THE INDUSTRIAL TRIBUNALS

CASE REF: 933/19

CLAIMANT: **Wesley Boyd**

RESPONDENT: **Northstone (NI) Limited**

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant was not subject to detriment or dismissal on grounds of having made a protected disclosure and his claim is dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Hamill**

Members: **Mrs G Clarke**
Mrs F Cummins

APPEARANCES:

The Claimant was unrepresented.

The Respondent was represented by Ms R Best, Barrister-at-Law, instructed by Jones Cassidy Brett Solicitors.

THE CLAIM

1. The Claimant claimed that he was subjected to detriment and was dismissed on grounds of having made a protected disclosure.

2. The Respondent denied:

   (1) That any Disclosure amounted to a protected Disclosure in that the Claimant failed to communicate information and lacked the requisite reasonable belief in the truth of any alleged disclosure.

   (2) That the alleged Disclosure was made in good faith.

   (3) That any detriment was suffered by the Claimant.

(4) That Disclosure was made in the public interest.

(5) That any alleged detriment was suffered on the grounds of having made any alleged protected disclosure and denied that the dismissal of the Claimant was in any way connected to the said alleged disclosure.

THE ISSUES

3. The issues before the Tribunal therefore were as follows:

(1) Did the Claimant make a Disclosure in the sense of conveying information?

(2) Did the alleged information tend to show a breach of one or more of the categories set out at Article 67B of the legislation? It was accepted that the category engaged was at Article 67B(1)(d) namely that the health or safety of an individual has been, is being or is likely to be endangered.

(3) Did the Claimant reasonably believe at the time of the alleged Disclosure that the information tended to show the relevant failure?

(4) Did the Claimant suffer one or more detriments?

(5) Were any alleged detriments including his dismissal on grounds of the fact of having made a protected disclosure?

(6) Was the alleged Disclosure made in the public interest?

(7) In relation to value, is the Claimant entitled to compensation for injury to feelings and/or dismissal?

(8) What was the reason for the Claimant's dismissal and was it connected to any protected disclosure?

SOURCES OF EVIDENCE

4. The Tribunal had before it written statements and oral evidence from the following witnesses and had regard to the documentation to which it was referred.

5. The Claimant gave evidence on his own behalf. The Tribunal was also referred to relevant extracts in the Claimant's GP notes and records.

6. For the Respondent the Tribunal heard from the following witnesses:-

1. Sam Seed
2. James Russell
3. Ryan McQuillan
4. John McReynolds

The Tribunal was also referred to statements from Matthew Dickson, Denise Geddis and David Parr. The Claimant indicated that he did not have questions for these witnesses. It was explained to him that in those circumstances their statements, having been adopted and if not subjected to question by the Claimant, would be taken by the Tribunal as unchallenged evidence. The Claimant was given time overnight to consider his position in this regard. The following morning he confirmed that he did not wish to challenge the witnesses and accordingly the Tribunal accepts their evidence.

THE LAW

7. The **Public Interest Disclosure (Northern Ireland) Order 1998** amended the **Employment Rights (Northern Ireland) Order 1996** ("the **ERO**") and introduced provisions protecting workers from suffering detriment on the grounds of having made protected disclosures.

8. The Tribunal was provided with helpful and detailed submissions on the case law and commentary in this area however in the particular circumstances of his case the Tribunal does not propose to recite the key elements of a whistleblowing complaint. This is because, even if the Claimant were to succeed in establishing that he met all of the criteria for having made a protected Disclosure and therefore the right not to suffer detriment, this Tribunal is satisfied that the matters that he complains of as detriments are not, in any way, linked to the making of such a Disclosure.

9. Under **Article 70B** of the **ERO** "a worker has the right not to be subject 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". This relates to detriment occasioned during the course of the Claimant's employment in this case and does not cover a dismissal.

10. Article **134A** of the **ERO** provides that "an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principle reason) for the dismissal is that the employee made a protected disclosure". The burden of establishing the reason for dismissal is on the Claimant as, in this case, he does not have sufficient qualifying period to claim unfair dismissal having been employed from the 5th of February 2018 to the 16th of November 2018. It is for him to satisfy the Tribunal that it has jurisdiction by discharging this burden. The Court of Appeal in the case of **Kuzel v Roche Products Ltd [2008] IRLR 530** considering the circumstances of a dismissal with an allegation of a protected interest disclosure, set out an analysis of an appropriate approach to consideration of the burden of proof. In the event, this Tribunal need go no further than answering the first of the four stated questions proposed by the Court of Appeal, to which the Tribunal will return:

> "Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent was not the true reason?"

