EMPLOYMENT TRIBUNALS

Claimant: **Mr. E. Huang**

Respondents: **(1) Dplay Entertainment Ltd**
(2) Discovery Corporate Service Ltd
(3) Ms. A. Girdwood

London Central **6-10, 13,14 March 2023**
Panel discussion 15 March

Employment Judge Goodman
Mr R. Baber
Mr D. Kendall

Representation:
Claimant: Anthony Korn, counsel
Respondents: Anya Palmer, counsel

RESERVED JUDGMENT

1. The first respondent unfairly dismissed the claimant by reason of redundancy.
2. The claim of dismissal for making a protected disclosure does not succeed.
3. The claims of detriment for making a protected disclosure do not succeed.
4. Remedy will be decided at a further hearing on 3 July 2023.

REASONS

1. The claimant was dismissed by the first respondent by reason of redundancy on 23 September 2022. He has brought claims for unfair dismissal, and for dismissal and detriment for making a protected disclosure.

2. The issues were explored at a case management hearing on 31 May 2023. The final list was agreed on 15 February 2023 and is appended to these reasons.

Evidence

3. The tribunal heard evidence from the following, in person except where indicated:

Eugene Huang, the claimant
Kelly Cole, a solicitor, who is Group Vice President for Employment Law and Immigration, covering employment law issues outside the United states.
Hannah Lucille, Director for P&C, employed by Discovery LLC, based in Washington state, USA. She gave evidence remotely, from Seattle
Amy Girdwood, third respondent
Andrew Georgiou who heads Discovery's sports business outside the United states. He gave evidence about a possible alternative vacancy for the claimant.
Alyson Jackson heard the claimant's appeal against dismissal. She is executive vice president of Global Content Supply Chain, based in London
Shane Shrader is Senior Vice President of Internal Audit. He gave evidence remotely from New York about investigations made in the months leading up to the claimant's dismissal.
Avi Saxena was the claimant's line manager, and made the decision that his post was redundant. He gave evidence remotely from Seattle.

4. Both Kelly Cole and Amy Girdwood filed revised witness statements on day three of the trial, after hearing the claimant being cross examined the previous day. The changes concerned discussions they had had in the summer of 2022, and so the content of the protected disclosure conversation.

5. There was a hearing bundle of 597 pages on liability issues. We read those to which we were directed.

Conduct of the Hearing

6. This was a hybrid hearing, with the panel and advocates in Victory House, and some witnesses remote.

7. It had been listed for 10 days on all issues, but the parties wanted to adjourn remedy to a later date to consider what evidence and submissions on remedy would be necessary in the light of the tribunal's decision on liability for the claims, and they did not expect to be ready for that within the time allocation, despite the claimant submitting a supplementary statement on remedy issues on 9 March. They also asked that the panel not deal with Polkey issues (if relevant) until a remedy hearing. A contingent hearing was therefore set for remedy on 3-4 July 2023.

8. The first day was spent reading in. The hearing of evidence would have concluded in the next four days but that the last witness was on holiday in Costa Rica in the first week of the hearing, and Costa Rica is a state which has not confirmed that evidence may be taken from its territory. His evidence was therefore taken on the afternoon of the Monday of the following week when he had returned to the United States, which does allow evidence to be given to a foreign court. Submissions were heard on Tuesday 14 March and the tribunal then reserved judgment.

Findings of Fact

9. The first and second respondents, Dplay Entertainment Limited and Discovery Corporate Service Limited, both based in the UK, belong to a group of companies under Discovery Inc in the United States. Discovery's business is broadcast media.

10. The claimant was employed by the first respondent on 1st July 2017, and first worked for their Golf TV.

11. In late 2020 he transferred to become senior vice-president, Digital Product and Technology,

leading Global Partner Integration, a group working on set-top box versions (STB) to deliver Discovery+ to a number of subsidiaries globally. This team worked in parallel with the client engineering team that developed the Discovery+ product on standard platforms. A parallel team worked on hosted web applications (HWA). Both reported to Avi Saxena, Chief Technology Officer of Discovery Communications LLC, who oversaw Discovery's global digital business.

12. The second respondent company, Discovery Corporate Services Limited, employs most of the back office staff for the UK business, including Human Resources, which is known within Discovery as "People and Culture" (P& C) rather than HR. This company employs the third respondent, Amy Girdwood, who is Executive Vice President of P&C (HR). She is based in London and has worked for the group for over 28 years. Other than a brief meet and greet conversation when the claimant joined in 2017, she and the claimant did not know each other.

The 2020 whistleblower SK allegation and the Amy Girdwood Letter

13. The story with which this tribunal was concerned begins in January 2020, when the respondent received a detailed e-mail from an unknown whistleblower stating that the claimant and an executive assistant, SK, were having an affair which was said to have "elements of abuse of power and control". (The full name of SK was used in the public hearing. As she did not give evidence, and as her identity is not material to the issue, her initials only are given here in order to protect her privacy as a married woman accused anonymously of an illicit affair, which in our finding outweighs the usual requirement of open justice). It was alleged that SK had visited the claimant's apartment, and had travelled abroad to see him when he was in the United States. The message gave details of her driving him to the airport for foreign travel, that he was trying to help her buy an apartment through a real estate company of which he was director, and that they "had even visited a fertility clinic together" during office hours. SK was said to be sometimes adamant that the affair was consensual, but at other times found him controlling. They had used Signal on SK's work phone for confidential messaging, but the claimant had recently asked her to use a personal phone to contact him, so messages could not be connected to work. Nor was he now taking her to see events connected to corporate hospitality.

14. Discovery has no policy against members of staff being in personal relationships with each other, provided it is in the open if they are in the same reporting line, but in view of the suggestion of abuse, Kelly Cole was asked to investigate. She saw SK first. SK bluntly denied having an affair, and said that this email 'felt malicious'.

15. Next Kelly Cole saw the claimant. She did not show him the email or tell him they had interviewed SK, but she did put the main points to him. She opened by saying this was about an allegation of a personal relationship with SK, made by someone concerned about her well-being. He denied it and said (according to the meeting notes): "the reason this is surprising is late last year … November/December, I received an unsigned letter at home address from Amy Girdwood not on company stationery. The letter alleged I was having relationship with someone at company. It didn't come to my home address on file with Discovery … it came to my London address. It said that if it (the relationship with someone at work) stops this will go away. The letter gave her personal e-mail and phone number. Said to keep it off work resources." He said he thought that the Executive Vice President of HR (Amy Girdwood) sending him this could not be official, and he was not sure where it came from. Asked if he kept it, he said "I did have a copy", but he was not going to share the letter unless he was compelled to do so. Asked why he had not reported it, he said it was because Discovery's code of ethics said to report such matters to senior HR, and the letter came from HR. The claimant went on to say that the only reason he could think of why someone would make it up is that he could be being thrown under the bus, just being forced to leave. They then went over the detail of the whistleblower e-mail. He denied going to a fertility clinic, and agreed a lot of PA's had

access to his diary. He was asked about some emails he had exchanged with SK the previous summer. Some of SK's emails to him were “more than just friendly”. The claimant agreed that he was at fault for not closing that down. Returning to the letter he said he had received at his London address, he said he had thought it was a crank letter and had no reason to throw Amy Girdwood under the bus on this. He wanted to clear his name.

16. A week later Kelly Cole told those concerned that the whistle-blower allegation was treated as unsubstantiated and the investigation would proceed no further.

17. The letter that the claimant said had been delivered to his London address late in 2019 has never been disclosed. According to the notes of a meeting in March 2020 with Shane Shrader and Kelly Cole, who were trying to see if they could find out more about the letter, the claimant said he could not produce it because it had been destroyed. In this tribunal however, he said the note they made of what he said is wrong, and that the true position is that he had not destroyed the letter, but it has been mislaid and he is still not able to find it. His evidence is that although the letter itself was not signed, he firmly believes that it came from Amy Girdwood herself.

