EMPLOYMENT TRIBUNALS

Claimant: **Mr DJ Stockdale**

Respondent: **Cleveland Bridge UK Limited**

JUDGMENT ON INTERIM RELIEF APPLICATION

The judgment of the Tribunal is that the Claimant's application for interim relief fails and is hereby dismissed.

APPLICATION

The Claimant's claim

1. By a Claim Form presented on 21 May 2020, the Claimant brought a claim of automatically unfair dismissal arising out of the summary termination of his employment on 14 May 2020. He contends that his dismissal is automatically unfair in that:

   1.1. The reason or principal reason for his dismissal was that, being a representative of workers within section 100(1)(b) Employment Rights Act 1996 ('ERA'), he performed a function as such a representative; alternatively,

   1.2. The reason or principal reason for his dismissal was that he had made a protected disclosure (section 103A ERA);

2. Each reason is referred to as an 'inadmissible reason'. In his Claim Form the Claimant made an application for interim relief under section 128 ERA. The parties attended a case management preliminary hearing by telephone on 12 June 2020. The application was listed for determination on 14 July 2020 and orders were made for preparation for that hearing.

The Interim Relief Hearing

3. The Claimant was represented by Paul Smith of counsel and the Respondent by Stefan Brochwicz-Lewinski of counsel. The parties had prepared a bundle of documents which ran to 761 pages. I was provided with statements from 5 individuals of the evidence (although not necessarily all of their evidence) that will be given at the Final Hearing. On the Claimant's side was his own statement plus statements from Mr Malcolm Noble, Ryan Waller and Michael Blewitt. On the Respondent's side I was provided with a statement from Ms Diane Boon.

4. Both counsel prepared written skeleton arguments. The hearing was listed for 1 day. I read the skeleton arguments and relevant case law the night before and on the day of the hearing was invited to and did read the statements and relevant documents prior to commencing the hearing.

5. Given the nature of the exercise, no oral evidence was given. The statements which were provided were statements of the evidence that will be adduced at the Final Hearing. Both counsel addressed me on the law, on the evidence that will be given as apparent from the statements and the documents and on the question of the likelihood of the Claimant succeeding at that Final Hearing.

6. These reasons consist of:

   6.1. Identification of the issue to be determined;

   6.2. The relevant legal principles to be applied;

   6.3. The parties' submissions;

   6.4. My conclusion and reasoning;

The issue to be determined

7. The issue, taken from section 129 ERA can be described as this: '*does it appear to me that it is likely that at the Final Hearing the tribunal will find that the reason or principal reason for the Claimant's dismissal was one of the inadmissible reasons"*?

Relevant legal principles

8. Counsel were agreed on the legal principles relevant to the determination of that issue. I was referred to the following authorities, which I shall call the 'section 129 authorities':

   8.1. **Taplin v Shippam** [1978] IRLR 450;
   8.2. **Ministry of Justice v Sarfraz** [2011] IRLR 562;
   8.3. **London City Airport v Chacko** [2013] IRLR 610
   8.4. **Hancock v Ter-Berg & anor** [2020] IRLR 97;

9. I was also referred to authorities on issues relating to the 'inadmissible reasons', namely:

9.1. **Shillito v Van Leer UK Ltd** [1997] IRLR;
9.2. **Goodwin v Cabletel UK Ltd** [1997] IRLR 665;
9.3. **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38;
9.4. **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4;
9.5. **Panayiotou v Chief Constable of Hampshire Police** [2014] IRLR 500;
9.6. **Shinwari v Vue Entertainment Ltd** (UKEAT/0394/14/BA);
9.7. **Parsons v Airplus International Ltd** (UKEAT/0111/17);
9.8. **Qasimi v Robinson** [2017] UKEAT/0283/17/JOL;
9.9. **Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436;

10. It is clear from the section 129 authorities that applications for interim relief are to be considered on a summary basis. A tribunal must do the best it can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The Tribunal must carry out an assessment of whether the claimant is 'likely' to succeed in his complaint, bearing in mind that the evidence on both sides is as yet untested (see in particular, **London City Airport v Chacko** [2013] IRLR 610).

11. The section 129 authorities show that when considering whether a claimant is 'likely' to succeed, it is not a case of asking whether he has a more than 50% chance of success. In **Taplin v C Shippam Ltd**, the EAT (Slynn J) stated that the tribunal must ask itself whether the claimant has shown that he has a 'pretty good' chance of succeeding at the final hearing (see paras 22-23):

"Nor do we think that it is right in a case of this kind to ask whether the applicant has proved his case on a balance of probabilities in the sense that he has established a 51% probability of succeeding in his application….It seems to us that the section requires that the employee shall establish more clearly that he is likely to succeed than that phrase is capable of suggesting on one meaning. On the other hand, it is clear that the tribunal does not have to be satisfied that the applicant will succeed at the trial. It may be undesirable to find a single synonym for the word 'likely' but equally, we think it is wrong to assess the degree of proof which has to be established in terms of a percentage as we have been invited to do.

The tribunal should ask itself whether the applicant has established that he has a "pretty good chance" of succeeding in the final application to the tribunal."

