EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100102/2020

Final Hearing held remotely on 24 - 28 May 2021
Employment Judge A Kemp
Tribunal Member P McColl
Tribunal Member A Shanahan

Mr M Watson	**Claimant** **In person**
Scotbeef Limited	**Respondent** **Represented by:** **Mr G Millar** **Solicitor**

JUDGMENT

The unanimous Judgment of the Tribunal is that the Claim does not succeed and is dismissed.

REASONS

Introduction

1. This Final Hearing took place remotely by Cloud Video Platform in accordance with the orders given at the last Preliminary Hearing. It was conducted successfully.

2. The claim is one for automatically unfair dismissal under section 103A of the Employment Rights Act 1996. At the commencement of the hearing the Judge proposed the following issues, with which the parties agreed –

(i) Did the claimant make a qualifying disclosure to the respondent under section 43B of the Employment Rights Act 1996 and in particular did he have a reasonable belief that the information tended to show that (i) a relevant offence or failure had occurred and (ii) that the disclosure was made in the public interest?

(ii) Was the reason or principal reason for the claimant's dismissal the making of that disclosure under section 103A of the Employment Rights Act 1996?

(iii) If the claimant succeeds to what remedy is he entitled, and in that regard

(a) What losses has he or will he suffer?

(b) Did he contribute to his dismissal?

(c) Should any award be reduced if it is held that the claimant did not make the disclosure in good faith

(d) Has the claimant mitigated his losses

(e) What is the appropriate award for injury to feelings

3. The claimant had provided a Schedule of Loss, but it was not sufficient as it was based on gross rather than net earnings, and some of the attachments were illegible. The respondent had been ordered to provide a response to that schedule but had not in fact done so.

4. A Bundle of Documents was before the Tribunal, but within that were some pages which were also illegible. That was addressed at the commencement of the hearing, and the suggestion made that either relevant parts were read out and agreed by the other party, or that legible copies be provided.

5. Before the commencement of the evidence the Judge explained to the claimant, who represented himself and had not conducted a Tribunal hearing before, how that would take place. He explained the need to give all the evidence he wished to on the merits of the claim and on remedy, about cross examination of witnesses on evidence that was challenged, or where they knew or ought to have known of a matter that was relevant, and about re-examination. The respondent offered to give its evidence first, although the last Preliminary Hearing Note had indicated that the claimant would do so as he had the onus of proof. The claimant indicated that he wished to give his evidence first, and he was permitted to do so.

The Evidence

6. The claimant gave evidence himself. The witnesses for the respondent were Gladys Caldwell, Jamie McKellar, Karol Wojcik and Tony Kirkbright. Mr Wojcik had not been originally on the list of witnesses for the respondent but was called by them on day four of the hearing. The claimant was given additional time to prepare for his cross-examination. The Bundle of Documents was spoken to in evidence but not all of the documents within it were referred to.

The Facts

7. The Tribunal found the following facts, material to the issues, to have been established:

8. The claimant is Malcolm Watson.

9. The respondent is Scotbeef Limited. It provides beef and lamb products to the UK retail market. It has sites principally at Queenslie in Glasgow, at East Kilbride and Wolverhampton.

10. The claimant was employed by the respondent as its Continuous Improvement Manager from 26 February 2021.

11. The claimant was initially approached by recruitment companies instructed by the respondent. An initial meeting was held between the claimant and Mrs Gladys Caldwell in late 2018, and a second one with Mrs Caldwell and the Chief Executive Officer and Chairman of the respondent Robbie Galloway thereafter. No notes of either meeting were kept by any of the attendees.

12. The respondent sought to employ its first Continuous Improvement Manager. It did so having been involved in re-tendering for its two major customers, large supermarket chains, in 2018. As a part of that process for one of the customers the respondent had been required to agree a payment to the customer of £1.25 million initially, and a balance of £750,000 payable it was later agreed by equal instalments over the five years of the contract. As a result of that the respondent sought to improve its profit margins, and in particular to effect cost savings.

13. The claimant had experience of doing so, and was employed in that role in a competitor, and much larger, company than the respondent. He was informed that he would not be working with a team of others, as he had been, and would be expected to perform the role alone. There was a discussion as to the need for effecting cost savings, and the claimant said something to the effect that there would be “low hanging fruit” which would enable savings to be achieved in the first twelve weeks, and that overall he would expect to achieve savings many times the salary. He also said that the role would not be expected to be a permanent one but last two to three years. He sought a higher salary than was eventually agreed.

14. The claimant was provided by the respondent with a Principal Statement of Terms and Conditions of Employment in November 2018 which provided for a three month probationary period. It provided that it could be extended up to six months, and that a performance review would be held at the end of the three month period and if satisfactory the continuation of employment would be confirmed. The salary was £135,000 rising to £145,000 on successful completion of the probationary period. The notice period was three months.

15. The contract stated that the claimant's role was "Continuous Improvement Manager, with responsibility for Group environmental matters", and that he would "report to Gladys Caldwell, MD of retail" The claimant was not provided with a Job Description.

16. The claimant generally worked for two days per week at the East Kilbride site, but also at other sites from time to time, and from home.

17. When he commenced work, he commenced preparations for a Plan A document for the respondent's site at East Kilbride, which was required by a major customer of the respondent, Marks and Spencer plc. Marks and Spencer were introducing a system for their suppliers under which they sought that the supplier achieve at least a sliver level under Plan A. They were to audit the respondent at East Kilbride on three dates in mid September 2019.

18. Plan A had three elements being Ethics, related to Human Resources practices and treating employees fairly, LEAN being a continuous improvement programme to ensure that the business is stable, sustainable, cost effective and efficiently managed, and Environmental under which the question was to what extent did the business set out and achieve a reduction on the use of utilities, its carbon footprint, waste, and secure gains in efficiency, energy and in recycling.

19. The claimant was experienced in the LEAN aspects of the Plan A, and was offered support by Jennifer Shannon in HR for Ethics, and Karol Wojcik the respondent's Environmental Manager for the Environmental aspects. The claimant had overall responsibility for completing Plan A, HE in effect led the project to do so.