18. Whether there was a letter, and if there was, who sent it, remains a mystery. The tribunal does not have to make findings about this, but it is relevant background to what was said or understood in the claimant’s disclosure, 18 months later, in July 2021.

New Confidentiality Terms

19. By July 2021, the claimant was upset about some new confidentiality terms. The claimant’s contract of employment contained a provision for keeping company business confidential. Breaches of this could be disciplinary matters. Discovery was rolling out its product, Discovery+, direct to consumers in 2021, and with a view to reinforcing the importance of confidentiality, drafted a more extensive agreement which was sent to all employees, including the claimant, at the end of February 2021. The claimant saw this as a one-sided attempt to change his contract to increase the grounds on which he could be dismissed. He complained about it to Hannah Lucille (of HR) on 4th March 2021. She referred him to the legal department . He had a discussion with Kelly Cole on 7th May, when he asked rhetorically if they would be cutting his salary next. Then it went to Savalle Sims, general counsel , who spoke to him on 14th June. He discussed it with his line manager, Avi Saxena, at their regular monthly meeting on 21 June. All told him that there was no material change in his contract terms, and that he was required to sign it. It was also suggested that as his team were all being required to sign he should show leadership by signing it himself,. He remained dissatisfied. He asked Savalle Sims and Avi Saxena: “in the event that I do not sign... what actions will Discovery take”. Looking for a solution, Hannah Lucille from HR prepared a document setting out the before and after provisions, side by side, and sent it to him on 8 July, asked what he wanted to amend in the new terms. He replied that he was researching the question. Chased for a reply by Hannah Lucille on 26th July, he said that he was still reviewing it. He never did sign.

Fertility Clinic Emails

20. On 24th June 2021 the claimant received an e-mail (at his company account) from a UK based fertility clinic, which linked his name with SK. He denies any previous contact with the clinic. He took a screenshot and then deleted the email. He got a similar message from a different clinic on the 10th July. He became concerned that someone was using his personal information to raise enquiries with fertility clinics in order to harass him, and that this could only be someone who knew about the January 2020 whistleblower email. On 11th July he asked Kelly Cole if he could speak with her urgently. They met next day, but in the meantime he received a third e-mail from a different fertility clinic, again appearing to respond to an inquiry he had made.

The protected disclosure conversation

21. There are conflicting accounts of what the claimant said to Kelly Cole on 12th July.

22. According to the claimant, he said the company e-mail and his personal mobile phone number had been used to contact fertility clinics, naming SK. This was unauthorised use of his personal data. He was not responsible for these emails. He believed Amy Girdwood was responsible. He also believed it was criminal behaviour as unlawful harassment, and a breach of his data rights. He was going to use his subject access right under the GDPR to get the IP address.

23. Not all this account can be accurate, as the claimant did not know at the time that his personal phone number had been given to any clinic - he only found this out on 6th of August, in a reply from one of the fertility clinics.

24. After speaking to the claimant, Kelly Cole telephoned her manager, Savalle Sims, and followed it up with an e-mail that evening with bullet points of the content of her discussion with the claimant, which she relies on as evidence of what the claimant had said to her. This largely reproduces the claimant's points, namely emails from fertility clinics which he had not signed up for, linking his name and that of SK , and that he was going to make a subject access request to see what he could find out. Kelly Cole did not record that he thought Amy Girdwood was behind it. She does say: "he believes this is work related harassment given historic allegations made against him about his relationship with (SK) and the specific fertility trips referenced in those allegations. All of which he denied", a reference of course to the January 2020 whistleblower email. In the final bullet she said: "he has asked that we not involve P&C given his historic concerns". Not involving P&C because of historic concerns could be a reference to the unseen letter he had spoken about in February 2020, which he believed came from Amy Girdwood.

25. We know that on or around the 12th of August 2021 Amy Girdwood, while on holiday, had a call from Fabienne Clermont (in Legal) to update her about the claimant, namely, according to the note she made at the time, that he had refused to sign the confidentiality agreement, that he had received emails from fertility clinics about a PA (executive assistant) which he wanted to investigate, and that preliminary investigation showed that two EA's had been pinpointed contacting fertility clinics, and there was a plan to interview them. This follows Kelly Coles's meeting, but does not mention that Amy Girdwood herself had been named, as might be expected if she was being updated on the claimant's concerns.

26. By the time this conversation took place, the claimant was being told he was at risk of redundancy because of a proposed restructure (see on).

27. We concluded the claimant did *not* on 12 July say explicitly that Amy Girdwood was responsible. He did link the fertility clinic emails with the January 2020 whistleblower, and he must have reminded Kelly Cole that he did not want senior HR to know, because of what had been said in the unseen letter. At best he hinted at it, but, in our finding, she did not take the hint, and did not recognise that he was saying Amy Girdwood had maliciously named him and SK in false enquiries to fertility clinics.

28. Kelly Cole asked to see the emails. The claimant sent them, together with an article from a U.S. law firm's website on how an employer can track down a harasser from emails, starting with tracing the IP address. As she was clearing her desk to go on holiday, Kelly Cole copied her note of the 12 July conversation to Fabienne Clermont, who was covering her absence.

29. The claimant made subject access requests to two clinics, and another to MailChimp, a third party connected with the clinic messages. He got another unsolicited e-mail on 5 August. On 6th August he discovered that a clinic had been given his personal UK mobile, information which is not held on a Discovery system. He was not able to obtain any IP address from the clinics.

30. The respondent meanwhile had started an investigation. About 50 staff had contacted fertility clinics from Discovery systems in the weeks leading up to the report. Two members of staff had contacted more than one of the clinics which had contacted the claimant. Neither of them had contacted all of them. This preliminary review must have been done by 12 August, when Fabienne Clermont spoke to Amy Girdwood.

31. Shane Shrader was asked around 19 August to follow up these preliminary checks, and he was given details of the January 2020 whistleblower investigation.

32. The prompt for this follow up was an email the claimant sent on 17 August, as part of the redundancy consultation that had now begun. In point C he asked: "why all this was happening", ('all this' being the redundancy proposal), and what was being done about:

> "1. apparent serious criminal behaviour by a senior Discovery executive against me, which is continuing; and,
> 2. HR and Legal's steadfast refusal to get to the truth of it by independent investigators, but instead of retaliating against me reporting it to HR and Legal".

In this way he made explicit, in point 1, that he thought a *senior Discovery executive* was responsible for the harassment or breach of data use, without naming her, and in point 2, that the redundancy was retaliation for his reporting of the emails. It was not however clear to Kelly Cole what he was saying. She asked (in reply to his 17 August email) what he meant by C1; was it "the matters we discussed on 12 July or something else?". Even when he replied on 20 August, he only alluded to the missing mystery letter, quoting "Discovery will not protect you" from it, while complaining that she had called the fertility clinic emails "spam", but he did not name Amy Girdwood. However, it was now that the "penny dropped" as she put it, and Kelly Cole informed Amy Girdwood that the claimant believed she was behind the fertility clinic emails. We make this finding aware of the timing of the supplementary witness statements of Amy Girdwood and Kelly Cole, and accepting the explanation given for the greater detail of when they discussed the claimant in July and August.

Discovery's Investigation

33. Shane Shrader met the claimant on 26th August 2021. They reviewed the claimant's own progress to date. The claimant attributed the start of the fertility clinic e-mails to his opposition to signing the confidentiality agreement. He also said he thought Amy Girdwood was the author of the mystery letter in December 2019. Next day he sent him the replies he had received from the clinics.