RELEVANT FINDINGS OF FACT

11. In the particular circumstances of this case as set out below the Tribunal is satisfied that if there were any "detriment" to the Claimant in the course of his employment, it was not caused by the alleged disclosure. In relation to each and any alleged detriment in the course of said employment the Tribunal is satisfied that the employer has presented evidence which shows that the events in question were unrelated to any disclosure. In this case the Tribunal is satisfied that the dismissal of the Claimant was entirely unrelated to the alleged protected disclosure. Turning to the dismissal of the Claimant and the question posed in **Kuzel**;

> "Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent was not the true reason?"

In the present case and for the reasons set out below the Tribunal has no hesitation in answering, no.

12. That being so the Claimant has not discharged the burden upon him and therefore has not satisfied the Tribunal that it has jurisdiction to further consider the matter of his dismissal. The Tribunal concludes that the alleged Disclosure was neither the reason for the dismissal nor a principal reason for the dismissal. The Tribunal accepts the reasons for the dismissal as given in evidence by the Respondent's witnesses and supported by the documentary record.

13. The Claimant, an HGV driver, was employed by the Respondent under a fixed term contract for six months from 5 February 2018 until 5 August 2018. While the Claimant contended at Hearing that he believed it was a permanent contract, having allegedly been told by Mr McReynolds at interview that after the initial six months he would be "*full-time*", this was disputed by the Respondent. The Tribunal had sight of the said contract of employment which in clear and unambiguous language states that it is a fixed term six month contract with the possibility of extension at the end of the six months.

CREDIBILITY

14. In the first of a number of instances at hearing which gave rise to concerns about the accuracy and reliability of the Claimant's evidence and recollection, the Claimant asserted that there was in existence a letter which indicated that his employment was or would become permanent. After exploration of this in cross examination, the Claimant then asserted that such an understanding had been given to him at interview by Mr McReynolds. Further examination of this point showed that there was no such letter and the Claimant then adopted the position that he would "*go with yours*" referring to the contract of employment before the Tribunal. When asked to explain why there was no reference in his witness statement to such an offer having been made at interview the Claimant stated that he had left it out of his statement of evidence because of a concern regarding the 5000 word limit imposed by the Tribunal during case management. The Tribunal found this to be surprising

given that the Claimant's final statement is only three pages long.

15. Other examples of evidence from the Claimant which the Tribunal found to be unreliable and lacking credibility were:

- The Claimant at hearing and in his witness statement complained about the conduct of Mr. McReynolds on 5 November 2018. He alleged that as he and Mr. McReynolds entered a meeting on that date convened to discuss his dismissal and the circumstances surrounding it, Mr. McReynolds made the comment to him "*we are not even here to discuss your contract of employment, you are out of here, we are paying you to 16th*". The Claimant's attention was directed at Tribunal to the notes of the said meeting. They show that Mr. McReynolds in fact did discuss the contract of employment and the circumstances surrounding it. This was a meeting at which all relevant matters including the economic downturn for the business were discussed.

- The record also shows that the Claimant had input to that meeting. The Claimant disputed the content of the note of the meeting and, when his attention was directed to his own handwritten signature at the end of the note confirming the accuracy thereof and further handwritten comments made by him, proceeded to dispute that it was, in fact, his handwriting or signature. The Claimant was then directed to numerous timesheets and work records contained within the bundle which he had filled in by hand and had signed. It appeared that the signatures and handwriting on the notes of the meeting of 5 November were very similar. On further questioning the Claimant conceded that it was, in fact, his handwriting and his signatures.

- When his attention was drawn to the note of 5 November and the failure at that meeting for him to mention that the cause was, as he claims now, the protected disclosure and that, in fact, he referred only to "bullying" on the part of Mr. Seeds, he said that he had not mentioned it as he did not want to prejudice a live investigation into his grievance. It was then pointed out to him that the grievance had in fact concluded by that time and that he had been notified by a letter of 30 October. He then questioned whether he had received the letter. It was then pointed out to him that the letter had been sent on 30 October by email. He then said that he did not get the email as all emails went to his sister. When asked if it was likely that his sister would not have immediately alerted him to the letter detailing an outcome in relation to grievance and other matters he conceded she would have.

