



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Wakefield  
**Respondent:** Adomast Manufacturing Limited  
**Heard at:** Sheffield **On:** 23, 24, 25, 26 and 27 November 2020

**Before:** Employment Judge Brain

## Representation

**Claimant:** In person  
**Respondent:** Mrs M Peckham, consultant at Citation Limited

## RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The respondent dismissed the claimant for a substantial reason due to a breakdown in the working relationship and the loss of trust and confidence between the parties.
2. The respondent's dismissal of the claimant was fair in the circumstances. Accordingly, the claimant's complaint of unfair dismissal fails and stands dismissed.
3. The reason for the dismissal of the claimant is that set out in paragraph 1. Accordingly, the claimant's complaint that he was dismissed for having made protected disclosures fails and stands dismissed.

## REASONS

### *Introduction*

1. After hearing the evidence in this case and after receiving the parties' helpful submissions, the Tribunal reserved judgment. There now follows the reasons for the Judgment that has been reached in this case.
2. The claimant's claim form was presented to the Employment Tribunal on 22 February 2020. The claimant claims that he was unfairly dismissed by the respondent. He therefore pursues claims under the Employment Rights Act 1996.
3. It is the claimant's case that he made disclosures which qualify for protection under the provisions to be found in Part IVA of the 1996 Act and that the reason or the principal reason for his dismissal was that he had done so. This is colloquially known as "*whistle blowing*". Where an employer dismisses an

employee for making a protected disclosure then the dismissal will be unfair. A dismissal of an employee in such circumstances is one of a kind prohibited by the law and which are commonly referred to as an “*automatically unfair dismissals*”.

4. In the alternative, the claimant says that even if he was not automatically unfairly dismissed for whistle blowing, then he was in any case unfairly dismissed because the respondent’s decision to bring his contract of employment to an end was one which fell outside the range of reasonable management responses given the circumstances. This is commonly known as “*ordinary unfair dismissal*”. In essence, the question is whether the dismissal was a reasonable thing for the employer to do in the circumstances of the case. (In contrast, reasonableness is not a consideration in cases of automatically unfair dismissal).
5. The respondent presented its grounds of resistance in answer to the claimant’s claim on 26 March 2020. The respondent admitted that they had dismissed the claimant on 14 February 2020. They denied that they had dismissed him for whistle blowing. They pleaded that they had a permitted reason for the dismissal of the claimant, being a substantial reason of a kind such as to justify the dismissal of him as they reasonably formed the view (given the circumstances) that there was a breakdown in trust and confidence between the parties such that the claimant’s employment was no longer sustainable. Alternatively, the respondent said in the grounds of resistance that they relied upon the claimant’s conduct. (The respondent did not rely upon conduct as a reason for the dismissal of the claimant at the hearing).
6. This matter benefited from a case management discussion which came before Employment Judge Little on 16 April 2020. In anticipation of the case management discussion, the Employment Judge (on 27 March 2020) ordered the claimant to complete a table setting out particulars of his claims. The claimant did so. In addition to the unfair dismissal complaints, he intimated an intention to complain that he suffered a detriment in employment attributable to whistle blowing.
7. It was clarified at the hearing before Employment Judge Little on 16 April 2020 that the claimant was not in fact making any claim of having suffered a detriment while in employment. His claim is confined to the unfair dismissal complaints only.
8. The issues were identified and are recorded in paragraph 7 of the minute of the case management discussion which Employment Judge Little caused to be sent to the parties on 27 April 2020. The issues (as set out in paragraph 7 of his Order) are as follows:
  - 8.1. *Did the claimant make one or more qualifying protected disclosures as defined by the Employment Rights Act 1996 section 43B?*
  - 8.2. *If so was the reason, or if more than one, the principal reason for the claimant’s dismissal that he made a protected disclosure?*
  - 8.3. *If the dismissal is not found to be automatically unfair, can the respondent show a potentially fair reason to dismiss (that is a reason within the Employment Rights Act 1996 section 98(1) and (2))? The respondent seeks to show that the reason was conduct or some other substantial reason of a kind such as to justify the dismissal of an*

*employee holding the position which the claimant held (the respondent contends that the manner in which the claimant raised approximately 23 grievances, not all of which it believes were of a genuine nature, severely disrupted the respondent's business operations to the point that it was having a detrimental effect on the health of the respondent's managing director and the welfare of the claimant's colleagues within a small workforce of approximately 13 staff).*

- 8.4. *If the respondent can show a potentially fair reason was that actually fair having regard to the statutory test set out in section 98(4) of the ERA 1996.*
- 8.5. *If the claimant is found to have been unfairly dismissed, did he contribute to that dismissal and if so to what extent? How should that be reflected in terms of remedy?*
- 8.6. *If the claimant's dismissal was procedurally unfair, would a fair procedure have made any difference to the ultimate outcome?*
9. It is not in dispute that the claimant made protected disclosures. It is convenient to summarise them here. The Tribunal will consider them in greater detail later on in these reasons. Broadly, the protected disclosures fall into three categories. The claimant made disclosures in which he provided information setting out his belief that the respondent was in breach of:
  - 9.1. The General Data Protection Regulation (2016/679/EU) and the Data Protection Act 2018.
  - 9.2. Health and safety law.
  - 9.3. Environmental law.
10. Although there is no issue that the claimant made protected disclosures, there is an issue raised by the respondent that him having done so was not the reason or the principal reason for his dismissal. Therefore, the respondent denies there to be a causal link between any of the protected disclosures made by the claimant on the one hand and his dismissal on the other.
11. The claimant had more than two years of service with the respondent. That being the case, it is for the respondent to show the reason for the dismissal. Here, the respondent of course says that the reason for the dismissal is for one of the permitted reasons in section 98 of the 1996 Act.
12. In circumstances where the employee argues (as the claimant does in this case) that the real reason for dismissal was not that advanced by the employer but that it was for an automatically unfair reason, the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which may show the competing automatically unfair reason advanced. Should the employee satisfy a tribunal that there is such an issue, the burden reverts to the employer, who must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal. There is no burden of proof upon the claimant to show that him making protected disclosures was the reason for his dismissal. However, it is insufficient for the claimant simply to assert that the making of the protected disclosures was the reason for his dismissal. He has to do more than that and show that there is an issue which warrants investigation and

provides a basis to establish that whistle blowing was the principal reason for the respondent's decision to dismiss him.

13. The Tribunal heard evidence from the claimant. On behalf of the respondent, the Tribunal heard evidence from:
  - 13.1. Denise Wolstenholme. She is the managing director of the respondent.
  - 13.2. Alisdair McQueen. He is employed by the respondent as a senior technical chemist.
  - 13.3. Stacey Darnell. She is employed by Citation Limited as a HR consultant.
14. Having considered the evidence, the Tribunal makes the findings of fact as set out below. After recording the findings of fact which have been made, the Tribunal will go on to set out the relevant law and will then apply that law to the factual findings in order to determine the issues in the case set out in paragraph 8 above.