34. On 15th September Shane Shrader sent the claimant a draft text to use to ask the clinics for the IP address of whoever had signed him up for emails. Unlike the claimant's own request it made specific reference to chapter and verse of GDPR. The claimant never replied, and he did not use the draft. He says he considered he had already done this.

35. On 16 September Shane Schrader met Amy Girdwood. She told him she had nothing to do with any letter to the claimant, or the fertility clinic emails. He did not meet the two EA's who had accessed more than one of the clinics, as none had contacted all the clinics that sent unwanted emails to the claimant.

36. Shane Shrader, perhaps not knowing that the claimant had been dismissed on 23rd September, and would not be getting emails, thought he was being deliberately obstructive about getting IP addresses. He said the claimant had not responded to follow up, though as we were not shown any follow up emails he had sent, he may just have meant he did not hear back from his 15th September email.. In October 2021 he closed off the investigation by preparing a fertility clinic communication review in which he concluded that they were not able to substantiate or identify who had signed up for the e-mail correspondence using the claimant's e-mail address.

Redundancy

37. On 3rd August 2021, so a week after Hannah Lucille's chaser to the claimant about signing the confidentiality agreement, and three weeks after his meeting with Kelly Cole about the fertility clinic emails, the claimant emailed Abby Saxena and Hannah Lucille to inform them that Patrick Healy, who managed the STB team, and reported to him, intended to resign. He had specifically cited "the toxic leadership environment that now exists in D2C that is taking a toll on his mental health - and his view that the STB team is dependent on other teams (e.g. HWA and the video player team) that "are not collaborative nor accountable." The claimant added that he had heard the same comments from other people in his team ,and suggested they met to discuss succession planning. On 9th August Patrick Healy submitted his formal resignation. He said the HWA team had promised a performance product since January 2021 and "as of August we still do not have something we can launch... despite several code releases". Without a code base specific to STB he could not see the current situation improving. It was having a negative impact on his health. He also wanted to reduce his notice from six months to three.

38. Avi Saxena's response to the claimant was that he was troubled by the disconnect between the STB and HWA teams on tech topics. He would "own fixing this".

39. His way of fixing it was to move the claimant's STB team to report to David Markley, who already managed the HWA team, so there would be less infighting between the two teams, and they would be working alongside the other platform teams. This would force the teams to communicate. It would however leave the claimant without enough to do to justify his senior vice-president role, as vice-president would be the appropriate level for his remaining responsibility. He consulted Hannah Lucille on how to handle this having regard to UK law. She sent him a script for a first consultation meeting with the claimant on 9th August, which set out how he was likely to reorganise the work, saying it was possible the claimant's role would be eliminated, but no final decision had been made, and there would be a consultation process.

40. In an exchange about the fine tuning of this script, Avi Saxena added a PS: " I wasn't on it this morning, but there was another meeting on Claro STB and we learned that Eugene COMPLETELY dropped the ball on a very important discussion with them. Apparently, that meeting completely blew up". Avi Saxena initiated a "celebration of error " (COE) process on the 17th August, by which Discovery was to review what had occurred so as to identify how to improve affiliate integrations in future. We are told this learning from mistakes is a standard Discovery procedure which can take some time.

First Consultation Meeting

41. The first redundancy consultation meeting took place on the 12th August by Zoom. The claimant was told that Patrick Healy's STB team was to move from the claimant to another, and his reduced role meant that he was at risk of redundancy. A formal at risk letter was sent to him on 16th of August telling the claimant there would now be a period of consultation when they would explore

ways of avoiding the need for his redundancy, inviting him to make suggestions or proposals on how to avoid redundancy. They would also look at suitable alternative roles for him.

42. The next meeting was on 24th August. The day before, the claimant was sent a slide deck setting out the company's proposal. The rationale for the change was that the HWA and STB teams were not working together in a coordinated way, and the sequential development of features impeded delivery. Patrick Healy's resignation meant they could move the STB team to sit with the front end team. They would also consider bringing video playback for all platforms under the GVP team. That would leave the client with technical account management only, not enough to justify a senior vice president. They did not manage to cover all the respondent's presentation in the meeting itself, because the claimant had so many questions about the process. He asked about recording the meeting, the appeals process, how it would impact his directorship of one of Discovery's subsidiaries, and complained that the meeting was being held outside his normal working hours. He challenged whether Patrick Healy's resignation was in fact the cause of the restructure that put his job at risk, suggesting there could not have been enough time to review the possible solutions to the technology and organisation issues.

43. Following that meeting the claimant saw Shane Shrader about investigating the fertility clinic emails (26th August), and on 13th September Hannah Lucille sent the claimant a link to the internal job careers site.

The Grievance

44. On the 14th September, the day of the next consultation meeting, the claimant raised a formal grievance with Kelly Cole (legal) , and also sent Avi Saxena his counterproposal for the tech problems.

45. The formal grievance raised three concerns. The first was an assertion that he was being automatically unfairly dismissed for making a protected disclosure contrary to section 103A of the Employment Rights Act 1996, based on his internal complaints about the fertility clinic emails, which had included an allegation that a specific employee, Amy Girdwood, or another employee, had been behind the emails, which represented stalking and harassment, "two criminal violations of UK law". They had unlawfully used his personal data and then engaged in stalking and harassment activities. The investigation had been unacceptably delayed and was not yet complete. The second concern was that there was unlawful discrimination on grounds of race, by reference to the Equality Act 2010 and title V il of the Civil Rights Act of 1964 in the US, in that the reorganisation announced on 3rd September had resulted in all bar one of Avi Saxena's direct reports being, like him, of ethnic Indian origin, assuming the claimant was to leave. The probability of achieving this outcome without a directed effort was, he said, less than 2%, and he asserted bias and discrimination in Discovery's employment practices. The third matter of concern was that he was being unfairly dismissed under section 98 of the Employment Rights Act 1996: this was not a genuine redundancy situation, but a sham, and was because he refused to sign new confidentiality terms, or because of his race or ethnicity. The proposed business plan contained numerous contradictions; ongoing internal audits into inefficiencies in the STB development process had not yet been completed. Alternative vacancies had not been properly explored. The integration having already been drawn up showed that the consultancy process was predetermined. He wanted the redundancy process to be terminated while his grievance was being handled.

46. Kelly Cole replied shortly before the meeting that the proper forum for discussion of his concern about the fairness of the redundancy process was the process itself. He was to attend that afternoon's meeting.

47. She did not mention the discrimination allegation, but two days later she referred the discrimination allegation to the Ethics and Compliance team to investigate. Eventually the team provided a short report on 9th November 2021 saying: "it is not possible to draw conclusions based on a statistical analysis applied to such a small sample", and that the specific reasons for his redundancy would be considered at the redundancy appeal hearing, which was taking place three days later.

Second Consultation Meeting

48. At the second redundancy consultation meeting on 14th September Hannah Lucille said that this meeting was to talk about alternative solutions. The claimant immediately objected that he had not yet walked through the whole business case from the last meeting. They had looked at the rationale, but not proposed changes. Avi Saxena began to explain. The claimant interrupted that he wanted to know what meetings had been held to discuss reorganisation between 6th and 12th August, between Patrick Healy resigning and the claimant being told he was at risk. He disputed that there was a business case for the proposed changes. They then discussed the specifics of partner integrations and the relevance of HWA. He also queried why his remaining role would not be at SVP level. The claimant then produced his counter-proposal (a slide deck) and started to read through it. There was dispute on whether he should have sent it ahead of the meeting. The transcript of the discussion shows Avi Saxena asserting that all the difficulties the claimant was discussing arose from the two teams being separated, and disputing the claimant's the proposal to use open source framework as an alternative, because he did not want third party dependency. Hannah Lucille intervened to move the discussion along. She asked the claimant to e-mail the rest of his slides and wound the meeting up. She urged the claimant to apply for alternative roles, though adding that they did not seem to have any suitable alternatives, as only vice president roles were vacant at the time.

