EMPLOYMENT TRIBUNALS

Claimant: Mr D Simpson

Respondent: Apogee Corporation Ltd

Heard at: Leeds **On: 16, 17 and 18 January 2017**
Before: Employment Judge Keevash **1 February 2017**
Mrs J Goodson-Moore **15 February 2017 (Reserved)**
Ms P Wolstonecroft

Representation
Claimant: In person
Respondent: Mr E Beever, Counsel

RESERVED JUDGMENT

The complaints of detriments for having made protected disclosures and dismissal contrary to section 103A of the Employments Rights Act 1996 fail.

REASONS

Background

1 By his Claim Form the Claimant complained that (a) he was subjected to detriments and (b) he was dismissed because he made protected disclosures.

Issues

2 The Tribunal noted that the issues for determination had been set out at Preliminary Hearings on 29 September 2016 and 9 November 2016. At the outset of the Hearing the Claimant asked the Tribunal to determine that he was subjected to a further

detriment namely that he was denied opportunities in relation to the Love Layla account. Mr Beever did not object to that course of action.

Hearing

3 With the parties' agreement the Tribunal read the witness statements. At the start of the second day the Claimant applied for five witness statements to be adduced in evidence:- (1) letters from Mr Thomas Buxey, director of Sorted Media UK Ltd, dated 31 October 2016 and undated (2) letter from Aura Infection Control Ltd T/A Quality Water Specialists dated 1 March 2016 (3) letter from Quoin Publishing Ltd dated 14 October 2016 (4) undated letter from Love Layla Designs Ltd, (5) letter from Jason Longley dated 31 October 2016. Mr Beever objected to (3), (4) and (5). He consented to (2) and reserved his position on (1) which he thought might be capable of agreement. After an adjournment, the Tribunal granted the application in respect of (2). It rejected it in respect of (3), (4) and (5) in accordance with the overriding objective within the 2013 Rules of Procedure, deciding that the prejudice to the Respondent outweighed the need to read the documents. It made no decision in respect of (1). Mr Beever then confirmed that ET could read (1).

4 The Claimant gave evidence on his own behalf. Caroline Jane Andrew-Johnstone, managing director of Fasprint Ltd, gave evidence on his behalf. As explained, the Tribunal read documents (1) and (2) referred to in the previous paragraph. Daniel Parker, former telesalesperson, Alan Pierpoint, Company secretary, and Neil Wojtas, Regional Sales Manager, gave evidence on behalf of the Respondent. The Tribunal also considered a bundle of documents.

Facts

5 The Tribunal found the following facts proved on the balance of probabilities:-

5.1 On or about 12 January 2015 the Claimant was employed by Balreed Digitec (Group) Ltd ("Balreed") as a print production sales manager. His role involved the sale of contracts to clients for the hire of specialist printing equipment. On 19 August 2015 he was transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

5.2 the Respondent is a supplier of copy, print, fax and scan systems. At the material time it employed 413 people nationally.

5.3 By an email Mr Wojtas informed several account managers :-

"As you will be aware Danny Simpson joins us as the North's PPD specialist. To that end the follow (sic) rules will be in place regards profit share and PPD leads.

All Balreed PPD clients will be moved over to Danny.

All New and Existing PPD opportunities are to be passed to Danny with the below splits …"

5.4 On or about 5 February 2015 the Claimant spoke to Mr Wojtas about the Dearnside Press ("DP") account. The customer had told the Claimant that it was receiving invoices which did not accord with the contract which it had made with Mr Taylor, the Respondent's account manager.

5.5 By an email dated 18 March 2015 the Claimant informed Mr Wojtas:-

"[DP] have two engines through [Mr Taylor] and are of the opinion that they have an unlimited volume of clicks through the agreement, the contract states that they have 242,860 colour prints and 180,000 mono prints included within the package.

The customer is adamant that this was not the agreement and has over £1000 of outstanding invoices which they refuse to clear until this is sorted.

The contract is only 12 months old with the best part of 50k outstanding on it, could you advice (sic) please …"

5.6 By an email dated 7 April 2015 Mr Wojtas informed Ms Smith:-

"From immediate effect any web lead that has print in the title or you suspect they are printers please send the lead to Danny Simpson irrespective of postcode."