- When the Claimant was asked if his IT1 and the content thereof was honest and accurate he replied that it was, with the exception of any reference to a protected disclosure. He had not in fact mentioned the protected Disclosure in the original IT1. When asked to explain why he did not include it he said that he did not want to prejudice a live investigation. When pointed out to him that the IT1 was issued in December and by that point the investigations had been closed for

approximately two months he then said that the reason was that he thought he only needed to put in an outline of part of his case in the IT1. When asked which of the two reasons he had given he wished to rely on his reply was "*just whatever, you know … just the first or the second one*".

- When asked in Tribunal why he had not attended the grievance appeal he said that he did not attend meetings unless he got a telephone call. This he said was his position despite the numerous letters and emails sent to him arranging and rearranging meetings. He was asked to confirm whether it was the case that he would not attend a meeting unless he got a telephone call, he did confirm this in his evidence and it was then pointed out that he had attended the meeting on 5 October as previously discussed without having received such a telephone call.

- In short, where there are disputes on the evidence as to what occurred, the Tribunal is therefore inclined to reject the Claimant's account as unreliable and lacking in credibility. In contrast the Tribunal found the evidence of the Respondents' witnesses to be clear, consistent and supported by the contemporaneous documentary record.

16. The current proceedings centre on the Claimant's allegation of an incident in April 2018. The date of the incident was a matter of considerable concern to the Claimant. While he initially identified the event as occurring on 16 April in his application to the Tribunal at hearing he was adamant that this date was wrong. He asserted and maintained the position that it had occurred on 17 or 18 April. He suggested throughout the hearing that stating it happened on 16 April was, in some way, a deliberate attempt by the Respondent to misrepresent the sequence of events. This was because he was able to show that it could not have happened on 16 April as he was otherwise engaged that day. The Respondents' witnesses denied this. The Tribunal sought to understand the significance of the date in the mind of the Claimant through questioning, but as the Respondent's witnesses agree that the subject event had, in general terms, occurred the Tribunal does not regard the date as having any material significance in the present proceedings.

17. The event in question was the repair of an HGV lorry onsite at the Respondent's quarry premises in Ballynahinch. On a date in April the vehicle was being repaired by the employee of a third party firm of mechanics. On the Claimant's account, he observed the mechanic working with his torso between the chassis and the raised body of the tipper lorry. The Claimant asserts and maintains that he observed this gentleman working in a dangerous manner because the raised body of the vehicle was not supported or propped up in any way and therefore was at risk of collapsing and seriously injuring or killing the mechanic.

18. This sequence of events is disputed by the Respondent's witness Mr Seed who it was agreed was onsite at the same time and witnessed the same event. In addition, during the subsequent Health and Safety enquiry into this incident, the said mechanic confirmed in interview to the Respondent that he

had not been working in such a dangerous manner.

19. The evidence from Mr Seed to the Tribunal was that he was working underneath the chassis of the vehicle and therefore not at risk. Having considered the oral testimony and written documentary evidence including the Health and Safety report referred to, the Tribunal is not persuaded that the Claimant's account is accurate. However, the Tribunal considers that the Claimant's view of what occurred is an honestly held belief. In the circumstances and considering the law as it relates to the making of a protected disclosure the Tribunal is conscious that the accuracy of the information disclosed is not determinative of whether or not a protected disclosure has been made.

20. The dispute between the parties as to the sequence of events continues in the evidence with the Claimant asserting in his witness statement that he spoke to the mechanic and to Mr Seed at the scene and on the day in question. This is not accepted by the Respondent's witnesses and the Tribunal notes that in his application to the Tribunal the Claimant at Section 7.4 stated "*I discreetly told him at a later date (2 weeks later approx.)*". On the basis of Mr Seed's evidence and the Claimant's own initial position in the IT1 the Tribunal concludes it was first raised by the Claimant two weeks after the event.

21. The Claimant also now alleges he spoke to Mr Russell about it on 19 April, which is strongly denied by Mr Russell. On Mr Seed's account the Claimant mentioned it to him in passing some two weeks later, which concurs with the Claimant's initial position in his IT1. Mr Seed's evidence was that it having been mentioned to him by the Claimant he then spoke separately to Mr Russell but sought to indicate that it was mentioned only in general terms. Mr Russell, in his evidence, confirmed having spoken to Mr Seed about it and said that they discussed it "*at length*". Mr Russell confirmed that, the matter having been explained to him by Mr Seed, he was of the view that while there had been an allegation of "*an unsafe act*" on the basis of what he had been told by Mr Seed no further action was required.