### **Findings of fact**

15. The claimant was employed by the respondent as a sales/office manager between 18 July 2016 and 14 February 2020. (The claimant's role attracted several different labels from time-to-time with the evolution of his functions as we shall see). The respondent manufactures chemicals and cementitious products for the construction industry. The respondent also manufactures rubberised products. The respondent is a small concern. They employ 13 employees. They operate from premises at Units 1 and 2, Barkston Road, Carleton Industrial Estate, Barnsley.
16. Mrs Wolstenholme gives a little more background about the respondent in paragraph 11 of her witness statement. She says, *"When I took over the company, it was in a bad way, both financially and structurally. However, it was and still is a good business. The owner of the business is Mr Morris Sherling (Charlie) who lives in Dublin. The company was located near Shafton, Barnsley. We moved to our current premises about four years ago, 2016 as it is a larger, and much safer premises."* She goes on to say that, *"Being in the chemical industry, we always take health and safety seriously. Our current premises are not a purpose built chemical manufacture facility, it always requires some sort of change due to a variety of factors. There are legislative changes, maintenance, advice given on insurance visits and sometimes, an inspector's personal preference for where and how items should be stored."*
17. An organisation chart is at page 153 of the bundle. This is dated September 2019 and appears to have been accurate at the time of the events with which the Tribunal is concerned. The claimant's job title was identified, in this document, as *"office and production manager"*. He was senior within the organisation, sitting behind only Mrs Wolstenholme and Mr McQueen in the hierarchy. There is another organisation chart within the health and safety handbook which is in the supplemental bundle ('SB'). At page 38SB may be found quite a simple safety management structure. The claimant (whose role is described there as *"production supervisor"*) reports upon safety issues to Mr McQueen who in turn reports to Mr Wolstenholme.

18. The offer of employment made to the claimant by the respondent may be found at page 66 of the bundle. This is dated 20 June 2016. The claimant was offered the role of sales/office manager. A statement of his terms and conditions of employment is at pages 66A to 66G. The statement of terms and conditions is dated 3 November 2016 and was signed both by the claimant and Mrs Wolstenholme. The job title is confirmed as sales/office manager.
19. The claimant's role was expanded in November 2016 to include human resources and health and safety. A letter addressed to members of staff notifying them of this expansion in the claimant's role is at page 67. This appears to have come about as a consequence of the claimant telling Mrs Wolstenholme about his experience in dealing with HR and health and safety matters with his previous employer Laing O'Rourke. Mrs Wolstenholme says in paragraph 9 of his witness statement that the claimant *"was to assist Mr McQueen with health and safety. This allowed Mr McQueen to focus on the COSHH and ISO work as well as the management of the business in my absence. The claimant assisted on the day to day health and safety processes in the company's premises."*
20. About this expansion of his role, the claimant says in paragraph 4 of his witness statement that, *"Following the site health and safety audit report on 27 October 2016 and the subsequent dismissal of Terry Payne, the production manager, on 15 November 2016 the respondent carried out a restructuring of duties. In to my role of sales/office manager the roles of production manager, being the production staff's line manager, training officer and health and safety officer, responsible for all enforcement policies and maintaining records, were all immediately added"*.
21. In addition to undertaking these duties, the claimant had a couple of additional responsibilities. He was one of the first aiders. His first aid certificate is at 566B. It is dated 27 October 2016. The certificate lasts for three years and therefore expired on 26 October 2019. At around the time of the expiry of the claimant's first aid certificate, the other two first aiders were Steven Davies (production operative) and Karl Hays (production operative). The claimant was also a GDPR officer (along with Mrs Wolstenholme and Sheena Lindley, accountant). The claimant was appointed to the GDPR role on 25 May 2018.
22. AS well as the contractual documentation already mentioned, the respondent has an employee handbook and a health and safety handbook. The employee handbook which features in the supplemental bundle at pages 1 to 30SB is dated 9 January 2019. A public interest disclosure policy is at page 18SB. This provides that anyone wishing to make a public interest disclosure *"is strongly recommended to raise the issue with management in the first instance so that, where appropriate, there is an opportunity to address the area of concern."* Alternatively, the policy says that disclosures may be made to the independent whistle blowing charity Protect.
23. Mrs Wolstenholme said in evidence that she was unaware of the handbook dated 9 January 2019 until her attention was drawn to it by Citation in connection with these proceedings. She then refers to a previous version of the employee handbook dated May 2018 at pages 198 to 226SB. This handbook does not contain a whistle blowing policy. She thought that at the material time, the respondent was operating pursuant to the 2018 policy.

24. This appears to be an issue upon which the parties agree (albeit with an undercurrent of tension which came to characterise the relationship). When the claimant cross-examined Mrs Wolstenholme, it was suggested to her that the respondent was still using the May 2018 handbook at the time of the events with which the Tribunal is concerned and that the whistle blowing policy set out in the January 2019 handbook was not yet in force. (Mrs Wolstenholme put it to the claimant that it was he who prepared the 2019 policy and that he had omitted to mention to her that there was a new version of the employee handbook. At all events, it appears to be common ground that the 2019 policy and the public interest disclosure provisions within it are not relevant).
25. As has been said, there is no issue that the claimant made some protected disclosures to the respondent. It is not necessary in a whistleblowing case for an employee or worker making a protected disclosure to follow the employer's whistle blowing policy. However, the issue around the provenance of the 2018 and 2019 handbooks is of relevance to the issue of trust and confidence.
26. There is no issue that the claimant performed his role well. Mrs Wolstenholme's concern was about the claimant's attitude and manner. In paragraph 56 of her witness statement she says, *"The claimant did have a controlling manner towards other staff – he was very good at his job, but his management skills were not the best. In summary it was his way or no way. His organisational skills and structure were very good but his conversational skills to other staff could be antagonistic. I had to intervene on several occasions as he had upset members of staff. I recall saying to him that he needed to smooth off the edges."*
27. Mrs Wolstenholme gave oral evidence before the Tribunal to much the same effect. She said that the claimant has *"sharp corners"* while at the same time acknowledging that he was very good in his role.
28. Earlier in her witness statement, in paragraph 14, Mrs Wolstenholme said that, *"Both myself and the claimant had a friendly professional working relationship. I did have occasion to speak to him informally about his communication style to employees and external persons on site. I informed him that his style could be harsh and he needed to "smooth off the edges." I had these informal discussions with him because it had been brought to my attention by one of the directors of Tarmac that the claimant had sworn at one of the young ladies over the phone (Kelly Copperwheat) when a delivery was incorrect. Our pallet supply also made complaints along with several others."* In evidence given under cross-examination, the claimant accepted that Mrs Wolstenholme had spoken to him about the issue involving Kelly Copperwheat.
29. Citation Limited, for whom Mrs Peckham works, is an employment law and health and safety consultancy service. As part of that service Citation carry out an annual health and safety audit. The 2018 audit was undertaken on 11 December 2018. It is to be found in the supplemental bundle at pages 132 to 155SB. The 2019 audit was carried out by Laura Bainbridge of Citation on 12 November 2019. Her report is at pages 156 to 195K.
30. During the course of her audit, Mrs Bainbridge took a number of photographs some of which appear within the report. It can be seen from the photograph at page 195F that the claimant and Mr Hays were identified (at the time of the report) on a notice displayed on a noticeboard as the site first aiders. The claimant fairly acknowledged this to be incorrect information. His first aid

certificate had expired on 26 October 2019 (page 566B). He gave unchallenged evidence that he corrected the notice within minutes of her leaving site following the audit. (The claimant said that in any case the mere expiry of the certificate would not have prevented him from rendering first aid had such been necessary, it being lawful for him so to do having undertaken the necessary training in October 2016). The Tribunal shall return to the issue of first aid cover later in these reasons as it features later in the story.

31. In anticipation of Mrs Bainbridge's health and safety audit, the claimant undertook a great deal of preparation work. In oral evidence, the claimant said that he had been preparing for the audit for around six weeks. The claimant was pleased with the audit outcome.