5.7 By an email (concerning DP) dated 10 June 2015 the Claimant informed Mr Wojtas:-

"Did you get anywhere with this one? I have a KM 1200 that we can get hold of which gives us an angle to switch some money about and draw a line under the old contract.

Any thoughts?"

5.8 By an email dated 11 June 2015 the Claimant informed Mr Wojtas:-

"…

With regard to [DP], we could realistically get the 1200 … this will … give us an angle to enhance their business and get rid of all the crap wrapped up in it.

I'll run with it but I just need to know the parameters of how far the potential credit could run and what's outstanding on the current contract.
Pointless if we can't make money out of it I know but the credit issue isn't going away and this could give us an angle to bury it".

5.9 By an email dated 25 June 2015 the Claimant informed Mr Wojtas:-

"I've been having a ding dong with Fasprint since starting and I had a meeting with them a couple of weeks ago where I committed to finding the year of manufacture for the laminator which they purchased, they were/are convinced that this device was supplied second user after an engineer went and told them that certain parts were worn out just after installation.
So, subsequent conversation … has led to confirmation that the product was in fact manufactured in 2009 and had been into another users premises.
The product was supplied new by Coner/Balreed and the customer is as you know tenacious to say the least, therefore, where would you like me to go with this?
Additionally, they are on the wrong service billing in as much they were quoted an A4 click price but not set up on one with the contract, who would I address this with please?"

5.10 By an email dated 21 July 2015 the Claimant asked Mr Wojtas to consider the DP issue. He attached an email from Ms Gaunt of the same date in which she complained that a debt collection company was trying to collect the outstanding amount on its account.

5.11 By an email dated 13 November 2015 Mr Wojtas informed Mr Brewin, the Respondent's
…:-

"See below-10 days and hasn't even called them.
Spoke to him about this loads of time now, just has no urgency.
Can I get rid at the end of the month if he is below target?"

Mr W attached an email from Mr Wright regarding Cartridge World Copiers.

5.12 By an email dated 13 November 2015 Mr Brewin informed Mr Stanton-Gleaves, the Respondent's managing director:-

"Can we just get rid of Danny?

Or do we need to go through the process."

5.13 On or about 2 February 2016 Mr Wojtas asked Mr Taylor to deal with the Love Layla Design account

5.14 By an email dated 29 March 2016 the Claimant informed Mr Stanton- Gleaves:-

"… over recent months there has (sic) been numerous occasions where production deals have been done on my area without my knowledge, these range from a single location corporate account … to a production opportunity which Richard Brewin invited a territory manager in to do rather than myself, there are several more run of the mill deals on top of these.

From my point of view, every one that I am aware of comes under the terms and conditions stressed by yourself at the kick off meeting and has since been reiterated in the pay plan, i.e. with an expectation that PP must be involved and a minimum reward and recognition of 50% of the deal value.

I have raised this with Richard and Neil but to no satisfaction or action…"

5.15 On or about 30 March 2016 Mr Wojtas informed Mr Stanton-Gleaves:-

"…

Danny Simpson, Looks like a Blank and is averaging £2.7k for the year. I've got real concerns about Danny, seems to have a real negative attitude …"

5.16 By an email dated 4 April 2016 Mr Wojtas informed Mr Stanton-Gleaves:-

"Please can you do me a favour and highlight Danny Simpson's performance YTD. I need to crank the pressure up on him so hopefully highlighting his poor performance in front of everyone will give him a kick up his arse."

5.17 By an email dated 6 April 2016 the Claimant informed Mr Stanton-Gleaves:-

"Sorry that I've just missed your call and apologies for the late notice but I will be unable to make the review tomorrow …

I was hoping to catch up with you (not for the public humiliation) so I'm hoping you will be at the Production meeting on Tuesday? …"

5.18 On 11 April 2016 the Claimant attended a meeting at which he was dismissed by Mr Wojtas. By an email sent later that day he informed Mr Wojtas:-

"… I would appreciate if you would confirm:
My dismissal in writing and for the reasons stated.
The proposed period of garden leave and therefore my final salaried date.
What will happen with outstanding commissions due …"

5.19 By an email dated 12 April 2016 Mr Wojtas informed the Claimant:-

"The decision was based on performance.
Your (sic) currently averaging £2.8k for the first quarter and have only written 1 deal in 3 months bottom of sales leagues, behind apprentice sales. You were the highest paid sales person in the north and you weren't coving (sic) your costs. Almost everyone in the sales team said that you were rarely available to attend meetings and took days to respond to emails requesting quotes and in some cases no quotes or contact with the clients were even made. If one person was saying this then that's their interpretation but for almost everyone saying it then there is a problem.
You were very rarely in the office and Phil confirms that you were never in Manchester so I'm unsure what you were doing all day. If you were out signing loads of deals and your diary was full of appointments then I could understand why we didn't see you very often but neither were (sic) the case …"

5.20 By an email dated 13 April 2016 Mr Wojtas informed Mr Brewin and Mr Stanton-Gleaves:-

"…
Danny was more focussed on getting profit shares rather than doing his own deals but offered limited or delayed support o the team who have simply lost all faith in him.
His figures for last year were largely based on service profit and deals that others (sic) guys brought to the table and they reluctantly shared.
He's been getting 2-3 web leads a month which he never converts and we even gave him a full time telesales guy who also lost faith in him as he rarely closed a deal. Telesales approached me and asked if they could go back to calling for the guys as Danny wasn't earning them any money.
The sales of PPD engines and duplo finishing equipment last year were well down on the previous year prior to Danny joining.
He was permanently moaning and always had a negative spin on things …"

5.21 By an email dated 13 April 2016 the Claimant informed Mr Stanton-Gleaves:-

"…

I have been told that my dismissal was performance related, but as expressed in the email I sent to you, there have been numerous Production deals done across the north which I should have been involved in where Richard gave the instructions for others to run with, this was raised time and again with your Northern management team and nothing changed.

Personally, I believe that I raised two (sic) many issues with them and my face clearly didn't fit. As I hope you are aware Robin, a vast number of the contracts written prior to my arrival were "doctored" after the customer had signed and as such, are leaving Apogee massively exposed, huge margins being generated through short funding customers, sales guys getting huge commissions and then leaving with Apogee or the next generation picking up the pieces.

…

I therefore do not accept the grounds for dismissal and feel that a discussion is warranted as this all happened without discussion of performance or fair process being followed …"

5.22 By an email dated 14 April 2016 Mr Brewin informed Mr Stanton-Gleaves:-

"The below [*referring to the email in 5.20 above*] are excuses as we know results come from hard work.

The results speak for themselves! As does Danny's work rate.

Danny was unable to cover his own costs and the decision was made on performance.

With regard to deals not coming his way we had a number of clients who would not deal with Danny such as propack and sim print and ASD all of which deals were done.

There was a real lack of confidence in Danny from the sales team and we had a number of complaints from sales that he did not get back to the client and took weeks to produce any quotes.

But more worrying is our opportunities have increased and the production sales have declined.

We also accommodated Danny's home life split between Manchester and Leeds but when he was not in Wakefield he said he was in Manchester but Phil says he never came to the office.

Danny's area was the entire north of the U.K.

And since Danny joined we have seen a 70% fall in production sales and 90% fall in

finishing equipment."

5.23 By a letter dated 14 April 2016 addressed to the Claimant the Respondent confirmed that it had dismissed him with effect from 11 April 2016.