12. In **Ministry of Justice v Sarfraz** the EAT (Underhill J) endorsed this approach, adding in paragraph 16:

"In this context 'likely' does not mean simply 'more likely than not' – that is at least 51% - but connotes a significantly higher degree of likelihood. Slynn J understandably declined to express that higher degree in percentage terms, since numbers can convey a spurious impression of precision in what is inevitably an exercise depending on the tribunal's impression."

13. Further, a claimant applying for interim relief must satisfy the Tribunal that it is likely (in the sense described above) that he will be able to satisfy each of the elements of his complaint, and not just the reason for dismissal: see **Hancock v Ter-Berg**, para 42, and Mr Smith's skeleton argument paragraph 4).

14. The 'inadmissible reasons' authorities are relevant to the extent that they relate to a number of matters within the substantive complaints, such as the proper approach to be taken and the legal principles to apply on a consideration of whether a person was dismissed for the inadmissible reason or whether he has made a protected disclosure or whether he was performing the functions of a representative of workers. Some of the key points derived from those authorities are as follows:

    14.1. There must be a disclosure of information (**Cavendish Munroe; Kilraine**);
    14.2. Assessment of reasonable belief takes account of the circumstances of the employee (**Korashi**);
    14.3. It is not necessary for the health and safety representative to have acted reasonably in order to benefit from the protection of section 100 (**Shillito**)

15. In **Shinwari**, Simler J (as she then was) said in para 55:

    *"In my judgment there is nothing in that authority [**Woodhouse v West North West Homes Leeds Ltd** (2013) UKEAT/0007/12], nor in s 47B of the Act, that prohibits the drawing of a distinction between the making of protected disclosures and conduct by the Respondent that follows, which although related to those disclosures is separable from them. Of course, care must be taken to ensure that an argument to that effect advanced by an employer is properly scrutinised, so that the legislation is not abused. But there is nothing, in my judgment, in principle to suggest that such a distinction cannot be drawn".*

16. Simler J continued in para 58:

    *"Both **Martin v Devonshire Solicitors** and **Woodhouse** support the conclusion that it is permissible in appropriate circumstances for a tribunal to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself, provided the tribunal is astute to ensure that the factors relied on are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did. Although in the Woodhouse case that principle was accepted, the EAT there suggested that it would be only in an exceptional case that the detriment or dismissal would not be found to be done by reason of the protected act. It seems to me that there is no additional requirement that the case be exceptional."*

17. A reason for dismissal *'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'*: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill

LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

18. In a 'misconduct' dismissal, the employer must also show that the principal reason for dismissal relates to the conduct of the employee. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996.

Claimant Submissions

19. At the heart of the dispute is an email which the Claimant sent to the Health & Safety Executive ('HSE') on 03 October 2019 (**page 87** bundle). As regards the section 100 claim, the Claimant says in paragraph 20 of his Particulars of Claim:

"The particular function he had carried out was to email the HSE on 3 October 2019 to notify them of his concerns that (amongst other things) the Respondent had given employees incorrect information about the presence of asbestos on the shop floor of its Darlington site in the past, that two colleagues may have unwittingly drilled into asbestos in the previous two years, and that both he and his GMB Safety Representative colleague (Mr Michael Blewitt) had been threatened with disciplinary action if they raised such concerns with the Respondent again."

20. As regards the section 103A claim, Mr Smith took me through the email sentence by sentence. During the course of the hearing, in answer to my question Mr Smith said that the protected disclosures contained in the email were:

    20.1. there was no Asbestos management plan in place at the time (2018);

    20.2. two lads had drilled into asbestos and

    20.3. the Respondent threatened the Claimant with disciplinary action for raising the issue of asbestos.

21. Mr Smith referred me to paragraph 21 of the Particulars of Claim. He added that the email may have conveyed more than is set out in the pleading and he did not wish to limit the scope of any disclosure which was made to those two matters but certainly those were the key points. He pointed out that the pleadings were drafted so as to comply with the tight time-frames applicable to interim relief applications (which must be presented within 7 days of the date of dismissal).

22. As regards the section 100 claim, Mr Smith submitted that:

    22.1. The Claimant was a representative of workers of health and safety;

    22.2. In emailing the HSE he was carrying out a function in that capacity;

22.3. There was nothing in the email of 03 October 2019 that was or could be said to be a lie or a falsehood (which was the ostensible reason for his dismissal);

22.4. The reasoning of Ms Boon was perverse, and that being perverse undermines her purported reason, revealing that her motivation – and the actual reason for terminating the Claimant's employment - was not the matters out in her letter of dismissal dated 14 May 2020 (**page 259** bundle) but that the Claimant had performed his functions as a representative and/or had made protected disclosures to the HSE.

23. By referring to 'perversity' Mr Smith submitted that no reasonable reader of the email would see it as containing an assertion that the Respondent had lied about the presence of asbestos; that Ms Boon could not reasonably have read it this way and in fact she did not genuinely read it that way. Mr Smith took me to other emails at **pages 131-142**, in support of the contention that what the Claimant wrote was grounded in fact, noting that even though Mr Stockdale did not have the email chain between Mr Noble (the former health and safety officer) and Ms Debnam at the time (see **page 113**), the information which he got from Mr Noble (and which he fed into the email to the HSE) was grounded in truth. Mr Smith submitted that the Respondent has wrongly (for its own purposes) sliced out or dissected two bits from the email, which must, he submitted be looked at as a whole.