32. One of the preparatory steps undertaken by the claimant was to obtain driving licence information from all of the authorised drivers of the respondent's vehicles. The claimant says the following in his witness statement:

*"(10) ...I had to obtain driving licence information to ensure all the drivers of respondent's vehicles had no points or bans on their licence. On 5 November 2019 I sent out an email requesting certain information to all the respondent's vehicle drivers. I was not aware at that time that I made an error in the process and I used the wrong portal on the DVLA website and had requested the incorrect route for the required information. I had used the "individual" request page and not the "company/third party" request page. A genuine error on my part from which I made no personal gain or use of the information provided to me in good faith.*

*(11) The information obtained from DVLA was shown to Mr Alisdair McQueen and he signed acceptance for himself and his wife, Mrs Anne McQueen. Mr Carl Green was also shown the same information and wished to also see confirmation of "how many points he currently had on his licence". Both signed the acceptance form on 7 November 2019.*

*(12) After the audit, on 14 November 2019, and obtaining a concession because I did not have all the employees' driving details. I sent a subsequent second email request to the respondent's managing director and Mr Sam Agar, I was then "pulled into a disciplinary meeting" with no witness or note take, by the respondent's managing director and told "I had broken the law" to which I vigorously denied. After this meeting, Citation Limited advised the respondent's managing director that it was not a disciplinary matter as the error made was a genuine mistake on my part and was not intentional. The respondent issued a "letter of concern" the following day, 15 November 2019, to myself based on my strong defence of a genuine mistake. I took the letter and hoped that would be the end of the matter.*

*(13) No employee of the respondent, involved with this request for information, although made aware of the incident at the time by the respondent's managing director, raised any written complaint or statements. Mr Carl Green and Mrs Anne McQueen only raised written complaints two months after the event, on 16 January 2020, eight days after I was suspended."*

33. In the passages cited in paragraph 32, the claimant makes reference to several documents within the bundle. It is necessary only to refer to some of them here. Pages 535 to 539 is a contemporaneous diary prepared by the claimant which covers the period between 5 November and 19 November 2019. This

document explains the circumstances of the “concession” described by the claimant in paragraph 12 of his witness statement. The claimant means here to refer to an extension of time within which to obtain the driving license information. This was needed because Mrs Wolstenholme and Mr Agar had not provided the information by the date of the health and safety audit. Mrs Bainbridge allowed the claimant to obtain the necessary information by 30 November 2019. (The Tribunal notes in passing that Mr Agar is Mrs Wolstenholme’s son).

34. The claimant also, in the passages cited in paragraph 32, makes reference to pages 503, 503A and 503B. Page 503 is the email addressed to those whose driver licence details the claimant was seeking. The claimant asked for the driving licence number, the individual’s national insurance number and the postcode at which the licence was registered. Page 503A is a list of those who had complied with the claimant’s request as at 7 November 2019. This records that Mrs Wolstenholme and Mr Agar’s details were still awaited. Page 503B is the reminder addressed to Mrs Wolstenholme and Mr Agar that their information was still awaited.
35. Mrs Wolstenholme says in her witness statement:
- “(15) ... on 14 November 2019, I had to speak to the claimant as I saw him accessing employee’s confidential driving licence information from the DVLA database. The claimant had emailed staff on 5 November 2019 (see pages 503 to 503B) to request personal information such as driving licence number, national insurance number and postcode where the licence is registered.*
- (16) I challenged him [in] the office and informed him he would not do it that way, it was illegal. The claimant became very argumentative and confrontational. He would not accept that he could not log in personally as the employee to view their driving licence details. The process was to request a check code. What the claimant had done was illegal as he had logged on using each individuals’ personal data to obtain a copy of their driving licence.*
- (17) The correct process to obtain updated driving licence information from employees is to request a check code from the DVLA. The procedure is shown on screenshots which are shown at pages 488 to 490 of the bundle.”*
36. Mrs Wolstenholme says in paragraph 18 of her witness statement that immediately after she saw the claimant accessing the confidential driver licence information from the DVLA database and upon her challenging him, the claimant “became very aggressive.” Mrs Wolstenholme says in that that, “I asked [the claimant] to come upstairs away from the main office to discuss the matter. On arrival in the boardroom he slammed his paperwork down on the table and started shouting that he had employees permission. I explained that asking for NI numbers, postcodes etc was not giving him permission. The situation soon became out of control and he insisted that I took it further. As I was very concerned about his anger and attitude to the extent that I took myself out of the office and contacted citation, our HR providers, for their advice. The claimant can be very aggressive and intimidating in his demeanour.”
37. The claimant does not go into a great deal of detail about the meeting of 14 November 2019 in his printed witness statement. However, in his contemporaneous note (in particular, at pages 535 to 537) the claimant provides more information. He says in this record that Mrs Wolstenholme told



him three times that he had broken the law and that she shouted at him upon the third occasion. The claimant says that he told her that he was unaware that he had broken the law and that he held his hand up to having done so but that it was not done *“with malicious intent”*.

38. The claimant records that Mrs Wolstenholme at this point said that she was going to seek advice from Citation. The claimant’s account is that around 45 minutes later he was summoned upstairs to the conference room once again and was told that the respondent would be taking action against him. The claimant says that Mrs Wolstenholme again said that he had broken the law. She then went on to say that, *“she had a couple of recent complaints about me from other members of staff and I had also had a run in with [Lucy McKeefery] last year which had caused issues.”* The claimant’s note records Mrs Wolstenholme saying that the claimant was becoming a problem. Mrs Wolstenholme then said that she was going to speak to Citation again whereupon the claimant returned to his desk, looked on the DVLA website and discovered that he had used the wrong portal by mistake.
39. When giving oral evidence before the Tribunal, the claimant fairly accepted that he had made an error and had logged on to the wrong portal. He also accepted that when confronted about this by Mrs Wolstenholme he had acted defensively. He said that when he returned to his computer after the second meeting that day, he realised that he had attempted to log on to the wrong portal. He described this a *“head in the hands moment to put it mildly”*.
40. It was put to the claimant that the arguments between Mrs Wolstenholme and him that day had become heated. This the claimant did not dispute although he said that Mrs Wolstenholme had set the tone. *“She started it as heated”* was how the claimant put it.
41. Mrs Wolstenholme produced no contemporaneous note of her dealings with the claimant on 14 November 2019. She said upon the first day of the hearing that there may be a contemporaneous note in a notebook kept by her at the office. However, an overnight search was to no avail. It appears not to be in dispute that the claimant’s document at pages 535 to 539 was made by him contemporaneously. At any rate, there was no suggestion that he had created the document at any other time. The Tribunal is satisfied, accordingly, that this is the best contemporaneous evidence available of what passed between Mrs Wolstenholme and the claimant that day.
42. From this, the Tribunal concludes that the claimant did make an error in seeking to access the incorrect portal. He was not permitted so to do. This was an innocent mistake. Mrs Wolstenholme acted correctly in stopping the claimant from performing the improper process which she had seen him attempting to undertake. A heated exchange between the claimant and Mrs Wolstenholme then followed.
43. The next day, 15 November 2019, Mrs Wolstenholme issued the claimant with a letter a copy of which is in the bundle at pages 70 and 71. Mrs Wolstenholme describes this in paragraph 19 of her witness statement as *“an informal warning/letter of concern”* about the claimant’s conduct. She says that she *“decided against disciplinary action at this stage and hoped that the informal approach would draw a line in the sand and prevent a repeat of his conduct.”*

44. The letter reads as follows:

*"I write further to our meeting on Thursday 14 November 2019 in which we discussed the following allegations:*

- *Accessing employee details from the DVLA without the necessary permission.*

*During the meeting your explanation for this was:*

- *That you had the employee's permission, you produced various documents. However it was proven that these documents did not grant you the permission required.*

*Having listened to your explanations in relation to the above, I have found them to be unsatisfactory for the following reasons:*

