EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Christian Lloyd	v	Ashbury Labelling Limited

Heard at: Reading by CVP **On:** 30 September, 1 and 2 October 2024

Before: Employment Judge W Anderson
F Betts
C Baggs

Appearances
For the claimant: In person
For the respondent: S Berry (counsel)

JUDGMENT

1. The claimant's claims of protected disclosure detriment and automatically unfair dismissal are dismissed

REASONS

Background

1. The claimant was employed by the respondent from 30 May 2022 until 19 June 2023. He was notified on 20 March 2023 that he had been dismissed and was on garden leave for the duration of his three-month notice period. Early conciliation commenced on 19 June 2023 and ended on 21 July 2023. This claim was filed on 21 August 2023.

2. The claimant's case is that his dismissal was automatically unfair as he was dismissed for making protected disclosures, and that he suffered detriment as a result of making protected disclosures. The respondent's defence is that the claimant was dismissed for some other substantial reason, namely the breakdown of the relationship between the claimant and the respondent's client, Tesco. It denies that the claimant made protected disclosures or that he suffered detriment as a result of doing so.

The Hearing

3. The parties filed a joint bundle, prepared by the respondent, of 543 pages. The tribunal received witness statements from the claimant and the respondent's four witness, James Post, Jamin Edwards, Natalie Leach and Zoe Jordan. All of the witnesses attended the hearing and gave oral evidence. In addition, the tribunal received a chronology and cast list, as well as written closing submissions from both parties.

4. Oral judgment was given at the end of the hearing. The claimant requested written reasons.

Applications

5. At the outset of the hearing two applications were made by the claimant.

5.1. Application to amend

5.1.1. Ms Berry, for the respondent, said that in supplying written further particulars on 5 July 2024 the claimant had raised matters that were not part of his claim as originally set out or clarified at the case management hearing on 10 April 2024 and an application to amend was required. These matters were the addition of a fourth alleged protected disclosure to Zoe Jordan (Amendment 1) and the expansion of the s43B factors (Employment Rights Act 1996) to include s43B(1)(c) *that a miscarriage of justice has occurred, is occurring or is likely to occur*, for all four alleged disclosures (Amendment 2). The tribunal agreed that both of those matters would be amendments and an application was required.

5.1.2. The tribunal heard oral submissions from both parties and made the following decision:

5.1.3. When considering an application to amend there are a number of factors that will generally be relevant to the assessment the tribunal must make. These are the nature of the amendment, the applicability of time limits, and the timing and manner of the application *[Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT].* All relevant matters should be taken into consideration and no particular matter will be determinative *[Vaughan v Modality Partnership 2021 ICR 535, EAT].*

5.1.4. Amendment 1 – notwithstanding the fact that the claimant had legal advice when he issued his claim and at the case management hearing, it is the conclusion of the tribunal that the disclosure which forms this amendment may be of importance to the claimant's case. It was raised as part of the clarification of the alleged disclosures, ordered to be provided after the case management hearing, by which time the claimant no longer had legal advice. The tribunal would need to consider substantial evidence in order to comment on the prospects of success of this allegation, where on the face of it there is a dispute

between two people and no other witness. The respondent has prepared its case on the assumption that it needs to defend this particular allegation, and the relevant witness is in attendance. That is not a deciding factor, but considering all of the circumstances, the tribunal's conclusion is that prejudice would be greater to the claimant in refusing the amendment than it would be to the respondent if it was allowed, and the application is granted. Whether the allegation was in time is a matter for evidence during the full hearing.

