistleblowing protection before a Tribunal bears the burden of proof of establishing the relevant failure (***Boldin v Land Securities Trillium (Media Services) Ltd*** UKEAT/0023/06).

154. It is necessary that the relevant information must tend to show that a person has failed, is failing or is likely to fail to comply with a legal obligation to which he is subject. In this context ***Kraus v Penna plc [2004] IRLR 260*** indicated that the term *"likely"* requires more than a possibility or a risk that the employer might fail to comply with a relevant legal obligation. The information disclosed should in the reasonable belief of the worker at the time it is disclosed tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation.

155. A disclosure to the worker's employer is always a protected disclosure whether the failure disclosed is a failure of the employer himself or of some other person (s43C(1)(a)).

Conclusions

156. In the first instance it is necessary to determine whether there was a protected disclosure in this case. That means considering the definition within section 43B(1) of ERA.

157. The first claimant relies on his email of 5 May 2020 to the respondent. He states that he did not consider he was *"adequately protected from the possibility of contracting coronavirus"* and that he did not *"experience the measures which I read about in the email from you, the PPE and social distancing was not enforced and the cleaning of workstations was not carried out as stated in the email. I feel the management needs to enforce this as nobody at work kept their distance."*

158. It was submitted that the particular matters advised in this case by the first claimant was that:-

(1) The wearing of PPE was not enforced.

(2) That social distancing was not enforced.

(3) Workstations were not cleaned and sanitised as stated in the email from the respondent to the claimant (J129).

159. The Tribunal did consider that this was information being provided and not simply an allegation as was submitted for the respondent. The Tribunal consider that there was sufficient factual content and it was sufficiently specific to come within the definition of disclosing *"information"*. The information provided was the non-enforcement of PPE and social distancing and cleaning of workstations not carried out as stated within the email to the claimant from the respondent of 1 May 2020.

160. The context was that in the email of 1 May 2020 the claimant had been told that certain measures would be put in place and he was indicating that these measures were not being enforced on 4 May 2020 when he returned to work. The Tribunal did not think it was necessary for him (as was submitted for the respondent) to indicate *"I saw factory staff going around without masks or wearing PPE"* before information was being provided. What was contained within the email for the Tribunal seemed sufficient information to be provided.

161. The second claimant relied on his email of 5 May 2020 to the respondent (J114) as a qualifying disclosure. He relied on information being provided that the *"two metre rule was not enforced and there was no time for cleaning done and we didn't receive goggles as per email"*. He also states that he has been on *"Scottish Government's webpage and we are not one of the 13 critical national infrastructure sectors"*.

162. It was maintained that the disclosures the second claimant makes are:-

(1) The two metre social distancing rule was not enforced.
(2) There was no time for cleaning workstations.
(3) He did not receive goggles (PPE) as per the email from the respondent of 1 May 2020.
(4) The respondent had re-opened in contravention of the Scottish Government stating that only 13 critical infrastructure areas should have opened.

163. The Tribunal considered there was sufficient specificity to take the statements out of mere allegations and into the category of "*information"* that the two metre social distancing rule was not being enforced; cleaning of workstations was not carried out; the wearing of PPE not enforced. There was doubt that the assertion that the respondent should not have reopened as it was not one of the "*13 critical infrastructure areas"* was *"information"* rather than allegation but there was sufficient in the email for it to qualify on the grounds of providing information.

164. The Tribunal did consider that in the context of the email from the respondent on 1 May 2020 there was sufficient factual content being provided in each case to enable the Tribunal to find that "*information"* was being provided.

Reasonable belief

165. In order for any disclosure to qualify for protection it must in the "*reasonable belief*" of the worker be made in the public interest and tend to show that one of the six relevant failures has occurred, is occurring or is likely to occur.

166. The fact that the section requires a *"reasonable"* belief introduces an objective standard to the test suggesting that there has to be some substantiated basis for the worker's belief. This does not mean that the worker's belief must necessarily be true and accurate as the provisions require only that the information disclosed *"tends to show"* that the relevant failure has occurred. It follows that there can be a qualifying disclosure of information even if the worker is wrong but reasonably mistaken in his or her belief.

167. However truth and accuracy are not entirely irrelevant considerations when determining whether a worker has a reasonable belief. It is difficult to see how a worker can reasonably believe that disclosure of information is in the public interest and tends to show that there has been a relevant failure if he or she knows that the factual basis of the information disclosed is false.

