EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr H J Moran-Cirkovic	**v**	**YEO Messaging Ltd**

Heard at: London Central
On: 6 August 2020

Before: Employment Judge Hodgson

Representation

For the Claimant: In person
For the Respondent: Ms D Grennan, counsel

DECISION

The application for interim relief pursuant to section 128 Employment Rights Act 1996 fails and is dismissed.

REASONS

Introduction

1. The claimant issued his claim on 12 June 2020. He alleges that he suffered detrimental treatment and he was dismissed because he made protected disclosures. He brings a claim pursuant to section 103A Employment Rights Act 1996. He seeks interim relief pursuant to section 128 Employment Rights Act 1996. It is agreed the claim has been brought in time.

The hearing

2. This case proceeded as a remote hearing.

3. Whilst witness evidence was presented, no party sought an order for cross examination.

4. I would like to express my thanks to both parties for the constructive and helpful way they embraced the use of a video hearing. Without this helpful approach, it would have been difficult to deal with this hearing online.

The legal framework

5. When there is a claim of automatic unfair dismissal contrary to section 103A Employment Rights Act 1996 (generally referred to as dismissal for whistleblowing), section 128 of the same act gives a right to bring a claim for interim relief.

6. Section 103A Employment Rights Act 1996 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.**

7. Section 128 Employment Rights Act 1996 provides:

> **(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed by his employer and—**
>
> > **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—**
> > **(i) … section… 103A…,**
>
> **may apply to the tribunal for interim relief.**

8. Section 129 deals with the procedure to be adopted when interim relief is granted:

> **129(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—**
>
> > **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—**
> >
> > > **(i) section 100(1)(*a*) and (*b*), 101A(1)(*d*), 102(1), 103 or 103A, or …**
>
> **(2) The tribunal shall announce its findings and explain to both parties (if present) …**

9. Interim relief is an exceptional form of relief granted pending determination of a complaint of unfair dismissal see **Taplin v C Shippam Ltd** [1978] ICR 1068. It is common ground that **Taplin** remains good law. When

considering whether it is likely the claimant will succeed, it is not enough to show a likelihood on the balance of probability. The claimant must show that his case has "a pretty good chance of" of success.

10. The principles were reviewed and summarised by the Employment Appeal Tribunal in **London City Airport Ltd v Chackro** [2013] IRLR 610:

> **10. The correct approach to be applied to the meaning of "it is likely" has been a matter of some controversy. It has been argued by some, not least in the relevant passages in *Harvey on Industrial Relations and Employment Law*, that it will be sufficient for the employee to show that, on the balance of probabilities, he or she is ultimately going to win at the subsequent unfair dismissal hearing. However, the weight of authority is against a simple balance of probabilities approach. As long ago as the decision of this Employment Appeal Tribunal in Taplin v C Shippam Ltd [1978] ICR 1068 it was held that the appropriate test is higher than simply establishing that the balance is somewhat more in favour of the employee's prospect of success. It must, on the authority of Taplin, be established that the employee can demonstrate a pretty good chance of success. While that cannot substitute for the statutory words, it has been the guiding light as to the meaning of "likely" in this context that has been applied over the subsequent three of more decades by the EAT. As recently as November 2009, this EAT in a constitution presided over by the then President, Underhill J, upheld the Taplin approach: Dandpat v University of Bath [2009] UKEAT/0408/2009. In that case, the appellant had sought to contend that the authority of Taplin had been undermined by a decision of the House of Lords. This EAT rejected that submission and in due course, held as follows:**
>
> > **"Taplin has been recognised as good law for 30 years. We see nothing in the experience of the intervening period to suggest that it should be reconsidered. On ordinary principles we should be guided by it unless we are satisfied that it is plainly wrong. That is very far from being the case. We do in fact see good reasons of policy for setting the test comparatively high in the way in which this Tribunal did in the case of applications for interim relief. If relief is granted, the respondent is irretrievably prejudiced because he is required to treat the contract as continuing and pay the claimant until the conclusion of the proceedings: that is not a consequence that should be imposed lightly." [20]**

11. The EAT also gave some guidance on the approach to be taken at paragraph 23:

> **23. In my judgment the correct starting point for this appeal is to fully appreciate the task which faces an employment judge on an application for interim relief. The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he**

> **has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim.**

12. An interim relief hearing is envisaged to be a summary process. There is no specific requirement on either party to provide evidence. Moreover, it is possible that an interim relief hearing would occur even before the time for filing a response has expired.

13. Rule 95 Employment Tribunal Rules of Procedure 2013 applies rules 53 – 56, which concern preliminary hearings, to interim relief applications. It specifies the tribunal shall not hear oral evidence, unless it directs otherwise.

14. The substantive law relating to whistleblowing must be considered.

15. Under section 43A Employment Rights Act 1996, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B Employment Rights Act 1996:

> **(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) 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.**
>
> **(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.**
> **…**
> **(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).**

16. The following questions must be addressed: first, is there a disclosure of information; second, does the disclosure of that information tend to show one of the matters referred to in section 43B(1)(a)-(e); third, what was the belief of the employee making the disclosure; and fourth, was a belief reasonably held that the disclosure tends to show one or more relevant

failing and was made in the public interest. All of these elements must be satisfied if the claim is to succeed at a final hearing.

17. Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. It is possible an allegation may contain information, whether expressly or impliedly (see **Kilraine v Wandsworth LBC** [2018] EWCA Civ1 1436). Each case will turn on its own facts.

18. It may be possible to aggregate disclosures, but the scope is not unlimited, and it is a question of fact for the tribunal.

19. It may be necessary to indicate the legal obligation on which the claimant is relying, but there may be cases when the legal obligation is obvious to all and need not be spelled-out (see **Bolton School v Evans** [2006] IRLR 500 EAT). However, where the breach is not obvious, the claimant may be called upon to identify the breach of obligation that was contemplated when the disclosure was made. It may be necessary to identify a legal obligation (even if mistaken), as opposed to a moral or lesser obligation (see **Eiger Securities LLP v Korshunova** [2017] IRLR 115, EAT.)

20. The reasonable belief of the worker must be considered. The test is whether the claimant reasonably believed that the information 'tended to show' that one of (a) to (f) existed; the truth of disclosure may reflect on the reasonableness of the belief. Reasonable belief requires a subjective belief that is objectively reasonable (see **Babula v Waltham Forest College** [2007] ICR 1026, per Wall LJ).