- *You became very argumentative and would not accept responsibility which led me to take further advice from our HR provider.*

*However, I have decided that on this occasion, no formal disciplinary action will be taken against you in relation to the matters discussed. Whilst no formal disciplinary action is being taken at this time, I do require that an immediate and sustained improvement be made in relation to the following:*

- *As I am very much aware you had the company's best interest in hand we still have to abide by the legal rules. Therefore when a matter of this importance is brought to your attention I would like you to accept the discussion as well-meaning and not become confrontational and argumentative.*

*Please note that whilst I have decided not to take any action this time, should there be a repeat of any of the above offences, the disciplinary procedure may be invoked and appropriate disciplinary action may be taken."*

45. The claimant's contemporaneous note says (at pages 537 to 538) that the claimant accepted the letter and resolved to "*take it on the chin*". He says in the note that Mrs Wolstenholme then said that she had had "*those two complaints*" about the claimant and that she was not impressed with his attitude. The complaints which were being referred to were from Miss McKeefery and from Rebound (which is a customer of the respondent to whom is supplied coloured tyres for children's playgrounds). The claimant records Mrs Wolstenholme as saying that "*the gate is always open and you are welcome to leave at any time*" which he took to be a threat.

46. He records Mrs Wolstenholme saying that she wished the claimant to take part in a '360 degree' appraisal, three years having elapsed since his last one. The claimant agreed to this suggestion. The claimant then makes reference to some correspondence that day with Mrs Wolstenholme about '360 degree' appraisals and the preparations that needed to be made for it. In the event, this did not take place.

47. Mrs Wolstenholme's evidence, in paragraph 21 of her witness statement, is that "*...following the issue of the letter [of concern dated 15 November 2019], this seemed to be the catalyst for a change in the claimant's behaviour at work. His approach and demeanour in the work deteriorated into a confrontational manner and aggressive manner. On at least two occasions he shouted*

*aggressively at me, stating my management skills are atrocious, he continued shouting at me and as I had a call from the owner, I put a stop to the conversation. In hindsight, I should have progressed that matter via a disciplinary procedure but, it was my practice to talk to staff to resolve matters and to this end, I would rather sit down and talk to someone rather than going down the official formal route.”*

48. On 19 November 2019 the claimant gave a tool box talk. This is documented at pages 213 to 215. The tool box talk concerned personal protective equipment ('PPE'). According to his contemporaneous note at pages 538 and 539, the claimant had arranged two tool box talks that day. One talk was for the production staff and the other was for the office staff. The claimant printed a list of attenders. This is at page 215. Mrs Wolstenholme's name does not appear upon the list.
49. There was a dispute between the claimant and Mrs Wolstenholme as to whether she had requested the claimant to remove her name from the list. According to the claimant's contemporaneous note (at page 539), he placed an individual PPE form and PPE equipment upon Mrs Wolstenholme's desk at around 15:40 on 19 November 2019. These were then returned to the claimant by her upon the basis that she had already had two sets of PPE. One she kept at work and the other she kept in her car. Mrs Wolstenholme attended one of the tool box talks. It was the claimant's case that she refused to sign the attendance sheet and asked for her name to be removed from the list of attenders. Mrs Wolstenholme's case is that the claimant had of his own volition omitted her name from the list and that she had not requested its removal. It is not necessary for the Tribunal to make findings of fact about who was in the right around the events concerning the tool box talk. It is sufficient to record that mutual antagonism was seeping into the relationship.
50. As if to reinforce this observation, the Tribunal has already observed that Mrs Wolstenholme pinpoints the incident that occurred on 14 November 2019 as the catalyst for the deterioration in the working relationship. The claimant, in evidence given under cross-examination, accepted that by early December 2019 the working relationship between the parties had become strained. The claimant says that, *“after the letter of concern, I thought long and hard over the weekend [of 16 and 17 November 2019] and resolved to get on with it. We then had the tool box talk on 19 November. [Mrs Wolstenholme] sabotaged it by refusing to get involved which demeaned my existence and then encouraged others not getting involved. Then there was the incident of 21 November 2019.”*
51. The claimant says in paragraph 17 of his witness statement that upon 21 November 2019 Mrs Wolstenholme *“organised two separate meetings, one with the office staff and the other with production staff and asked that anyone who had issues with any other member of staff come to her with their grievances in confidence. She then subsequently held meetings with individual members of my line managed staff, without me being present, and asked subsequently asking them to monitor me.”*
52. The claimant gives pages 173 to 183 of the bundle as the relevant references corroborative of his evidence in paragraph 17 of his witness statement. (These pages in fact form part of a grievance raised later by the claimant). Page 178 is a witness statement dated 22 November 2019 from Mr Davies. He says that

the five members of the production staff (himself included and all of whom are identified in the organisation chart at page 153) were present at a meeting with Mrs Wolstenholme held on 21 November 2019. Mr Davies says that Mrs Wolstenholme, *“asked that if anyone had a problem with someone on site could they now please make it official as in the past she had tried to deal with issues by not making them official. She also made the comment “as we have someone on site who likes to do things by the book so she was having to do this now.”* Mr Davies goes on to say that, *“after Denise left we all had a discussion and knew the person she was talking about was our line manager, Mark Wakefield.”*

53. In oral evidence about this, Mrs Wolstenholme said that she had had meetings with members of staff and that *“because people were complaining I just asked for complaints to be by email”*.
54. On 26 November 2019 the claimant wrote to Mrs Wolstenholme. In this letter, he made a data subject access request (“SAR”) pursuant to the General Data Protection Regulations. The letter is at pages 72 and 72A. It will be recalled that after May 2018 until this point the claimant had been one of the three GDPR officers. On 26 November 2019 he sent an email to the other two GDPR officers (Mrs Wolstenholme and Mrs Lindley) advising them that in light of him having made a SAR *“I have been advised to temporarily relinquish my access to the company personnel files and ask that I also temporarily stand down as a named GDPR officer within the company.”* He returned his personnel file key to Mrs Wolstenholme. A receipt for the key signed by both of them is at page 244.
55. At 09:35 on 28 November 2019 the claimant emailed Mrs Wolstenholme (page 74). This was a complaint raised under section E of the respondent’s staff handbook (which deals with equal opportunities and diversity). It was a complaint of victimisation and harassment and bullying. The claimant complained that:
  - 55.1. On 27 November 2019 he had greeted all members of staff by saying *“morning”*. Mr Agar did not respond to the claimant’s greeting.
  - 55.2. On 28 November 2019 the claimant arrived at the office at 8.25am. Again, the complaint was about Mr Agar’s manner towards the claimant including looking at the claimant *“in a threatening manner.”* The claimant requested Mrs Wolstenholme take steps to resolve the matter. He concluded by saying that he *“will add these grievances to the others I have against the company.”*
56. On 29 November 2019 the respondent wrote to the claimant (pages 75 and 76). The claimant’s grievance of 28 November 2019 (wrongly referred to as having been dated 26 November 2019) was acknowledged. Mrs Wolstenholme said in the letter that a formal grievance hearing had been arranged for 5 December 2019. She went on to say that, *“I want to deal with this matter thoroughly and ensure that it is dealt with as objectively as possible. Therefore, we have engaged an impartial consultant from Citation Limited, Katherine Biglen, who will chair the grievance hearing. Katherine Biglen will hold this hearing, which will include considering any representations you wish*

to make, review all the evidence and provide me with a report containing recommendations.” Mrs Wolstenholme summarised the claimant’s complaints at this time as follows:

*“1. Complaint of company personnel (Denise Wolstenholme, Alisdair McQueen, Carl Green and Sam Agar) breaking health and safety and GDPR regulations.*