5.24 By an email dated 5 May 2016 the Claimant informed the Respondent that he intended "to take my case for unfair dismissal to the small claims court". He also stated:-

"Additionally, and perhaps most importantly of all, I have raised on numerous occasions my concerns surrounding the fraudulent activities taking place with the contracts after the customers have signed them to inflate the profits being represented by the individual sales people and the company, this has resulted in customers losing many thousand of pounds through committed volumes (funds) not being honoured. This in legal parlance is classed as whistle blowing and as per the legal regulations, if not given satisfactory response, can be taken to higher courts …"

5.25 By an email dated 23 May 2016 Mr Pierpoint informed the Claimant:-

"…from an initial consideration of the facts I believe that you are unable to pursue a claim for unfair dismissal for the following reasons…you have not acquired the right not to be unfairly dismissed…"

5.26 By an email dated 9 June 2016 the Claimant informed Mr Pierpoint:-

"…

Having taken advice on this, I totally agree with your view given the two year employment law, however, this is overridden if I have raised a "Public Interest Disclosure" also known as whistleblowing which I had done prior to being dismissed, this was not resolved in a satisfactory way and as such, can and will be escalated to a higher court.

Additionally, and as per my previous email, my claims over not being included in "production" deals has never been resolved or clarified given the published commission plan stating that Production Specialists must be involved in these deals, it would appear that my raising the first point had a detrimental effect on my career with clear instructions not to involve me in production deals providing Apogee with the reason to dismiss me, i.e. On a performance related basis…"

5.27 On 10 June 2016 the Claimant contacted ACAS.

5.28 By an email dated 13 June 2016 Mr Pierpoint asked the Claimant to provide additional information about his allegations.

5.29 By an email dated 21 June 2016 the Claimant provided Mr Pierpoint with the requested additional information. Mr Pierpoint sent that request to Mr Stanton-Gleaves who replied with his comments on the Claimant's allegations.

5.30 On 10 July 2016 ACAS issued an early conciliation certificate.

5.31 On 9 August 2016 the Claimant presented a Claim Form to the Tribunal.

5.32 At the material time R had a Public Interest Disclosure ('Whistleblowing') policy which provided:-

"…

Your responsibilities

You are encouraged to bring to the attention of the Company any practice or action of the Company, its employees or other agents that you reasonably believe I against the public interest, in the practice or action is …

The raising of a concern will be covered by this policy provided you have a reasonable belief that it is in the public interest to do so…

Procedure

In the first instance, you should raise any concerns you have with your manager. If you believe your manager to be involved, or if, for any reason, you do not wish to approach your manager, then you should raise it with a more senior person in the Company.

Any matter raised under this policy will be investigated promptly and confidentially. The outcome of the investigation, as well a any necessary remedial action to be taken, will be confirmed to you. If no action is to be taken, the reason for this will be explained to you….

Escalating your concern

If you are dissatisfied with this response, you should raise your concerns in writing directly with a more senior person in the Company…"

Law

6 Section 43A of the Employment Rights Act 1996 ("the 1996 Act") provides:-

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

43H."

Section 43B(1) of the 1996 Act provides:-

"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 on or more of the following-

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

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

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

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

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

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

Section 43C(1) of the 1996 Act provides:-

"A qualifying disclosure is made in accordance with this section if the worker makes the disclosure-

(a) to his employer …"

Section 47B(1) of the 1996 Act provides:-

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

Section 103A of the 1996 Act 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."

Submissions

7 The Claimant presented written submissions. He also made oral submissions. Mr Beever presented written submissions. He also made oral submissions. He referred to **Blackbay Ventures Ltd (T/A Chemistree) v Gahir** [2014] IRLR 416 EAT;

Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 31 EAT; **Kilraine v LB of Wandsworth** [2016] IRLR 422 EAT; **Chesterton Global Ltd v Nurmohamed** [2015] ICR 920 EAT; **NHS Manchester v Fecitt** [2012] IRLR 64 CA; **McKinney v Newham LB Council** [2015] ICR 495 EAT; **Kuzel v Roche Products Ltd** [2008] ICR 799 CA. Where appropriate, reference will be made to the submissions in the Discussion section of these reasons.

Discussion

Complaints that R subjected C to detriments on the ground that he made a protected disclosure

Did the Claimant disclose information to the Respondent?

8 The Tribunal found that neither the Claimant nor Mr Wojtas knew about the Respondent's whistleblowing policy. That, of course, was not fatal to the contention that he had made a protected disclosure. A disclosure of information was capable of constituting a protected disclosure provided it complied with the 1996 Act. Good practice would have led Mr Wojtas to ask what the Claimant wanted him to do about any matter he raised. Mr Wojtas should have made a record of those conversations because they were potentially important.