21. Reasonable belief is to be considered by reference to the personal circumstances of the individual. It may be that an individual with specialist or professional knowledge of the matters being disclosed may not have a reasonable belief, whereas a less informed, but mistaken individual, might (see **Korashi v Abertwe Bro Morgannwg University Local Health Board** [2012] IRLR 4). Each case must be considered on its facts.

22. The public interest element was added in 2013 to address the decision in **Parkins v Sodexho Ltd** [2002] IRLR 109, EAT. This has been considered by the Court of Appeal in **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ979. Underhill LJ gave the lead judgment in the Court of Appeal and addressed whether a disclosure made in the private interest of the worker may also be in the public interest, because it serves the interests of other workers as well (see Underhill LJ, paragraph 32). Underhill LJ declined to interfere with the tribunal's decision and set out his reasons at paragraph 37.

> **.. the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker… The question is one to**

> **be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool… but that is subject to the strong note of caution which I have sounded in the previous paragraph.**

23. Underhill LJ expressly refused to rule out the possibility that even a disclosure of a breach of a particular worker's contract will not be in the public interest. The tribunal must consider all the circumstances, Underhill LJ also gave some general guidance. Starting at paragraph 26, he dealt with some "preliminaries." He reiterated that the tribunal must first ask whether the worker believed, at the time he was making the disclosure that it was in the public interest and if so, whether that belief was reasonably held. At paragraph 27 he stated:

> **First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula ... The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable…**

24. When considering the dismissal, it is necessary to consider the thought processes of the individual or individuals who dismissed.

25. I should have in mind the case of **Kuzel v Roche Products** [2008] ICR 799, in which LJ Mummery gave the leading decision. The following paragraphs are particularly helpful.

> **52. Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.**
> **53. Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
> **54. Fifthly, the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.**
> **…**
> **56. I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant…**
> **57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
> **58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by**

> **reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
> **59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
> **60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.**

26. In order to determine this interim relief application, it is necessary to take a view on the likelihood of the 103A claim succeeding. I am considering how the case appears to me at present, and then I am projecting forward to consider the likely findings of the final tribunal. This involves considering what must be established, forming views on the likely strength of the evidence, and considering how that evidence will be interpreted.

27. For the purposes of this application, it is necessary for me to identify the main points about which the tribunal must be satisfied before a claimant can succeed. I should then consider the nature of the dispute in relation to each matter and the likelihood of the issue being decided in the claimant's favour.

28. First, there must be a disclosure of information.

29. Second, the disclosure of information must be protected. In order for it to be protected, it is necessary to look at the thought processes of the claimant at the time when the disclosure was made to consider whether, in the reasonable belief, of the employee the information tended to show a relevant failure as described in section 43B(1)(a)–(f). It is not conceded that the alleged disclosures were made in the public interest, and it is implicit that the respondent alleges there was a significant degree of self-interest.

30. Third, one or more of the protected disclosures must be the sole or principal reason for the dismissal. It is for the final tribunal to decide, as a question of fact, what is the reason for dismissal. In deciding that reason, it may be appropriate to draw secondary inferences from primary findings of fact. The reason for dismissal is disputed. I must ask if it appears to me likely that the final tribunal will draw an inference, or find directly on the primary finding of fact, that the sole or principal reason for dismissal was the protected disclosure.

Documents

31. Both parties have supplied extensive documents, including audio recordings from the claimant. At appendix 1, I have set out the documents received.

32. I have read the relevant statements and documents. I have listened to the recordings as necessary. I should note that it is not my role to undertake a mini trial. I have not in these reasons referred in detail to all the documents disclosed or witness statements. To do so would be disproportionate and unnecessary. I have referred only to the key documents. I have not found it necessary to record the detail of the various conversations. It is sufficient for me to note that I think it unlikely the claimant's interpretation of those conversations will be wholly accepted by the tribunal that hears this claim.

The factual background

33. I did not hear evidence, and I cannot resolve any disputed facts. There is significant agreement; it is appropriate for me to outline the relevant circumstances and indicate where there is dispute.

34. The respondent is a new, privately owned company. It has developed, or is developing, a confidential messaging platform secured through an encrypted private channel which involves sender encryption and continuous facial recognition authentication. It is likely to have commercial uses. The company is backed by investors.

35. By 2019, the respondent had secured investment to develop android and iOS platforms. The claimant was appointed as lead developer for the iOS platform, with effect from 18 November 2019.

36. It is apparent the working relationship was initially good and the respondent had confidence in the claimant. He completed three months' probation on 19 February 2020.

37. As time passed, the chief executive officer, Mr Alan Jones, alleges he became increasingly concerned about the claimant's ability to deliver the project on time. The project was due for completion around the end of March 2020.

38. Around 11 March 2020, having regard to the restrictions caused by Covid-19, the respondent moved to homeworking. The respondent alleges that Mr Alan Jones discussed with Mr Alan Wilson, the chief operating officer, concerns about the claimant's likelihood of delivering the project.

39. The respondent alleges that there were various discussions in March concerning the possibility of furloughing staff and agreeing temporary pay reductions.

40. On 26 March 2020, Mr Jones wrote to the claimant and confirmed that he would be offered share options.

41. There was a video meeting on 27 March with the claimant and his wife, and both Mr Jones and Mr Wilson. It is from this point that the parties' accounts diverge significantly about the content and nature of discussions, albeit there is significant agreement about relevant dates and the fact that meetings occurred.

42. It is convenient to trace the narrative through the claimant's perspective, and comment where there appears to be significant disagreement. I have taken this narrative largely from the claimant's own particulars.

43. The claimant states that on 27 March 2020, he was told by Mr Jones and Mr Wilson that the company was running low on money and that staff sacrifices were needed. He was asked to reduce his salary by 25%. He alleges that he accepted a reduction in principle but sought a smaller percentage. The claimant alleges he was asked to combine 10% deduction and the acceptance of furlough, but he would be required to continue working and must keep it quiet.

44. The claimant states "I believed that training while furloughed was allowed so I offered this avenue instead." He also says he offered to check the government rules. He says the company agreed to promote him to acting chief technical officer. Later that day he was given the title.

45. The claimant alleges he researched government guidance and at 17:02 phoned Mr Jones to explain that training was within the rules but there were limitations as to the activities he could undertake during training. The claimant was prepared to be furloughed and continue with online training.

46. The claimant did not record the meeting on 27 March. However, after this date the claimant commenced a series of covert recordings which have since been disclosed to the respondent.