24. Mr Smith took me to documents which he submitted supported the Claimant's position. He referred me to **page 190r**, an interview of Mr Saunders. He took me to what was referred to as 'the Oakes report', submitting that this report was flawed in that it did not investigate the issue of missing 'toolbox talks', referring in particular to **page 63,** submitting that Mr Abbott was not asked during the Oakes investigation about whether the 'toolbox talks' went missing. When I asked whether it was being said that the Oakes report was a cover up, Mr Smith said that the Claimant had not gone as far as to say that.

25. Mr Smith took me to Mr Waller's statement obtained during the investigation, which is at **page 193** and also that of Mr O'Kane at **194a**. These supported what the Claimant says about Mr Hardy's toolbox talk back on 30 April 2019.

26. He also took me to **page 196** a statement from Mr Blewitt. Contrary to what the Respondent appeared to be saying, Mr Blewitt was not interviewed because he was absent on sick-leave, submitted Mr Smith – but because Ms Boon chose not to. He also submitted that Mr Blewitt's email is consistent with the statement presented for today's interim relief hearing, which I read during my pre-reading. Mr Smith submitted that Mr Blewitt's account is and was important because his evidence demonstrates what was in Mr Stockdale's mind when he (Mr Stockdale) came to write the HSE email, which was the key point Ms Boon had to decide.

27. Mr Smith took me to Ms Boon's witness statement for this hearing and in particular paragraph 77. He submitted that what she says in para 77.6 and 77.7

is not made out from a reading of **page 144** and was not in fact suggested by Mr Stockdale during the investigation.

28. Mr Smith submitted that the Claimant's understanding and belief was simply that the toolbox talks had gone missing and that nobody had been asked about whether they had in fact gone missing. That is something Mr Stockdale is entitled to say based on what he knew or believed to be the case. He was simply stating what he believed to be the factual situation. He was not suggesting that there had been any cover up or that the toolbox talk was deliberately removed.

29. Mr Smith submitted that there was clear evidence that the Claimant had been threatened with discipline and referred me to **page 75** of the bundle ('the Parker letter'). He said that it follows logically from the Parker letter that an employee could take this as an underlying threat that there would be disciplinary action should something happen again.

30. Mr Smith referred to the fact that there was a tour of the site by the Claimant; that he then refers to two lads drilling into asbestos, which is not contested.Mr Brocwicz-Lewinski said that this was not in dispute.

31. Mr Smith then took me to the documents at **pages 730-731** one of which was an unofficial minute where it said asbestos was not to be raised. Therefore, when Mr Stockdale told the HSE in his email that 'we were not to mention it', Mr Smith submitted this was correct and he was stating a fact.

32. I was told that the document at **page 731** was disclosed to the Claimant in the course of preparing for this hearing. Mr Smith submitted that Ms Boon's conclusion that the threat of discipline was known by the Claimant to be a lie is unsustainable and that Ms Boon did not inquire into the question of threats to discipline him. Mr Smith accepted that Mr Stockdale told Ms Boon that the threat of discipline was made verbally by Mr Parker and Ms Dover and that they were interviewed by Ms Boon. When I asked what was the clear evidence, Mr Smith said that it was:

    32.1. the Parker letter,
    32.2. the subsequent letter to the union (**page 83**) and
    32.3. the verbal threats made by Mr Parker and Ms Dover.

33. Mr Smith submitted that there is evidence of 'animus' as regards the Claimant performing his role as a representative of workers. In answer to my question what evidence will be given of any 'animus' between Ms Boon and the Claimant, Mr Smith referred to:

    - The 'clip around the ear' remark in June 2018 (see para 6 of Ms Boon's statement prepared for this hearing);
    - Mr Oakes' description in his report of an 'ulterior motive' on the part of Mr Stockdale although this supposed ulterior motive was never described;
    - The disciplinary investigation in June 2018 into the Claimant's conduct (in respect of alleged disruptive behaviour at a health and safety meeting on

24 May 2018): see **page 28** of the bundle and the subsequent verbal warning administered by Victoria O'Malley;

34. Mr Smith took me to **page 31** where there was a reference (in relation to that investigation back in June 2018) to Ms Boon declining to attend to explain why there was friction at the meeting. All of this, submitted Mr Smith, was in the context of his H&S representation.

35. Having addressed me on the facts, Mr Smith then took me to the legal framework. Against that framework, he submitted that:

    35.1. Nothing in the email could amount to gross misconduct;

    35.2. The Claimant will show that he was dismissed for carrying out Health & Safety duties,

    35.3. The Respondent will fail to establish a genuine reason for dismissal;

36. Mr Smith submitted that the whistle-blowing claim is secondary but based on the same essential facts as the section 100 claim. On the issue of whistle-blowing, Mr Smith accepted that the Claimant has to satisfy all elements of 43B. He submitted that the public interest element will easily be satisfied given the subject matter of asbestos. He will easily show that he made a protected disclosure in that email. Even if a tribunal were to find that there was some animus on the part of Mr Stockdale in making the disclosure (which he does not accept) bad faith is now relevant only to remedy.