*2. Complaint of victimisation by Denise Wolstenholme (MD).*

*3. Complaint of harassment and bullying by Sam Agar.”*

57. The third of these issues was a reference to complaint in the email of 28 November 2019 at page 74. The first and second arose out of an incident which took place on 28 November 2019 and which was recorded in an email sent by the claimant early on 29 November 2019. This email is at page 77.
58. In the email at page 77, the claimant referred to an incident which took place on 28 November 2019 at 09:50. He says that he was *“walking back into the sales office, I witnessed you, with your computer screen turned in to face the open office showing Alisdair McQueen and other members of staff that could see it, the grievance email I had sent to you at 09:40 (sic), the same day, concerning Sam Agar.”* [This was the email at page 74. The claimant in fact sent that email at 09:35 on 28 November 2019. His reference in the email at page 77 to it being sent at 09:40 is in fact an error].
59. The claimant went on to say (in page 77) that, *“I wish to now inform you that I have raised an official complaint with the Information Commissioner’s Office (ICO) listing you as the company respondent but also giving the names of all the staff present at the time of the incident.”* The staff are then listed. Included within the list was Mr McQueen.
60. The claimant went on to say that, *“I have also raised a written SAR request, sent yesterday, to the Employment Law manager at Citation making the same request for copy of any personal details they hold on me. In particular I have requested a transcript of a phone call you made to them on 26 November 2019 at 10:30 from the technical office when you said, “can I put you on hands free as I have got Alisdair [McQueen] with me.” I was sat, on a break, in the staff canteen next door and could clearly hear your conversation from which I have made notes which will be given to the ICO and my legal representative.”* The claimant concluded, *“I will **no longer** communicate with you, the company or any of your “third party representatives” by email as I believe, and have been advised, it to be an unsecure method of communication within the company and not protected by GDPR 2018”.* The claimant copied the letter to the ICO and Howells, solicitors.
61. When asked by the claimant about the incident of 28 November 2019, Mrs Wolstenholme accepted that she had shown Mr McQueen the email from the claimant at page 74. In fact, she accepts having done so in paragraph 35 of her printed witness statement. In paragraph 36 of her statement she says that, *“Mr McQueen is part of the senior leadership team in the company and, as second in command, was entitled to see the claimant’s email as he would have*

*involvement in the grievance investigation. The claimant is fully aware that both myself and Mr McQueen discuss management issues whilst we are at work. The claimant has previously been part of management meetings and has never questioned them before.” Mrs Wolstenholme then goes on to say in paragraph 37 of her witness statement that, “The claimant came in shouting, “that’s it, you have broken GDPR”. He was shouting and was very aggressive in his demeanour and tone in front of the staff in the office. I had been the subject of a number of his emails. Alisdair told him to calm down and that it was enough. I left the office because I was so upset.”*

62. Mrs Wolstenholme goes on to say in paragraph 38 of her witness statement that she became upset and started to cry. She says that she *“walked off to the toilets, some of the girls in the office followed me. The claimant’s conduct was intolerable and aggressive. This was an example of where I felt scared to be in the same room as him. I was aware that as I walked away, the claimant continued shouting at Alisdair who also walked away to avoid any further confrontation. Unfortunately, the claimant followed him continuing to shout. I am aware that Faz, [Mohammad Fazil Reza] our accounts apprentice followed Alisdair and the claimant out of the office to try and calm the situation down.”*
63. In paragraph 34 of her witness statement, Mrs Wolstenholme comments upon the claimant’s observation in the email at page 77 about overhearing the telephone call of 26 November 2019 at 10:30am. Mrs Wolstenholme says that she believed, having been informed by staff members, that the claimant had been seen in the toilets standing next to the wall trying to overhear conversations and that he had not, as he claimed, overheard it whilst sitting in the staff canteen.
64. In oral evidence, Mr McQueen commented that *“things seemed to be ramped up a notch or two”* following the incident of 14 November 2019 concerning the driving licences. In his printed witness statement Mr McQueen says:
- “(28) There was an incident where Mrs Wolstenholme and I were in my office discussing some recently received additional grievance sent to her and the corresponding intimidating attitude and behaviour with Citation on an open call when we were then accused of breaking GDPR regulations by the claimant. It had transpired that he had been listening in on the conversation from the kitchen area next door to my office. I would point out that Mrs Wolstenholme was perfectly entitled to discuss these matters with me and with Citation as we both had responsibility for operational and management issues. [This is the incident of 26 November 2019 referred to in paragraph 34 of Mrs Wolstenholme’s witness statement and to which the claimant makes reference in his letter of 29 November 2019 at page 77].*
- (29) On one occasion in the open sales office which I had just entered, Mrs Wolstenholme tried to show me an email just sent regarding some further grievance. [This is the email of 28 November 2019 at page 74].*
- (30) He saw what was happening and he kicked off in the sales office in front of staff, shouting and screaming about breaches of GDPR. I believe this was in relation to the letter of 28 November 2019 at page 74 of the bundle.*
- (31) I told him to be quiet and stop shouting and back off. He ignored me and Mrs Wolstenholme got upset and started crying. She went to the bathroom*

*and was followed out by a couple of the girls from the office to make sure she was ok.*

*(32) I then left the office and set off towards the factory. The claimant followed me out of the office shouting "I expected better of you (ie me) – breaking the law".*

*(33) I replied that the only one breaking the law was him by going on to the DVLA website without obtaining permission and obtaining people's driving licence information. He replied – "you gave me permission". I informed him that was not true (he had asked by email for us with company cars to supply him with driving licence details, home postcode and NI details) and most certainly, my wife hadn't given him permission.*

*(34) I also recall a colleague, Fazil following us out of the office area and telling him to leave it and calm down.*

*(35) After this incident, it got really unpleasant, you did not want to go in the office as the atmosphere was very intimidating and dreadful. No one was speaking to one another and no one wanted to spend any time there. Previously, the main sales office was very friendly and everyone was chatting and laughing and joking with each other.*

*(36) I stopped going into the office where possible as the atmosphere was not pleasant, and this was being created by the claimant. A constant and repeat barrage of memos day in, day out emphasised in strong and intimidating terms, some complaint and grievance where we (ie the company) were allegedly failing to comply with another industrial or environmental regulation."*

65. When asked about these passages in cross-examination, Mr McQueen said that Mrs Wolstenholme had on 28 November 2019 shown him the email from the claimant sent earlier that morning. Mr McQueen said that Mrs Wolstenholme had asked him "*have you seen this?*" Mr McQueen said that the claimant was aggressive and hostile and maintained that Mrs Wolstenholme had breached the GDPR. It was suggested by the claimant that Mrs Wolstenholme had breached GDPR by showing Mr McQueen the email. This Mr McQueen denied. He added, "*the atmosphere was starting to deteriorate rapidly. You were swearing at the top of your voice. You reduced Mrs Wolstenholme to tears and screamed at me as I left the office. You followed me out. You said that I had broken the law. I said that you had by going on to the DVLA site as those individuals. I didn't give you permission.*"
66. In paragraph 21 of his printed statement, the claimant makes reference to entering the main office on 28 November 2019 to find that Mrs Wolstenholme had turned her computer screen in order that Mr McQueen could see it. The claimant was concerned that other members of staff were also able to see the screen.
67. The claimant says in paragraph 22 of his witness statement that within an hour of the grievance of 29 November 2019 at page 77 having been received by the respondent his factory keys were taken from him. The claimant said that he had been a keyholder since November 2016 with no issues. In paragraph 23 of his witness statement he said, "*I had taken responsibility for locking up factory one and setting the office alarm at the end of each day since 1 December 2017 when Bruce Robertson was put on short time and only worked*