Alternative Vacancies

49. There was a potential vacancy at the time in Golf TV, where the claimant used to work before being promoted. A VP level team member was leaving, and a senior manager in London mentioned to Andrew Georgiou, the recently appointed leader of Golf TV, that the claimant might be looking for a job. He asked Amy Girdwood, around 16th or 17th September, whether the claimant might be available, saying he understood the position was "delicate". He does not remember what Amy Girdwood said. He was already discussing with Liz Goulding, Discovery's product lead for sports products, the likely future of Golf TV and whether they needed a consultancy firm to provide extra help, and he and Liz Goulding concluded that as one of the likely outcomes was to close Golf TV entirely, it would not be helpful to add a temporary team member at this stage. So no offer was made to the claimant. Mr Georgiou says he had never worked with the claimant, and did not know that he had made complaints about the organisation. Having heard his evidence and read the contemporary emails we concluded that Golf TV's position was indeed complicated and uncertain at the time, and that was more likely to be the reason than anything Amy Girdwood might have said about the claimant.

50. There were no SVP level alternatives on the internal website. The claimant did not ask if any SVP vacancy was available but not advertised. The respondent says there were some sales and marketing roles but the claimant did not have the relevant experience. They did not ask for his CV, but the tribunal has seen it and it does not suggest relevant experience. Much of the claimant's previous career was in US government roles.

51. After the meeting on the 12th September the claimant sent Avi Saxena his slide deck. Three days later Avi Saxena responded that having considered and thought it through, he still preferred his own solution, with engineering front end teams to sit together to build efficiency and reduce silos.

This was the appropriate way forward. The claimant replied that Avi Saxena had fundamentally misunderstood, in particular that open source presentation did not mean involving third parties.

Dismissal

52. The claimant and Avi Saxena were due to meet again on 20th September. The claimant however sent a message that there was a medical emergency with his mother. He had to clear the day, and would update about the rest of the week. Hannah Lucille's emails show that they planned to tell the claimant at that meeting that he was to be dismissed by reason of redundancy. If they were "unable to catch him live by Wednesday", they would consider alternatives. On 21st September the claimant updated Avi Saxena: "I'm going to be touch and go all week this week. Although she has been discharged from hospital there is a follow up appointment with the doctors tomorrow (Wednesday)". He would update availability. The claimant was then sent a zoom meeting invitation for Wednesday 22nd September at 3:00 pm.

53. The claimant cancelled the meeting without explanation. Avi Saxena, in Seattle, seems to have decided that the claimant was avoiding him. He and Hannah Lucille had been told the claimant was in other meetings that day, though for both this was hearsay, and a review of the meeting scripts shows extremely brief involvement of the claimant in any meeting. Avi Saxena e-mailed the claimant to say that he was sorry they had not been able to have a conversation, but it was important to communicate his decision following the recent redundancy consultation process. He had decided that his role would be eliminated and his employment was to end onThursday 23rd September 2021. He was given some specific instructions about handover. Hannah Lucille sent a formal dismissal letter with an account of his final payments, including six months in lieu of notice. Avi Saxena reviewed the drafting of an announcement about organisational update with her, which went out on Friday, saying Patrick Healy and his team were moving to the overall front end team, so as to achieve technical efficiency in delivery with HWA. The claimant was leaving, and Satish Annapareddy was to be interim leader for the affiliate integration.

Appeal

54. On 30th September 2020 the claimant appealed his dismissal in a 12 page letter. Summarising, he said the real reason for terminating his employment was his making a protected whistleblowing claim that "implicated serious and potentially criminal wrongdoing by Amy Girdwood or other persons employed by Discovery". The timing of events, substantive flaws in the business case, and procedural flaws in the consultation process, showed the redundancy was a sham to hide that main reason for dismissal. Additional reasons for his termination were his refusal to sign the confidentiality agreement, and race discrimination. There followed a detailed analysis of the timeline, an assertion that separate HR processes were not being run on the redundancy and his whistle blowing, and that he expected "Discovery's true motive for my dismissal would be revealed in the employment tribunal, as per the standard set forth in Royal Mail Group Limited v Jhuti (2019) UKSC 55", quoting: "the court's duty to penetrate through the invention rather than to allow it also to infect its own determination". The redundancy was an invention. There was enough evidence to believe that "Amy Girdwood would seek to take action to terminate my employment given the existence of the original letter that was sent to me on the 9th December 2019 and the subsequent whistle blowing allegations on 12th July 2021 that will give her reason to retaliate". She was "a person in the hierarchy of responsibility above the employee" (a formulation taken from Jhuti) making a decision on termination, Avi Saxena. He was also aware of an alternative proposal commissioned by JP Perette which he had not taken into account. Hannah Lucille had tried to rush the scheduling of the meetings. He was forced into a final meeting when his mother was ill. He then set out the legal basis of his whistleblowing claim by reference to UK case law. This is followed by discussion of the confidentiality terms and the threat of discipline if he did not sign, and then

analysis of the ethnicity of the new team, who like Avi Saxena were all of Indian background, and in the US, except Grant Bremner who was UK but based, whereas all others were in the US. His team was being split between two other Indian origin managers, Mit Majithia and Satish Annapareddy. This suggested systemic bias. Finally, if Discovery did not reverse the decision to dismiss him he would bring claims in the employment tribunal for unfair dismissal, unfair dismissal for making a protected disclosure, unlawful detriment for protected disclosure, and discrimination, together with a discrimination charge to the US Equal Employment Opportunity Commission.

55. In this letter the claimant cites Amy Girdwood as the source of the mystery letter in December 2019, because she alone will have known his home address, as she would have registered him as director of a Discovery subsidiary. In the hearing bundle we had copies of the claimants' entries on the Companies House register of directors. Only his business address is given for his directorship of the Discovery subsidiary in July 2018. His home address in London is given for his directorship of a property company of his own, registered by him in March 2019. These entries would come up in the first few lines of any Google search for the claimant. The entries show: (1) in December 2019 anyone could have known his London address (2) it was not known to Discovery. There was no reason why Amy Girdwood as head of HR should know it, as the claimant had only given the respondent an accommodation address in Oxford for their personnel records.

56. The redundancy appeal was passed to Alyson Jackson. She proposed they meet on the 1st November, just after half term, then postponed it to the 12th of November to make some more enquiries. After seeing the claimant, she interviewed Avi Saxena, Hannah Lucille, Fabienne Clermont, Shane Schrader and Kelly Cole. She reviewed the minutes of the redundancy meetings, the two sets of slide decks, his exchanges with Avi Saxena and Hannah Lucille about the process, Michael Schmidt's paper on STB and HWA strategy, and the ethics and compliance e-mail on the outcome of his discrimination complaint. Towards the end of November she reported that there would be some delay preparing an outcome.