5.1.5. Amendment 2 – again the tribunal was aware that the claimant had legal advice when filing his claim, and that he was represented by counsel at the case management hearing. EJ Hawksworth had recorded the nature of the disclosures in detail in her case management order and this factor (miscarriage of justice) is not included. It is not a position clearly argued by the claimant, either in the particulars of claim or in his witness statement, even though it was raised as an issue by the respondent some months ago, i.e. before the witness statements were finalised. The tribunal has weighed the balance of prejudice between the parties in granting or refusing this amendment. For the respondent there is prejudice in that there is no clear case on this matter to prepare for and answer. There would be further work for the respondent and where the claimant's case on this matter is not clear, it will be difficult for the respondent's witnesses to provide relevant evidence. For the claimant, his case is that there was fraud, and he was punished for raising this. This is a matter that the tribunal will consider and decide as part of this hearing. It is the tribunal's decision that in refusing the amendment of a pleading under s43B (1)(c), this would not preclude the claimant from fully arguing his case about fraud or protected disclosure detriment. For these reasons the application to amend is refused.

5.2. Application for specific disclosure

5.2.1. The claimant sought the disclosure of contracts between the respondent and two of its clients, Tesco and Marks and Spencer (M&S). The respondent said that it had disclosed all relevant contracts, and these were in the bundle. It said it had asked the clients to provide copies of all contracts. The claimant said that he had seen different contracts whilst employed by the respondent and those had not been disclosed. He sought an order for specific disclosure against the respondent, and also against Tesco and Marks and Spencer. The tribunal heard oral submissions from both parties.

5.2.2. The test for whether an order for disclosure of documents should be made was set out by the Court of Appeal *in Canadian Imperial Bank of Commerce v Beck 2009 IRLR 740, CA.* The test is that documents will be disclosable if they are (a) relevant and (b) 'necessary for fairly disposing of the proceedings'. Both parties have a duty to disclose all documents that are relevant to the case whether these are helpful or

harmful to their respective positions and this duty is ongoing throughout the life of the case.

5.2.3. The claimant asks the tribunal to take the position that the respondent is withholding documents from the claimant and the tribunal. What this amounts to, is the claimant asking the tribunal to accept that the respondent is being dishonest, simply because he said so. Further he asks the tribunal to accept that both Tesco and M&S would, if he approached them directly, withhold documents from him unless they were ordered to provide them by the tribunal.

5.2.4. The claimant's claim is one of whistleblowing detriment. Whether the claimant was correct in claiming that the respondent was in breach of its contract with two third parties is not a determination that the tribunal needs to make. Its task is to decide whether the claimant made protected disclosures, i.e. that he made a disclosure, or disclosures and he did so in the belief that the disclosures related, in this case, to whether a criminal offence had been committed or the health and safety of an individual was endangered.

5.2.5. The claimant's application for specific disclosure is refused. The evidence before the tribunal is that the respondent has complied with its duty of disclosure, and all relevant contractual documents have been disclosed. The tribunal accepts that if there was further contractual documentation it may be relevant to the claimant's case, but it has no grounds on which to assume there is further undisclosed documentation, and it does not accept that such documentation is, in any event, necessary for it to make a judgment on this claim.

Issues

6. The issues agreed at the case management hearing on 10 April 2024, as amended on 30 September 2024, are set out below. Though time limits were a matter included in the list, Ms Berry confirmed for the respondent at the hearing that it did not pursue a time point.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened on or before 19 March 2023 may not have been brought in time.

1.2 Were the complaints of detriment made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?
1.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a

reasonable period?

2. Protected disclosure

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the claimant say or write? When? To whom? The claimant says they made disclosures on these occasions:

2.1.1.1 Throughout June 2022 to October 2022 to Natalie Leach during teams calls, in relation to the respondent's requirement that he was to be a full time dedicated Account Director for two clients at the same time which would be in breach of the agreement between the respondent and its clients;

2.1.1.2 Throughout June 2022 to October 2022 to Natalie Leach in various 1-2-1 and objectives meetings, in respect of his excessive workload and the respondent's requirement for him to be a full time dedicated Account Director for two clients at the same time which would be in breach of the agreement between the respondent and its clients;

2.1.1.3 Throughout November 2022 to March 2023 to Jamin Edwards in respect of his excessive workload and the respondent's requirement that he be a full time dedicated Account Director for two clients at the same time which would be in breach of the agreement between the respondent and its clients.