9 The Claimant contended that he made ten disclosures. Mr Beever submitted that the alleged disclosures amounted to nothing more than discussions about customer complaints. There was nothing in writing at all to support the Claimant's case about the content of his disclosures until after he was dismissed (and when arguably he realised the significance of whistleblowing to his case. It was more plausible that he was simply raising customer grievances and a desire to resolve them so as to be able to progress with sales.

10 The Tribunal understood that the onus was on the Claimant to prove that he made one or more protected disclosures. Although he explained that he customarily conducted his business affairs without committing to writing, the Tribunal found and decided that, if he had made all the protected disclosures he alleged, he would undoubtedly have formalised them, if not contemporaneously, after it appeared that the Respondent was not taking them seriously. His failure to do so led the Tribunal to conclude that on the whole his emphasis was on trying to get issues resolved in

order that he could complete sales. As will be explained, he did make some disclosures but not all those he alleged. The Tribunal did not find that he intended to mislead it. He genuinely believed that his discussions "fitted" the definition of a protected disclosure under the 1996 Act and he genuinely recalled them in that manner. In reaching that conclusion it found that he had not been consistent in the manner in which he presented his case. Even after making allowances for the fact that he was a litigant in person, inconsistencies between his allegations and his evidence led the Tribunal to doubt the accuracy of his recollection of events and conversations. It was more appropriate to give weight to contemporaneous documents such as the Claimant' email to Mr Stanton-Gleaves dated 29 March 2016 in which he made no express reference to disclosures. The Tribunal also noted the guidance in **Kilraine** that it should exercise caution before deciding that the Claimant had made an allegation rather than a disclosure of information.

11 The Tribunal considered each of the alleged disclosures as follows:-

(1) <u>conversation on or about 5 February 2015 with Mr Wojtas (about the DP issue)</u>

The Respondent accepted that a conversation took place. The Tribunal noted that the Claimant's case in relation to this incident had been variously described throughout the proceedings. In his additional information he first alleged that he "initially raised concerns" and subsequently he alleged that he stated that the contract "didn't stack up" but **<u>not</u>** (his emphasis) levelling any accusations of fraud". During cross examination he accepted that he did not make an accusation of fraud. The Tribunal accepted Mr Beever's submission and found and decided that the alleged disclosure amounted to nothing more than a discussion about a customer complaint. It was not a disclosure of information. In any event there was no evidence to support the contention that it complied with any of the s43B(1) criteria.

(2) <u>conversation on 30 March 2015 with Mr Wojtas and Mr Brewin (about the G Cowley issue)</u>

In his additional information the Claimant alleged that he "directly raised the issue that customer contracts had been doctored and specifically [the GC] contract had been altered after the contract had been signed stating that this was fraud. In his witness statement he confirmed that there had been a conversation about, among other matters, the GC contract. However, he did not say that it had been "doctored". Instead he referred to "activities that amounted to fraudulent activities". In view of that omission Tribunal found that the Claimant did not use the word "doctored"

during the conversation. It was more likely that he told Mr Wojtas and Mr Brewin that GC "felt misled" because the Respondent had gained a commercial advantage from the change to the contract. The Tribunal rejected Mr Beever's submission that this was more an allegation of fraud than a disclosure of information. The Claimant clearly conveyed facts (or at least what he believed to be facts). In the Tribunal's judgment that was a disclosure of information.

(3) conversation on 21 April 2015 with Mr Wojtas and Mr Brewin (about the GC issue and other customer contracts, including DP and Printswift).

In his additional information the Claimant alleged that he spoke "in stronger terms" that contracts were being amended without the customers' knowledge or consent. The Tribunal found that in relation to GC this was nothing more than a follow up query. There was insufficient or no evidence to support a finding that during this conversation the Claimant had disclosed information in relation to the other customers. In the Tribunal's judgment the alleged disclosure was not a disclosure of information.