*mornings. Only when I was on holiday or requested an early finish Mr Alisdair McQueen would carry out this task."*

68. The verbal exchange of 29 November 2019 between Mrs Wolstenholme and the claimant about the factory keys resulted in Mrs Wolstenholme issuing a memorandum to the claimant. This is at pages 73B (and is also at page 231). She wrote, *"I have today requested your company site keys which you refused to give to me until I made assurances that you would receive a receipt, yet another act of total defiance and aggression."*
69. The claimant complains that there was no need for the keys to be taken from him as there were four sets of keys and only three key holders following Mr Robertson going on to short time working.
70. It was put to Mrs Wolstenholme in cross-examination that there was no reason for her to take the factory keys away from him and that she had done so as an *"arbitrary punishment."* She said that she had become paranoid.
71. The respondent's case was that the claimant was effectively working to rule and arriving and leaving at his precise start and finish times. Therefore, it was necessary for another person to open up and lock down the factory at the beginning and end of each working day. The claimant produced a record (at page 540) showing that he had in fact not been working to rule and had opened up and locked the factory for the vast majority of the six months' period from the beginning of June to the end of November 2019.
72. In paragraph 32 of her witness statement, Mrs Wolstenholme says that the claimant *"started to come in and out of work on time, so we needed someone else to lock up the site and set the alarm. I asked him for the keys, there were plenty of people in the office, my voice was not raised as he seeks to allege. He refused to return the company keys without a receipt. I explained to him that if he was not going to lock up then the company would need to train someone else up to cover the locking up procedures. The claimant's demeanour to me was aggressive, he eventually went out to his car and got the keys."* She then makes reference to the receipt at page 73B.
73. The letter of 29 November 2019 at page 77 is the first of the protected disclosures which form the basis of the claimant's complaint that he was automatically unfairly dismissed. It is conceded by the respondent that the letter is a protected disclosure and that it qualifies for protection as it was sent to the respondent in its capacity of the claimant's employer. The respondent does not concede the letter of 29 November 2019 to be a protected disclosure by virtue of it having been sent to the Information Commissioner's Office. The Tribunal shall deal with this aspect of the matter in due course.
74. On 3 December 2019 the claimant wrote to Mrs Wolstenholme (pages 78 and 79). The claimant objected to Mrs Wolstenholme's proposal to involve Citation in the grievance procedure. He said, *"I would only be willing to have an arranged meeting with a genuinely impartial employment arbitrator such as ACAS"*.
75. The claimant also commented upon Mrs Wolstenholme's attempt to summarise the claimant's grievances (as set out in paragraph 56 above). He said:



- 75.1. That the health and safety issue (which surrounds the toolbox talk and PPE) involved Mr McQueen, Mr Agar and Mrs Wolstenholme but not Mr Green.
- 75.2. The victimisation complaint was against her and that such will *“be made a grievance at any formal grievance hearing”*.
- 75.3. That he had not made a *“complaint”* of harassment and bullying upon the part of Mr Agar. Rather, he said that he had raised a written grievance about him.
76. On 4 December 2019 the claimant wrote to Mrs Wolstenholme again. The letter is at pages 80 and 81. The claimant opened by saying, *“In accordance with the above act of parliament [The Public Interest Disclosure Act 1998] I wish to advise you that I have contacted various government agencies about the actions of the company and some of its officers.”* The claimant added that within an hour of him advising her (in the letter of 29 November 2019 at page 77) that he had contacted the Information Commissioner’s Office Mrs Wolstenholme approached his working station and demanded the return of the factory keys in a threatening matter. The claimant reported the exchange in the following terms:
- “I want your factory keys NOW”.*
- I replied, “can you give me reason?”*
- You replied “I want your factory keys”.*
- I replied “will I get a receipt?”*
- You replied “just get me your keys NOW”.*
- I said “they are in my car” and you told me to “go and get them”.*
- On returning to the office I offered you the keys and you snatched them away from me.*
- As I was about to ask “will I get a receipt” you did not reply and returned to your desk. You subsequently presented me, about 40 minutes later, a letter from yourself which contains inaccuracies and is becoming a pattern of misrepresentations of our conversations”*
77. The claimant complained that he had been a factory holder since 15 November 2016 *“when I was given by yourself, the former production manager Terry Payne, set of factory keys after he had been dismissed and escorted from the premises by myself”*. The claimant concluded *“your ongoing refusal to exchange pleasantries in the morning when I arrive in the office, as you did on 2 December 2019 at 08:29 is “setting a tone” for each day and which I will regard as detrimental treatment. Moving forward I will only communicate with you by email as this will be far easier to monitor our conversations”*. A copy of this letter was sent to the Information Commissioner’s Office and *“Legal”*.
78. At the hearing, the claimant took issue with Mrs Wolstenholme’s assertion that he was working to rule and not opening and closing the factory upon a routine basis. He asked the Tribunal for an order for disclosure by the respondent of CCTV footage which would demonstrate that he had opened and closed the factory at the beginning and end of each working day. This request was refused. It was made very late in the day. The viewing of substantial amounts of CCTV footage would prolong the hearing of the case and would not be

proportionate. In any case, the Tribunal is prepared to accept, upon the basis of the document at page 540, that the claimant would routinely open and close the factory. The real significance of the issue around the factory keys is that it evidences the degree of mutual and mistrust that was by this stage growing between the parties and the suspicion and rancour which appeared to accompany every exchange between Mrs Wolstenholme and the claimant.

79. On 6 December 2019 the claimant emailed Mrs Wolstenholme (page 82). He raised a further allegation of a breach of the GDPR, this time in connection with the issue of record keeping around attendance, sickness and holiday entitlement of members of staff. The claimant told Mrs Wolstenholme of his intention to report the issue to the Information Commissioner's Office.
80. Also on 6 December 2019 the claimant wrote to Mrs Wolstenholme (pages 83 to 85). He complained in this letter about the talks which Mrs Wolstenholme had had with members of staff on 21 November 2019 (referred to in paragraphs 51 and 52 above). He said that Mrs Wolstenholme had effectively declared "*open season*" on him by doing this. He complained that Mrs Wolstenholme had not followed through with the suggestion of undertaking a '360 degree' appraisal. He complained again about the incident of 28 November 2019 in which Mrs Wolstenholme had shown Mr McQueen the email from him sent earlier that morning.
81. Several other issues were mentioned in the letter which need not be set out here. The claimant concluded, "*As I have a greater knowledge than most of your "management tactics" towards staff you fall out with. I have fully prepared myself for your "onslaught" and made follow up personal notes from every meeting we have had since early November 2016 when you asked me to look into getting "rid" of Terry Payne, Chad Payne and Kenny Payne. Since then I have also dealt with the dismissals of Liam Popplewell, Bruce Robertson and in particular that of Gareth Sacre. I had also kept all emails relating to these actions and will present them at any Tribunal or legal proceedings.*" Again, the claimant said that he had copied the letter to the ICO and "*Legal*".
82. On 9 December 2019, the claimant emailed Mrs Wolstenholme (pages 87 and 88). He accused her of an "*outburst*" in the rubber production room and sales office that morning and demanded a written and verbal apology. The claimant also raised that he had received a text from Mr Davies at 09:21 in the morning of 7 December 2019. Mr Davies alleged, in the text, that Mr Agar had assaulted him (Mr Davies) at the staff Christmas party held on Friday 6 December 2019.
83. Mrs Wolstenholme replied the same day (page 86). She was already aware of an incident having taken place between Mr Agar and Mr Davies. She said that she had nothing to apologise for. She said, "*...all I am doing is asking questions regarding things that you are doing, more employees have approached me today to inform me that you have asked them off the record that you have questioned them regarding my son showing porn on his phone to them amongst other things. With regards to this situation I have tried my best to resolve it, I have instructed an independent company Citation and you have been asked to attend a meeting. However you just seem to obstruct everything that I am attempting to do. You refused to attend therefore I am unsure of how we can move forward or address your issues and/or grievances against me, the company and other employees. I have taken further advice*

*regarding this situation and another meeting is going to be arranged where we can deal with the issues and then hopefully move on, I would really appreciate it if you would really appreciate if you would attend and you can then put all your grievances forward from 2016.”* (Mrs Wolstenholme accepted in evidence that here she meant to refer to 2019).