57. On 5th January 2022 she checked some points about other meetings on 22 September 2021, and on 6th of January 2022 sent the claimant a letter upholding the dismissal. Ms Jackson had decided to consider: was there was a genuine redundancy situation, was the process fair and reasonable, was the decision influenced by his complaint, either about Amy Girdwood, or about the confidentiality agreement, whether he was treated less favourably than others in the digital technology team because of his race, whether there was a breach of rights by arranging a zoom call when caring for his mother, and whether there was any breach in rejecting his proposed date for the first meeting. In seven pages she reviewed the detail. She concluded the redundancy existed, including whether the SVP in charge of the HWA team could have left and the claimant retained, which was explained as the SVP leader in HWA having a better engineering background. She held the process was fair, meetings had been arranged to suit him and his representative, and noted his failure to attend the final meeting. The consultation had been meaningful. As for the Amy Girdwood allegation, there was nothing to connect her with the fertility clinic emails. In any case, neither Hannah Lucille nor Avi Saxena knew about his allegations - the processes had been kept separate. Confidentiality terms had not entered into redundancy decision. On the race claim, discriminatory hiring practices could not be shown based on so small a sample, and he not referred to any other incidents of discrimination. As for the lack of a meeting on 22nd September, he was doing some work that day and had appeared in some of the remote meetings. Alyson Jackson did however consider that the timing of communicating the final decision lacked sympathy and consideration. It could have been delayed a few days. She also thought that the company could have allocated more time for the second consultation meeting for face to face discussion of the counter proposal, and the redundancy decision could have been delayed to the 27th September. She concluded that the decision to make him redundant was based on a sound commercial judgement and that the process was fair, he had had time to present a counterproposal which was

debated in person and by e-mail, and rejected on business grounds. There were some learning points about meeting scheduling and process, but he had not been discriminated against.

58. The claimant had gone to ACAS for early conciliation on the 21st December 2022. He presented a claim to the employment tribunal on 25th February 2022. He found better paid work at Google from May 2022.

Relevant Law

Protected Disclosure

59. The statutory protection of whistleblowers is set out in the Employment Rights Act 1996. In **ALM Medical Services Ltd v Bladon (2002) IRLR 807,** L J Mummery said the purpose of the legislation is:

> "to protect employees…for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have an early knowledge of them, and protecting the respective interests of employers and employees".

60. The "whistleblowing " that is protected is:

"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,

…

- section 43B Employment Rights Act.

61. The disclosure qualifies for protection if made to someone provided for in section 43C :

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . . —

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

62. Tribunals must approach the question of whether there was a protected disclosure in structured way. They must consider whether there has been a disclosure of information, not a bare allegation - **Cavendish Munro Professional Risks Management Ltd v Geduld (2010) ICR 325**, although an allegation may accompany information. **Kilraine v L.B. Wandsworth(2018) EWCA Civ 1436** makes clear that the disclosure must have "sufficient factual content" to make it a disclosure of information and not just an allegation.

63. Tribunals must then consider whether the worker held a belief that the information tended to show a class of wrongdoing set out in section 43B (the subjective element), and whether that belief was held on reasonable grounds (the objective element). That is not to say that belief in wrongdoing must have been correct, as a belief *could* be held on reasonable grounds but still be mistaken - **Babula v Waltham Forest College (2007) ICR 1026, CA.** Then the tribunal must

assess whether the claimant believed he was making the disclosure in the public interest, and finally, whether his belief that it was in the public interest was reasonable. The belief in wrongdoing or public interest need not be made explicit, for example, where, as was said by the EAT in **Bolton School v Evans**, "it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to potential legal liability".

64. **Chesterton Global Ltd v Nurmohamed (2017) IRLR 837** confirms that a claimant's genuine belief in wrongdoing, the reasonableness of that belief, and his belief in public interest, is to be assessed as at the time he was making it, though his *reasons* for believing it was in the public interest can be set out later. Public interest need not be the predominant reason for making it. Public interest is "open textured" and cannot be defined by bright lines. It must be more than the individual concern of the whistleblower - **Chesterton**, and **Ibrahim v HCA International (2020) IRLR 224**. It can be a section of the public (such as a section of the workforce, as in **Chesterton)** and there may be some feature besides numbers, such as deliberate wrongdoing, to indicate it is a matter of public interest. In **Ibrahim**, where the claimant had complained he (alone) was being defamed by a colleague spreading false rumours about him to patients, the Employment Appeal Tribunal had accepted an argument that section 43B could include an allegation of defamation as protected disclosure, and that finding was not appealed, nevertheless the Court of Appeal, considering whether the claimant had believed at the time he made the disclosure in the public interest (he had not been asked that question) observed:

> "it seems counter-intuitive to describe as a disclosure in the public interest a complaint by a worker to management that someone is spreading false rumours about him; on the other hand, intuition is not a safe means of interpreting the quite intricate and technical provisions of what is now Part IVA of the Employment Rights Act 1996".

65. The whistleblower may have a different motive for making the disclosure, but the test is whether, at the time, he believed there was a wider interest in what he was saying was wrong.

66. Each of these five questions must be answered for each disclosure in order to decide whether it was made and whether it qualified for protection.

Was the conversation on 12 July 2021 a protected disclosure – Discussion and Conclusion

67. The information the claimant disclosed was that someone was getting fertility clinics to send him emails linking him and SK, using his work email address.

68. He did not say the company database had been compromised, or that Amy Girdwood was responsible. His ground for thinking the fertility clinic emails came from her relies on her access as HR head to personal information about him, and a supposition that she knew the content of the anonymous whistleblower letter, but as of the 12th July he had no grounds for thinking that clinics had been given his personal telephone number, nor did he say that Amy Girdwood would know his London address - this was not said until his redundancy appeal letter, and as we have found, Discovery did not have the London address, and it could easily be discovered without access to personnel records. At best he was saying that his work e-mail address had been used, but that could be known to anyone, within or without the organisation, who had been sent or copied in to an e-mail from or to him. This does not amount, expressly or by implication, to a "security lapse", as the claimant submitted. We know he believed she was the source of the mystery letter in December 2019, but as a tribunal we are concerned that this belief was not reasonable. Someone as senior as Amy Girdwood is unlikely to have used such a bizarre means contact him with threats. If she thought there as something going on with SK she could simply have called him in for discussion. What the claimant has told the tribunal and others about this letter - always supposing it existed -

suggests that it came from a crank, or perhaps a malicious fellow employee, or even SK. He did allude, in his conversation with Kelly Cole, to his worry about HR, as a "historic concern". We concluded his 'information' was no more than that he was being harassed, and that he wanted the respondent's help tracking down who was responsible, though he was making enquiries of his own. It could not be understood as saying the company was in breach of GDPR, or even that an employee was misusing his personal data. Further, there was nothing in the conversation to show that misuse of his company email address was a matter of public interest, or that he thought it was. The tribunal does not accept the information tended to show a breach of GDPR security of personal data, let alone that he said so. The disclosure is not protected because of breach of any legal obligation under GDPR.

69. We considered a suggestion that a crime was being committed. He did link the fertility clinic emails with the whistleblower email from January 2020. He did indicate he thought this was harassment, by sending on the law firm article about tracking down senders of emails. We accept that if the clinic emails came from someone else, who wanted to link his name to SK, that will have been very disturbing. The fact that the company investigated which staff had accessed these clinics from work systems suggests they did not think it trivial. It might be doubted whether two episodes of harassing activity 18 months apart were enough to found a prosecution for stalking, but for all he or Kelly Cole knew this was the beginning of a campaign, and the context indicates *he* believed a criminal offence was being committed or likely to be committed, while the respondent thought it was something that should be investigated, insofar as it was connected to the SK allegation, as a work matter.

70. Nothing about the allegation of harassment however suggests he had public interest in mind when making it. It was about his own position. If it was in the public interest it is of note that he did not go to the police or even follow up getting the IP addresses. Only if any giving of information suggesting a crime is or is likely to be committed is a matter of public interest could it be protected. We concluded he did not consider public interest, or make the disclosure with that in mind. If they came from someone else, he wanted help finding out who was behind it.

71. We concluded the disclosure of information did not qualify for protection, but in case we are wrong, we have gone on to consider whether the disclosure caused detriment or was the reason for dismissal.