47. It is the respondent's case the claimant's suggestion that he needed to spend up to 80% of his time training caused immense concern, as the claimant had represented himself as being fully competent.

48. It is common ground the claimant did not deliver the project as agreed. At the end of March Mr Wilson sought to agree a new schedule extending time until the end of April 2020. The claimant agreed a new timetable. It is respondent's case investors and potential investors were becoming increasingly concerned by the timescales. The product needed to be developed before there was any prospect of an income stream.

49. The claimant accepts there were discussions leading up to 30 March concerning the project and its delivery. He sent an email on 30 March 2020 and states that Mr Jones "seemed surprised by the amount of work

yet to be done and asked me for reassurance that we could hit the revised deadline (end of April)". He states that on 30 March, Mr Jones sent a surprising email unfairly comparing the iOS development (which was the claimant's concern) with the Android development. He describes this as aggressive and bullying. He says Mr Jones complaints did not make sense.

50. There was a further conversation on 1 April 2020. At this stage, the claimant started his covert recordings. The claimant's description in his particulars suggest that Mr Jones stated, categorically, that he was asking the claimant to continue working on the project whilst furloughed, and that he understood this was against the rules. The claimant alleges he reiterated that most of his time could be refocused to online training, which was compliant with the furlough rules. The claimant says he insisted his furlough should be done in observance with the rules. Mr Wilson said he would consult and revert.

51. At 17:49 on the same day, Mr Wilson phoned the claimant and told him, categorically, that he would not be furloughed. The claimant alleges there was discussion about the relevant percentage reduction in his salary. The claimant would not accept more than 10%. The claimant states that he, the claimant, "insisted on the online training furlough on a temporary basis." The claimant says he was shot down and he puts it as follows, "During this second call Alan Wilson insinuated that I either worked illegally while furloughed, took a 20% salary deferral on their terms, or got fired." The claimant says he was left without viable options.

52. The particulars of claim fall short of saying that Mr Wilson used clear words. It is unclear what is meant by "insinuated." There is a fundamental dispute of fact. Mr Wilson alleges the claimant pressed to be placed on furlough leave during which he could undertake extensive training. Mr Wilson was not happy to agree to those terms, as the claimant was seen as a key resource, and the product needed to be developed. It is for that reason the respondent alleges that the possibility of furlough was abandoned in the claimant's case. It does not appear the claimant agreed to a salary decrease, or that a decrease was insisted on. It is the respondent's case the claimant stated he wanted a 5% pay increase by way of reward for any deferment.

53. The project was not delivered by the end of April.

54. The claimant relies on a discussion with Mr Luca Rognoni which occurred on 2 April 2020; this was after the claimant had been told he would not be furloughed. There is significant dispute about this conversation. It is common ground that the claimant covertly recorded it. It is respondent's positioned that the claimant sought to lead Mr Rognoni Noni into a number of admissions. It is respondent's case that Mr Rognoni was not furloughed at that time, but was later furloughed on or around 10 April 2020. It is the claimant's case that Mr Rognoni indicated he was furloughed and had been required to continue working.

55. The claimant does accept that there was a further meeting on 6 April 2020 and Mr Rognoni indicated he would stop working if it crossed the boundary.

56. It is the claimant's case that he made significant progress on the iOS project in April, but it is common ground he did not deliver the project.

57. The claimant alleges on 4 May 2020 that Mr Wilson stated he was unhappy with the claimant's performance and the status of the iOS project. The claimant said there had been a series of problems including his Covid-19 illness, the time used to prepare for lockdown, the flooding of Peter's property,[1] the Easter break, and the pandemic.

58. The claimant's particulars do not record that he delivered his work on 4 May 2020. It is the respondent's case that both Mr Alan Jones and Mr Alan Wilson were horrified by the work produced and considered it had limited functionality and failed to meet expectations in numerous ways. The respondent accepts these matters were raised with the claimant. The claimant says that his performance was "unfairly demeaned."

59. It follows it is common ground that the claimant was criticised on or around 4 May 2020, albeit the claimant does not give full details of the reasons. The respondent sought shortly thereafter to recruit another individual, who essentially was the claimant's replacement.

60. On 7 May 2020, the respondent interviewed a new senior iOS developer, Mr Paul Calvo. He was eventually appointed on 11 May 2020. It appears to be common ground that the claimant was not informed of this process. It is respondent's case that the new person was employed because of fundamental problems with the claimant and it was necessary to employ a new person, despite the expense, because of the importance of the project and the fundamental failure of the claimant.

61. There was specific criticism of the claimant on 11 May relating to features the claimant had promised would be available, but which he could not deliver.

62. The claimant says "I came to the realisation that the company decided to replace me upon my refusal to cooperate with their fraudulent furlough initiative and engaged in a strategy of bullying and intimidation to make me resign, also demoting and ostracising me. For this reason on Monday 11th of May 2020 I contacted the whistleblower charity "Project – Advise" for help."

[1] Mr Peter Rocker was the Android lead developer.

63. It follows that at this time, the claimant's position had fundamentally changed. On his own case, he had formed the view that the respondent was seeking to dismiss him.

64. On 17 May 2020 23:38, allegedly in reply to an email enquiry from Mr Alan Jones, the claimant sent emails which he describes as one of his protected disclosures. It is difficult to understand the nature of this response and it appears to answer a question which related to queries regarding the implementation of features and coding with an accusation. It states:

> **My answer: no, I don't need to learn how to implement the features before coding them each time. I proposed the training initiative because on the 27 March you asked me to get furloughed and take a wage deferral on the basis that the company was running out of cash. To my surprise you also asked me to keep working while furloughed. I told you that I needed to get advice on this and you asked me not to do so because you knew that this was against the rules. You asked me to just do it and not to tell anyone. I said that I didn't want to break the rules because it's not something I do, and more so because I have a family to support. I said that I believed that training was allowed by the furloughing rules and proposed to undertake online training while furloughed because an important part of my work involves research that can be refocused as online training. Initially you seemed to agree and soon after our conversation I sent you an email thanking you and quoting the applicable government rules, which, as I said, allow for online training, but do not allow furloughed employees to contribute to revenue or provide services to the company. However, a couple of days later Alan Wilson told me that you had rejected my training-based furlough initiative, insisting that it was not acceptable because I wouldn't be undertaking all of my usual work activities. He said that other employees of the company had agreed to be furloughed yet keep working, and insinuated that I should do likewise, or "else". I held my ground and refused to break the rules. Please understand that the government rules are clear in that furloughed employees cannot keep providing services for the company. I believe this to be fraud. Accordingly, no employee of YEO should be working while on furlough: these are critical times for our society and companies should not be profiting from the government's efforts to uphold the economy during the pandemic. Equally, no employee should be put in a situation where they need to decide between breaking the rules or losing their jobs.**

65. It is respondent's case this was an accusation by the claimant of the respondent fraudulently using a furlough scheme and that the accusation came out of the blue. It is respondent's case that the claimant knew this allegation to be nonsense. The respondent sought legal advice and in particular legal advice concerning the claimant's dismissal. Before me today, the respondent has waived privilege in relation to that legal advice and I have recorded the respondent's concession as follows:

> **It is the respondent's case that it saw no benefit in going through a disciplinary or capability process with an employee who was unable or willing to accept his performance was not acceptable who instead continued to blame others for failures to deliver the project on time and to a satisfactory standard.**

66. It is respondent's case that they did deal with the claimant's accusations and considered the matter closed on 19 May 2020.

67. It is apparent that the relationship deteriorated. It is respondent's case that the claimant threatened to report either Mr Jones or Mr Wilson to the police for contacting him by mobile phone. The claimant does not mention this. If this is true, it difficult to imagine a more graphic illustration of a serious deterioration of a working relationship.

68. I do not need to consider the detail of the account leading up to the claimant's resignation and the respondent purported dismissal. By 29 May 2020, there had been a number of discussions and numerous emails. At 16:24 on 29 May 2020, Mr Jones sent the following email to the claimant.

> **Given that you are accusing the company of acts of a "criminal" nature we take this very seriously. As a consequence I am seeking legal advice so please be very clear with your accusation and let me know if I misunderstand. If you wish to pursue this route as a way of ransom of the company to provide additional compensation then I am afraid we will not entertain it in any way and will in any case revert to the disciplinary procedure as referenced in your employment contract. As you were told yesterday we are unhappy with your performance and believe that you are unhappy being part of our company. To protect the business and the employees we have to act. We chose to offer you a compromise agreement rather than terminate the employment for poor performance, which we have discussed with you several times.**

69. The claimant relies on paragraph 60 of his particulars. He sets out his interpretation as follows.:

> **Crucially, in this email Alan Jones says that because I am accusing The Company of acts of a criminal nature (which nothing else but my protected disclosures) he will revert me to the disciplinary procedure. Further, he indicates the intention to terminate the employment for poor performance, but does not revert to the disciplinary procedure for that reason.**

70. It is respondent's case that claimant was told on 28 May 2020 that he had no future with the company and his employment would be terminated. It is said the claimant responded negatively and indicated he would raise a grievance and revive the previous closed issue of the furlough discussion. The respondent alleges the claimant failed to upload his work before commencing his annual leave on 29 May 2020.

71. The claimant's email of 29 May 2020 illustrates the breakdown in the relationship. It reads as follows:

> **Alan,**
>
> **I will be uploading the code today.**
>
> **Again, this email is without prejudice (except for the raising of the Grievance below).**

I'm raising a Grievance with immediate effect due to, among other issues, the intimidation, bulling and harassment I have suffered from you and Alan Wilson ever since I refused to cooperate with your apparently fraudulent furlough scheme and raised a protected disclosure. I have evidence and witnesses to this effect and will not hesitate to action any legal avenues, including criminal procedures, if forced to do so. I have not accused the company of anything, but have been advised that the events that occurred are potentially criminal - note the word "potentially".

I am not holding the company to ransom, but if you are going to terminate my contract without me being in breach of contract then I have the right to negotiate a compensation I feel appropriate, particularly in view of the above and in these challenging times. If you want to action disciplinary procedures then please feel free to do so, keeping in mind that I actioned my Grievance before you suggested this, as per yesterday's conversation and my earlier email. Further, I have replied to your emails in what I consider is Stage 1 of the Grievance procedure in the Employment Contract, but neither Alan Wilson nor You have taken any corrective measures, hence why I'm proceeding formally with Stage 2 of the Grievance procedure as per this email. I have put Sarah Jones in copy as I believe she is the closest to an HR Manager YEO has. Since the law allows me to be accompanied by a colleague or Union representative, yet lockdown conditions are making this unviable, I am appointing my wife Alexandra as witness and companion in these exchanges.

The main points of my Grievance are:

*** I was asked repeatedly to cooperate with an apparently fraudulent furlough scheme, causing distress to me and my family.**
*** You and your managers have made unreasonable demands and have blamed me for issues beyond my control. For example, I have been accused of promising hard deadlines and features and not delivering. This is untrue.**
*** I have had to endure emails and hours of conversations demeaning my performance, work quality, knowledge and expertise.**
*** I have been promoted to Acting CTO and then demoted without notice both in title, as you later referred to me as Lead iOS Developer, and in action, for example excluding me from meetings relating to server architecture which I used to be involved in.**
*** I have been ostracised, particularly being excluded from important recruitment activities. To illustrate, the hiring of Paul Calver, an iOS Developer who happens to have skills almost identical to mine, took place behind my back. Further, you have been interviewing several other iOS developers without telling or involving me.**
*** You have blocked my access to working tools, for example reducing my access rights for Jira and suspending my G Suite account yesterday.**
*** Yesterday you also sent me an email where you state that you intend to give me notice by the end of May, before having any of these conversations or going through a disciplinary procedure. This clearly shows that you intend to dismiss me regardless of the outcome of any disciplinary procedure.**

All these actions started and continued immediately following my refusal to cooperate in a furlough scheme where the expectation was that I keep working while furloughed, which in my view was and is fraudulent. Further, this request and the subsequent mistreatment listed above equal to a breach of trust and a breach of contract. I am not accepting this breach and these changes to my contract, have the right to work without intimidation, bulling or harassment, and am therefore working under protest.

I demand that according to my employment contract and employment rights this situation is corrected immediately. I am not in breach of my contract, YEO is in breach of my contract due to the grievance points above, and if you expect to dismiss me then I am free to negotiate any compensation I consider appropriate - that's not holding someone to ransom, you don't have to dismiss me. I have not stopped performing my duties and am doing as possible to continue even under the unacceptable detrimental working environment you have created. You had the opportunity to come up with a reasonable agreement, but seem to have chosen otherwise.