37. Mr Smith says the bigger issue will be whether causation is satisfied. It is for the Respondent to establish the reason for dismissal and he submits that, in light of the evidence that will be seen at the final hearing, the Respondent is unlikely to establish that it genuinely dismissed for the stated reasons.

Respondent submissions

38. Mr Brochwicz-Lewinski began with the law and reminded the tribunal of some of the key legal principles. Referring to **Korashi** at paras 61-62 he submitted that in a whistle-blowing case, when considering the reasonableness of a belief the tribunal must look at the circumstances of the individual concerned. He highlighted this point as it brings into play all the historical matter of which the Claimant was aware. He submitted that the evidence shows that for well over a year before he emailed the HSE in October 2019, the Claimant knew that there was asbestos present within the shop floor. He submitted that when the tribunal considers the evidence at a final hearing it will see that there was no reasonable basis for the Claimant's belief that workers had been told there was no asbestos and that he is likely to fail to show that he made a protected disclosure.

39. Mr Brochwicz-Lewinski referred me to section 43F ERA. That section is concerned with disclosure to a 'prescribed person' of which the HSE is one – see Schedule to the Public Interest Disclosure (Prescribed Persons) Order 2914. Therefore, he submitted, not only must the Claimant 'get home' on

section 43B but also 43F which requires him to show that the information disclosed and any allegation contained in it are substantially true. Mr Smith interjected, saying that he disagreed that section 43F was in play, observing that the Claimant relies on section 43C(1)(b)(ii) of the Act (see paragraph 21 of the Particulars of Claim). That section deals with disclosures to the employer or 'other responsible person'.

40. Mr Brochwicz-Lewinski submitted that the Claimant cannot show that he is likely to succeed at a final hearing because the evidence is clear that he was dismissed for reasons separable from any disclosures that might otherwise have been made in his email to the HSE and that his claim to have been automatically dismissed for either of the inadmissible reasons will fail on a 'reason why' analysis.

41. He referred to **Panyiotou**, paras 44 and 51-52; **Shinwari**, paras 55-56; **Parsons** at para 45 observing that, in that case, the claimant was a compliance officer and that her job as a whole involved drawing to the employer's attentions matters which would invariably fall under the category of qualifying disclosures – his point being that, even in a case where a person's role is conveying that sort or quality of information, an employer is still entitled to separate out other aspects from the making of the disclosure. Those are cases dealing with public interest disclosure. Mr Brochwicz-Lewinski also referred to **Shillito**, paras 17-18, a case concerning detriment on the grounds of performance of the functions of a safety representative. By parity of reasoning, he submitted the same principles apply, in that by knowingly advancing a lie (as he put it) in respect of the two matters set out in the dismissal letter, this is separable from the performance of functions by him (such as writing to the HSE) as a representative. If the reason for dismissal of the Claimant was genuinely as given by Ms Boon, then he submits the claim under section 100 will fail. Mr Brochwicz-Lewinski referred to **Goodwin**, paras 39-40 in support of his submission.

42. Mr Brochwicz-Lewinski submitted that the Respondent has no issue with the Claimant performing his functions, writing to HSE saying that there was no asbestos plan in 2016 nor with him telling the HSE about people drilling into asbestos but the Respondent's position is that he was not dismissed for doing any of this. The matter for which he was dismissed is truly separable and constitutes misconduct, namely knowingly advancing a lie that the Respondent lied as to the presence of asbestos in the factory and that he had been threatened with discipline for mentioning asbestos. He submitted that it is plain from Ms Boon's assessment that he was dismissed for this separable reason and that the question of sanction was permissible.

43. On the subject of the reasonableness of belief (the section 103A claim) he took me to the document at **page 279 – 478**, which is referred to as 'the Eton report' dated 28 December 2016. At **page 287** is a table showing the locations of asbestos containing materials ('ACM's) identified at the time of the survey. The table identifies with some precision the location of ACMs and assigns a number designed to highlight the risk ranging from 0-12 (a score of 1-2 is 'very low' and a score of 3-5 is 'low'). The report contains photos of suspected asbestos. The identified ACMs are in the low/very lo category.

44. The evidence will reveal, says Mr Brochwicz-Lewinski, that the Claimant had seen that document by the time he sent the email on **page 87**, where it says he had been assured that there was 'none on the shop floor'. I was then taken through some of the chronology and events.

45. Mr Brochwicz-Lewinski took me to **page 479**, which was a document called 'Asbestos Management Plan (AMP)'. This is a summary document which refers to the presence of 31 low/very low risk items as per the Eton Report. The AMP was updated, he said, in 2018 (**page 483a**). He also referred to **page 527**, a questionnaire dated 23 July 2018 which refers to the Eton Report and to Ms Debnam's statement therein that asbestos had not been removed since the Eton Report.

46. He submitted that the evidence at the final hearing will show that those documents were made available to the Claimant well before his email of October 2019. He referred to **page 686** which is a minute of a meeting of 26 July 2018 at which the Claimant was present. It is a note by Mr Shimmins. I was taken to the Claimant's note at **page 755** which I was told by both counsel related to the same meeting and where the Claimant records being made aware of *'asbestos in factory 31 low risk*'. Mr Smith confirmed that '*factorr'* was a reference to 'factory'. When I asked whether 'factory' was synonymous with 'shop-floor' in this context, Mr Smith said he did not believe that it was (although the Respondent does not agree). It was agreed that Chris Johnson (referred to in the note) is/was a supervisor on the shop floor.