22. Given the Tribunals' conclusions in this case, it is not necessary to consider the issue in detail, nonetheless the Tribunal is satisfied that the Claimant did make a disclosure of information, in that he drew attention to a specific event at a specific time and place and asserted that the manner in which the operations were being carried presented a danger to life and limb. The Respondent's position is that this was not a Disclosure of information but rather a vague or general allegation. The Tribunal is unclear as to what further material the Claimant could have added to his assertion either at the time or subsequently. Thus the Tribunal is satisfied that the Claimant has discharged this element of the test.

23. The Tribunal is satisfied in the circumstances that the Claimant had a reasonable belief at the time as to what he had seen. By the Respondent's admission the vehicle was resting with the body raised and it was confirmed by the mechanic in his statement to the Health and Safety investigation, the notes of which were before the Tribunal, that at some point or points he was

leaning over the side of the chassis in order to view the arrangement of mechanical parts under the frame of the vehicle. In such circumstances it seems to the Tribunal that an observer might reasonably form the view that the mechanic was carrying out his duties in an unsafe manner. For the avoidance of doubt, the Tribunal is not saying that this is what occurred, rather the Tribunal is saying that it is not unreasonable for the Claimant to have formed the view that this is what was happening. Therefore, the Tribunal views his belief as reasonable.

24. The final element is that of whether or not this Disclosure was made "in the public interest". The tribunal concludes that raising a risk of serious injury or death and the operation of dangerous work practices was self-evidently made in that interest.

25. The next issue is, if the Claimant made a protected disclosure, did he then suffer any detriment over the following months. The Tribunal's attention was drawn by the Claimant to events in July 2018. On 19 and 20 July 2018 Mr Seed was carrying out the Despatch Operation at the quarry. This was not Mr Seed's normal duty. On this occasion it was caused by the absence of the regular Despatch Manager. On 19 July there was a dispute between himself and the Claimant regarding directions which he gave the Claimant and which he felt the Claimant had not carried out properly. The Claimant agrees that he did dispute with Mr Seed directions that he was given to carry out on that day. On 20 July there was a further incident when the Claimant, having been dispatched to a Dunmurry quarry by Mr Seed with specific directions to deliver and then return and carry out other specified tasks had, at the direction of a manager at the Dunmurry site, instead carried out other operations. When Mr Seed became aware of this on the Claimant's return he was irritated and displayed this when dealing with the Claimant and seeking to direct him to other activities. The Claimant admits that he challenged Mr Seed in relation to the directions that he had been given. In evidence, Mr Seed confirmed that he was irritated on the day in question but that he did not hold the Claimant responsible, rather he held the manager in Dunmurry responsible for interfering with one of his staff. The Claimant in turn accepted that after speaking to him, Mr Seed then telephoned Dunmurry and he observed Mr Seed complaining about what had happened in Dunmurry. There is no suggestion that Mr Seed used improper language with the Claimant on that occasion or that the Claimant was subject to any disciplinary or other action as a result. The question for the Tribunal is whether or not any of the actions of Mr Seed on the day in question can be linked to the alleged protected disclosure.

26. The Tribunal was not presented with any evidence which could link those events with the disclosure, rather it appears that the Claimant in looking back at the said events, has chosen to ascribe a causal link which does not exist. The actions of Mr Seed on the days in question appear to the Tribunal to be entirely reasonable and explained by the surrounding circumstances. In his witness statement the Claimant makes reference to being "*over scrutinised*" and "*picked on*" as well as referring in his application to the Tribunal to "*bullying*" actions by Mr Seed. However, apart from the matters referred to

above the Claimant has not specified any other instance of hostile or unfair action on the part of Mr Seed. Therefore the Tribunal does not view Mr Seed as acting against the Claimant on the basis of the disclosure at any time.

27. The Claimant then complains about his suspension. This suspension arose out of the grievance procedure which the Claimant initiated in July 2018. Having made a subject access request the Claimant came into possession of interview notes from the said grievance procedure and specifically the interview notes of Mr Seed. He then chose to distribute these interview notes to various other staff. He admitted freely to having done so, when interviewed about his conduct and, asked how many people he had given the notes to, he informed management that it was "*none of your business*". In Tribunal the Claimant accepted that it would have been appropriate for his employer to investigate this allegation. The Tribunal was directed to the Respondent's disciplinary system and procedure. Therein there is a list of offences which can result in dismissal without notice and specifically there is an offence of breach of confidentiality contained therein. This is defined as "deliberate disclosure without permission of company information that might prejudice the company's interests".