In the meanwhile please refrain from calling me on my personal phone. The reason I had to stop working this afternoon when you called was stress, particularly because of your threats with referral to your lawyers, which add to the bullying, intimidation and harassment suffered. Any further calls to my personal phone will be reported to the police as intimidation and harassment.

Humberto

72. This letter specifically refers to reporting Mr Jones to the police if he used the claimant's private phone again.

73. It is the respondent's case that on 8 June 2020, on the claimant's return from annual leave, the respondent made one last attempt to resolve matters with the claimant and the claimant instead emailed a letter referring to constructive dismissal. Before me, the claimant says this is a letter of resignation with immediate effect. The letter reads as follows.

CONSTRUCTIVE UNFAIR DISMISSAL

Alan Edward Joseph Jones,

This morning I tried to start my working day and found that my work accounts remain closed, as they have been since I raised a formal grievance on the evening of the 29th of May 2020. As explained to you in numerous communications, I needed my work accounts to be operational before, during and after my leave because, for example, of the following reasons:

- **I needed to send follow-up documents to the development team.**
- **Some of my work-related online subscriptions will expire.**
- **I need to keep receiving work emails and meeting invitations from the team.**
- **My reputation with the rest of the team and other people emailing me will be affected.**
- **I needed to prepare evidential support for the grievance I just raised.**

Despite my repeated requests to restore my work accounts earlier and despite your promise to do so by today before the start of business, these remain closed so I have not been able to reincorporate to work today. Note that in lockdown conditions I am unable to do any work without my online work accounts. Further, this mistreatment adds to a long list of detrimental actions by you and Alan Wilson as detailed in my grievance and a number of earlier emails. You have now closed my work accounts for more than 10 days, not only during my leave, but also during working hours.

> **As per your email sent on the 1st June 2020 at 12:37 the reasons why you closed my work accounts, in your own words, were: "*The work you do is confidential, your accusations towards the company are very serious and your emails underpin the breakdown in relationship, this and the fact that you did not respond within the business day to direct requests to upload code, left us with no choice.*" You have made reference to my "serious accusations" in a number of other emails, for example on email sent on the 29th May 2020 at 15:30 where you state: "*I am afraid with your accusations we need to immediately refer this to our lawyers.*".**
>
> **As you know I uploaded my latest code later that day and explained to you that I had to take a break due to stress. Further, that day my Internet was unreliable due to a country-wide outage and I made Alan Wilson and the team aware of this. It would have been more reasonable to conclude that I did not receive your emails in time or that I did not have Internet access to upload the code. Closing my accounts just because I made the submission somewhat later than your arbitrary 15-minute deadline seems extremely unreasonable and disproportionate - an excuse to be frank, and in any event you closed my accounts after my code submission and refused to restore them even after I informed you of its completion. Further, in your latest email sent on the 4th June 2020 at 09:24 you say that you intent to terminate my employment, but provide no reasons for such a decision.**
>
> **Simply put, it is clear that the principal reason why you closed my work accounts and intent to dismiss me is because of the serious "accusations towards the company" I made in my grievance and protected disclosures. You have not provided any other sensible explanation.**
>
> **Further, yesterday 7th June 2020, in preparation for my return to work, I tried to connect to my G Suite account, which is used for emails, appointments, meetings etc., and received an "invalid password" error, specifically: "Your password was changed 3 days ago". This morning the message changed to "Your password was changed 11 hours ago". Initially you disabled my account and there is no need to change its password to either keep it disabled or reinstate it, so I fail to understand why it was necessary to change my password twice - unless you have decided to tamper with my G Suite account. The email address used to reset the password of my account has also been changed by the administrator so I am unable to correct this myself. I warn you to refrain from sending emails in my name or tampering with my existing emails, appointments or other G Suite data. For same reason I will not be held responsible for the content of any data that you may currently have relating to my accounts.**
>
> **To summarise, you took away essential working tools from me after I made protected disclosures and raised a grievance that you mistook for "accusations". You did this without undergoing any disciplinary procedure and right after I submitted a whistleblower grievance. Your long-standing detrimental conduct is forcing me to resign in this Constructive Dismissal. Since the reason of your conduct is the "accusations" I made, in other words my protected disclosures as whistleblower, this dismissal is automatically unfair.**

74. It is the claimant's case that this was resignation with immediate effect and amounted to a constructive dismissal.

75. The following day, the respondent purported to dismiss the claimant. The relevant letter reads as follows:

> **Termination of Employment**
>
> **Further to my email of 27th May which stated our intent to terminate your employment contract and discussions with you on 28th. I am writing to confirm that we are terminating your employment with effect from today's date in line with clause 102 of your contract of employment.**
>
> **You will be paid 4 weeks in lieu of notice, which will be made within 28 days of the termination. You have accrued a total of 11 vacation days including 6 days in lieu of weekend working. You will be required to take your holidays during the notice period with the balance of the days as garden leave.**
>
> **As in your contract of employment, please return any company property including without limitation all confidential information, security cards, computer equipment and mobile phone. Due to lockdown, if you would kindly box up the equipment safely we will make arrangement to collect them before Friday 12th June. You should provide a signed statement that you have fully complied. I would also like to remind you of the post-termination restrictive covenants in your contract (clause 106).**
>
> **I wish you well for the future.**

The protected disclosures (PIDs)

76. The claimant has identified five alleged protected disclosure. Those disclosures are not sufficiently clear in his claim form, but I sought clarification.

77. PID 1 occurred in the meeting of 27 March 2020. It was described by the claimant as follows:

> **I replied that I did not want to do anything against the rules because I do not do that and because I have a family to protect. I told them that I believed that the rules did not allow furloughed employees to undertake work for the company.**

78. The claimant clarified that this is reference to furlough in not allowing an individual to undertake work.

79. PID 2 is said to have been in a conversation on 1 April 2020 and he described in the following terms:

> **During this conversation I clarified the government rules for the Furlough Scheme and insisted that my furlough should be done in observance of the rules (second protected disclosure). Alan Wilson finished the conversation saying that he was going back to Alan Jones and James, the Director, to consult again on my online-training counterproposal.**

80. PID 3 is said to have occurred on 2 April 2020 during a meeting with Mr Luca Rognoni; it is described in the following terms

> **On the 2nd of April 2020 at 15:14 at the end of a technical meeting I asked Luca how much I could count on him for the development because Alan Wilson told me that he was going to be furloughed. He said that he had agreed to keep working while furloughed and told me that officially he was not working, but that in reality he was working. I said that they proposed**