47. Mr Brochwicz-Lewinski submitted in any event that the evidence will show that by 2018 the Claimant was aware of the presence of asbestos, that there was a report to that effect showing its presence on the shop-floor and elsewhere, that it was said to be low risk, that it was disclosed and being managed. I was next taken to 14 august 2018 when Mr Stockdale attended an asbestos awareness course (**page 573**) at which I was told the asbestos register was made available. I was told that the register is the accumulation of the Eton Reports and other documents. Mr Brochwicz-Lewinski said that in the Claimant's interview he refers to there being a thick file, this being a reference to the voluminous documentation.

48. I was then taken to the events of 30 April 2019 and Mr Stockdale's complaint concerning Mr Hardy's toolbox talk, which generated the Oakes report at **page 39**. He referred me to **page 40** and that everyone was clear there was asbestos at the Darlington site. To counter the suggestion that there had been no proper investigation regarding to what was said at the toolbox talk (a point made by Mr Smith in his submissions), he referred to **page 47** submitting that Mr Hardy had been interviewed by Mr Oakes.

49. I was told that the 'script' used by Mr Hardy for the toolbox talk in April 2019 is the document at **page 55**. The script was drafted by H&S manager, Mark Jackson who sits above Mr Hardy in the management structure. The written script says '*there is some asbestos on site but it is managed and not hazardous'…..'The plant has an asbestos management plan for the asbestos we have on site*'. Mr Brochwicz-Lewinski says that the suggestion by the

Claimant during the disciplinary investigation was that the toolbox talk used by Mr Hardy had subsequently been replaced by another script. He noted that Mr Smith did not accept that the Claimant alleged this and that he took issue with paragraph 77.6 of Ms Boon's statement prepared for this hearing (see paragraph 27 above).

50. Mr Brochwicz-Lewinski submitted that from a reading of the section between the hole-punches on **page 144** the allegation is clearly made that there had been two toolbox scripts.

51. Continuing with the chronology I was referred to a further report by Eton at **page 587**, which is a reinspection survey from August 2019 and a document at **page 575-576**, containing the Claimant's signature which I was told confirms that he had seen the asbestos management plan for 2018/19. As for the documents at **pages 730 and 731**, Mr Brochwicz-Lewinski said that the latter was not issued to anyone; it was not the note sent out and that the Respondent happened upon it during the disclosure exercise for this hearing. He submitted that the document at **page 730** represents the accurate minute of the meeting.

52. This historic view of what had gone on before the email of October 2019 will be relevant when looking at the reasonableness of what the Claimant says about being assured that there had been no asbestos on the shop floor and the genuineness of what he said. Mr Brochwicz-Lewinski submitted that the evidence will show that management had been open about the presence of asbestos, had documented it and had the appropriate asbestos management plan in place and had not mislead or lied to anyone.

53. On the subject of the 'reason for dismissal', Mr Brochwicz-Lewinski submitted that Ms Boon's analysis of what happened and her conclusion on the Claimant's conduct was evidence based and that this evidence, apparent from the documents and from what she did will be before the Tribunal at the final hearing. She formed the view that the Claimant knowingly advanced untruths. The Claimant's case must be that she is unlikely to establish that she genuinely believed this and that this was the reason for his dismissal. Mr Brochwicz-Lewinski submitted that as a matter of law, the Claimant may be dismissed for matters separable from disclosures/performance of his functions. The question is a factual one – was he in fact dismissed for the separable reason? He asked is it unlikely that she will make out her position on the facts? He submitted that her conclusion was plainly permissible on the evidence, not just the findings but how she got there.

54. First is the allegation against the Claimant that he said management had lied about presence of asbestos. Although the Claimant's position is he did not make this assertion, the reference to all the toolbox talks going missing reasonably suggests an allegation of cover up by management. This is an assertion of lying. At the very least it must be a permissible reading by Ms Boon, Mr Brochwicz-Lewinski submitted. In support of this he referred to Mr Wilson's last comment on **page 142**, by the second hole punch.

55. Mr Brochwicz-Lewinski took issue with paragraph 12 of Mr Smith's submissions. There was no such concession by Mr Elliott, he said. There was the clear implication of lying by management in what the Claimant said reported to the HSE in his email. Mr Brochwicz-Lewinski submitted that the last sentence in para 12 of Mr Smith's skeleton argument is unsustainable:- that is precisely what the Claimant was alleging in his email, he submitted.

56. Mr Brochwicz-Lewinski referred to **pages 261-262** (within the dismissal letter) where he says Ms Boon addressed this very issue. She looked at what Mr Brochwicz-Lewinski referred to as the Claimant's propensity in the past to accuse management of lying or misleading workers. He submitted that she could have looked only at the face of email but that she properly looked behind it; that she looked at whether the Claimant believed what he said but also looked at the truth of them. He took me to top of **page 263** of the dismissal letter and 2.15 and where she then comments on various interviews.