(4) conversation on 17 June 2015 with Alan Wall and James Raynor about 2020 Perfect Vision, GC, DP, and Printswift

In his additional information the Claimant first alleged that he "further disclosed" that customers' contracts were being amended without their knowledge or consent and subsequently he alleged that he "raised the fraudulent activities". He also gave evidence about this conversation. The Respondent did not deny this conversation. In the circumstances the Tribunal accepted the Claimant's evidence. It found and decided that this was a disclosure of information.

(5) conversation on 27July 2015 with NW about Sorted Media

In his additional information the Claimant alleged that he "made a further disclosure … with regard to my discovery of a "doctored" contract". However in his evidence to the Tribunal it was clear that he was actually concerned about not being given a credit for the account. In those circumstances the Tribunal found that during this conversation he raised a customer grievance which he wanted to be resolved so as to be able to progress with sales. It decided that this was not a disclosure of information.

(6) Conversation on 25 November 2015 with Gary Downey, marketing director and

board member, about Print Bureau

In his additional information the Claimant first alleged that he spoke about the fraudulent activities and subsequently he alleged that he also spoke to Mr Downey because he had been kept out of a production opportunity. Mr Downey told him that issues had to be addressed by Mr Brewin and, if that did not happen, by Mr Stanton-Gleaves. The Tribunal found that during this conversation the Claimant expressed his concern about not being permitted to "front the deal". In its judgment this was not a disclosure of information.

(7) Conversation on 19 January 2016 with Mr Wojtas about Sorted Media

In his additional information the Claimant alleged that he "raised the issue again over the fraudulent contract". However, in his evidence to the Tribunal it was clear that he was actually concerned about being denied an opportunity to make a sale to this customer. In those circumstances the Tribunal found that during this conversation he raised a customer grievance which he wanted to be resolved so as to be able to progress with a sale. It decided that this was not a disclosure of information.

(8) Conversation on 6 February 2016 with Mr Wojtas about Highfield Grange, ASD Lighting, Print Bureau, Sorted Media, Fasprint, GC, 2020 Perfect Vision

In his additional information the Claimant alleged that he "raised issues over being kept out of opportunities … as well as the fraudulent contracts …" However, in his evidence to the Tribunal it was clear that he was actually concerned about being denied an opportunity to make a sale to these customers. In those circumstances the Tribunal found that during this conversation he raised customer grievances which he wanted to be resolved so as to be able to progress with sales. It decided that this was not a disclosure of information.

(9) Email dated 29 March 2016 Claimant to Mr Stanton- Gleaves

Although this had been previously identified as an alleged protected disclosure the Tribunal was at a loss to understand the basis for such a contention. By the email the Claimant was seeking to clarify certain matters with a view to explaining his performance for the first quarter. At no stage did he refer to fraudulent contracts or any matter which met the s43B(1) criteria. The Tribunal found and decided that this was not a disclosure of information.

(10) Email dated 13 April 2016 Claimant to Mr Stanton-Gleaves

The Tribunal found that from a reading of this document the Claimant had made a protected disclosure. There was a disclosure of information which met the s43B(1) criteria. Mr Beevers limited his submission to the relevance of the document.

In any of the disclosures did the information in the Claimant's reasonable belief tend to show a contravention under ss43B(1)(a), (b) or (f)?

12 The Tribunal began its consideration of this issue by noting that during the course of the Preliminary Hearing on 29 September 2015 the Claimant confirmed that he did not rely on an allegation that the information tended to show that a miscarriage of justice had occurred. During this Hearing he did not advance any case under ss43B(1)(b) or 43B(1)(f) of the 1996 Act. Accordingly the Tribunal confined its deliberations to his belief in relation to s43B(1)(a) of the 1996 Act.

(1) <u>conversation on 30 March 2015 with Mr Wojtas and Mr Brewin (about the G Cowley issue)</u>

The Tribunal found that the Claimant formed his belief based on what he had been told by Mr Longley about a conversation with GC and (according to Mr Longley) Mr Taylor's admission that he had doctored documents after GC had signed the contract. He was entitled to rely on those matters because he knew Mr Longley well and trusted him even though he did not have the documents at the time of the conversation. The Tribunal understood that it was arguable that the contract which appeared at page 61 of the Bundle did contain the terms and conditions to which they had agreed. GC did not retain a signed copy of the contract which it said contained different terms. However it was also unnecessary for the Claimant to prove that there had in law been a fraud. He had good reason to believe Mr Longley. In those circumstances the Tribunal found and decided that the Claimant had a reasonable belief that the criminal offence of fraud had been committed by Mr Taylor.

(2) <u>conversation on 17 June 2015 with Alan Wall and James Raynor about 2020 Perfect Vision, GC, DP, and Printswift</u>

The Tribunal found that, when making the GC disclosure, the Claimant had a reasonable belief that a criminal offence had been committed (see previous paragraph).

(3) Email dated 13 April 2016 Claimant to Mr Stanton-Gleaves

The Tribunal found that, when making the GC disclosure, the Claimant had a reasonable belief that a criminal offence had been committed (see previous paragraphs).

If so, did the Claimant reasonably believe that the disclosure was made in the public interest?

13 The Tribunal found that the Claimant believed that contractual documents had been unilaterally altered by Mr Taylor without GC's knowledge or consent. He believed Mr Taylor had so acted in order to increase the Respondent's profit and his own commission. He believed that a criminal offence had been committed. The Tribunal decided that the GC disclosure went beyond a private employment dispute. It clearly met the public interest threshold in that there must be a public interest in an allegation that a company is defrauding its customer. Not only would that allegation be of concern to other customers but also the proper administration of justice requires that the criminal law not be infringed. The Tribunal decided that, when making the GC disclosure, the Claimant reasonably believed that it was made in the public interest.

Did the Claimant make the disclosure to his employer?

14 Mr Beever submitted that the conversation on 17 June 2015 was not made to the Claimant's employer. The Tribunal found that Mr Rayner was the Claimant's colleague. There was no evidence that he was senior to the Claimant or that he had any authority, express or implied, over him. However, Mr Wall was a director of Balreed. He did hold a position of authority over the Claimant and for the purposes of section 43C(1) of the 1996 Act he was his employer. In the circumstances the Tribunal found and decided that this was a protected disclosure. In relation to any other disclosure, the Respondent accepted that the manner of disclosure to his managers complied with the 1996 Act. Accordingly the Tribunal found and decided that the Claimant made three GC disclosures on 30 March and 17 June 2015 and 13 April 2016.

Was the Claimant subjected to any detriments on the ground that he made a protected disclosure?

15 The Tribunal understood that it had to determine whether any of the protected disclosures was a material factor in the Respondent's decision to subject the

Claimant to a detriment (see **Fecitt**).

16 The Claimant contended that the Respondent denied him access to an opportunity of securing a deal with (a) Highfield Grange (b) ASD (c) Print Bureau (d) Love Layla. For the sake of completeness, the Tribunal noted that within these proceedings the Claimant did not complain that he was subjected to any detriment on the ground that he made a disclosure when sending to Mr Stanton-Gleaves the email dated 13 April 2016. In particular he did not make any complaint about Mr Pierpoint's actions or failures. Mr Beevers queried the relevance of this disclosure because it was made after termination of employment and after the last detriment on which the Claimant relied. The Tribunal understood that it was settled law that a worker could bring a claim under s47B of the 1996 Act in respect of any detrimental action taken by an employer after employment had ended (see **Woodward v Abbey National plc (No1)** [2006] ICR 1436 CA). Further in **Onyango v Berkeley (t/a Berkeley Solicitors)** [2013] ICR 17 EAT it was held that a worker had protection even where the disclosure had been made after employment had ended.

Highfield Grange

The Tribunal found that any detriment must have occurred by October 2015. It found that Exact Ltd ("Exact") was previously owned by Mr Steel. One of Exact's clients was Highfield Grange ("HG"). When the Respondent purchased Exact, Mr Steel became its employee. It was agreed that he could retain HG as his client. In those circumstances the Tribunal found and decided that the Claimant had an unjustified sense of grievance about not having an opportunity to secure a deal with HG. In any event the Claimant's protected disclosures were not a factor (material or otherwise) in the Respondent's actions or failures in relation to this matter. The complaint failed.