> **the same to me but I refused because it is against the rules (third protected disclosure - note that Luca is CSO, cofounder and shareholder).**

81. PID 4 is said to have occurred on 17 May 2020. The claimant refers to his email of 17 May 2020, 23:38 and the key part of this email appears to be the following

> **…on the 27 March you asked me to get furloughed and take a wage deferral on the basis that the company was running out of cash. To my surprise you also asked me to keep working while furloughed. I told you that I needed to get advice on this and you asked me not to do so because you knew that this was against the rules. You asked me to just do it and not to tell anyone. I said that I didn't want to break the rules because it's not something I do, and more so because I have a family to support.**

82. The email had further similar allegations, but they do not appear to add materially.

83. PID 5 is said to be from 19 May 2020 in an email at 11:26 the relevant part reads as follows

> **I raised the points during our conversation and on the very same moment you suggested that I kept working while furloughed, that is, on Monday [SIC] the 27 March 2020. You knew then that it was against the rules, and you said so and told me not to tell anyone. It was not an exploration of options, it was an outright proposal. I raised further such concerns to Alan Wilson on the 1 April 2020, and he knew that working while on furlough was against the rules yet said that other employees were doing it and he wanted me to do likewise.**

84. Before me, the claimant relied on the same allegation of public interest for all disclosures. He stated that furlough requires the use of public money, and that breaching the rules, by requiring an individual to work whilst furloughed, is stealing money from the government. He considered this to be wrong.

85. It is the claimant's case that he did not have direct evidence that the respondent had done anything wrong. He believed that the proposal in relation to himself would have been a criminal act, but he did not know whether the respondent undertook any criminal activity, as he described it. It is not clear the claimant believed, at any stage he made an alleged disclosure, that there had been a breach of the relevant regulations. He does advance his case on the basis that he believed the respondent was likely to fail in its legal obligation which may amount to a likely failure to comply with a legal obligation or that a criminal offence is likely to be committed.

86. During submissions, the claimant said he did not know what the respondent did in relation to furloughing individuals. He now doubts he was not furloughed having received, after his dismissal, a payslip for March; he did not see this before his dismissal.

Discussion

87. As I have noted, I cannot resolve disputes of fact. However, when there is a fundamental dispute of fact, it may be appropriate for me to consider, broadly, the nature of the evidence advanced and the likely finding of fact for the final tribunal. The fact of dispute may itself make it impossible to find, at this stage, that it is likely the claimant will succeed. However, I should consider if I am able to form a view on how likely it is the claimant's account will be preferred. It is not for me to undertake a mini trial. Equally, if there appears to be clear contemporaneous evidence, particularly if supported by clear documentation, it may be appropriate for me to take a view as to which party is more likely to be believed on any fundamental dispute of fact.

88. It may be necessary to take a view on a likely finding of fact in order to ask the next question which is given what I know at present, and acknowledging that the picture is bound to be incomplete, how the final tribunal is likely to view those facts and whether there would be sufficient direct evidence to find the sole or principal reason for dismissal was the making of a protected disclosure, or whether it is likely that the tribunal will draw the relevant inference that the sole or principal reason was the making of a protected disclosure.

89. It is necessary to examine each of the relevant stages. The first question is whether the claimant disclosed information. I should have in mind it is not all facts or opinions that will be relevant information. It must be information that tends to show a relevant failure.

90. The essence of the first disclosure is the claimant's expression of his own opinion that furloughed employees must not undertake work for the company. Even on the claimant's own case, this appears to be common knowledge. I am not convinced that the expression of this opinion is a disclosure of relevant information. Stating there is an obligation may not tend to show a relevant failure.

91. Disclosure 2 is a further assertion of the nature of the government rules, and his insistence that he did not wish to break them. Again, it is difficult to see this is a disclosure of information, particularly given the categorical statement that he would not be furloughed.

92. Disclosure 3 appears to be an assertion made to Mr Luca Rognoni that the claimant had refused to work whilst furloughed. It is possible that a disclosure of information could be inferred. The suggestion is that he had been asked to work whilst furloughed. However, this is difficult to reconcile with the disclosures 1 and 2. I doubt that there is a disclosure of information at this stage; it is possible that if he asserted he had been told to work it could be relevant information in that it could be information that tended to show a failure of legal obligation.

93. The fourth disclosure is a specific allegation that the claimant was asked on 27 March 2020 to keep working whilst furloughed. Whilst this was an allegation made on 4 May 2020, I find it hard to reconcile with the description of the events from 27 March, as set out in the particulars.

94. It may be possible to interpret the conversation on 27 March as a disclosure of information. If it is accepted that the claimant was told categorically that he should, as he puts it, "just do it and don't tell anyone," and that he then went on to say that he wouldn't do it, coupled with an assertion as to the nature of the rules, that may be a disclosure of information, despite my doubts. However, these facts are in dispute.

95. The fifth disclosure is essentially a repetition of the first disclosure.

96. I doubt that the final tribunal will resolve the factual dispute in the claimant's favour. The contemporaneous documentation does not appear to support the claimant's position. I have considered the transcript of the conversation from 1 April, and I have listened carefully to the conversation. It is consistent with a general conversation about possibilities, and it is not consistent with the claimant's account which suggests the respondent was aggressive and insisted on his compliance. It seems to me the thrust of the conversation revolved around the claimant saying that he could be furloughed and undertake training. He appears to be encouraging Mr Wilson to furlough him. Mr Wilson appears to have serious reservations and wanted to discuss the matter with his colleagues before making any decisions. It is claimant's stated case that the respondent "insinuated" that he would be dismissed if he did not agree to work whilst on furlough. I can discern no part of the conversation which appears to be consistent with this description. The requirement to accept furlough does not appear to be an express requirement of the respondent and I think there is a real possibility that the tribunal will find the claimant's evidence, to the extent it makes unsupported allegations that the respondent insisted he "cooperate with a fraudulent furlough initiative threatening [him] with dismissal," to be exaggerated, incomplete, and misleading.

97. The single most important fact is that on 1 April 2020, the claimant was told, categorically, that he would not be furloughed. Yet despite this, he seems to misrepresent the position to Mr Rognoni during the conversation on 2 April 2020, which he describes as the third disclosure.

98. Moreover, the claimant's actions after 27 March are consistent with his exploring options and providing information. They are not consistent with a reaction to a respondent that had formed the view that the claimant must be furloughed and may be dismissed should he not cooperate.