Protected Disclosure Detriment

72. By section 47B(1) A:

> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

73. Detriment means that: ''a reasonable worker would take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" -**De Souza v AA 1986 ICR**

514. That it is the view of a reasonable worker is underlined by the comment that an "unjustified sense of grievance cannot amount to detriment" **Barclays Bank v Kapur no2 1995 IRLR.**

74. As for whether any detriment was "on the ground that" a disclosure had been made, the tribunal should consider whether the disclosure has had a material influence on the detriment- **Fecitt v NHS Manchester**. There may be more than one influence.

75. Section 48 provides that it is for the employer to show the reason for a detriment. Time limits for detriment claims are also set out in section 48:

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer ... shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done.

Was the claimant subjected to detriment because he made a disclosure - Discussion

76. The first detriment alleged is that the respondent deliberately did not carry out an investigation and ignored what he said. Factually, we observe that they did investigate. There was a pause between whatever was done immediately after 12th July, and the follow up from the 17th August, but it is not clear what else could have been done, when not even the two staff members who had contacted two of the clinics had contacted all of them, they could not get IP addresses from the clinics because it was not their personal data, and they did provide the claimant with a legally drafted data subject access request to use, which he decided not to use. This did not amount to ignoring what he said. In one of his August emails the claimant said they should use an external investigator, but we could not see why they should have. It might be said they should have interviewed the two staff who had contacted two fertility clinics, but given the large number of staff contacting fertility clinics from their work addresses (the wide extent surprised the investigators) it should have been clear that such interviews could have been embarrassing conversations on personal matters, and getting IP addresses would be a more fruitful preliminary path to detection. The respondent made a reasonable investigation. They were not obliged to leave no stone unturned. It cannot be said that they deliberately omitted these additional steps because he had made the disclosure. They did not take it further because this would have been disproportionate to do so in the absence of a firmer and clearer subject access request to the clinics.

77. The second detriment allegation is that he was selected for redundancy for making the disclosure. All the evidence points to Avi Saxena making his decision for the reasons he gave: relations between STB and HWA teams were so bad that a vice president was resigning because of the toxic atmosphere and he thought a reorganisation of the technical teams would make them work better together. There is nothing to indicate that Avi Saxena knew anything about the claimant's disclosure of fertility clinic emails. The claimant may speculate that Kelly Cole had spoken to HR, or that Amy

Girdwood, told about the start of an investigation into the source of the fertility clinic emails, apprehended that she might be identified, so she needed to get the claimant out of the organisation, and so initiated a restructure proposal, but this far fetched. We have seen no evidence to suggest that this is more than speculation. Kelly Cole did not understand that the claimant was implicating Amy Girdwood in the fertility clinic emails until mid-August, after the decision to restructure had been made. There is no evidence that Amy Girdwood spoke to Hannah Lucille, who was managing the restructure process for Avi Saxena. If there was a protected disclosure, the claimant was not subjected to this detriment because of it.

78. The third allegation is that the process was rushed. Certainly Avi Saxena and Hannah Lucille decided on it swiftly and wanted to get on with it. We discuss the redundancy process in more detail later, but we observe that there were good business reasons, namely the pressure to roll out Discovery+ to subsidiaries and then the public that year, to get on with it. Rushing the process may have been deliberate, but it was not because the claimant made a protected disclosure about fertility clinic emails.

79. The fourth allegation is that the claimant was not considered for alternative roles because of the protected disclosure. We know that inquiries were made about alternative roles with the internal recruitment team (Kit Hererra). We know the claimant did not want a vice president role, and that this was the level of the role Andrew Georgiou might have available. If Andrew Georgiou had a more senior role available, we accept the evidence that he and Liz Goulding did not want a temporary appointment, and in the event Golf TV was handed back to another organisation not long after. We know Amy Girdwood was briefly consulted, but there were independent reasons why it was not offered to the claimant. The respondent went through the motions, but there is no evidence that any opportunities were concealed from him, let alone that this was deliberately done because he had made a disclosure about fertility clinic emails.

80. The fifth allegation of detriment is that his grievance was deliberately ignored or dismissed. The first part of the 14 September grievance was about the redundancy being because of a protected disclosure, and included a complaint about unacceptable delay in completing an investigation into the fertility clinic emails. In fact he heard from Shane Shrader next day. That may or my not have been coincidence, but it was an answer. The respondent did not answer explicitly on the investigation point, but that is likely to be because the claimant had been contacted direct. He was not sent the closure report. That is likely to be because he had not replied to the 15 September email. In any case in our finding it is improbable that there was no formal reply because of his conversation on 12 July, even if it was a protected disclosure. An investigation had started, stalled for lack of leads, and closed because he did not reply. As for a complaint that he was being made redundant because of this disclosure, that was a complaint about dismissal which was best addressed within the dismissal process, including the appeal. The respondent may have apprehended an intention to delay or derail their redundancy process, and so decided not to deal with it separately, but they did not make that decision because the claimant had disclosed information about fertility clinic emails. The second part of the grievance was the race discrimination allegation. This was addressed, though briefly, with the November outcome. There was no meeting with the claimant about it, partly because he had left before there was time for a meeting, but perhaps too because he had not stated anything other than that this particular team was now mostly of south Asian ethnicity, so there would not have been much to discuss, even if there were time for a meeting before his dismissal. The claimant has not included a race discrimination complaint to the tribunal, and so know nothing beyond this comment about the make-up of the team, or about (say) the proportion of Indian ethnicity IT professionals in the UK and north America. It was in essence a complaint about the proposal to make him redundant, so something that could be addressed with him within the dismissal process and the appeal against dismissal. It was not ignored. It was dismissed, but on the grounds given by the Alyson Jackson and the Ethics and Compliance Team. Neither decision, in our finding, was influenced by what he said

on 12 July about the fertility clinic emails, even had they been protected disclosures. The third part of the grievance was about the redundancy process. That again was best dealt with in the dismissal procedures. As the final meeting did not take place, it was no addressed then, but it was addressed in the dismissal appeal. We do not find that deciding not to run a separate process to deal with this grievance was influenced by the 12 July disclosure. As it was mostly about dismissal, it was best addressed within the dismissal process

Protected Interest Dismissal

81. Where the claim is of dismissal for making a protected disclosure, which makes the dismissal automatically unfair, it is not enough that the disclosure had a material influence on the outcome. By section 103A of the Employment Rights Act 1996 a dismissal is unfair if the protected disclosure "sole or principal" reason for dismissal.

82. We have found the disclosure was not protected, but in case we are wrong will examine whether that conversation was the sole or principal reason for the purported dismissal for redundancy.

Unfair Dismissal

83. Where an employee has more than two years' service (as the claimant does) he can also claim he has been unfairly dismissed under section 98 of the Employment Rights Act 1996. This provides the following are potentially fair reasons for dismissal: conduct, capability, statutory obligation, redundancy, or "some other substantial reason justifying dismissal". It is for the employer to establish the reason for dismissal.

84. If a potentially fair reason is shown by the employer, section 98 (4) provides that it is the employment tribunal to determine:

> "whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—(which)
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case".

85. The tribunal must not substitute its own view for that of the employer, provided the employer's action was within the range of responses of a reasonable employer, and this principle applies both to findings on whether the decision itself was reasonable, and on whether the process adopted was reasonable – **Foley v Post Office (2000) IR LR 82,** and **Sainsbury's Supermarkets Ltd v Hitt (2002) EWCA Civ 1588.**

86. That is so not only in relation to the substantive decision to dismiss but also in respect of the question of procedural failures. Decisions taken in this regard must not be considered not in isolation but as part of the overall process, as was explained by the Smith LJ in **Taylor v OCS Group (2006) ICR 1602 CA:**

> "… employment tribunals … should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.

> "48. In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss".