168. That brings into account the differing evidence being given by claimants and respondent on the events in the factory on 4 May 2020. The respondent's evidence was that the measures set out in the email of 1 May 2020 were being enforced within the premises and that the claimants well knew this. Their claim to be at home was not driven by a reasonable belief in the public interest that health and safety was at risk or there was contravention of a legal obligation but that it suited them to be on furlough for childcare or other reasons.

169. The Tribunal did not find this to be an easy issue to resolve. However on balance of the evidence the Tribunal came to the view that the claimants did not have a reasonable belief in the public interest that the information tended to show there had been a relevant failure. The Tribunal had in mind the following issues:-

(i) The return to manufacture by the respondent was a planned exercise. The Tribunal did accept the evidence from Mr Queen that they had identified the measures that they wished to take to allow a safe return to work and that those measures were in line with the Government guidelines. In respect of those guidelines reference was made to s4 of the Health Protection (Coronavirus) (Restrictions)

(Scotland) Regulations 2020. That section advised that businesses should (a) take "all reasonable measures" to ensure distances of 2 metres was maintained between persons on the premises (b) take "all reasonable measures" to ensure that it only admitted people in sufficiently small numbers to make it possible to distance (c) take "all reasonable measures" to ensure that distance was kept by those waiting to enter the premises. The email of 1 May 2020 did set out the measures it was intended to take and it was unlikely that having made those preparations that the respondent would not enforce the measures with particular reference for employees to socially distance.

(ii) The Tribunal accepted that the respondent had been in the habit of providing sufficient and appropriate PPE for the workforce prior to shutdown and that included safety glasses, work boots, fleece jackets and gloves. The Tribunal accepted that on the return to work there had been measures put in place to ensure that there was an adequate supply of these items and also masks. The Tribunal were satisfied from the evidence that these masks had been provided to employees. Indeed, there appeared no dispute on that as the claimants accepted that they had received masks. The Tribunal was satisfied that prior to shutdown PPE (barring masks) were required to be worn in the factory premises. The addition of masks on return was in place. The Tribunal was satisfied PPE continued to be worn in the factory on a return to work

(iii) There was no disclosure of information made that hand sanitisers or viral spray or other form of disinfectant was not being provided. Neither was there any assertion in the information provided that more than two people were being allowed in the toilet area or that signage was insufficient in some respects to ensure information was being conveyed to the workforce that they should handwash and keep socially distant. There were allegations made in the evidence of the claimants that anti viral spray was not being provided but it was not information provided within the disclosures relied upon causing the Tribunal to doubt whether the evidence of the claimants was accurate in this respect. The Tribunal accepted the evidence that

hand sanitisers were widely available and that anti-viral spray to wipe down work stations was available.

(iv) The evidence on lack of social distancing and non-wearing of masks was somewhat unspecific by the claimants. No particular instances were given by the claimants on which colleagues or on what occasions they saw people not wearing masks or not adhering to social distancing. The only specific evidence given was that two people working on a particular machine could not have been two metres distant because it was thought the width of the machine in operation was narrower. However, no particular information was given about that operation or how it was that they determined that operators could not work at a safe distance or that safe distance working was not being enforced as they had stated in their emails.

(v) This was a factory which had an abundance of space. Evidence was that 15 employees occupied a very large area of workspace within their sheds and there was no question that social distancing could be conducted with some ease in this factory.

(vi) It was accepted by the claimant that they would be the ones required to clean down their workstations. There was no suggestion that they were prevented from doing this. The evidence was that it was their responsibility to effect this cleaning at the beginning and end of shift. If necessary the production could have been paused for that to happen. It was alleged by the claimants that there was material that required to be cleared away at the beginning of the shift as the recycling station had a pile of material covered in *"pigeon droppings"*. This was denied by the respondent who indicated that the factory had not been open since around 23 March 2020. In any event, this was not information provided within the emails of 5 May 2020 that they had a reasonable belief in the public interest that clearing away of that material tended to show one of the relevant failures. It was not stated how it was that requiring to sort out and take this material away from the workstation put them or others at risk. They accepted that the machine could be sanitised quickly as it was mainly button operated.