99. It follows that I have serious reservations about the claimant's account. I have no doubt there were discussions. However, the dispute revolves around whether there was ever any attempt to insist the claimant should

work whilst furloughed. In my view it is unlikely that that will be resolved in favour of the claimant.

100. To the extent the claimant suggests, for the first three disclosures, that there was information, that is contingent on a finding the respondent insisting that he work whilst furloughed, and the contemporaneous written documentation to which I have been taken is not supportive.

101. If the claimant can demonstrate the disclosure of information in his reasonable belief tended to show a relevant failure, it is necessary to consider whether it was made in the public interest.

102. On 27 March, and 1 April, it may be possible to argue that the position was unclear, and that the respondent was exploring possibilities. The need to comply with the regulations has a personal interest as individuals may wish to avoid committing a criminal offence and appear to have been alert to the possible commission of a criminal offence. Whether it is made in the public interest may well depend upon the reasonableness of the belief that there had been illegality or a criminal offence had been committed or if it was likely that there would be illegality or criminal offence.

103. The discussions with the claimant concerned his own position. If the respondent suggested to the claimant that he should accept furlough and work illegally, he would have the relevant reasonable belief that it was likely there would be the relevant failure. If that was not said to him, and all that was happening was an exploration of possibilities, it is difficult to see how he could believe that there had been a relevant failure, or there was likely to be a relevant failure.

104. It is clear the claimant went off to consider the matter on 27 March and produce proposals. The proposals he produced were that he be furloughed, but that he should undertake training, which was within the regulations. This is entirely inconsistent with a finding that the respondent had told the claimant he should be furloughed and work illegally. Prior to the third disclosure, the claimant had been told that he would not be furloughed. It is difficult to see any public interest in the claimant disclosing to Mr Rognoni the content of the conversation if that conversation was no more than an exploration of possibilities.

105. I think it is unlikely that the claimant will demonstrate that he believed there had been or would be a relevant failure. Moreover, it is the information disclosed which must tend to show the relevant failure. And in putting forward that information, the reasonable belief attaches not only to the actual or prospective failure, but also to the public interest. I think it is unlikely a tribunal will find the claimant believed there was a public interest when discussing the possibilities, which led to his making proposals. It is unclear why the claimant would believe that there was a public interest in disclosing the possibility of a failure when he knew that he was not to be

furloughed. Even on his own case, he was looking only at the potential for failure (see his grievance of 29 May 2020).

106. As to disclosures 4 and 5, the position had materially changed. The claimant's capability had been questioned. The process of replacing him was underway. There is a real prospect of the tribunal finding that those disclosures were not founded on a reasonable belief of a relevant failure or a reasonable belief they were made in the public interest, but instead that they were made purely to bolster the claimant's negotiating position.

107. It follows from all I said that I think it unlikely that the claimant will be found to have made protected disclosures. I should clarify I am not equating the word unlikely with the legal test of likely under section 43B. I am using unlikely in a general way to simply mean on the balance of probability.

108. Put another way, he has less than a 50% chance of establishing he made protected disclosures.

109. If the claimant can establish that he made protected disclosures he can only succeed if the tribunal finds that the sole or principal reason for dismissal was the making of protected disclosures.

110. The claimant does not have two years' qualifying service. I do not need to consider, in detail, the burden of proof. For this analysis, I will assume that the claimant can satisfy any evidential burden.

111. It is the claimant's case that the respondent has not set out, at any stage of the dismissal, the reason for dismissal. He appears to allege that the tribunal must accept the alternative reason he puts forward, namely the making of protected disclosures. I do not accept either submission.

112. Before me, the claimant accepted that there had been a delay in the project. However, he categorically refused to accept that any criticism of the quality of his work was justified.

113. The final tribunal must look at the reason for the dismissal. This will involve considering the thought processes of at least Mr Jones and probably Mr Wilson, and potentially others. It depends on who made the final decision. For the claimant to succeed, the sole or principal reason must be the making of protected disclosures. If the making of protected disclosures is only part of the reason, he will fail.

114. I should note as an aside that there is a general question as to whether the claimant was dismissed at all, albeit neither party has engaged adequately with this. There is a real possibility that a tribunal will find that the claimant resigned by letter without notice, and he did so prior to being dismissed: that is his case. It is at least arguable the employment ended by resignation before the purported express dismissal. He would have to establish the respondent was in breach of contract, and I think he would have difficulty with that. There is indication that the respondent did

remove the claimant's computer privileges, which prevented him from undertaking his role. However, in a situation where there is dispute and a deterioration of the relationship, it may not be a breach of contract to remove privileges to preserve the position. I doubt the claimant will be able to demonstrate that the respondent was in fundamental breach of contract at the point when he resigned.

115. It follows the claimant may need to rely on the later the express dismissal, but given his own actions, he may not be able to do so.

116. In support of his argument that there were no real concerns about his performance. The claimant points to the failure to conduct a capability procedure, or to refer clearly to capability when dismissing him. I note there is no obligation on the respondent to behave in a way which may be deemed, in some general sense, fair.

117. The claimant asks the tribunal to believe that there was no difficulty with his work. He therefore asks the tribunal to infer that the respondent believed there was no difficulty with his work. The logic of the claimant's position is that as the claimant was clearly performing his duties adequately, dismissing him was irrational and demonstrably unreasonable. He asks the tribunal to infer that the true reason must have been the making of protected disclosures.

118. As to the delay in finalising the project, he points to the difficulties he had with his own health, and the general difficulties caused by the pandemic.

119. I think it is unlikely that a tribunal will accept the claimant's submissions.

120. The respondent was disappointed by the claimant's failure to deliver in March. However, despite the fundamental importance of the claimant's work to the development of a product essential to the success of the respondent, he was given more time. To the extent there had been delay caused by matters beyond the claimant's control, the fact that he was given more time suggests an accommodating and reasonable response by the respondent.

121. I think it is likely a tribunal will find that the respondent was not unreasonable in questioning why it was necessary to extend the time period even further.

122. It is, in my view, likely that a tribunal would look very carefully at whether there is evidence that the claimant's work was of such a standard that criticism of it appears to be irrational. I accept that if the tribunal finds that criticism of the claimant's work was irrational this may be a finding of fact from which it may be possible to infer that the true reason was something other than capability or performance.