87. Where a dismissal is found unfair because of shortcomings in the process by which the decision was reached, when it comes to remedy, the tribunal can consider what difference a fair procedure would have made to the outcome – **Polkey v AE Dayton Services Ltd (1988) AC 344**.

88. A dismissal by reason of redundancy is defined in section 139 of the Employment Rights Act as where:

> the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
> (i) to carry on the business for the purposes of which the employee was employed by him, or
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
> (i) for employees to carry out work of a particular kind, or
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
> have ceased or diminished or are expected to cease or diminish .

89. On reason for dismissal, the tribunal must consider whether the employer's requirements for employees to carry on work of a particular kind have ceased or diminished, or are expected to cease or diminish, and whether the dismissal was caused wholly or mainly by the a cessation or diminution - **Safeway Stores v Burrell (1997) ICR 523**. This was endorsed in **Murray v Foyle Meats Limited 1999 ICR 827** - the important word in section 139 was 'attributable'.

90. In redundancy cases, a tribunal may, in relation to the fairness issue, consider the pool of employees considered for redundancy, how the criteria for selection for redundancy within that pool are identified and applied, how employees are consulted about redundancy, and what consideration is given to alternative employment, but should remember not to decide for itself whether an alternative would have been fairer, but only whether the employer's decisions were within the range of conduct of a reasonable employer – **Williams v Compair Maxam Ltd (1982) IRLR 83.** It is for the employer to decide the pool - **Lomond Motors Ltd v Clyde (2009) 0019/09.** That choice can be difficult to challenge if the employer has genuinely applied his mind to that – **Taymech Ltd v Ryan EAT/663/94.** It can be a reasonable decision to have a pool of one person only – **Halpin v Sandpiper Books Ltd UKAEAT/0171/11.** As for consultation, in **Polkey,** an employer "will normally not act reasonably unless he warns and consults any employees affected…"; but what consultation is required will depend on the facts of the case, and the tribunal should consider the reasonableness in the circumstances. The claimant refers us to the collective consultation cases as in **Rowell v Hubbard (1995) IRLR 19**, and **R v BCC and anor ex parte Price (1994) IRLR 72,** to the effect that fair consultation involves "a fair and proper opportunity to understand fully the matters on which they are being consulted, and to express their views on those subjects, and to consider those views properly and genuinely".

91. On alternative work, an employer is generally obliged to take reasonable steps to look for alternative work, but is not required to take every conceivable step possible - **Quinton Hazell Ltd v Earl (1976) IRLR 296,** and **British United Shoe Machinery Co Ltd v Clarke (1977) IRLR 297.**

Discussion and Conclusion

Reason for Dismissal

92. The claimant contends that the redundancy was a sham and that the real reason for dismissal was either that he had made a protected disclosure, or that he had refused to sign the new confidentiality terms. Thus the first issue for the tribunal is what was the respondents reason for dismissal.

93. A reason is a set of facts, or as the case may be, beliefs, known to the employer which caused him to act as he did – **Abernethy v Mott Hay and Anderson(1974) ICR 323.** Why did Mr Saxena decide to dismiss the claimant?

94. The timing of the decision suggests it was the reasons given. Patrick Healey was resigning because of the frustrations of technical solutions having to pass between teams and taking a very long time. It was the claimant who passed the news on, on 3 August, even before the forma resignation on 9 August. Mr Saxena's response to the problem was "I will own fixing this", and his fix was to make the teams work alongside reporting to the same manager. It was an organisational solution, resulting in reduced responsibility for the claimant and increased responsibility for others. He made his decision very quickly. On 9th August 2021 he was already discussing a script with Hannah Lucille, but probably not much before then, as she would have been able to use a standard template for her draft. He explained his rationale at the first meeting, the claimant endeavoured to put forward an alternative solution that would not result in redundancy at the next meeting. But while the claimant's solution was to examine the underlying basis of the technology, Mr Saxena saw the problem as identified by Patrick Healy as one of relationships between the teams which could be fixed by reorganising how they worked. Mr Saxena's solution may not have been the only one, but in our view it was genuine. Other managers may have taken longer to think about it. Other managers may have found a different solution. It cannot be said that reorganising the teams was irrational. The result of the organisation decision was that the first respondent's need for employees of a particular kind, that is, at senior vice president level which required more people to manage than the claimant was left with, had diminished.

95. We considered whether the speed of Mr Saxena's decision suggested that it was but a peg on which to hang a dismissal for other reasons. All the evidence indicated that the claimant was senior and experienced, and whatever the outburst about the Claro meeting (of which we heard little in evidence from either side), had had a good working relationship with his manager. It would be absurd for an employer to dismiss an employee for not signing new confidentiality terms at this point. They were still exploring with the claimant the reason for his objection, and so whether they could find a way to overcome it. Dismissing an otherwise satisfactory employee for this reason is a nuclear option. Had the confidentiality terms been of crucial importance at that point, the employer could have been expected to give the claimant an ultimatum, dismissing him for not signing, coupled with an offer to reengage him on the new terms, so as to keep him.

96. We also considered whether the disclosure of information to Kelly Cole, had we found it protected, was the sole or principal reason for the dismissal. Again, this is improbable, and on close examination of events, fanciful. By the time Amy Girdwood was updated on events by Fabienne Clermont on 12th of August, Avi Saxena had made his decision. There is nothing but speculation to suggest that Kelly Cole or Amy Girdwood had discussed a need to get rid of the claimant with Hannah Lucille, the HR person who worked with Avi Saxena. By the time the "penny dropped" for Kelly Cole that the claimant was saying Amy Girdwood was behind the fertility clinic emails, on 17th of August, the redundancy process was well under way. There is no evidence that Avi Saxena knew about the disclosure. There is no evidence that he was persuaded by someone who did.

Even if he did know, it is hard to see why he should care whether the claimant was suggesting that he was being harassed by a senior HR person, or that the security of personnel records was unsatisfactory. His concern was finding the technical solutions to roll out the product to various platforms, and his decision that the problem was not the tech but the team structure makes sense. Patrick Healy had said he was leaving because of the toxic atmosphere and the inability to get anything done, and the claimant agreed with this. Other managers might have taken longer to explore, but he must already have known the personalities and some of the friction.

97. The claimant has also argued he was dismissed because of his grievance, but the decision that he was at risk – and the only person at risk- had already been made then.

98. We conclude that the reason for dismissal was redundancy

Fairness

99. Was it fair to dismiss for that reason?

100. The claimant belatedly suggested there should have been a choice – a pool - between him and one of the other team managers. He did not argue this at the time. There was no evidence before us on whether the claimant was equally qualified or could have led all the teams now reporting together. He was told at appeal the other manager had a better engineering background, and we have no reason to think otherwise. If there was no longer any need for a manager at his level, there was a pool of one, and we must examine whether the process of information and consultation about redundancy was fair.

101. The claimant submits the consultation was a sham, that the decision had already been made, and the respondent was merely going through the motions. There are many redundancies that work like this. There may not be any real alternatives. Consultation is however required for the sake of fairness to someone who is going to lose their job. Alternatives may be unlikely, but they should be explored. The claimant was told early what the proposal was, even before the at risk letter. That gave him some time to consider it. The respondent did take him through their reasons, though some of the time allotted was taken up with the claimant's questions about other matters.