(vii) While there were difficulties in accepting the evidence of Mr Queen in certain respects the Tribunal did believe him when he said that he

had been approached by the claimants in the course of 4 May 2020 seeking to be put on furlough. There was support for this from the email of 5 May 2020 from the first claimant who asks *"please allow me to stay (on) furlough into the near future…"* and that the second claimant certainly had childcare issues which would support the view that his preference was to be at home on furlough. He advises in his email that *"I am also looking after my son as his mum is working in the NHS. I tried to leave him with my mum yesterday but it's not plausible"*. The evidence was that the second claimant's son was at home because the school was closed and his wife worked in the NHS and so was unable to be at home to look after him. In answer to our question on that aspect of matters he advised that he thought that two of the team leaders were *"not in as their wives worked in the NHS"*. For the Tribunal there was support that he wanted to be on furlough also which made it more likely that he had asked Mr Queen to remain on furlough. The Tribunal considered that each wanted that to continue and had approached Mr Queen on that matter on 4 May 2020

(viii) In so far as the issue over the supply of *"goggles"* was concerned this was a term used by the respondent for safety glasses which were provided. There was no evidence that the claimants expected a different form of eye protection other than the safety glasses which had been provided and continued to be provided.

(ix) The second claimed stated that he had been on the Scottish Government's webpage which advised that the respondent was *"not one of the 13 critical national infrastructure sectors"*. There was no evidence produced to suggest that was the case. Mr Queen indicated that return to work was allowed at the time. There was no challenge to Mr Queen on that. There was no evidence from this claimant as to which webpage he had been examining or how he had come to the conclusion that the respondent was not included within a manufacturing process which was allowed to return to working. No webpage was produced or referred to in evidence. There was no evidence to show how he had come to this belief other than an indication that he had looked at a webpage which was not identified in any way to see whether his belief could be a reasonable belief.

(x) No representation was made by the claimants on 4 May 2020 as to the conditions they asserted were in place regarding PPE, social distancing, lack of material to clean their machine or any other issue. Their reason for not saying anything at the time was that they had witnessed an individual being sacked for raising health and safety issues just prior to lockdown. Their position was that if they raised an issue they would be regarded as troublemakers and dismissed. The Tribunal did not accept on the evidence that the individual who had been dismissed just prior to lockdown was raising health and safety issues. They accepted the evidence from Ms Young and Mr Queen that this individual had become aggressive and confrontational in the course of a meeting and as a consequence had been dismissed for that reason. The Tribunal did not accept that the claimants were scared to raise issues on 4 May 2020 but rather that they did not raise them because there was no fear for health and safety in lack of enforcement of the measures. The lack of concerns being raised with any team leader or other member of management on 4 May 2020 about alleged non-enforcement supported a view that for their own reasons they would prefer to be at home on furlough rather than in the factory premises.

170. In short therefore the Tribunal for the foregoing reasons did not consider that the claimants had a reasonable belief that the disclosures were being made in the public interest and tended to show breach of the relevant failures. The Tribunal did not consider that the information provided by the claimants was factually correct. They considered that being in the factory and being able to observe matters themselves they would know that was the case and therefore they could not have a reasonable belief that the disclosures were being made in the public interest and tended to show the relevant failures. Given that there was no protected disclosure in the view of the Tribunal then there could be no automatic unfair dismissal under s 103A of ERA. Given the lack of qualifying period the claimants had no other basis of claim.

171. It should be said that had the Tribunal considered there was a protected disclosure being made then it seemed clear as was submitted for the

claimants that there was retaliation by Mr Queen. There were issues within the evidence given by Mr Queen about the investigation he claimed to have conducted to establish the failures that were outlined in his letter to the claimants of 7 May 2020. The Tribunal had doubts about his claim to have examined CCTV footage which showed failures by the claimants. The Tribunal did not believe that he had received information that the claimants were in the toilets in breach of the requirement or that they had been seen using their mobile phone on the premises. Mr Queen claimed that the information on these matters had come from team leaders but no team leader appeared to give evidence. These were matters which concerned the Tribunal in coming to assess credibility. That said the Tribunal did consider that Mr Queen had grounds to complain (as he did repeatedly) that the information provided on alleged lack of enforcement of safety measures were not true and that the real reason for the emails of 5 May 2020 being sent by the claimants was their desire to remain on furlough.

Employment Judge: **J Young**
Date of Judgment: **05 July 2021**
Date sent to parties: **06 July 2021**