ASD

The Tribunal accepted Mr Wojtas' unchallenged evidence on this matter. It found that in or about February 2015 the Respondent asked Mr Wright to contact this customer. It did so because the Claimant had not complied with Mr Brewin's request to follow up the lead. The deal was concluded by 4 November 2015. In those circumstances the Tribunal found and decided that the Claimant had an unjustified sense of grievance about not having an opportunity to secure a deal with ASD. In any event the Claimant's protected disclosures were not a factor (material

or otherwise) in the Respondent's actions or failures in relation to this matter. The complaint failed.

Print Bureau

The Tribunal found that the Respondent passed this account to Mr Wall in 2015 because the client did not want to deal with the Claimant. That was confirmed by Mr Brewin's email to the Claimant dated 14 January 2016. At the time the Claimant accepted that the client's decision was made because he had made an error in a site survey. There was insufficient evidence to support the Claimant's contention that this was not the real reason for the Respondent's action. In those circumstances the Tribunal found and decided that the Claimant had an unjustified sense of grievance about not having an opportunity to secure a deal with Print Bureau. In any event the Claimant's protected disclosures were not a factor (material or otherwise) in the Respondent's actions or failures in relation to this matter. The complaint failed.

Love Layla

The Tribunal accepted Mr Wojtas' evidence on this matter. It found that on or about 2 February 2016 the Respondent passed this account to Mr Taylor. It accepted Mr Wojtas' evidence that at first it did not appeared to be a PPD deal. By the time this did became apparent, he had lost confidence in the Claimant's ability to close the deal. There was insufficient evidence to support the Claimant's contention that this was not the real reason for the Respondent's action. In those circumstances the Tribunal found and decided that the Claimant's protected disclosures were not a factor (material or otherwise) in the Respondent's actions or failures in relation to this matter. The complaint failed.

Did the complaints relating to detriment fall outside the time limit for bringing such claims and, in that respect, did any constitute a series of similar acts or failures to act?

17 In the light of the Tribunal's decision that none of the detriment complaints succeeded, it was unnecessary to determine this issue.

Complaint that C was unfairly dismissed because the reason or principal reason for dismissal was that he made a protected disclosure

Was the making of any proven protected disclosure the reason or principal reason for the dismissal?

18 The Claimant did not have at least two years' continuous employment. Therefore, the burden was on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosures. The Tribunal understood that section 103A of the 1996 Act provided for the situation where an employer had more than one reason for the decision to dismiss. A 'principal' reason was the reason that operated in the employer's mind at the time of dismissal. In the instant case even if the fact that the Claimant made protected disclosures was a reason subsidiary to the main reason for dismissal, his complaint had to fail.

19 The Tribunal carefully considered the Claimant's contention that the real reason for his dismissal was the fact that he made protected disclosures. Mr Wojtas wanted to dismiss him in November 2015 for that reason. After he was thwarted by senior management, he starved the Claimant of opportunities to demonstrate that he lacked capability. However, that was a device to hide the real reason. Mr Wojtas did not want the Claimant to upset the deals which Mr Taylor had secured with his knowledge and consent.

20 The Tribunal accepted the evidence of Mr Wojtas. It found that he made the decision to dismiss the Claimant solely on the ground of poor performance. It accepted Mr Beever's submission that the contemporaneous documents supported that conclusion. There was documentary evidence to show conclusively that the Claimant's sales performance was poor and that he had failed to achieve target. This was particularly significant when bearing in mind that he was the highest paid salesperson. The Tribunal also accepted the evidence of Mr Parker which supported the Respondent's case.

21 The Claimant also contended that he was treated less favourably than three comparators who had performed poorly and who had not made protected

disclosures. The Tribunal accepted Mr Wojtas' evidence in relation to these employees. The comparators all performed better than did the Claimant and there was no good reason for the Respondent to dismiss them. There was no basis upon which the Tribunal could draw any inference that there was any other reason for dismissal.

22 Accordingly the complaint under this head failed.

Employment Judge Keevash

Date: 15 March 2017
Sent on: 15 March 2017