102. The next meeting where the claimant put his counter proposal was rushed – it is clear from Hannah Lucile's interventions that she saw it as a foregone conclusion, and that the meeting must finish. Despite that we accepted Avi Saxena's evidence that he did read and consider the claimant's slide deck on his five hour flight back to Seattle, and his subsequent emails show that he engaged with the argument, even if he did not accept it and the claimant disagreed with what he said. The slides the claimant prepared do not address the friction and frustrations that Patrick Healey had described as "toxic". He proposed that the teams should be left as two, and a replacement for Patrick Healey hired. The claimant also argued that if the STB team did move away from him, what was left was still a senior vice president role, rather than a vice president role, as the company had no "levelling" of what was done at each grade. This remains an assertion, and was not explored in evidence. Much of the claimant's argument was that instead of reorganising using the current technical solutions, the company should step back and develop a native application internally. It can be understood how a manager concerned that target dates for rolling out the product were not going to be met by the end of the year would not be receptive to a proposal to go back to the drawing board. Nor is it likely he would be receptive to the last two slides denouncing the business case as "devoid of facts" and accusing his manager of jumping to conclusions, accusations that it was the front end client engineering team was fault, that the redundancy was a sham, and that he was being targeted as retaliation for whistle blowing, and because he was not an ethnic Indian origin. This was not likely to be a constructive discussion.

103. If there was a failure to explore the arguments as fully as the claimant wished, they were treated carefully at the appeal stage, though it took so long that reinstatement, had it succeeded, would have been difficult.

104. The tribunal panel was, like the appeal manager, concerned that the claimant was dismissed abruptly when he did not join what was intended to be, and which he almost certainly knew, was to be the dismissal meeting. The claimant had explained that Wednesday would be difficult as he had to see his mother's doctors. He cancelled simply by not accepting the Outlook link. The respondent jumped to the conclusion on scant evidence that he was deliberately avoiding the meeting. HR may have decided this was an employee spinning out the process with grievances, but they should have known this was a difficult day and rescheduled. They could have done that next day, certainly within the week, without trouble. Even if the result was inevitable, the claimant was owed a meeting to tell him to his face.

105. It was argued for the claimant that the redundancy consultation should have been suspended to allow the grievance to be investigated, relying on the ACAS Code on Discipline and Grievance., which at paragraph 46 says:

> "Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."

106. We observe that the ACAS Code does not apply to redundancy, further, that the grievance was all about the redundancy process, so could appropriately be considered as part of that process, and it was in the appeal against dismissal. The claimant did get outcomes for this grievance, though not before he was dismissed.

107. On alternative vacancies, the respondent did send him a list, though only a week before the meeting where they planned to dismiss. It was suggested to Andrew Georgiou that the claimant might be looking. The claimant did not ask at the meeting next day about senior vice-president roles, which we understood would not usually appear on the vacancy list. It was put to the respondent's witnesses that he would have been suitable for sales and marketing roles, but most of his past employment was in government jobs, and his description of his work at American Express and True North Venture Partners does not suggest sales or marketing. There was not much time allowed for finding an internal vacancy. Hannah Lucile did say she spoke to the internal recruiter about alternatives. It was clear though that the claimant did not want a vice-president level role. We concluded the respondent made some attempt at considering alternative work. It is not shown there was any at a level the claimant would have wanted.

108. Taking the process as a whole, we concluded that the process, otherwise adequate, was made unfair by the rush to dismiss when the claimant could not attend the meeting on 22 September, and the assumption he was avoiding it. No reasonable employer would have done this. Other than that, any issues were properly considered at the appeal stage. We tend to agree with Alyson's Jackson's assessment of when he would have been dismissed had more time been taken.

109. Assessment of remedy for unfair dismissal will be on 2 July, if the parties have not by then agreed terms.

Employment Judge Goodman

Date : 27th April 2023

JUDGMENT SENT TO THE PARTIES ON

28/04/2023

FOR THE TRIBUNAL OFFICE

APPENDIX
AGREED LIST OF ISSUES

UNFAIR DISMISSAL (section 98 Employment Rights Act 1996)

Claim against the First Respondent

It is not in dispute that the Claimant was dismissed.

1. Has the First Respondent shown that the reason or principal reason why it dismissed the Claimant was redundancy, as defined within s.139 Employment Rights Act 1996?

   The Claimant contends that the true reason for dismissal was because:

   a. The Third Respondent was prejudiced against him; and/or
   b. He had raised a complaint against the First Respondent and Respondent alleging criminal activity and breaches of personal data rights; and/or
   c. He had refused to sign the new confidentiality terms; and/or
   d. He had raised a grievance.

2. If so, was the dismissal of this employee for this reason fair or unfair in all the circumstances? In particular:

   2.1 Did the First Respondent undertake a genuine consultation with the Claimant?

   2.2 Was the consultation process rushed by the First Respondent?

2.3 Did the First Respondent make reasonable efforts (within the range of reasonable responses) to find suitable alternative roles for the Claimant?

PROTECTED DISCLOSURE CLAIMS

Claims against the First Respondent and the Third Respondent

3. Did the Claimant make a protected disclosure:

3.1 Did he complain to Ms Cole that his personal details, including his name, work email address and personal mobile number had been used without his knowledge to contact fertility clinics, and inform her that he was raising a complaint regarding the unauthorised use of his personal information which had been used for stalking and harassment?

3.2 If so, was this disclosure, in the Claimant's reasonable belief, made in the public interest?

3.3 If so did this disclosure, in the Claimant's reasonable belief, tend to show:

(a) that criminal offences had been committed, being that the Claimant's personal data had been obtained and used by the Third Respondent, or an employee of the First Respondent, Second Respondent or another entity within Discovery, to engage in unlawful harassment and stalking, and that the Claimant's personal data rights had been breached in the process?

and/or

(b) that the First Respondent had failed to comply with legal obligations to which it was subject, those obligations being

(i) to protect and process the personal data it holds for the claimant in compliance with the Data Protection Act 2019 and the General Data Protection Regulation 2016/679, and

(ii) its implied duty of mutual trust and confidence to the Claimant?

AUTOMATIC UNFAIR DISMISSAL FOR MAKING A PROTECTED DISCLOSURE

Section 103A Employment Rights Act

Claim against the First Respondent

If the Claimant made a protected disclosure:

4. Was the reason or principal reason for the Claimant's dismissal that he had made a protected disclosure?

DETRIMENT FOR MAKING A PROTECTED DISCLOSURE- section 47 – claims against the First Respondent and the Third Respondent

If the Claimant made a protected disclosure:

5. Did the First Respondent and/or the Third Respondent subject the Claimant to the following detriments:

   5.1 his protected disclosure was deliberately not genuinely investigated and was ignored;

   5.2 he was selected for redundancy;

   5.3 the redundancy consultation process was rushed and deliberately did not follow a fair process;

   5.4 he was deliberately not considered for suitable alternative employment as

   (a) the proposals he put forward in the consultation meeting on 14 September 2021 where not genuinely considered and implemented; and

   (b) suitable alternative roles for the Claimant within the business were not explored or offered;

   5.5 his grievance was deliberately ignored and/or was dismissed?

6. Did the Third Respondent subject the Claimant to a detriment with the decision to dismiss him on 22 September 2021.

7. If so, and in each case, did the First Respondent and/or the Third Respondent

(as the case may be) subject the Claimant to that detriment because the Claimant had made a protected disclosure?

8. If the Third Respondent subjected the Claimant to any detriment or detriments, was she acting as a worker of the First Respondent or as agent of the First Respondent with its authority?

TIME

The Claimant was dismissed with effect from 22 September 2021. ACAS was notified on 21 December 2021. Therefore, the dismissal claims are in time, but the detriment claims will only, on the face of it, be in time if the detriment continued until 22 September 2021.

9. For each of the detriment claims:

9.1 Was the claim on the face of it presented in time, having regard to the time provisions in s.48(3)-(4) Employment Rights Act 1996 and the provisions for extending time to allow for pre-action conciliation?

9.2 If not, was it "not reasonably practicable" for the claim to be presented in time?

9.3 If so, was the claim presented within such further time as the tribunal considers reasonable?