28. The Tribunal accepts that circulating the interview notes of a member of staff obtained during a grievance process to other members of staff who are not involved in said process could constitute such an offence. In the circumstances, the investigation being merited, the suspension of an employee under suspicion of such a potential offence seems to the Tribunal to be an entirely reasonable step. More pertinently for the purposes of this case, on the evidence presented, the Tribunal does not accept that there was a link between the suspension, caused by the Claimant's own actions, and the alleged protected disclosure. Therefore the Tribunal does not accept that the suspension was connected to the protected disclosure.

29. The remaining issue is the reason for the Claimant's dismissal. The Claimant asserts that the dismissal was caused by the disclosure in April. The Respondent asserts that the dismissal was occasioned by the economic climate at the time. The Claimant, who is a very experienced driver in the construction industry, accepted in evidence that business in that industry is seasonal. He confirmed that things will get "*quieter*" during the winter months and that there would therefore be less work available. In addition, the Respondent produced financial information to the Tribunal showing a steep downturn in business over the winter months by approximately 50%. This was not challenged by the claimant.

30. The Tribunal accepts the Respondents' evidence on the following points:

- two of the Respondents neighbouring concrete plants, situated at Downpatrick and Newry, were shut in or around September 2018 and have not reopened;

- the Claimant's position with the Respondent has not been filled since his dismissal;

- that there are two other drivers employed by the Respondent at the Ballynahinch quarry and that they are each on permanent contracts, having been employed for approximately five years;

- the only other tipper driver used by the Respondent quarry is an employee of a sub-contractor;

- that sub-contractor is used "*as and when needed*" and the Claimant accepted that this is the manner of that operation.

In short, on the basis of the evidence placed before the Tribunal, the Tribunal accepts that the reason for the Claimant's dismissal was the reduced need for his services at the time. The Respondent asserted that this was the reason why he was employed on a fixed term contract, as such reductions in turnover and therefore reduced need for drivers is both normal and anticipated.

31. A separate but very significant event in this case were the actions of the Respondent at the end of the Claimant's initial six month contract. At that point, in early August 2018, the Claimant had made the protected disclosure and had subsequently raised the grievance against Mr Seed. In the currency of that grievance he drew attention again to the alleged breach of health and safety. On the Claimant's account the Respondent was therefore motivated against him. The Claimant asserted that the Respondent wished to remove him because of his threat to raise the health and safety matter with the Respondent's parent company.

32. At the end of the six month contract in August the Respondent chose to extend the Claimant's employment by a further three months. The Tribunal is of the view that, if the Respondent possessed the motivation attributed to it by the Claimant, it would not have continued to employ him for a further significant period when there was no obligation upon them to have done so. Given the availability of sub-contractors to carry out his duties there would also appear to be no operational or financial need for them to retain him at that time. The fact that they did continue to employ him appears to the Tribunal to be strong evidence against any animosity toward the Claimant on the part of the Respondent.

33. The Tribunal also notes that there was a further two week extension at the end of that three month period, given to the Claimant while he was appealing his grievance and was on notice of the termination of his contract. When asked why this was done by the Respondent, given that it would have been entirely possible to continue with the various processes but not pay the Claimant (who was, at that time, on suspension), Mr. McReynolds stated in evidence that he took the view that, as it was a very complicated situation, it was a matter of "*common decency*" to do so to allow the Claimant time to consider his position. The Tribunal regards this as a significant indicator of the Respondent's actual treatment of the Claimant. In conclusion the Tribunal is satisfied that the reason for the dismissal was unconnected to the protected disclosure in April.

34. The Claimant raised a grievance in relation to a number of matters, in addition to the exchanges with Mr. Seed and the health and safety issue from April. The Tribunal does not consider there is any significance to any of the other matters raised therein. The grievance was dismissed and appealed by the Claimant on 19 September 2018. He was invited to an appeal hearing on 4 October 2018 but did not attend that hearing. A second hearing was arranged which again he did not attend and the process concluded on 17 October 2018. Having considered the evidence presented and the documentary record the Tribunal does not find any evidence in the procedure, proceedings or outcome of the grievance which could demonstrate a link to the alleged protected Disclosure or any substantive unfairness.

35. Accordingly, the Tribunal rejects the Claimant's assertion that he was subjected to any detriment as a result of having made a protected interest disclosure. The Tribunal further finds that his dismissal was not unfair either procedurally or substantively and finds that it was unconnected to the said disclosure. The Tribunal therefore dismisses the Claimant's claim.

Employment Judge:

Date and place of hearing: 14 to 16 January 2020, Belfast.

This judgment was entered in the register and issued to the parties on: