EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR TREVOR LEE	AND	LEOFRIC BUILDING SYSTEMS LTD (R1) MR COLIN HAMMOND (R2) MRS JULIE HOUSTON (R3)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 7TH / 8TH / 9TH FEBRUARY 2022

EMPLOYMENT JUDGE MR P CADNEY

MEMBERS:
MR K SLEETH
MR D STEWART

APPEARANCES:-

FOR THE CLAIMANT:- **MS S WILCOX**

FOR THE RESPONDENTS:- **MR N HENRY**

JUDGMENT

The unanimous judgment of the tribunal is that:-

i) The claimant's claims of public interest disclosure detriment contrary to s47B Employment Rights Act 1996 against R1 / R2 / R3 are not well founded and are dismissed.

ii) The claimant's claim of automatic unfair dismissal contrary to s103A Employment Rights Act 1996 against R1 is not well founded and is dismissed.

iii) The claimant's claim of automatic unfair dismissal contrary to s100 (1) (c) Employment Rights Act 1996 against R1 is well founded and is upheld.

iv) The claimant's claim of failure to provide written particulars of the main terms of employment contrary to s1 Employment Rights Act 1996 against R1 is well founded and is upheld.

Remedy

i) Unfair Dismissal – The claimant is awarded compensation of £18,845.69 (subject to the recoupment provisions in respect of universal credit received in the sum of £5,575.86) giving a net figure immediately payable to the claimant of £13,278.83.

ii) Failure to provide written particulars of the main terms of employment- £1326.00 .

iii) Total immediately payable £14,604.83.

Reasons

1. By this claim the claimant brings claims of:

I) Automatic unfair dismissal contrary s103A and/or s100 (1)(c) Employment Rights Act 1996:

II) Whistleblowing detriment contrary to s 47B Employment Rights Act 1996.

III) Failure to provide written particulars of employment.

2. In summary the claimant contends that he made a protected disclosure to Mr Allan Green (his line manager) on 6th January 2021 drawing to his attention what the claimant believed to be failures in the respondents Covid 19 prevention measures. I addition he had drawn similar health and safety concerns to Mr Hammond and Mrs Houston. As a result he was threatened by Mrs Houston (R3) with being dismissed in a meeting on Friday 8th January 2021; and Mr Hammond decided to dismiss him by 11th January 2021. Both of these are alleged as whistleblowing detriments, the first against R1 and R3; the second against R1 and R2. In addition he was dismissed on 11th January 2021 and he contends that the reason or principal reason was either the protected disclosure (s103A) and/or the subject matter of the disclosure and other conversations which fell withins100 (1) (c).

3. The allegation of failing to provide written particulars of employment is not in dispute.

4. The tribunal has heard evidence from the claimant; and on behalf of the respondents Mr Hammond; Mrs Houston and Mr Alan Green.

Background

5. The respondent manufactures, constructs and instals sectional concrete buildings. Mr Hammond (R2) is the Managing Director and owner of the business and Mrs Houston is the Accounts Manager. The claimant was employed as a concrete worker manufacturing concrete panels from 22nd April 2019 until his summary dismissal on 11th January 2021. The claimant was furloughed between 23rd March 2020 until 8th September 2020 when he returned to work full time. The events with which we are concerned relate to a very short period beginning on 4th January 2021 on the return to work after the Christmas break and ending with the claimant's dismissal on 11th January 2021.

6. On Tuesday 5th January 2021 the claimant asked Mr Hammond if he could be placed on furlough. The basis for this was that although not her sole carer the claimant had caring responsibilities for his mother and wished to minimise the risk of her catching Covid 19. A similar request was made by a colleague B P-W for similar reasons. Mr Hammond stated that he would have to consult Mrs Houston. She returned to work on 6th January and took advice from the company's legal advisors and HMRC and was told that it was not permissible for the respondent to place employees on furlough in those circumstances. The claimant contends that this advice was wrong, but whether it was or was not we accept Mrs Houston's evidence that it was the advice she was given and communicated to Mr Hammond. The claimant and B P-W were called to a meeting by Mr Hammond but they were late and met up with him as he was driving out. In a brief conversation through the car window he informed them that they could not be furloughed and the claimant complained in general terms about the lack of steps to make the workplace reasonably covid 19 free and what steps could be taken to improve it, which prompted Mr Hammond accuse him of being "a barrack room lawyer."

7. Shortly thereafter the claimant had a conversation with Mr Green which is said to be the public interest disclosure. In the claim form the claimant sets out five matters he raised with Mr Green ; that there was no regular cleaning; that there was only one communal white towel; staff were routinely not wearing face masks; they were routinely not respecting the two metre rule; and there were no hand sanitiser dispensers. Mr Green does not broadly dispute that these complaints were made or that they were to an extent justified. However, his evidence, which we accept, was that he did not tell anyone ese about this conversation or the information disclosed.

8. On 7th January 2021 Mr Hammond wrote to the claimant setting out the position as to furlough and asking that claimant put his health and safety concerns in writing.

9. On the morning of 8th January 2021 Mrs Houston had a meeting with the claimant and B P-W to discuss the furloughing issue.

10. In addition it is accepted that in the afternoon she called all the workforce for a meeting. She accepts that she told them that it was informal, should not be recorded and that if asked she would deny that it had taken place. Her evidence is that the reason for doing so is that Mr Hammond, who was not on the premises, did not know that she was going to hold the meeting and had not given her permission to disclose the information she proposed to give to the workforce. In essence she wanted to and did tell the workforce that the company was and had been trading at a loss and was only continuing to trade because Mr Hammond was subsidising it. He could at any moment decide not to and they would all lose their jobs. She wanted to emphasise the seriousness of the situation and that they had to do everything they could to ensure the continued existence of the company.

11. The claimant alleges that during the meeting she specifically stated that "if we keep on with all the covid and health and safety that Colin will shut the business down." She denies saying this. It is evident from the transcript of the morning meeting that whilst the respondent wished it only to be about furlough that the claimant had kept raising the issue of health and safety. In essence the claimant was saying that if he could not be furloughed that the health and safety issues would have to be addressed and that, in effect the two were inextricably linked in that it was the inadequacy of the health and safety measures that had prompted the request for furlough. In those circumstances in our judgement it is highly likely, and we find on the balance of probabilities, that Mrs Houston did make the comments attributed to her, and we accept the claimant's evidence that his was said.

12. It is not in dispute that on the morning of 11th January both the claimant and B P-W were summarily dismissed.

13. The respondent's case is that both the claimant and B P-W were dismissed because of their inability to work on site and/or to work overtime. Mr Hammond's evidence is that he had begun to consider the necessity for redundancies in a meeting with his son, the only other director on 23rd December 2020. He had thought about it during the Christmas lockdown but had only finally decided to dismiss the two employees on Thursday or Friday 7th / 8th January 2021. The basis for doing so was that, as is shown in a matrix which it is accepted was subsequent compiled, but which Mr Hammond says represented his thinking, that by that point the company had four employees. A fifth was employed as a joiner and was not considered for selection. Mr Hammond believed that the claimant could not drive, which is correct, and was not prepared to work overtime or to travel to site, which the claimant disputes. Mr Hammond's case is that at very least the claimant had made it clear that he had to be able to leave at 4.30 pm to care for his mother. Mr Green's evidence supports Mr Hammond to the extent that he accepted that the claimant had not refused to do overtime or travel but did require to leave at 4.30 pm. Mr Hammond's evidence is that he needed a flexible workforce who were able to manufacture the concrete sheets and attend on site to assemble the buildings and it was not possible to do this within ordinary working hours. Accordingly he decided to dismiss both the claimant and B P-W .He had taken advice and as neither had two years' service it was not necessary to follow any particular process or the normal redundancy consultation which would

have been required had they had longer service. As a result he summarily dismissed them on 11th January 2021. If this correct the reason or principal reason for the claimant's dismissal was not one of the automatically unfair reasons relied on.

14. The claimant contends that we should not accept this explanation. It is, he suggests no coincidence that he was dismissed less than a week after raising health and safety concerns. Secondly that it is extremely odd that the claimant was invited on the 7th January 2021 to put his health and safety concerns in writing and that either the same day or the next, a decision was taken to dismiss him before they had ever been received or considered. Moreover he points to the fact that the matrix was a subsequently created document and that there is in fact no contemporaneous documentation which supplies any support for the respondent's contentions.

15. In our judgement there are reasons to doubt the respondent's account. Firstly whilst there was no legal obligation to engage in a formal redundancy consultation, as at the 11th January 2021 the claimant had not at any stage been informed that his job was at risk if he could not be more flexible. Since there were apparently no other concerns about his work it is in our view extremely surprising that a meeting was not held with him to set out the situation and give him some time, even if it was a short time, to see whether alternative arrangements could be made for the care of his mother so as to allow him to keep his job. The fact that nothing of the sort happened is in our judgment strongly suggestive of the fact that this was not the true reason. Secondly there is the coincidence of time which is relied on by the claimant. For the claimant to have returned to work on the 5th January 2021 and a decision made to dismiss him by the 8th January again strongly suggests was the cause was something that had happened between those two dates. Thirdly although the respondent, as is apparent from the meeting of 8th January 2021, sought to detach the furlough issue from the health and safety issue they were clearly related in that the claimant was asking to be furloughed because of the health and safety concerns of the heightened risk of transmitting Covid. In our judgement the respondent must in those circumstances have known that if they could not furlough the claimant they would have to address the health and safety issues with him if he remained in their employment.

16. In our judgement on the balance of probabilities the principal reason for dismissing the claimant was that he had raised the health and safety concerns and that the dismissal was a means of avoiding addressing them.

Public Interest Disclosure

17. The first question is whether the Claimant was an individual (employee or worker of the respondent) who is capable of being protected under the PIDA provisions. This is not in dispute and it is not therefore necessary to set out the law.

18. The second is whether there was a qualifying disclosure within the meaning of S.43B ERA. This requires a) a disclosure of information that b) in the reasonable belief of the worker making it is c) in the public interest and d) tends to show that one or more of the six relevant failures has occurred or is likely to occur. The relevant failure relied

on in relation to the disclosure in this case is a breach of a legal obligation (s43B (1)(b) ERA 1996) and/or s43B (1) (d) (health and safety disclosure).

19. There respondent does not accept however, that there was a disclosure of information. The following principles emerge from the case-law in relation to the provision of information:

    There must be a disclosure of information (*Cavendish Munro Professional Risks Management Ltd v Geguld [2010] IRLR 38; Goode v Marks and Spencer plc UKEAT/0442/09.* However, there is a grey area between `information" and `allegation`/`opinion`. The question will always be a fact-sensitive one (see *Kilraine v London Borough of Wandsworth [2018[EWCA Civ 1436 para 30)*:*"the dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not be decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that it nothing to the point"*.

    Thus, the question is simply whether there is sufficient information to satisfy s.43B, which is a question of fact for the tribunal.

Automatic Unfair Dismissal

a) S.103A renders a dismissal automatically unfair where *the reason or principal reason for the dismissal is that the employee made a protected disclosure.*

Conclusions

Protected Disclosure

20. It is sensible to start with the protected disclosures. Taking the requirements set out above it is not in dispute that the claimant was an employee of the respondent and therefore capable of attracting the protection of the Act.

21. In our judgement the substance of the matters disclosed were clearly "information", in that he disclosed very specifically the ways in which he alleged the covid 19 rules/ guidance were being broken. Moreover we accept that the claimant reasonably believed them to be in the public interest. It is obviously correct that if conditions the workplace created a heightened risk of the transmission of Covid 19 then those in the workplace faced a heightened risk of being infected themselves and infecting others. We are not convinced that this falls within s43B(1)(b) (the breach of a legal obligation) not least because the claimant has not sought to identify why the failures were in breach of a legal requirement rather than simply guidance. However we are

satisfied that it falls within s43B(1)(d) in that the disclosure tended to show that the health or safety of any individual was likely to be endangered for the reason given above.

Detriment

22. The first detriment relied on is the comment made by Mrs Houston in the meeting pf 8th January. Clearly being threatened with dismissal is a detriment. In our judgement the difficulty in this case is linking the disclosure to the detriment. Mr Green's evidence, which we accept, is that he had not specifically disclosed the conversation to anybody. By the afternoon of 8th January 2021 Mrs Houston clearly knew in general terms that the claimant was concerned about health and safety as she knew he had raised it with Mr Hammond and that he had raised it with her in the morning. However, none of those matters are relied on as disclosures. Whilst therefore it is clear in general terms that Mrs Houston was aware of the claimant's concerns, there is no specific evidence that she had any knowledge of the disclosure made to Mr Green, which we repeat is the only one relied on. In those circumstances we are unable to conclude that the disclosure itself was a material factor in causing her to make the remark.

23. The second detriment is the decision taken to dismiss by Mr Hammond. This is inextricably linked with the claims for automatic unfair dismissal and is discussed below.

Unfair Dismissal

24. S103A / Whistleblowing Detriment - We have found above that the claimant did make a public interest disclosure on 6th January 2021. As with Mrs Houston there is no specific evidence that Mr Hammond was aware of what had been said to Mr Green in that conversation but he had direct knowledge at least in general terms from the conversation he had had with the claimant. Again it follows in our view that we cannot infer any knowledge of the disclosure and there is no sufficient direct evidence from which we could conclude that the disclosure itself was a material factor in the decision to dismiss.

25. It equally follows that the detriment claim must fail for the same reasons.

26. S100 (1)(c) – However in our judgement the situation is different in respect of the s100(1)(c) claim. S 100 (1)(c) renders a dismissal unfair if the reason or principle reason for dismissal, is that "…*he brought to his employer's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety*".

27. In our judgement firstly he had on the evidence before us on two occasions in addition to the specific disclosure, brought to his employers attention circumstances he reasonably believed were harmful to health and safety. For the reasons set out

above we have concluded that this was the principal reason for his dismissal and it follows that the claim for automatic unfair dismissal is upheld.

Remedy

28. The broad facts are not in dispute. The claimant has been out of work since his dismissal in January 2021. He has not for most of the period been fit to work as a result of long standing mental health issues which have been exacerbated by his dismissal. He has however, made a number of unsuccessful attempts to find work.

29. The burden of demonstrating a failure to mitigate his loss lies on the respondent. It makes a single submission as to the failure to mitigate. On 30th June 2021 the new General Manager of the respondent Mr Haverly emailed the claimant offering him his old job back. The claimant declined and the respondent suits that that is a failure to mitigate and that any recoverable losses should end at a point shortly thereafter at which the claimant could have resumed employment with the respondent and avoided any further loss . The claimant declined the offer saying " *Dear Mark, Thank you for your recent email and letter in regards to reinstating my position at Leofric. After being made redundant on this occasion I feel that after the way I was last treated it would not be suitable for me to accept this offer as a result of being unfairly dismissed for raising health and safety concerns. I've been deemed unfit for work by the doctors and the mental health team. I feel that Leofric is not a safe working environment and would feel like I couldn't raise any further concerns that may arise in future as I would be yet again be a victim of unfair dismissal…"*

30. The question of whether the refusal of an offer of re-employment is a failure to mitigate turns on the question of the reasonableness of the decision not to accept the offer. We have to take into account all the circumstances of the case including the subjective reasons the claimant gives for turning down the offer. In our judgement the reasons for which the claimant turned down the offer were reasonable and we do not conclude that the failure to accept the offer constitutes a failure to mitigate.

31. The claimant seeks compensation for a period of approximately eighteen months following his dismissal up until June 2022. We have to make an award which we consider just and equitable in the circumstances. The claimant began counselling in December 2021, and in our judgment he is likely to able to find employment sooner than June 2022. Accordingly we have decided that we will award his past losses up to today's date, and future loss for a further eight weeks which takes the claimant to just before Easter 2022.

32. The figures are as follows. In respect of past loss, and in respect of loss of earnings the figure is £16,102.90, and for loss of pension £352.55 which gives a total of £16,455.45.

33. For the future loss, the loss of earnings is £2347.96 and £51.28 for pension loss, giving a total of £2399.24.

34. We have awarded four weeks loss of earnings for the failure to provide written terms of employment of £1,326.00.

35. That is a total of £20,180.69.

36. However the claimant has been in receipt of universal credit and the recoupment provisions apply, The amount received by the claimant in respect of past loss is £5,575.86 which will be subject to recoupment. The total award the respondent is ordered to pay immediately to the claimant is £14, 604.83.

Recoupment

(a) Monetary award: £16,455.45

(b) Prescribed element: £ 5,575.86

(c) Period to which (b) relates: 11th January 2021 - 9th February 2022

(d) Excess of (a) over (b). £10,879.59

Employment Judge Cadney
Date: 21 February 2022

Judgment & reasons sent to parties: 22 February 2022

FOR THE TRIBUNAL OFFICE