57. I asked Mr Brochwicz-Lewinski what he had to say about **page 196** where it says Ms Boon 'does not wish to interview Michael Blewitt' – as opposed to being unable to interview him. He submitted that Mr Blewitt was off sick with a stress related illness at the time; that he had just put in a further sick-note and the decision not to interview him was made in that capacity and context. As for what Mr Blewitt said at **page 191**, these, he submitted, were matters on which there was other evidence.

58. I was taken to **page 203** and the interview of Mr Hardy. It was submitted that what Ms Boon says in para 2.16.13 at **page 265** is clearly supported by the evidence she had gathered. As to the suggestion that there had been no investigation into the missing toolbox talk, I was referred to paragraph 2.16.23 at **page 267**. Ms Boon, I was told, asked Mark Jackson about this issue. I was taken to **page 235** to Mr Jackson's interview. Mr Brochwicz-Lewinski submitted that not only did Ms Boon have Mr Hardy identifying the script/talk, it had Jackson who produced the talk. All this, he submitted, goes fundamentally against what the Claimant asserted and what Mr Blewitt said and supports Ms Boon's conclusion that there was no evidence that this talk went missing.

59. Mr Brochwicz-Lewinski took me to **page 266**, and para 2.16.19 to 2.16.24 where she appears to weigh up the evidence.

60. Returning to the email on **page 8**7 Mr Brochwicz-Lewinski said that the Claimant is putting forward in that email that the Respondent was being untruthful about the presence of asbestos; he then says that all the toolbox talks went missing which was demonstrably untrue. He submitted that there was no compelling evidence in support yet Mr Stockdale presents the missing toolboxes as fact.

61. As to the second part, Mr Brochwicz-Lewinski submitted that the Claimant's assertion that was threatened for discipline was not true either, something which was known to the Claimant. I was taken to **page 73** and the 'Parker letter', which it was submitted is on any reading not a threat. I asked why should it not be ready by the Claimant as a shot across his bows, or a message to that

effect? Although he did not accept that it was a shot across the bows, Mr Brochwicz-Lewinski said – even if that were so, there is nothing wrong with the message in that letter. It was not a shot across the bows that Mr Brochwicz-Lewinski he Claimant would be disciplined for raising or mentioning asbestos.

62. I asked what Mr Brochwicz-Lewinski had to say about the question of 'animus'. He said the previous issue (**page 28**) is not about health and safety representation or the role; it was not about what the Claimant had raised; it was about his conduct at a meeting. It was his other conduct that was objected to. During the hearing, Mr Smith said the 'conduct' was slamming a book on a table. The 'clip around the ear' reference was not about his role or involvement in raising disclosures submitted Mr Brochwicz-Lewinski. None of this would be enough to undermine the likelihood of the Respondent establishing a genuine reason for his dismissal.

63. As regards the letter to the union at **page 83**, neither Mr Brochwicz-Lewinski nor Mr Smith is aware of any response from the union taking exception to the content.

64. Mr Brochwicz-Lewinski took me to **page 269** and para 3.11-3.16 submitting that this demonstrates a careful and logical review of the evidence by Ms Boon. In their interviews, Ms Dover and Mr Parker said there had been no mention of discipline at all by them. Mr Brochwicz-Lewinski submitted that the Claimant's statement to the HSE was that he had been threatened for mentioning asbestos but that his own statement does not come up proof on that. He referred to **page 270** and para 3.17 where Ms Boon cites what Mr Stockdale said during the investigation, that he was threatened with discipline if he disclosed the Oakes report – not that he was threatened with discipline for mentioning asbestos. Mr Brochwicz-Lewinski submitted that at **page 270**, para 3.18 the conclusion that Ms Boon reached on the subject of threat was impeccable. He observed that the Claimant never acknowledged that he had gone too far. He resisted the suggestion that he had suggested the Respondent had lied because he realised that he had over-stepped the mark. This failure to recognise this was relevant to sanction.

65. Ultimately, Mr Brochwicz-Lewinski submitted, the Claimant falls short of what is required to succeed on an application for interim relief.

Discussion and conclusion

66. Consideration of sections 100 and 103A ERA requires an inquiry into what facts or beliefs caused the decision-maker (in this case, Ms Boon) to decide to dismiss. That inquiry would be limited if the tribunal were to confine itself to an analysis of the decision-maker's reason by reference to the disclosure in isolation. Other matters may and often will be relevant to a proper scrutiny of the decision-maker's reason or motivation – matters such as whether there is a history of disclosures being made by the claimant, the reaction of the decision maker to previous disclosures, the existence of any 'animus' or tension between the decision-maker and the activities of the claimant. The process which preceded the dismissal such as the extent and reasonableness of any

investigation into the disciplinary allegations and of any disciplinary hearing may and often will play a part in this analysis.

67. At the Final Hearing, it will be for the Respondent to establish the reason or principal for dismissal. Therefore, it will have to satisfy the Tribunal that Ms Boon genuinely dismissed for the reasons given in her dismissal, namely that she genuinely believed the Claimant had, in his email to the HSE, made two assertions which he could not have believed to have been true:

    67.1. That the Respondent had lied about the presence of asbestos in the factory; and

    67.2. That he had been threatened with discipline for mentioning asbestos

68. How the Respondent employer seeks to establish the 'reason' will be by adduce evidence of the decision-maker as to her beliefs, how she formed her beliefs and what material she had before her in forming those beliefs. The belief and the information relied on for forming those beliefs will be scrutinised very carefully by any tribunal and will be the subject of challenge by the claimant. It will be tested against any evidence of antagonism towards the Claimant either in his role or at a personal level. It will be tested against what the Respondent did or failed to do in terms of investigating the allegations against the Claimant. It will be tested against the historical background and the evidence of Mr Blewitt, Mr Waller and Mr Noble. Before determining whether she truly and genuinely believed that the Claimant had lied about being assured of the absence of asbestos and of the threat of discipline if he mentioned asbestos, the tribunal will have regard to the email, the relevant factual matrix and history leading up to the sending the email, the nature and extent of the investigation into the allegations and what came out of the investigation. It will look carefully at her analysis in the letter of dismissal. Although I am not making any findings of fact, I have looked at these matters in this exercise by way of a broad assessment. I have considered the material referred to in the statements and in submissions and read the statements of some of those who will be giving evidence at the final hearing. I have done so with a view to assessing the likelihood (in the sense set out above) of a tribunal concluding that the reason for dismissal was inadmissible.

69. I do not agree with Mr Smith that the tribunal at the final hearing will or is likely to conclude that the email conveyed no suggestion that the employer had misled or lied to anyone or sought to cover anything up. On reading the email without any prior knowledge of any of the history I was left with the impression that the writer was, at the very least, conveying the message that something very fishy was going on within management in their dealing with the presence of asbestos. There is a reference to the Claimant having been told by management after June 2018 that 'they had one' (that is an asbestos management plan); that he had been 'assured' there was 'none [asbestos] on the shop floor' and that he took his word for this until May 2019. There is reference to toolbox talks going missing after someone pointed out there was in fact asbestos on the shop floor and to important witnesses not being interviewed. This is supplemented by the threat of discipline for mentioning

asbestos. The juxtaposition of these references and the statement that there was asbestos on the shop floor at the very least creates the impression that management have been up to no good, implying a cover-up of the presence of asbestos on the shop floor, that documents had gone missing and that he was met with a heavy-handed response and threat for mentioning asbestos. It is capable, on my assessment at this stage, of being construed as an assertion that management had lied/misled and sought to cover things up.

70. Whether the email was or was not capable of being construed as containing an assertion that management had lied about the presence of asbestos in the factory is an important consideration in assessing the likelihood of the Claimant succeeding at a final hearing. If I had concluded that it was not so capable this would, in my assessment, have enhanced the likelihood of the Claimant succeeding. My analysis is not confined to the email itself. Given that the allegations were as to what to his state of mind was (in the sense of what he intended to convey to HSE) it will be necessary for the Tribunal to consider what, in addition to the email, Ms Boon based her decision on (for example, why conclude the Claimant had lied, as opposed to simply making a reasonable mistake? Furthermore, it is perfectly possible for an employer to seize on something that could justifiably lead to disciplinary action or dismissal but be seized on by an employer intent on dismissing the representative for performing his functions or for making disclosures. I have not discounted this possibility. I raised this directly with Mr Brochwicz-Lewinski who accepted the validity of such a situation. However, he submitted that was not this case and that looking at the evidence as a whole, it could not be said that there was a pretty good chance of a tribunal reaching that conclusion.

71. I have had regard to the investigation which was undertaken and to the content of Mr Stockdale's interview, where he says that he did not say management had lied or mislead anyone (pages **140-142**) and what he said (and will say at a final hearing) about the missing toolbox talks (**page 144**).

72. On my assessment, the email itself does carry an implication of misleading (about the presence of asbestos) and of covering up (the missing toolbox talks). Without doubt it asserts that disciplinary action was threatened if asbestos is mentioned. Both of these matters were investigated by Ms Boon.

73. On the face of things, the Respondent has not appear to have reacted to the HSE complaint in a knee-jerk way. The matter was reported to them in October 2019 and the Claimant was not dismissed until May 2019. The Claimant was not suspended. The Respondent carried out an investigation. I have read the interviews. The interview with the Claimant was recorded and a full transcript was prepared. I have seen the Eton Reports and associated documentation and have taken those into account. I have scrutinised what I have seen against a background of the alleged 'animus' between Ms Boon and the Claimant and I have retained a 'suspicious mind' given the Claimant's status as a representative of workers on matters of health and safety and the importance of the subject matter, namely 'asbestos' and the potential that an employer might reach angrily and punitively towards an employee raising such matters with a prescribed body such as the HSE.

74. I take notice of the fact that, when it comes to protected disclosures, the Claimant does not have to show that he was right and that in the context of his safety role, he may undertake his functions reasonably or even unreasonably. I note the words of the higher courts that a tribunal will carefully scrutinise an employer's decision in cases where an inadmissible reason is in play – and this is what will happen at the final hearing. In doing all of this I must avoid making determinations or findings of fact as if I were determining the final hearing. As stated, this is a broad assessment on untested evidence.