123. It is unlikely, in my view, that a tribunal will find the claimant's work was adequate. I reach this conclusion for a number of reasons.

124. The claimant was given extra time in which to deliver the project. I accept that the problems he faced may have caused delay. But it was not irrational to expect the claimant to deliver, in accordance with his own promises, by the end of April.

125. The claimant represented himself as competent and knowledgeable. Following the meeting on 27 March 2020, he represented to the respondent that he could spend at least 80% of his time training. The claimant appears to see no difficulty with this. This was a development company. Individuals were investing to develop an app to take to market. If the claimant failed to deliver, there would be nothing to sell. He had been employed for his expertise and his ability to deliver. The idea that an individual who professes such expertise, and ability to develop, should spend an indefinite amount of time simply training is likely to cause any reasonable manager the most serious concern. Put simply, what was he training to do and why couldn't he do it already? It is entirely credible that his suggestion that he could, and indeed should, spend 80% of his time training would cause the most serious concern.

126. On 4 May 2020, he did deliver the product of his work. It is common ground that he was criticised. He does not accept the criticism was reasonable or rational. It is clear that the respondent's response was to go to market and employ somebody else who was brought in at considerable expense. On the claimant's case, this occurred because he had raised concerns about being required to work when furloughed. The respondent's case is it occurred because the product, as produced by the claimant, was inadequate, flawed, and did not deliver.

127. Stepping back from the detail of this, I observe the claimant asks the tribunal to accept that the respondent, which appears to be increasingly desperate to make progress, would take a backward step by employing another person who undoubtedly would have to come up to speed in developing the product, simply because the respondent was unhappy with the claimant's requirement that he not be furloughed, even though the respondent had abandoned, by the beginning of April, the idea of furloughing him, and abandoned any salary reduction. There is a lack of rationality in the claimant's position.

128. It seems to me the more probable reason for the respondent's actions is that Mr Wilson, Mr Jones, and others had reached the view that the claimant's performance was inadequate, and that the only way of salvaging the position would be to replace him.

129. I think it is likely that the tribunal will accept the respondent's explanation.

130. I do not accept that there is a lack of evidence about the respondent's true reason. It may be that the reason was not set out adequately in the dismissal letter. It may be that the respondent did not go through any form of performance improvement plan. It seems to me that the development

of the product was time critical. The claimant's role was critical. In those circumstances, simply removing the claimant and bringing somebody else in appears to be both rational and reasonable. Moreover, it is compelling evidence about the true motivation.

131. The claimant asks the tribunal to accept that delay was not down to him, that his work was adequate, that there were no performance concerns, and that any indication of performance concerns was produced as a smokescreen in order to dismiss him because of the protected disclosures made by the claimant. It is unlikely that the claimant will succeed on any of these points.

132. It follows that in my view the tribunal is likely to accept that the sole or principal reason for the claimant's dismissal, should he establish that there was a dismissal, will be because his performance, both in terms of keeping to a timetable and delivering a workable product, was seriously inadequate. This is essentially performance. There is little or no prospect, in my view, of the claimant establishing that there was a protected disclosure which was the sole or principal reason for his dismissal. It follows that I do not find it likely that he will succeed in his claim of automatic unfair dismissal.

133. For the removal of doubt in this case my analysis does not turn on a nuanced understanding of the word likely. His chances of success are significantly less than 50% and come nowhere near to approaching the pretty good chance of success which is necessary.

_____

Employment Judge Hodgson

Dated: 18 August 2020

Sent to the parties on:

18/08/2020

For the Tribunal Office

Appendix 1

Documents from the claimant

Claimant's list of all the documents sent to the tribunal by the claimant and relied on by the claimant.

Bundle of evidence

Split bundle of evidence 1.pdf - This document contains the Employment Agreement and Payslips

Split bundle of evidence 2.pdf - This document contains the relevant communications until April 2020

Split bundle of evidence 3.pdf - This document contains the relevant communications during May 2020

Split bundle of evidence 4.pdf - This document contains the relevant communications during June and July 2020

Split bundle of evidence 5a.pdf - This document contains evidence of work until April 2020

Split bundle of evidence 5b.pdf - This document contains evidence of work for May 2020

Split bundle of evidence 6.pdf - This document contains miscellaneous evidence

Witness Statements

Witness Statement Alexandra.docx - This document contains the witness statement by Alexandra Komissarova

Witness Statement Peter Rocker.docx - This document contains the witness statement by Peter Rocker

Witness Statement Mirijana.docx - This document contains the witness statement by Mirijana Cirkovic

Supplemental Witness Statement Humberto.docx - This document contains a supplemental witness statement by Humberto Moran-Cirkovic

Recordings –
Alan Wilson 1.wma.zip - This is the recording for the first conversation with Alan Wilson on the 1st April 2020

Alan Wilson 2.wma.zip - This is the recording for the second conversation with Alan Wilson on the 1st April 2020

Luca Rognoni 1.wma.zip - This is the recording for the conversation with Luca Rognoni on the 2nd of April 2020

Luca Rognoni 2.wma - This is the recording for the conversation with Luca Rognoni on the 6th of April 2020

Alan Wilson 4.wma.zip - This is the recording for the conversation with Alan Wilson on the 11th May 2020

Alan Wilson 5.wma.zip - This is the recording for the conversation with Alan Wilson on the 18th May 2020

Skeleton Argument

Skeleton arguments Claimant minor corrections.docx

Respondents documents (as recorded by the respondent)

- [Respondent's] Email sent on the 4 August 15:43
  - YEO Document Bundle Index Final
  - YEO Respondent Bundle 040820
- [Respondent's] Email sent on the 4 August 16:48
  - 200804 JW Submission of Facts
  - Alan Jones Witness Statement (signed pdf and word document)
  - Alan Wilson Witness Statement (signed pdf and word document)
  - Katie Hirst (Letter)
  - YEO Calver Witness Statement Final (signed pdf and word document)
  - ET3 Form
  - YEO Grounds of Resistance
- [Respondent's] Email sent on the 5 August 10:12
  - YEO Respondent Skeleton Argument
- [Respondent's] Email sent on the 5 August 10:17 (Case Authorities)
  - DANDPAT
  - RAJA
  - ROBINSON
  - SARFRAZ
  - TAPLIN
- [Respondent's] Email sent on the 5 August 17:07
  - YEO Document Bundle (reformatted)

- [Respondent's] Email sent on 6 August 07:34
    - Letter re March payslips (Katie Hirst)