84. On 10 December 2019 Mrs Wolstenholme wrote to the claimant (pages 89 and 90). Here, she sought to address the claimant’s concerns about Citation. She said, *“Citation have confirmed to me that the Employment Law Advice Team (who we call upon for advice when we need HR guidance) is entirely separate to the team that carries out on site HR services, such as the grievance meeting you were invited to attend. The consultant who would chair your grievance would have had no prior involvement with us in the matter or provided us with any HR related advice on this and as such we would be taking a completely impartial and independent view on the case. Whilst I appreciate the company pays for Citation’s services, they are still an entirely neutral third party in this particular context and work to strict professional standards. Given the concerns you have raised involved myself and Alisdair McQueen and given the small size of the company with no other more senior management, there is little option but to engage the services of a third party to ensure your grievances are heard. ACAS do not perform this type of service; consequently, I have engaged Citation Limited to manage the process. The only alternative to us engaging (and paying) third parties such as Citation would be for myself or Alisdair to actually chair that grievance process. I genuinely believed that it would be in everyone’s interest for a third party to independently chair and investigate the grievance, which is exactly what we are proposing to do.”*
85. Mrs Wolstenholme therefore proposed a grievance hearing should take place on 12 December 2019. It was to be chaired by Meghan Mulholland of Citation with Katherine Biglen to attend as note taker.
86. Mrs Wolstenholme sought to categorise the claimant’s areas of concern. These need not be set out in detail here. Suffice it to say that they comprise of complaints of victimisation, harassment and bullying, breach of confidence, breach of the GDPR and Mrs Wolstenholme’s *“management tactics”*.
87. On 10 December 2019 the claimant contacted the Environment Agency on its incident hotline. He reported concerns that he had about the respondent’s lack of action upon and potential environmental damage which may be caused by waste or overspill from two storage tanks upon the respondent’s land. The claimant identified the tanks in question (known as interceptor tanks) by reference to the photograph at page 156SB. The claimant mentioned that this was not the first time that the Environment Agency had cause to be involved with the claimant’s operation and that there was a visit in 2017 following concerns raised by a dog walker about leaks from intermediate bulk carriers (known as ‘IBCs’) kept by the respondent on site.
88. On 11 December 2019 the claimant sent a further letter to Mrs Wolstenholme (pages 91 to 93). He complained that there had been no response to the email of 6 December 2019 (page 82) which concerned the alleged breach of GDPR in relation to staff records. The claimant informed her that there had been a significant breach of GDPR. He recommended Mrs Wolstenholme to contact all affected employees. At the end of the letter he said (in bold type for emphasis) that, *“Failing to notify a breach when required to do so can result in*

*a significant fine of up to 10 million Euros or 2% of your global turnover. The fine can be combined with the ICO's other corrective powers under Article 58. So it is important to make sure you have a robust breach-reporting process in place to ensure you detect and can notify a breach, on time, and to provide the necessary details".*

89. On 13 December 2019 the claimant wrote again to Mrs Wolstenholme (page 95A). He asked Citation *"to arrange a meeting with one of their representatives and myself to conduct a discussion pursuant to section 111A Employment Rights Act and on a without prejudice basis"*. (There is no issue that this letter may be referred to in these proceedings. It would be impermissible to make reference to the fact of without prejudice negotiations having taken place were the claimant's complaint confined to one of ordinary unfair dismissal only. However, this is not the case and therefore the fact of without prejudice communication having taken place may be referred to (but not of course the content of those without prejudice discussions absent the consent of each party being forthcoming)).
90. On 17 December 2019 the respondent sent to the claimant a copy of the information held by the respondent upon its computer systems and manual files (page 96). This disclosure was made pursuant to the SAR made by the claimant on 26 November 2019.
91. On 18 December 2019 the claimant emailed the respondent with concerns about a further breach of the GDPR. This email is at pages 97 and 98. The claimant was concerned that Mrs Wolstenholme and Mr McQueen were discussing a member of staff's absence in the presence of other staff members. The claimant contended that this was a breach of the GDPR and also of the staff member's rights to a private family life under Article 8 of schedule 1 to the Human Rights Act 1998. (The claimant is incorrect to have made the latter assertion as the respondent is not a public authority).
92. On 18 December 2019 the respondent responded positively to the claimant's suggestion of a meeting under section 111A of the 1996 Act. The claimant replied on 20 December. He offered some dates for the meeting to take place. He said that he had been advised by his solicitor that he may meet up with a representative from Citation. He closed by saying, *"At any grievance meeting the list of my concerns will not be exhaustive as I stated in my letters of 6 and 12 December 2019. The fact that acts of victimisation, bullying and harassment are still taking place on a daily basis and they are all being documented."* The relevant correspondence is at pages 98A and 99.
93. On 20 December 2019 the claimant wrote to Mrs Wolstenholme (pages 100 and 101). He complained that certain items were missing from the data disclosed to him pursuant to the SAR. It is not necessary to go into detail about the missing items. The respondent replied to address some of the claimant's concerns on 21 December 2019 (page 110).
94. On 23 December 2019 the claimant raised a further issue of an alleged GDPR breach (pages 111 and 112). This, in fact, was a follow up of the issue concerning raised on 18 December 2019 about a member of staff's absence upon sick leave. The claimant informed Mrs Wolstenholme that he had told Mr Davies (who was the member of staff concerned) about the respondent's alleged failure, the respondent having failed so to do notwithstanding the prominent warning set out in the letter cited in paragraph 88.