75. Taking section 103A first, it must be likely that a tribunal will determine:

    75.1. The Claimant made a qualifying disclosure;
    75.2. That he reasonably believed that the disclosure tended to show that
    75.3. the Respondent failed, was failing or was likely to fail to comply with a legal obligation or that the health or safety of an individual had been was being or was likely to be endangered;
    75.4. That he reasonably believed the disclosure to be made in the public interest;
    75.5. (if the Respondent is right, that he reasonably believed the information disclosed and any allegations contained in it are substantially true;
    75.6. That the disclosure was the principal reason for his dismissal

76. As regards section 100, it must be likely that a tribunal will determine:

    76.1. The Claimant was a representative of workers on matters of health and safety at work;
    76.2. He performed functions as such a representative;
    76.3. That the performance of his functions was the principal reason for his dismissal;

77. I have approached this matter by concentrating on what is likely to be the main battle-ground, namely the reason for dismissal. Assuming he establishes the essential components of the statutory provisions, the Claimant will succeed in his automatic unfair dismissal claim if the conclusion of the Tribunal is that the Respondent has failed to establish the reason for dismissal as being that set out in Ms Boon's dismissal letter and if it goes on to conclude that the true reason, or the principal reason was either the disclosure or that he performed his functions as a safety representative.

78. Based on all that I have read and on the submissions of counsel I am unable to conclude that there is a pretty good chance of the tribunal so concluding. The Claimant's case is not that he accused the respondent of misleading anyone or of covering up and that he reasonably believed this to be so. It is the opposite: he never accused anyone of this. The Claimant denied that he had sought to convey lies or a cover-up in his email. Ms Boon concluded otherwise and in my assessment the email is capable of being read in this way. That matter is separable from the rest of the email (for example the reference to the two lads drilling into asbestos). I have also considered the Parker letter and the

interview notes of Ms Dover and Mr Parker, as well as the Claimant's own interview in which he refers to the threat of discipline if he disclosed the Oakes report. While it may be a fine line between saying 'I was threatened with discipline if I disclosed a confidential report' and 'I was threatened with discipline if I mentioned asbestos', nevertheless the two things are different.

79. The letter which was sent to the union at **page 83** did not induce a response from it taking exception to the Respondent's position following the Oakes' report. Neither that letter nor the letter sent to the Claimant by Mr Parker contains any explicit threat – at best there may be said to be an implicit threat in the sense that if the Claimant continues to maintain the things for which disciplinary action could have been taken on this occasion, things will be different next time.

80. I have had regard to the fact that (even though the Claimant says the threat was explicit) the Claimant is entitled to be wrong about what the implied threat related to: that all that is required is that he reasonably believed that he was being threatened with discipline if he mentioned asbestos. However, that goes only to the issue of whether he made qualifying disclosure. When it comes to the 'reason' for his dismissal, **Abernethy** and subsequent cases require a tribunal to consider the state of mind of the decision maker. I must recognise this in assessing the likelihood of a tribunal determining the 'reason' issue in favour of the Claimant. Having reviewed the documentation and read the analysis of Ms Boon in her outcome letter and statement, weighing that against the points ably made by Mr Smith, I cannot say that there is a likelihood of a tribunal concluding either that Ms Boon did not genuinely believe that the Claimant had lied to the HSE about the threat.

81. I am not persuaded on the material before me that the evidence relied on by the Claimant as to antagonism towards him by Ms Boon and/or others (or 'animus') (paragraph 32 above) or the Claimant's experience of the Oakes report or the evidence of Mr Blewitt and Mr Waller (and taking all this together) is likely to be sufficient to undermine her reason as being the genuine reason. The Respondent did not rush into making any decision. The investigation undertaken prior to the dismissal is on the face of it apparently thorough.

82. That being my broad assessment on the central issue, it is unnecessary for me to say much about the other aspects of the claim. I have proceeded on the assumption that the Claimant has a pretty good chance of establishing that he made a qualifying disclosure in his email to the HSE and that in emailing the HSE he was performing a function as a safety representative. He has, after all reported an incident of two workers drilling into asbestos. Concerns regarding asbestos are likely to be raised in the public interest. The Claimant has also reported the historical absence of an asbestos management plan based on things he was told by Mr Noble. He was on the face of things, doing these things in the performance of his safety representative role as submitted by Mr Smith. However, in light of the separable matters identified by the respondent and addressed by Ms Boon, I am unable to say that there is a pretty good chance that a tribunal will conclude he was dismissed for either inadmissible reason.

The matters for which the Respondent says it dismissed are in my assessment separable from the disclosure and from the performance of his functions.

83. Whether section 43C(1)(b)(ii) applies here – will be a matter for full argument at the final hearing. In the context of this case, that provision envisages the Claimant making a disclosure to a person (here, the HSE) where (in the reasonable belief of the Claimant) **that** person has legal responsibility for the matter to which the relevant failure solely or mainly relates. The reference in section 43C(1)(b)(ii) to 'legal responsibility' is a reference to the 'any other matter'. For this section to apply, the 'matter' must be the legal responsibility of the person to whom the qualifying disclosure is made (or at any rate, the Claimant must reasonably believe that to be so). Whether the HSE may be both a 'prescribed person' and an 'other responsible person' is something that will have to be decided. However, it has no bearing on my assessment on the central issue, the reason for dismissal.

84. I emphasise that I am not making findings of fact on any of these issues; the statements and documents I have considered are untested. It remains to be seen whether, after consideration of tested evidence, the tribunal will determine the complaints of automatic unfair dismissal in favour of the Claimant.

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Employment Judge Sweeney
Date: 21st July 2020