20. The LEAN aspect included matters that would or could lead to cost reductions and improved profitability.

21. The response for Plan A required a document to be prepared with supporting materials. The claimant sent an email on 28 February 2019 to Mrs Caldwell with a summary of the LEAN element of Plan A. He held

weekly meetings with others to progress matters. On 8 March 2019 he sent Mrs Caldwell a plan for the first six months for each of the three sites the respondents operated.

22. He made material progress on the Ethics and LEAN elements, but not on Environmental as Mr Wojcik was too busy on other matters to assist him to anything other than a very limited extent. He raised that issue by email on 3 May 2019 to Gladys Caldwell the Managing Director of the Retail division of the respondent and other senior managers of a high likelihood of a fail of the Environmental element of Plan A. If one element of Plan A was failed, all of it failed. He said that either Mr Wojcik was released for two days per week to work on it, or external resource was required. External resource was not authorised.

23. There was to have been a probationary review meeting between the claimant and Mrs Caldwell towards the end of the first three months of his employment. Mrs Caldwell went on a business trip to the USA, and shortly before doing so told him by telephone that they would have the review meeting on her return. She had a discussion with Mr Tony Kirkbright the respondent's Group Finance Director about the review. His opinion was that there had been no evidence of cost savings from the claimant's employment and that the employment should terminate. Her view was that she wished to give it more time, and Mr Kirkbright agreed that she should do so.

24. By letter of 23 May 2019 the claimant was informed by Ms Shannon of HR that Mrs Caldwell was unwell, and that his probation was extended to 10 June 2019, and a meeting to be scheduled with him.

25. The claimant met Mrs Caldwell on 5 June 2019. At that meeting Mrs Caldwell informed the claimant that she had not seen evidence of cost savings being achieved, and that the probationary period would be extended for a further three months so that that could be demonstrated. As the probationary period had not been completed successfully the claimant's salary was not increased.

26. Jennifer Shannon of HR prepared a letter for Mrs Caldwell to send to the claimant after that meeting, and sent it to Mrs Caldwell by email at 4.30pm on 5 June 2019. Mrs Caldwell either approved it or made changes to set out the reason for the extension as "We require to see an increase in money value deliverables within your workload." Neither Ms Shannon nor Mrs Caldwell sent it to the claimant, although it was dated 7 June 2019 and bore to have been sent by email.

27. The claimant, Mrs Caldwell and Mr Jamie McKellar the Retail Accountant of the respondent met on 13 June 2019. Mrs Caldwell stated again to the claimant that she required to see reduction in costs that were being seen in the accounts, or words to that effect. Mr McKellar's role was to validate the cost savings that the claimant was to produce.

28. The claimant emailed Mr McKellar with a list of seven projects he was working on by email after that meeting on 13 June 2019. On 15 June 2019, a Saturday, Mr McKellar replied adding his own comments including details of validation required by finance for the same.

29. The claimant set out his continuing concerns that the respondent would fail the environment aspect of the audit in an email to Ms Caldwell and others on 10 July 2019. The audit by Marks and Spencer was to be on 16 September 2019.

30. On 9 July 2019 the claimant sent Mr McKellar an email with information for two days in relation to the beef line at East Kilbride. The claimant had not calculated what cost saving could be achieved, however. After two emails to chase a response Mr McKellar replied on 25 July 2019 and said that the detail must be comprehensive, and asked when could the savings ben reviewed. There was an exchange as to the date for a meeting and on 29 July 2019 Mr McKellar emailed the claimant stating " I was hoping to review project savings rather than talk through what is required to substantiate the saving." He did so as he was increasingly concerned at the absence of savings being effected by the claimant.

31. Separately on 12 July 2019 the claimant sent Mr McKellar an email with regard to the mincing line in Wolverhampton. Mr McKellar responded the next day, a Saturday, with an excel spreadsheet which would allow the claimant to produce a calculation of an annual saving. The claimant did not send such a calculation.

32. On 1 August 2019 the claimant, Mrs Caldwell and Mr McKellar met. After an initial discussion Mrs Caldwell left to attend another meeting, and then returned after about half an hour. There was a meeting with the three of them sitting at a table, and during that Mrs Caldwell made clear to the claimant the need for cost savings to be achieved urgently.

33. On 2 August 2019 the claimant emailed Mr McKellar and asked for a variance report, but did not receive that. A variance report showed differences in daily metrics. On the same day he also emailed the Factory Manager at East Kilbride Mr Forrest and another colleague and said "Following a meeting with Gladys and Jamie yesterday there is growing frustration that they can't see the impact of any improvements on the bottom line so we need to have a blitz on the beef line over the next 2 weeks and track the money….."

34. On 7 August 2019 the claimant sent the first of a series of emails to Mr Wojcik asking for information and documents in relation to the environmental aspect of the Plan A audit. Another site of the respondents at Queenslie, Glasgow had passed a Plan A audit by Marks and Spencer in 2018. The claimant asked for the Environmental document used for that.

35. On 16 August 2019 Mr Wojcik sent an email with an energy audit report. That report had been prepared by him on or before 5 December 2015 to comply with the Energy Savings Opportunity Scheme Regulations 2014, known as the ESOS Regulations. The Regulations required the respondent, and the JW Galloway Ltd group of which it was a part, to audit its energy use and provide a report in relation to that and the savings that could be achieved, amongst other matters. Mr Wojcik had attended a four day course to be qualified to do so as a Lead Assessor. The report had been based on utilities and other invoices, and had been under the overall

direction of the Finance Director Mr Kirkbright who had validated the evidence relied on.

36. In his email Mr Wojcik said that the respondent had not been interested in doing one, even when it became a legal requirement.. He added "I had to make it up, sorry."

37. On the same day Mr Wojcik sent a reply to a list of questions from the claimant. He indicated that the energy audit was "not the real one" and had been sent in his previous email, being that referred to in the preceding paragraph. He added at the end

> "I realise the above is very disappointing, but that's the real picture of our environmental management. It's never been one of the company's priorities, furthermore, its always been treated as a necessary evil. I've always been a "face" of our EMS (Environmental Management System) but in reality I do loads of other stuff, and when required I only make thinks up if I'm given enough time. Queenslie's EMS existed only for Plan A, Bride of Allan's EMS exists but its badly neglected. I never had a change to do it properly for all sites. In fact the EMS has never had resources, time, funds, senior support or even attention."

38. The claimant spoke to Mr Wojcik that day by telephone. Mr Wojcik explained that he did not mean that the report had been fabricated, but created by him. He added that he considered that it would have been preferable to have instructed external consultants to prepare a more professional report, or words to that effect.

39. Over the weekend of 17 and 18 August 2019 the claimant researched issue of protected disclosures online.

40. On 19 August 2019 the claimant emailed Ms Caldwell, and indicated that with four weeks to go to the audit for Plan A failure was certain. He said that he had tried to create something with Mr Wojcik's help but now regarded that option as impossible. He thought that there would be two

choices, either to postpone the audit until the first quarter of 2020 or to stop working on it and concentrate on cost reduction initiatives.

41. Mrs Caldwell replied that same day to say that she would speak to the Factory Manager about it and catch up with him on the following day. She later spoke to the claimant by telephone to say that she would have a meeting with him, mentioning a probationary review.

42. On or about that day Mrs Caldwell had a discussion with the Finance Director Tony Kirkbright about the claimant's probationary review. He indicated that his view had been that that should have been brought to an end earlier. She was coming to that conclusion, but a final decision had not yet been reached.

43. On 21 August 2021, a Wednesday, the claimant spoke to Mr Wojcik by telephone at 7.20am. Mr Wojcik confirmed the terms of his earlier conversations to the effect that when he had said that the report was made up he meant that it had been created by him, not that it had been fabricated. He also explained that he had himself prepared the report but was not proud of it, that he thought that an external consultant ought to have been employed, and that a more professional report produced. He said that there was a deadline to comply with stage 2 of Energy Savings Opportunity Scheme Regulations 2014, under which there was a significantly increased level of scrutiny, by 5 December 2019.

44. The claimant then emailed Ms Caldwell at 8.02 that day. The email stated:

> "Something else to be aware of ……The legislation that required the energy audit which Karol has said was made up is the Energy Efficiency Directive 2012 which spawned the ESOS Regulations 2014 which we were obliged to comply with by December 2015……..Karol created these reports knowing that they were false with the Company's consent and possibly under its direction and the potential wrongdoing needs to be investigated by a non-executive director or perhaps by Angela in her role as Governance

> Officer. Perhaps at the time the impact of these actions was not fully understood….."

45. Mrs Caldwell contacted Mr Kirkbright on its receipt. She read the contents of the email to him. He then called Mr Wojcik into a meeting. Mr Wojcik explained what he had meant by the phrase made up, being created not falsified, that he had told the claimant that, and that he had explained his views as to having a more professional report by an external consultant.

46. Mr Kirkbright called Mrs Caldwell back after having had that conversation. He did so around 10am that day. He told her that he had been involved in the preparation of the energy audit report. He explained that it had been properly prepared, that Mr Wojcik had attended a course to do so, that utilities and other invoices had been used for it and validated by him at the time, and that there was nothing false about the report.

47. Mrs Caldwell replied to the claimant's email at 10.42 in an email which she sent from Queenslie, where she was normally based. It stated:

> "….The information below in the email is inaccurate! Karol was independently trained and qualified to carry out the ESOS 1 audit, the report was compiled with factual and accurate data which is supported by billing documentation from utility providers. Energy saving projects identified as part of the process were realistic and have ben implemented with varying degrees of success. Whilst I appreciate that we haven't been able to hit all time scales, I struggle to understand where this information has come from, as we have spoken to Karol and this is not his view. At no time was any information fabricated and your accusations regarding the company and its officers' integrity is totally unfounded and very questionable…."

48. Mrs Caldwell then drove from Queensilie to East Kilbride, and arrived at about 11.30. Shortly after arriving Mrs Caldwell and Elaine Lamont from HR who had travelled with her met the claimant, and asked where Mr Forest the Factory Manager was, then left. About half an hour later they

returned, and had a meeting with the claimant. It commenced at about noon. They initially discussed the claimant's email to her that morning. Mrs Caldwell refuted the allegations, and asked where the detail had come from. She was told by the claimant it was from Mr Wojcik, and he read to her one of the messages from him. She said that the company would look into it. At 12.22 three emails were sent from the claimant's email account to Mr Kirkbright attaching a series emails between the claimant and Mr Wojcik in relation to the energy audit. The emails to Mr Kirkbright did not have any comment within them. They then discussed the claimant's performance, and Mrs Caldwell referred to the lack of savings that he had achieved during the six months of his employment. The claimant said that there had been improvements and said that Mr McKellar had not helped him. Mrs Caldwell said that it had not worked out and that she would end his employment, pay him three months notice, and allow him to keep his car for three months. He asked to keep his company phone and laptop. She left the room and called Mr Kirkbright who did not agree that he could do so as that was not company policy. Mrs Caldwell said that she had ended the claimant's employment, and Mr Kirkbright then told IT to end his access to emails. They then did so, at a time not given in evidence, but likey to have been at about 12.45. Mrs Caldwell told Ms Lamont to inform the claimant of that. He left the laptop and was given an alternative phone to use. The meeting with the claimant took a total of about 45 minutes, and concluded at about 12.45 accordingly.

49. The claimant then went to collect belongings from another part of the premises, and said goodbye to some of those he had worked with. He left the premises shortly thereafter.

50. A letter was sent to the claimant dated that day confirming the termination of his employment by Elaine Lamont of HR.

51. On 28 August 2019 the claimant intimated an appeal to Tony Kirkbright of the respondent. It included reference to his having highlighted potential wrongdoing and that that led to his dismissal. The claimant was offered an initial set of dates by the respondent but could not attend as he had

interviews. He replied with three alternative dates. He did not receive a response. The claimant suggested a hearing time at around noon so that he could travel to it the same day, but that if it was to be early or late in the day that he have accommodation overnight. No detailed arrangements were made.

52. The claimant sent an email to Jennifer Shannon of HR about a possible appeal hearing date on 21 October 2021. No appeal hearing was intimated to the claimant by the respondent, and no appeal was conducted by them accordingly.

53. The claimant received payment from the respondent for three months pay in lieu of notice for the period from 21 August 2019.

54. The claimant sought other employment by registering with agencies, and online job vacancy sites. He was employed by another company from 18 November 2019.

55. When employed by the respondent his net pay was £1,437.88 per week. He had benefits of a company car, and pension contributions. His new employment had net pay of £1,043.57 per week. He also had a bonus of £1.000, company car and pension contributions.

56. The claimant was distressed by his dismissal. He had not been dismissed before. He did not seek medical assistance at any stage.

57. The claimant was not replaced in his role by the respondent. In September 2019 Marks and Spencer postponed progress on their Plan A accreditation system.

58. The respondent instructed external consultants for the stage two audit under the ESOS Regulations on 5 December 2019. As a part of that the consultants reviewed the energy audit report prepared for stage one, and found it to be in order.

59. The claimant did not at any stage report concerns over the energy audit to the Environment Agency or the Scottish Environment Protection Agency.

60. During the period of the claimant's employment the respondent tracked financial data for East Kilbride and its other sites on a daily, weekly, and monthly basis. There was no appreciable improvement in the figures for East Kilbride for the six month period before, and during the claimant's employment, for reduction in costs or increase in profit margin.

61. The claimant commenced early conciliation on 13 November 2019. The Certificate was issued on 13 December 2019. The Claim Form was presented on 9 January 2020.

Claimant's submission

62. The following is a basic summary of the claimant's submission. The claimant argued that there were many conflicts of evidence both between the parties and within the respondent's witnesses themselves. He referred to differences of the evidence of Mrs Caldwell, Mr Wojcik, Mr McKellar and Mr Kirkbright. He argued that the respondent had chosen not to follow basic business processes such as a Job Description, formal targets, a probationary review, an investigation, the dismissal and appeal. He argued that it was not reasonable to believe that there were performance concerns, and no evidence of the dismissal meeting being pre-arranged. The emails from Mr Wojcik were extremely concerning. He had made a qualifying and protected disclosure, and that was the reason for the dismissal, which was automatically unfair under section 103A of the Employment Rights Act 1996. He sought a declaration as to that, and compensation that was just and equitable.

Respondent's submission

63. Mr Millar had prepared a written submission, and the following is a basic summary of that. He accepted that in many respects the respondents could have done things differently, but the question was whether the claimant had proved that the principal reason for dismissal was a protected disclosure. He argued that there was no protected disclosure. Mr Wojcik had vehemently denied saying what had been claimed, but had told the claimant that there had been no falsifying the report. There was no reasonable basis to believe in wrongdoing and the claim fell at that point. In any event, the reason for the dismissal was not the disclosure. The evidence of Mrs Caldwell should be accepted. There was evidence to support her, including from the claimant's own emails and note. The reason for dismissal was the claimant's failure to produce cost savings. There was no evidence of any saving for the duration of the claimant's employment. The exercise had been an eye-opener for the company, and the claimant was only able to construct a claim from the absence of documentation. Had there been an independent investigation into the energy audit report it would have resulted in the same outcome, as it was not falsified in any way. Had Elaine Lamont or Robbie Galloway been led as witnesses the position may have been clearer but Ms Lamont had not remembered the meeting and could not add beyond her written document. The issue was what the reason or principal reason for dismissal was, and that was only the claimant's abject performance. The claim should be dismissed.

The law

64. The relevant section of the Employment Rights Act 1996 are as follows**:**

> **'43A Meaning of "protected disclosure".**
>
> 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.
>
> **43B Disclosures qualifying for protection.**

(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, is being or is likely to be deliberately concealed.

103A Protected disclosures

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 his dismissal is that the employee made a protected disclosure.'

65. The words 'in the public interest' in s 43B(1) were introduced by amendment with effect from June 2013. In ***Chesterton Global Ltd v Nurmohamed [2018] ICR 731,*** the Court of Appeal held that the question for the tribunal was whether the worker believed, at the time he was making it, that the disclosure was in the public interest; whether, if so, that belief was reasonable; and that, while the worker must have a genuine

and reasonable belief that a disclosure is in the public interest, this does not have to be his or her predominant motivation in making it.

66. The issue of what amounts to a 'disclosure of information', was addressed in ***Kilraine v Wandsworth London Borough Council [2018] ICR 1850***, in which it was confirmed that there was no rigid distinction between information and allegations, and that the full context required to be considered. What was necessary was the disclosure of sufficient information.

67. The question of the reason or principal reason for dismissal in such a claim was addressed in ***Eiger Securities LLP V Korshunova 2017 IRLR 115.*** The test is not the same as for detriment, or in discrimination law, but to apply the statutory language and ascertain the reason or principal reason for the dismissal

68. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance on what the reason for a decision to dismiss means was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

69. These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

Discussion

70. The evidence for each of the parties was very different, particularly that of the claimant and Mrs Caldwell. They had entirely different recollections of the interview meetings, and what the role of the claimant was to be. Mrs Caldwell said that it was made very clear that the claimant's primary purpose was to make savings in cost, and that he had promised savings in 12 weeks, that there was low hanging fruit, and that he would more than pay his own salary. The claimant said that he had explained that a continuous improvement process was a change of culture and that savings could not be expected in the first year. He denied making any comment about low hanging fruit.

71. There was a similar difference in the evidence about a meeting on 5 June 2019. Mrs Caldwell said that it was to review his performance for probationary purposes, and he denied that. She said that she had made it clear that the performance was not adequate as no cost savings had been made, and that the focus was on the bottom line, as she put it. He denied that. She said that she had told him that his probationary period would be extended for three months, which he also denied.

72. He said that his focus was on seeking to pass an audit with Marks and Spencer, and that it was heading for a fail which could lose the respondent the contract for East Kilbride. Mrs Caldwell denied that there was any risk of that, and said that his primary role was not that, but to make cost savings.

73. The dispute continued into other meetings, for example that on 1 August 2019. The claimant said that Mrs Caldwell had only stood at the door for up to ten minutes, but she and Mr McKellar said that she had returned about half an hour later, they had sat at a table, and discussed his performance, making it clear that what was needed was cost savings.

74. The claimant denied that a meeting on 21 August 2019 had been arranged with him in advance as a performance review meeting, which is what Mrs Caldwell said. What happened at that meeting was also disputed. The claimant alleged that he told Mrs Caldwell about allegations from Mr Wojcik that she had been one of the directors who had instructed him to

fabricate a report, for example, which she strenuously denied. She said that she had decided to terminate the probationary period because of the absence of cost savings after six months, and that her doing so had nothing to do with an email from him sent a few hours before the meeting making allegations of wrongdoing.

75. Neither of them kept full records. Matters were often discussed at meetings or by telephone only. The email trail was limited. In many ways the question was largely one of which of those two witnesses should be believed as credible, and accepted as reliable.

76. That task was not assisted by it being clear that a letter to the claimant dated 7 June 2019 confirming the extension of probation had not been sent to him, that he did not have any Job Description or similar, that the respondent did have a policy as to whistleblowing, which unaccountably for a whistleblowing case was not in the Bundle which all of its witnesses save Mr Kirkbright could not explain what it provided for, and that it did not produce some witnesses who might have given relevant evidence. It tendered a statement from Ms Elaine Lamont, said to have left the company when that statement was addressed during evidence, who it later transpired in the evidence of Mrs Caldwell is still employed. Whist Mr Millar said that' she did not recall the meeting her evidence was potentially relevant. She could have been asked for example when the document was produced and in what circumstances. It has the unusual heading of "Statement" rather than file note for example. She could also have been asked whether, if it was alleged at the meeting by the claimant that Mrs Caldwell had been one of those who had instructed the faibrivcation of an energy audit she might have recalled that. Mr Galloway was at the second interview meeting but not called. Jennifer Shannon was involved in many HR matters including the appeal but not called. M

77. The timing of matters caused the Tribunal initially considerable concern. The claimant sent an email at just after 8am and less than four hours later he was dismissed. His email had followed emails from Mr Wojcik which on the face of them were concerning. The claimant in the email to Mrs Caldwell suggested an investigation, and did so in a manner that did not

sensationalise the allegations. There was no real investigation at all, instead Mr Kirkbright told Mrs Caldwell that there was nothing in them. He had been involved in the audit report, and could not be said to be an impartial person to carry out an investigation, nor indeed for any later appeal.

Was there a qualifying disclosure?

78. All of the elements of a qualifying disclosure were present save for the disputed issue of whether the claimant had a reasonable belief of there having been a failure to comply with a legal obligation or that the disclosure was in the public interest. Had it been said by the claimant in his evidence that the belief rested purely on the emails sent to him by Mr Wojcik, that would have sufficed. But the claimant's evidence was that the email sent to Mrs Caldwell on 21 August 2019 was based on what Mr Wojcik told him early on that morning, which was firstly that the report had been falsified or fabricated, and secondly that Mrs Caldwell and Mr Galloway had instructed that that be done, or words to that effect. Mr Wojcik denied what the claimant said had been discussed. Mr Wojcik said that he had explained to the claimant firstly that he had not fabricated the report or meant to given such an impression, but had prepared it himself from materials that existed, and secondly he denied that he had said that he had been instructed by Mrs Caldwell and Mr Galloway to do that.

79. This was an important chapter of evidence. The Tribunal was alive to the possibility of a current employee changing his account, but was satisfied that Mr Wojcik gave credible and reliable evidence. He gave evidence in a straightforward manner. He did not simply support all that the respondent did. He criticised it for doing things at the last minute, and as cheaply as it could. He thought that external consultants should have been used for the stage one energy audit, and it would then have been more comprehensive and professional. His explanation in evidence of the meaning of the phrase "made up" was consistent with his email on 16 August 2019 when he said that he did lots of other things and when required only made things up if given enough time. That is a phrase more consistent with making up in the sense of drafting or creating something,

not falsifying it. The Tribunal preferred his evidence on this issue to that of the claimant, partly as it accepted Mr Wojick's evidence but partly also as there were other issues of concern over the claimant's evidence as referred to below.

80. It is for the claimant to prove that he made a qualifying disclosure. The Tribunal concluded that he had not proved that he had a reasonable belief in the allegations made. He had been told by Mr Wojick both before and in particular on 21 August 2019 that the report was not false, but in effect less good than it could have been. It was still adequate and lawful, however. Separately, the claimant had, we concluded, made up the allegations in relation to Mrs Caldwell and Mr Galloway instructing the falsification of the report. For the reasons we shall come to we did not accept that the meeting on 21 August 2019 happened as the claimant argued, nor did we accept the accuracy of his notes, nor did we accept the timings he argued for. We concluded that Mr Wojcik did not make the claim to the claimant in the telephone call that day that the claimant alleged. On the contrary, the was told in effect that the report had not been falsified, and not told anything that might allege instruction to falsify a report by directors. The basis for making a disclosure of such matters to Mrs Caldwell did not exist, and the claimant knew that at that time. He could not have had a reasonable belief in allegations that amount to a qualifying disclosure. It follows that he has not proved that there was a qualifying disclosure, and his claim must therefore fail.

If there was a protected disclosure, was the reason or principal reason for the claimant's dismissal the making of that disclosure?

81. This issue now does not arise but is addressed for completeness. The Tribunal was concerned that there were so many deficiencies of documentation and processes followed in this case which are the responsibilities of the respondent. There was nothing in writing to state exactly what the claimant's role would be, nothing in the way of a job description, targets or similar, and there was a difference of evidence between Mrs Caldwell and Mr Kirkbright even as to the limited terms of clause one of the contract, Mrs Caldwell saying that the reference to

environmental responsibility was an error, Mr Kirkbright saying that it was intended, he being the person who signed the contract for the respondent. The absence of a written record sent to the claimant of the probationary period being extended is surprising, as is the absence of a written record of a meeting being arranged with him in advance for 19 and then 21 August 2019 for a review meeting, and that was enhanced by there being a standard form letter sent for such meetings not utilised. The meeting on 21 August 2019 was some days in advance of the end of the probationary period on 2 September 2019 if that was the date. It was the date given in the letter of 7 June 2019 never sent to the claimant, but that document was at least written evidence of some kind as to what had been discussed, even although its evidential value was limited by the fact that the claimant did not see it. When the claimant's email on 21 August 2019 was received one would normally expect an investigation to be conducted impartially, and for the meeting with the claimant to be delayed pending that. It may only have taken a few days to investigate, and allows matters to be resolved to avoid obvious concerns of a relationship between the making of the alleged disclosure (now found not to be such) and the dismissal. There is then the issue of the meeting on 21 August 2019 and a purported Statement said to have been written by Ms Lamont. When that was first referred to in evidence the respondent's solicitor represented that it was written by Ms Lamont at about the time as a file record, and that she had left the respondent's employment. It transpired that that was wrong, and that she remained an employee. She was not called to give evidence about that document, even to the extent of confirming that she had prepared it herself and when she did so. The document was considered by the Tribunal to be of no evidential weight in those circumstances. What did have weight was the evidence of Mrs Caldwell, against the evidence of the claimant, and there was some other supporting evidence to consider, but not having someone present during the meeting who had taken what was said to be a note of it, when that meeting was disputed and when the note-taker was still an employee of the respondent was very surprising indeed. The decision then led to an appeal which was never heard, before someone who had been involved in the discussions to

dismiss and was quite obviously not an impartial person to hear it. Others were available to do so, and to investigate the allegations.

82. The Tribunal concluded that, had there been a protected disclosure, the claimant had raised what was a prima facie case that the principal reason for the dismissal at least might have been his making a disclosure absent any explanation from the respondent. The long catalogue or unusual events, lack of documentation and failures of procedure taken with the timing of the dismissal within about four hours of what was said to be the disclosure led to that prima facie case.

83. The central issue was then whether the respondent was able to meet the evidential burden of proving that the reason or principal reason for the dismissal was capability as they argued. If not, it would be the making of that disclosure.

84. Mrs Caldwell took the decision, and it is therefore her evidence that is the most significant in this context. Her evidence was that she had made the decision to dismiss because, in her view, the claimant's role was primarily to make cost savings, he had not to any material extent (very limited savings of a few thousand pounds at best were acknowledged), he had a very high salary and had made promises at interview not delivered, and she considered that it was time to call a halt to that.

85. On balance the Tribunal accepted her evidence as to the reason for the dismissal, and preferred her evidence to that of the claimant on disputed points. She gave her evidence in a clear, candid and forthright manner. She said when she could not recall detail and accepted that she should have documented matters more fully. All three members of the Tribunal questioned Mrs Caldwell, and all came to the view that she was credible and reliable.

86. One particular chapter of evidence was important. When it was suggested in examination in chief that the claimant had told her on 21 August that she was one of the directors who had instructed Mr Wojcik to make up a report she was shocked, and horrified. Her reaction was one of genuine

surprise, in the Tribunal's view. Surprisingly she had not read the Bundle fully before the hearing, and said that she saw his notes of the meeting in which that allegation is made happened for the first time during her evidence. The Tribunal accepted that. Her reaction was not, in their view, one of someone who had heard that allegation on 21 August 2019, as he claimed. Her position was also supported by Mr Kirkbright. She did not tell him when she called him after dismissal of any such allegation, and it is inconceivable that she would not have done so if it had been made. It is also supported by clear evidence that Mrs Caldwell was not involved at all in the creation of the energy audit. She had very little contact with Mr Wojcik. He was not under her line management in any way. It was most unlikely that she would be the source of any instruction to him. In this regard the Tribunal did not place weight on the written statement of Ms Lamont for the reasons given, although it did not mention such an allegation. The evidence of Mrs Caldwell was preferred on this point to that of the claimant having regard to the evidence heard as a whole, disregarding that statement. It appeared to the Tribunal that the allegation, strongly denied by Mr Wojcik said by the claimant to be its source in his own evidence and which the Tribunal accepted, was most unlikely to have been said by Mr Wojcik to the claimant on 21 August 2019 as was claimed, and therefore most unlikely to have been said by the claimant to Mrs Caldwell at the meeting later that day.

87. Another important chapter of evidence was in relation to the timings of what happened on 21 August 2019. The claimant's written notes alleged that they had been prepared at 12.25pm that day (the actual date on the notes is 21/6/19 but that was acknowledged to be incorrect), shortly after the end of the meeting with Mrs Caldwell and Ms Lamont when he had been dismissed. He denied having sent the messages by email to Mr Kirkbright timed at 12.22. The Tribunal did not consider that the claimant's eversion of the timing was correct. The email sent to the claimant by Mrs Caldwell is timed at 10.42. Her evidence was that she was at that point in Queenslie. That was where she was based. It was where Elaine Lamont was, who accompanied her in the car to the meeting in East Kilbride. Mr Kirkright was asked where Mrs Caldwell was when she called him after 8

am that day to tell him about the email from the claimant, and where she was when he called back later that morning and he said it was Queenslie. The Tribunal was satisfied that the location where Mrs Caldwell was at 10.42 was Queenslie. It takes about 30 – 40 minutes to drive from there to East Kilbride, and that was not challenged in evidence. It would have taken a few minutes after sending the email to arrange to leave, and collect Ms Lamont. The Tribunal concluded that Mrs Caldwell and Ms Lamont arrived at East Kilbride at around 11.30. There was an initial very short discussion with the claimant and they returned for the main meeting about half an hour later. That means that the meeting started at about noon. The meeting lasted about 45 minutes on Mrs Caldwell's evidence, and around an hour on the claimant's notes and timings. Mr Kirkbright said in his evidence, which the Tribunal accepted, that the call to him from Mrs Caldwell after she had dismissed the claimant, when she asked about his laptop, was about 1pm. The Tribunal concluded that the meeting had been held between about noon and 1pm.

88. The timings given in the respondent's evidence are all consistent, reasonably, with such a timeframe. The timings given by the claimant in his written notes are not. The Tribunal did not regard the claimant's notes as being accurate or reliable in relation to timings, and that the purported time of their being prepared at 12.25 was not correct. They were created later, and possibly much later.

89. That then has consequences for the issue of three emails sent from the claimant's email account to Mr Kirkbright at 12.22 that day copying on messages from Mr Wojcik. The claimant said in evidence that he did not do so, and not only that his laptop had been removed from him by then, but also that email access had been removed from him by the respondent earlier during the course of the meeting, which would have been on his analysis before about noon. On the timings that the Tribunal considered were likely to be correct however, the main meeting with Mrs Caldwell and Ms Lamont was ongoing at that point, having started at about noon. The claimant had read out to Mrs Caldwell the terms of an email from Mr Wojcik from his laptop in the course of it. It was in front of him, and operational,

when he did so. The Tribunal concluded that the claimant had shortly after then sent the emails at 12.22 to Mr Kirkbright at a point in the meeting when discussion on the allegations as to a protected disclosure he made was ending, or had ended, and moving to discussion of his own performance.

90. The conclusion from the foregoing is that the claimant is wrong on suh points of detail, and may have made up some of his evidence, in particular the terms of notes said to have been written at 12.25, what Mr Wojcik told him in relation to Mrs Caldwell and Mr Galloway instructing falsifying reports, that he referred to that in the meeting on 21 August that led to his dismissal, and the removal of email access during the course of the meeting. They were not what happened. Mr Wojcik did not make that allegation to him. The claimant did not make it at the dismissal meeting. He did sent the emails at 12.22. Email access was removed after about 1pm, after the dismissal meeting, and not during it as he had claimed. That accords both with the evidence as to timings above, and common sense. It is normal practice to remove access to emails once an employee has been told of dismissal, not before unless there are concerns that justify doing so.

91. That there are a number of such material matters where the evidence has been held at the least unreliablle if not incredible on the part of the claimant caused the Tribunal to have substantial doubts over the credibility and reliability of the rest of the evidence of the claimant. It also raised very considerable doubts over the claimant's allegations as to evidence not being provided by the respondents. He produced a draft of the Plan A document which he said had been further amended prior to his dismissal, and argued that that was evidence of his good performance. When one graph from it was put to Mr McKellar in evidence, he said that he had not seen it before. The Tribunal accepted Mr McKellar's evidence. Whilst the claimant may have been working on Plan A materials, he did not appear to have addressed his attention directly to providing Mr McKellar with the details he sought a to cost cutting. That is why there was no further email

evidence on that matter, or others, not because they had been withheld by the respondent as the clamant alleged, in the Tribunal's judgment.

92. The Tribunal accepted Mrs Caldwell's evidence on the interview discussions, and that they had referred to the role in cutting costs. It also accepted her evidence that there had been a performance review meeting for the probationary period on 5 June 2019. That had been set up in general terms by the earlier email on 23 May 2019 from HR to the claimant which extended the probation to 10 June 2019, although a date for the meeting not then given. It was more likely that a meeting shortly before the end of the probationary period on 10 June 2019 would be that review meeting. The claimant did not after it have an increase in salary, which is consistent with the probationary period being further extended. The Tribunal did not think that the explanation by the claimant of Mrs Caldwell telling him in effect to wait and he would be seen all right was likely to be right. He alleged that Mrs Caldwell had told him about the situation when she had been provided by the respondent with a new car, said that she could not afford the extra tax, and been told by Mr Galloway that her salary would increase to cover the additional tax on it. When that was put to her in cross examination she was surprised about it, and said that it related to a family issue, inferring that she felt it private. It did not appear to the Tribunal that her reaction was other than a genuine one, and that she would not have volunteered that form of explanation when she genuinely regarded it as a private matter, such that it was most unlikely that she had given the claimant the explanation he contended for. It concluded that that was a further matter that the claimant had made up. The reason that the salary was not increased was not such a discussion as he alleged, but because his probation had not been passed and was being extended for three months. The Tribunal concluded that it was also more likely that Mrs Caldwell had told him at the meeting that the need on his part was for the production of actual cost savings, and that his probation would be extended specifically to 2 September 2019.

93. It was very surprising that there was such a substantial difference of evidence of what was the most significant part of the claimant's role. Mrs

Caldwell said that it was saving cost. The claimant said that it was to meet Plan A. That difference was at least partly as the respondent did not provide any Job Description. Putting matters simply they ought to have done so. It is also very surprising that as the claimant kept not providing the performance Mrs Caldwell wanted, with savings achieved rather quickly, and her oral instructions to him about cost saving did not lead to that, she did not email him to spell that out clearly as a record of her having done so. That is so particularly on 10 July 2019 when he sent an urgent email about the environmental aspect of Plan A, and Mrs Caldwell one of those who received it did not reply saying forget that focus on cost saving or words to that effect. It is also very surprising that she or HR did not send the extension letter dated 7 June 2019 which had been prepared, or something in writing about the 21 August review meeting in advance of that, including using the template HR prepared to do so earlier.

94. But there is material support for Mrs Caldwell on the issue of his performance from other sources, including the evidence of Mr McKellar, the evidence of Mr Kirkbright, and the email from the claimant himself of 2 August 2019 when there was recognition by him of the need to show cost savings directly. His use of the word “growing” for frustration as to lack of impact of improvements on the bottom line indicated that that frustration had started earlier, and was not new on that date as he claimed in his evidence.

95. Mr McKellar was clear in his evidence that the claimant had been told about the need for cost savings at a number of meetings. His evidence on the meeting of 1 August 2019 was consistent with that of Mrs Caldwell, they both spoke to a second part of the meeting when they were all sitting at a table. It appeared to the Tribunal very likely that their evidence on that meeting was correct, and that the claimant’s evidence (that there had not been that second part of the meeting and that cost saving was not made clear as the priority) was not. That was also supported by the email trail in July 2019 when Mr McKellar had made it clear that he wanted more than proposals to discuss, but savings to check. He had not received that by 1

August 2019 and it would be common sense to raise that with him then, as the Tribunal find did occur.

96. Mr Kirkbright also supported the evidence of Mrs Caldwell about discussions before any disclosure was made about whether to terminate the claimant's employment, and on the circumstance of 21 August 2019. His focus had been on looking for evidence of cost savings. He reviewed the figures produced on a daily, weekly and monthly basis, but saw no evidence of any change. He expressed his views to Mrs Caldwell initially at the time of the first probationary review, and it seems to the Tribunal most unlikely that she did not share the concerns by the time of the second review approaching. It is also clear that there was an overall focus on saving cost in the circumstance of a tendering exercise completed in 2018, before the claimant started working for the respondent, involving a very large initial payment and only slightly smaller balance being paid over five years. The total was £2 million. That obviously would lead to a focus on seeking to improve margins, and was the background to the employment of the claimant. His evidence that the need for him to focus on savings on costs was not raised until 1 August 2019 was not credible in that context.

97. The claimant in his submission sought to rely on a wider point, to the effect that the respondent did not have an appropriate attitude towards its environmental duties, did not support them, and that there was a risk of them breaching their duties in future. That was not however the disclosure that he made in the email to Mrs Caldwell, nor was it pled in the Claim Form, and nor was it the basis on which he described the disclosure he relied on in his evidence. It had the hallmarks of an argument arising from a concern that the primary arguments were not succeeding, but in any event the Tribunal did not consider that there was any basis for such an argument to be made. Whilst Mr Wojcik criticised the respondent to an extent for not attending to matters as he wished, and a general lack of support, the stage one ESOS audit was completed, and the stage two audit was conducted by external auditors, such that there was no evidence of any failure to comply at all.

98. The claimant in submission also sought to rely on section 98 of the Employment Rights Act 1996, but that was not an issue in the case, and he did not have the necessary service to make a claim of unfair dismissal under what is in fact section 94 of the Act.

99. Whilst on balance Mrs Caldwell's evidence was accepted, it is right to say that there are many issues which caused the Tribunal concern. The lack of documentation was extensive from the interview to the lack of an appeal. The level of ineptitude in how matters were handled was at a high level. There was a whistleblowing policy but not before us, and even Mrs Caldwell did not know what it provided for. For that to be the case in each respect, in what was a whistleblowing case, was astonishing. There was a failure to recognise the impression that dismissing on the day of an email with purported disclosures would give. Not all of the evidence of Mrs Caldwell and Mr Kirkbright was the same – for example the former said that the decision to dismiss was made before 19 August and discussed with Mr Kirkbright but he said that that discussion was not one with dismissal being "absolute". It was heading towards that, but not there at that point. These and other points of detail were not however so significant differences that the Tribunal concluded that it would not accept Mrs Caldwell's evidence. It tended to indicate simply that the evidence had not been rehearsed between them.

100. The emails contained comments as to a lack of proper support on environmental matters at the very least, as well as issues that gave the impression of a lack of compliance. They were such that having an impartial investigation conducted under the policy that existed and was only sketched out before us in the evidence of Mr Kirkbright should have taken place. Mr Kirkbright could not have been the one to do so, as he could not be impartial having been involved materially in the stage one audit. The whole point of an impartial investigation is to find out what happened, and to be seen to do so in a reliable way. That is not done when someone in effect marks their own homework. That is what happened here when Mr Kirikbright spoke to Mr Wojcik and then told Mrs Caldwell that there was no basis in the allegations. But despite that, the

Tribunal did not conclude that Mr Kirkbright's evidence should not be accepted. As a matter of fact there was nothing in the allegations as to the false creation of the report, and he did know that. His evidence was supported both by Mr Wojcik himself and the evidence that the stage two audit was carried out by external consultants who in effect validated the stage one report.

101. The Tribunal did consider whether the absence of documentation meant that the respondent's evidence should not be accepted. It had in mind the possibility that the explanations given by the respondent's witnesses were made up, in order to cover for these matters. That was the essence of the claimant's case. The Tribunal thought that the possibility of that was very small. For it to have been successful at least Mrs Caldwell and Mr Kirkbright would have had to predict which questions would be asked by the Tribunal, and prepare answers that did so which were consistent between them to the degree that it was. That included for example details such as where Mrs Campbell was when she sent the email to the claimant at 10.42 on 21 August 2019. The Tribunal was satisfied that the answers given were reliable, on that and other points of detail, sufficiently so that the possibility of there having been a conspiracy to mislead the Tribunal was a very small one. As already stated, the evidence between those witnesses was not so similar as would indicate collusion between them. One can never exclude such a possibility, with witnesses giving perjured evidence to cover their tracks as it were but the Tribunal was satisfied that that was most unlikely to have happened in light of the evidence it heard.

102. Mrs Caldwell was asked whether she recognised that dismissing in that timeframe may appear suspicious. She said that she did not, as that was not why she did so. Her answer betrays perhaps a lack of appreciation as to whistle-blowing issues, and she admitted to a degree of naivety in relation to the lack of documented evidence. It was accepted in submission that lessons would be learned from the case. It was not because of the respondent's processes or record keeping that we found for them, but fundamentally because Mrs Caldwell was an honest and reliable witness, as we found her to be.

103. We were therefore satisfied on the evidence given by Mrs Caldwell, and from the support for that we have described above, that the principal reason for dismissal was not any protected disclosure if that were held to have been made, but her views about the lack of performance against what she thought the claimant should have been doing as his priority, namely achieving material savings in cost, and there having been insufficient evidence of him doing so.

Conclusion

104. We answer each of the issues one and two above in the negative.

105. In light of that, we dismiss the Claim.

Employment Judge: **Alexander Kemp**
Date of Judgment: **04 June 2021**
Date sent to parties: **04 June 2021**