2.1.1.4 In a conversation with Zoe Jordan in the kitchen at Ashbury office in respect of his excessive workload and the respondent's requirement that he be a full time dedicated Account Director for two clients at the same time which would be in breach of the agreement between the respondent and its clients.

2.1.2 Did they disclose information?

2.1.3 Did they believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did they believe it tended to show that:

2.1.5.1 a criminal offence had been, was being or was likely to be committed (the respondent was fraudulently charging two clients for a full time dedicated Account Director);

2.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation (a duty of care to the claimant to ensure he would not be working excessive hours);

2.1.5.3 the health or safety of the claimant had been, was being or was likely to be endangered (given the pressure and the requirement for him to work excessive hours to try and cover two full time roles).

2.1.6 Was that belief reasonable?

2.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

3. Detriment (Employment Rights Act 1996 section 48)

3.1 Did the respondent do the following things as alleged by the claimant:

3.1.1 Fail to provide the claimant with a right of appeal against dismissal;
3.1.2 Not allow the claimant to continue working on the Marks and Spencer account;
3.1.3 Delay responding to the claimant's solicitor's letter of 31 July 2023, specifically to a request for documentation relevant and supportive of his claim including the client's commercial contract.

3.2 By doing so, did it subject the claimant to detriment?

3.3 If so, was it done on the ground that they made a protected disclosure?

4. Remedy for Protected Disclosure Detriment

4.1 What financial losses has the detrimental treatment caused the claimant?

4.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

4.3 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

4.4 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

4.5 Is it just and equitable to award the claimant other compensation?

4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

4.7 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

4.8 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

5. Automatic unfair dismissal

5.1 Was the reason or principal reason for dismissal that the claimant made a protected disclosure?
If so, the claimant will be regarded as unfairly dismissed.

6. Remedy for unfair dismissal

6.1 Does the claimant wish to be reinstated to their previous employment?

6.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

6.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

6.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

6.5 What should the terms of the re-engagement order be?

6.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

6.6.1 What financial losses has the dismissal caused the claimant?
6.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?
6.6.3 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?
6.6.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
6.6.5 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
6.6.6 Does the statutory cap apply?

6.7 What basic award is payable to the claimant, if any?

6.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Law

7. The law with respect to public interest disclosures is set out in part IVA of Employment Rights Act 1996 (ERA 96). Section 43A ERA 96 defines a 'protected disclosure' as a qualifying disclosure (as defined by s43B) which is made by a worker in accordance with any of sections 43C to 43H".

8. The relevant parts of section 43B of ERA 96 state:

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

(a) that a criminal offence has been committed, is being committed, or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) …
(d) that the health or safety of any individual has been, is being or is likely to be endangered,

…

9. Pursuant to s43C a qualifying disclosure is made if the worker makes the disclosure to his employer.

10. The claimant must show that he reasonably believed the disclosure was in the public interest. There is no requirement to show that the breach actually occurred.

11. Section 47B ERA 96 states:

> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

12. Section 48(2) ERA 96 states:

> …
>
> (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
> …
>
> (2) On a complaint under subsection…(1A)… it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

13. The tribunal must decide what caused the detriments (if any are found) and the dismissal. Helpful guidance in assessing causation is provided in the Court of Appeal's judgment in *Fecitt v NHS Manchester [2012] ICR 372* where it was said:

> "section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than trivial influence) the employer's treatment of the whistleblower".

14. Section 103A ERA 96 provides:

> "An employee who is dismissed shall be regarded for the purposes of this Part 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".

15. If the tribunal finds that there were one or more public interest disclosures, it must then consider whether the dismissal was because the claimant made the disclosure(s). With respect to the burden of proof where the claimant claims automatically unfair dismissal under s103A ERA, the case of *Kuzel v Roche Products Ltd [2008] IRLR 530* states that the claimant must challenge the employer's reason and produce some evidence of a different reason for dismissal.

Submissions

16. The parties both made written and oral submissions which are summarised below.

17. The claimant said that he had been wronged by the respondent and was still suffering the consequences today. He said that if the respondent had not been in breach of contract with Tesco and M&S it would have said that to him when he raised his concerns. He said that the absence of any clause in the documents disclosed relating to a full time dedicated account director was

conspicuous by its absence. The claimant noted there had been no complaints or significant issues with him at the point of his three month probationary assessment or at his five-month one to one assessment. He said the respondent could have told Tesco that the claimant was also working on an M&S account which might explain his lack of focus and it would have done so if there had been no problem with him working on two accounts. He noted that he had been dismissed out of the blue with no previous discussions or feedback, no disciplinary measures and no formal retraining procedure. The claimant disputed the information provided in the bundle by the respondent about his working hours and noted that there was evidence in the bundle that Jamin Edwards agreed that he was working excessively.

18. Ms Berry, for the respondent, said that the tribunal should accept the evidence of its four witnesses, three of whom denied that the claimant had raised with them excessive hours or the breach of contract, and the fourth, Jamin Edwards who said that the matter of a breach had been raised on one occasion. Ms Berry said that there were clear reasons for the alleged detriments, not connected with alleged protected disclosures. The respondent had shown that that the reason for the claimant's dismissal was the breakdown in the relationship with Tesco. The reason he was not switched to the M&S account was that Helen McCabe had expert knowledge and a long relationship with M&S. There were no other vacancies and the claimant had not challenged that evidence.

Findings of Fact

19. The claimant commenced employment with the respondent on 30 May 2022 as an account director for the respondent's accounts with Tesco and M&S.

20. The respondent provides professional regulatory services to businesses including food retailers.

21. The claimant began by managing the Tesco account only and took over responsibility for M&S on 9 September 2022.

22. The claimant's case is that when he commenced work for the respondent, he saw contract documentation between the respondent and both Tesco and M&S which contained a clause that each account should have a single dedicated full time account director. No such documents have come to light in disclosure and the respondent's position is that they do not exist. The tribunal finds that the claimant saw contractual documentation which he believed contained a clause that each account should have a single dedicated full time account director.

23. The claimant's line manager was Natalie Leach until the end of October 2022.

24. In a meeting in June 2022 the claimant raised with Ms Leach that he was worried about the relationship with the two clients, Tesco and M&S, if they found out he was dealing with both. Ms Leach said that she did not feel that this was a significant issue.

25. The tribunal finds, in this situation where there were no other witnesses to the conversation, that the claimant did not say to Ms Leach specifically that he

believed there was a breach of contract. The two continued to work together for a number of months, there is written evidence of their meetings and no issues relevant to this matter are referenced in written records. Furthermore, the claimant took over management of the second account on 9 September 2022.

26. It is the claimant's case that he raised the issue of a breach of contract on a number of occasions. For the same reasons as set out in relation to the findings on the June 2022 meeting, the tribunal accepts the evidence of Ms Leach that the claimant did not raise with her that he believed there was a breach of the contracts with Tesco and M&S on the part of the respondent.

27. It is the claimant's case that he raised several times in meetings with Ms Leach during June to October 2022 that his workload would be excessive if he took on the M&S contract in addition to the Tesco contract and that this would have a detrimental effect on his health. Ms Leach denies that such a matter was raised with her.

28. Documents recording 1:1 meetings on 9 September 2022 and 28 October 2022 and a probationary review on 23 August 2022 show that the claimant was happy in his job and Ms Leach was pleased with his performance.

29. Ms Leach said in evidence that she had explained to the claimant at one meeting that the current workload of the two accounts did not warrant two account directors.

30. The tribunal finds that the claimant did discuss with Ms Leach the volume of work involved in handling two accounts but does not accept that it was raised with her that he was being asked to do two full time jobs and that this would affect his health. In oral evidence the claimant said that he had raised the matter (with Ms Leach and others) in that by stating he had an excessive workload the respondent would have known that he was stating that that was detrimental to his health. The tribunal does not find that in raising that his workload would be or was excessive that he had also raised that there was an adverse effect on his health.

31. When Ms Leach commenced maternity leave at the end of October 2022 Jamin Edwards replaced her as the claimant's line manager.

32. It is the claimant's case that in October 2022 when he attended the office for a meeting he spoke to Zoe Jordan (the respondent's CEO) in the kitchen area and told her that the respondent was in breach of contract and his health would be adversely affected by doing two full time jobs. Ms Jordan denies that such a conversation took place. It was put to her in cross examination that no-one would forget a conversation of this nature. She agreed. In the absence of any independent corroborating evidence, and noting that the claimant continued to be employed without issue for many months after October 2022, the tribunal finds that although there may have been a conversation between the two it was not raised in specific terms by the claimant with Ms Jordan that the respondent was in breach of contract with

its clients or that the claimant's health was or would be adversely effected by his work.

33. It is admitted by Mr Edwards that in December 2022 the claimant raised with Mr Edwards that he believed that the respondent's contracts with Tesco and M&S required separate account directors for each account. In a meeting he shared a screen showing documentation that he believed evidenced this. In cross examination the claimant said he could not remember this but did not deny it. In any event it is his case that he raised the matter with Mr Edwards and the tribunal accepts Mr Edwards evidence on this point.

34. Mr Edwards evidence was that he was not concerned by the claimant's information and was convinced, on a review of the situation after taking over from Ms Leach, that an upturn in business meant that the recruitment of a second Account Director was warranted. That Mr Edwards had a business case for recruiting a second Account Director was confirmed by Ms Jordan in her evidence and the tribunal accepts the respondent's evidence on this matter.

35. At the same time the claimant raised that he was already working excessive hours and Mr Edwards agreed with and accepted that information as is clear from his communication with the claimant on 24 January 2023 when he sent an email to the claimant which included the statement:
…but I'm going to officially log with HR that you doing 2 roles is not acceptable, as Zoe and I agree.

36. There was some dispute in cross examination about the use of the words 'two jobs' and 'two roles'. The tribunal finds that the communication above indicates that Mr Edwards believed the claimant was working in excess of his contracted hours but does not find that this is evidence that he believed the claimant was carrying out two full time roles.

37. There is further evidence that Mr Edwards accepted that the claimant had too much work in the record of a 1:1 meeting that took place on 25 January 2023. The claimant recorded that overall he was enjoying his role and happy but noted:

Very time pressured being Account Director for two client accounts, though and am spreading myself too thinly across the two. [324-5]

38. He states that he wishes to be account manager for M&S only.

39. Mr Edwards comments in that same document are that the claimant is overstretched, that there has been too much early and late working. He states that continuing as account director of the two accounts is not sustainable and notes that the '*doubling up of everything'* has resulted in *'one of our clients questioning the level of focus'.*

40. On 7 February 2023 in an email to Mr Edwards the claimant refers to '*Thee and I had previously discussed that we needed a full time account manager for M&S given the workload and annual client account value.* [332]

41. The tribunal finds that the claimant raised with Mr Edwards that handling both the Tesco and M&S accounts was too much work for one person and that Mr Edwards accepted that view. It finds that this information played a part in him reaching a decision that the recruitment of a second account director was warranted. It is denied by Mr Edwards in his witness statement that the claimant raised with him that his health was suffering. It was not put to Mr Edwards in cross examination that the claimant had done so. In his witness statement the claimant refers to raising an excessive workload but does not refer to his health. The tribunal does not accept that the claimant raised with Mr Edwards that his health was suffering because of the workload.

42. The position of account director for Tesco/M&S was advertised internally by the respondent in February 2023.

43. It was Mr Edwards uncontested evidence that during February 2023 both Tesco and M&S contacted the respondent to discuss improvements to account management.

44. In March 2023 the main contact at Tesco, Peter Barr, formally raised concerns about the claimant's capability with Jamin Edwards and Zoe Jordan, the respondent's Chief Executive Officer. Those concerns are recorded in an email from Mr Edwards to Mr Barr dated 6 March 2023, as follows:

    - *The current account director [Christian Lloyd] is falling short of your expectations regards "Management" and "Understanding" of the Tesco Account/Services Ashbury's provides.*
    - *There is only so much coaching you can do to support the development of someone in the role from a Tesco perspective and after months of doing so, it can't be a continuous process.*
    - *We/Tesco don't feel Christian is right for the Tesco/Ashbury role and we don't have time now we are about to head into the "New World Services" that will require an even higher level of Management and Understanding.*

45. On 17 March 2023 Helen McCabe was promoted to the role of account director. Ms McCabe had been working on the M&S account in a more junior role for a number of years and had expert technical knowledge of M&S processes. For these reasons it was decided by Mr Edwards and Ms Jordan that Ms McCabe should take over as account director for M&S.

46. It is the uncontested evidence of Mr Edwards that consideration was given to whether the claimant could be offered a role as account director for another client (i.e. other than M&S and Tesco) but that none was available. Mr Edwards then discussed the matter with the respondent's HR manager Adam Beckles who advised that as the claimant had been employed for under two years, he could be dismissed due to the breakdown in the relationship with Tesco.

47. On 20 March 2023 the claimant met with Mr Edwards and Adam Beckles of HR. He was advised that his employment would be terminated and a letter

dated 11 April 2023 set out that this was due to the irretrievable relationship breakdown between the claimant and the clients that he serviced.

48. On 23 March 2023 Mr Edwards advised the M&S client that the claimant had been removed from the M&S account and that Ms McCabe would take over as account director.

49. The claimant had a three month notice period commencing on 20 March 2023 during which he was on garden leave.

50. Early conciliation took place between 19 June 2023 and 21 July 2023.

51. On 31 July 2023 the claimant's then solicitor wrote to the respondent setting out that he believed that he had been subject to protected disclosure detriment and automatically unfair dismissal and requesting disclosure of a number of documents. The respondent did not respond to this letter.

52. This claim was filed on 21 August 2023.

Decision and Reasons

Protected Disclosures

53. A protected disclosure is a qualifying disclosure made by a worker to, amongst others, his employer. In order to be a qualifying disclosure it must be a disclosure of information which in the reasonable belief of the worker making it is made in the public interest and tend to show one of the matters listed at s43B (1) of the ERA96. In this case those matters are:
    a. that a criminal offence has been committed or, 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 and
    d. that the health and safety of any individual has been or is likely to be damaged.

54. Whether any disclosure made by the claimant was factually correct is not relevant to the tribunal's assessment of whether it was a qualifying disclosure for the purposes of s43B ERA96, in circumstances where the claimant reasonably believed it to be true.

55. The claimant claims to have made numerous qualifying disclosures over the course of his employment with the respondent and these have been grouped into three categories, as set out in the list of issues in the case management order dated 10 April 2024. A fourth was added by way of an amendment application made at the beginning of this hearing. Taking each in turn, the tribunal's decision on whether each disclosure was made, and whether it was a qualifying disclosure is as follows:

That throughout June to October 22 during Teams calls to Natalie Leach the claimant raised that the respondent was in breach of its contracts with Tesco and M&S.

56. The tribunal has found above that breach of contract was not raised with Ms Leach and its decision is that no qualifying disclosure was made.

    That throughout June to October 22 in 1 to 1 and objectives meetings, the claimant raised his excessive workload and that the respondent was in breach of its contract with Tesco and M&S.

57. The tribunal has found above that the matter of a breach of contract was not raised with Ms Leach and its decision is that no qualifying disclosure was made in that respect.

58. The tribunal finds that the matter of a potential excessive workload was raised with Ms Leach however it finds that this disclosure was not a qualifying disclosure for the purposes of the ERA 96. The tribunal understands that the claimant's case is that an excessive workload was a danger to his health. The claimant provided no evidence or submissions as to why he believed this disclosure was one which was made in the public interest and the tribunal finds that it was not. It falls squarely into the category of a private employment dispute and while the tribunal accept that there are circumstances in which a disclosure about a private employment dispute can be in the public interest [*Chesterton Global Ltd & Anor v Nurmohamed & Anor [2017] EWCA Civ 979]* even, on occasion, where only one person is affected, it does not find that this is such a case. The claimant simply raised with his managers that he thought he would have, or did have, too much work.

59. Furthermore, the claimant agreed in oral evidence that he had not raised with Ms Leach that the potential excessive workload would be detrimental to his health. He said, in relation to Ms Leach and the respondent's other witnesses that in raising excessive workload that was an allusion to his health. It is not and the tribunal does not accept that this was a belief reasonably held by the claimant where he has provided no evidence to support that claim.

    That throughout November 2022 to March 2023 the claimant raised his excessive workload and that the respondent was in breach of its contract with Tesco and M&S to Jamin Edwards.

60. In respect of the disclosure about excessive workload the tribunal finds that the matter of a potential excessive workload was raised with Mr Edwards however it finds that this disclosure was not a qualifying disclosure for the purposes of the ERA 96. For the same reasons as set out above in relation to his disclosure to Ms Leach, the tribunal concludes that he did not have a belief that his disclosure was in the public interest. Again, the claimant admitted in cross examination that he had not specifically said to Mr Edwards that the excessive workload was detrimental to his health and the documentary evidence about the excessive workload, written in part by the claimant himself, makes no reference to an effect on health. Furthermore the part written by Mr Edwards does not indicate that any refence to health has been made to him by the claimant. For these reasons the tribunal finds that it was not a reasonable belief of the claimant that in disclosing that he believed his workload was excessive that this showed the health and safety of an individual was endangered.

61. In respect of the disclosure about breach of contract the tribunal finds that the claimant made a disclosure in December 2022 and it finds this was a qualifying disclosure in that in the reasonable belief of the claimant this was a matter in the public interest and one which tended to show that a person has failed to comply with a legal obligation to which they are subject. The tribunal did not accept the argument of Ms Berry that the claimant had failed to identify the legal obligation. The obligation was clearly to comply with a legally binding contract between the respondent and Tesco and between the respondent and M&S. The tribunal finds that the claimant's concern that the matter would affect the respondent, the employees who worked on those contracts and the other parties to the contracts is sufficient to establish a belief that disclosure was made in the public interest.

    That the claimant raised with Zoe Jordan face to face in October 2022 the effect on his health of being asked to do two full time jobs and that the respondent was in breach of its contract with Tesco and M&S.

62. The tribunal has found above that these two matters were not raised with Zoe Jordan and and its decision is that no such qualifying disclosures were made.

63. The claimant states that he suffered three detriments because he made a protected disclosure. As the tribunal has only upheld one disclosure as protected, it is necessary only to consider whether any or all of the three detriments were because of that one disclosure.

    Detriment 1 – that the respondent failed to provide a right of appeal to the claimant's dismissal.

64. It is the tribunal's decision that this was not a detriment. The claimant had no legal entitlement to an appeal and the tribunal does not accept that there is a detriment where the respondent did not offer something that it had no obligation to offer. The tribunal went on to consider whether, if this had amounted to a detriment, it was done because the claimant made a protected disclosure. The tribunal noted that the disclosure was made in December 2022, that subsequent to that the claimant had received positive written feedback from his line manager in a review on 25 January 2023, and there is no evidence that the person who decided upon and implemented the dismissal procedure (Adam Beckles) had any knowledge at this point that the claimant had made a protected disclosure. From this the tribunal concludes that the failure to offer an appeal was not because the claimant made a protected disclosure.

    Detriment 2 – removing the claimant from the M&S contract.

65. The tribunal accepts that this was a detriment. The protected disclosure was made in December 2022. The decision to remove the claimant from the M&S contract was made in March 2023 after Helen McCabe had been recruited as the second account director and it was determined that she was an expert in M&S processes. The respondent has provided clear and uncontested evidence as to why Ms McCabe was the best person to take on that role and the tribunal finds that this was the reason that the claimant was removed from that contract rather than that he had made a protected disclosure.

Detriment 3 – the delay in responding to the claimant's solicitor's letter dated 31 July 2023, 'specifically to a request for documentation relevant and supportive of his claim including the client's commercial contract'

66. Early conciliation had taken place by this time, the respondent was aware that the claimant was likely to institute legal proceedings and it was under no obligation to provide the documentation (including commercially sensitive documentation) requested by the claimant's solicitor. Documentation was obtained through the disclosure process in these proceedings. The tribunal finds that the failure to respond to this letter was not a detriment, and notes that there is no evidence any response would have led to a conclusion of the matter. The tribunal went on to consider whether, if this had amounted to a detriment, it was done because the claimant made a protected disclosure. Mr Post's uncontested evidence was that this was a decision made by the respondent's HR manager, Mr Beckles, and that he (Mr Beckles) did not think a response was necessary. Certainly, there was no obligation to respond and as Mr Beckles had no knowledge of the alleged disclosures beyond what was set out in this letter (as confirmed by Mr Edwards and Ms Leach) the tribunal does not accept that his decision that a response was unnecessary was because of the protected disclosure made in December 2022.

67. For these reasons the claimant's claim of protected disclosure detriment is dismissed.

Automatically Unfair Dismissal.

68. Under section 103A of the ERA 1996 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. It is for the respondent to show the reason for dismissal.

69. It is the respondent's position that the claimant was dismissed because of the breakdown in his relationship with the respondent's client, Tesco, specifically with their main contact at Tesco, Peter Barr. The respondent's evidence as set out in the witness statement of Mr. Edwards is that it considered whether there were alternative accounts of which the claimant could become account director after being removed from the Tesco account, but there were none. The respondent set out in detail why it decided to appoint Helen McCabe as the account director for M&S. The claimant did not contest this evidence. Nor did he put it to any of the witnesses that there were alternative roles available for which he was suitable. The respondent provided written evidence of Mr Barr's request to have the claimant removed from the Tesco account. Mr. Edwards provided uncontested evidence that when he had discussed the matter with Adam Beckles in HR he was advised that the claimant could be dismissed because of the relationship breakdown with Tesco. Mr Edwards evidence was that he did not discuss with Mr Beckles any disclosures that the claimant claims to have made.

70. The claimant states that he was dismissed because he made protected disclosures. The tribunal has found that the only disclosure made was to Mr.

Edwards in December 2022 when the claimant said to Mr. Edwards that he believed the respondent was in breach of its contracts with M&S and Tesco. Following that disclosure Mr. Edwards and the claimant continued to work together and there is documentary evidence that Mr. Edwards provided support to the claimant and continued to praise his work ethic.

71. The tribunal concludes that the respondent has shown that it had a clear and cogent reason for dismissing the claimant, namely the breakdown of the relationship with Tesco.

72. The claimant makes the points that the issues with Tesco were not raised with him formally, that he was not given a chance to remedy them nor was he given the opportunity to undertake further remedial training, and notes that he was not taken through a disciplinary process. It is his position that this shows that the respondent simply wanted to get rid of him because of his disclosures. The tribunal agrees that the respondent could have taken any of these measures, however it decided not to do so, and it has provided a reason for its decision to dismiss the claimant, which is evidenced, and unconnected to the claimant's protected disclosure.

73. For these reasons the claimant's claim of automatically unfair dismissal is dismissed.

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Employment Judge W Anderson

Date: 21 October 2024

Sent to the parties on: 26 November 2024

T Cadman
For the Tribunal Office