95. On 2 January 2020 the claimant raised further allegations of the respondent's breach of the GDPR (pages 113 and 114). He alleged that there were still missing items which should have been disclosed to him pursuant to the SAR of 26 November 2019.
96. On 6 January 2020 the claimant emailed Mrs Wolstenholme (page 216). He drew to her attention the fact that Karl Hays was on holiday that week. Mr Davies was at this time absent from work through ill health. Accordingly, the claimant was concerned that the site was left without first aid cover.
97. On 7 January 2020, the claimant sent an email to all staff (pages 115 and 116). He said, *"It has now been eight weeks since our successful health and safety audit on 12 November 2019. During the pre-audit preparations and shortly afterwards new items of PPE were issued to all production staff – safety glasses, face shields, protective gloves and ear defenders. You all took part in a toolbox talk on 19 November 2019 where it was made clear to you all the necessary lawful requirements put on the company and yourselves by current legislation and the wearing and issuing of PPE"*.
98. The claimant then quoted the salient passages of the staff handbook which contains the respondent's health and safety policy. He concluded, *"Following this audit, we have had an 'honeymoon period' where I have, on numerous occasions, verbally requested that some of you wear or use certain items of PPE, so from 08:30 8 January 2020 there will be a **'ZERO TOLERANCE'** policy regarding the wearing and use of company issued PPE. Anyone not following the company's policy will be subject to section C – disciplinary procedure of the current staff handbook."*
99. Mrs Wolstenholme said in oral evidence that the "zero tolerance memorandum" (as it became known) *"pushed everyone to the brink"*.
100. Mrs Wolstenholme emailed the claimant on 7 January 2020 (page 227). She said that she had apologised to staff for the zero tolerance memorandum. She said that, *"In future all memos will be authorised me and no one but me will issue **ZERO TOLERANCE** memos. This type of behaviour has to stop Mark your grievance meeting will take place and you will be given your opportunity, however in the meantime will you please behave in a professional manner towards other members of staff."*
101. In evidence given under cross-examination, the claimant fairly accepted that typing the words "zero tolerance" in block capitals, underlining it and presenting it in bold font was the literary equivalent of shouting. The claimant sought to justify his presentation of the memorandum. He said that he did this purposely. He was well aware of the exact connotations. He justified his position upon the basis that the respondent worked with dangerous chemicals. Therefore, there must be zero tolerance of unsafe practices.
102. Also on 7 January 2020, Mrs Wolstenholme sent a second email to the claimant very much in the same vein to that at page 227. She said to him, "do not issue any further memos, or correspondence to any member of staff without my approval, especially ones of a threatening nature, I am the only person that will issue a **ZERO TOLERANCE** with regards to anything".
103. On 8 January 2020 the claimant emailed Mrs Wolstenholme (pages 218 to 220). He made reference to his email of 6 January 2020 at page 216. He asked Mrs Wolstenholme to inform him who the site's designated first aider

was that day (8 January 2020). He drew Mrs Wolstenholme's attention to health and safety legislation and the salient passages in the staff handbook concerning health and safety matters. He closed by saying that, *"these requirements have not been met and this site is classed as a "high risk environment" in its first aid risk assessment issued on 8 November 2019, can you please advise all staff that they have no first aid cover. I have informed the HSE of the situation in another written submission to them."* Attached to the email was a first aid risk assessment. This was reviewed by the claimant on 6 January 2020. He records (at page 222) there being a potential for no first aid cover upon the site.

104. On 8 January 2020 the claimant was suspended on full pay. In her printed witness statement Mrs Wolstenholme says:

*"(57) On 8 January 2020, I had a meeting with the claimant, I was accompanied by Mr McQueen. A transcript of the meeting is shown at page 119 MB of the bundle. I suspended him due to his behaviour, the situation in the workplace had become untenable and it was affecting the general atmosphere in the workplace and staff morale. I had spoken to him to see if he would agree to a meeting with me and Alisdair (as he had asked for a witness) to try to resolve the matter.*

*(58) I wanted to try to get to the bottom of the issues and talk about matters off the record and I had hoped that the claimant would engage with this. It was to try and resolve the issues, I was concerned about people's health and well-being, staff had informed me that they did not want to come to work anymore. The atmosphere was that bad, it was toxic and vile. The claimant was walking around with a notebook following staff members to write down notes of any discussions they made."*

105. Mr McQueen says, in paragraph 44 of his printed witness statement, that, *"On 8 January 2020, I attended a meeting with the claimant and Mrs Wolstenholme. I took notes of that meeting and the transcript of the meeting is shown at page 119 MB of the bundle. The claimant was suspended due to his behaviour, the situation in the workplace had deteriorated and had become untenable, it was affecting the general atmosphere in the workplace and staff morale"*.

106. The claimant's evidence about the events of 8 January 2020 is as follows:

*"(33) On 8 January 2020 at 08:46, I emailed a memo to the respondent's managing director telling her I was contacting the Health and Safety Executive (HSE) to raise my concerns. I also advised all the staff on site about these concerns as the respondent had not done so (pages 218 to 220).*

*(34) On 8 January 2020 I went on to the HSE web page, on their "concerns form" at [website address] and raised the following concerns for which I have a copy of from the HSE:*

- The lack of first aid cover at the respondent business address*
- The attitude of respondent's managing director towards the company's health and safety issues*
- Staff being told to ignore H&S memos*

- *The risk assessments for a “designated higher risk” site being ignored by staff not wearing the appropriate PPE and the lack of implementation. Pages 560A to 560D*

*(35) I believe therefore I made a qualifying disclosure in that I believed that the respondent had failed, is failing or is likely to fail to comply with any legal obligation to which it is subject, namely the Health and Safety (First Aid) Regulations 1989 – Regulation 3(2) and that the health or safety of any individual has been, is being or is likely to be endangered contrary to section 43(b) and (d) of the Public Interest Disclosure Act.*

*(36) On this day, 8 January 2020, the respondent had eleven members of staff on site with one member also over five months pregnant, Mrs L McKeefery. Mrs L McKeefery was the recipient of a personal risk assessment, in view that the respondent was a chemical manufacturer, which stated extra care and attention be taken as regard her welfare ...*

*(37) On 8 January 2020, at 16:35, I was asked by the respondent’s managing director to attend a meeting in the respondent’s main conference room. I asked if there would be a witness and told Mr Alisdair McQueen was already waiting in the room. On entering the room, I saw Mr Alisdair McQueen with a notepad and I asked if I could have a copy of the meeting notes and also if I could record the meeting and the respondent’s managing director said “yes” to both requests. The respondent’s managing director was asked by me to announce those present and then advised it was an “off the record meeting” with a note taker present. I refused to take part in an off the record meeting with a note taker. I was then given a letter suspending me immediately on full pay with no explanation and just told by the respondent’s managing director “it was all in the letter”. The respondent’s managing director then asked me to leave the premises and I was escorted off site by her in front of all the office staff, which was highly embarrassing, deeply traumatic for me and made me look guilty of unproven allegations. (Pages 355 to 374)”.*

107. Picking up on several matters arising from these passages of the claimant’s witness statement, the Tribunal observes that:

- Pages 223 to 227 concern the zero tolerance memorandum issued by the claimant on 7 January 2020 (which also features at pages 115 and 116) as well as the email exchanges referred to in paragraphs 97-103 above.
- The respondent accepts that the disclosure made by the claimant to the Health and Safety Executive at pages 560A and 560D is a disclosure qualifying for protection and one that was made both to the respondent in its capacity as the claimant’s employer and to the Health and Safety Executive in its capacity as a prescribed person to whom protected disclosures may be made. The respondent therefore accepts that the claimant made disclosures about health and safety matters and which qualify for protection by virtue of sections 43B, 43C and 43F of the 1996 Act.
- Pages 355 to 374 form part of the documentation handed to Mrs Darnell by the claimant when she conducted the grievance hearing.

108. There is a transcript of the exchanges between Mrs Wolstenholme and the claimant at the meeting held on 8 January 2020. The transcript is at page 119. It is signed by Mr McQueen. It is not in dispute that Mr McQueen's record of the meeting is accurate and mutually agreed. The transcript shows that the claimant requested those present at the meeting to identify themselves. Mrs Wolstenholme and Mr McQueen did so. She then said that, "*The purpose of the meeting is to try to attempt to resolve and bring it to a conclusion basically – it's an off the record conversation*". At that point, the claimant said, "*Right. Ok. Well stop there then. I don't want to have an off the record conversation. Sorry – I have been advised by my solicitor that nothing is off the record.*" Mrs Wolstenholme then said, "*Well, on that note, I'm going to suspend you.*" The claimant asked her for the grounds of suspension to which she replied that the grounds were in a letter (at pages 117 and 118) which she then handed to him. It is recorded the claimant was then escorted from the premises. The claimant was refused permission to read the letter of suspension before leaving the premises.
109. The letter of suspension is at pages 117 and 118. Mrs Wolstenholme said that following the incident of 14 November 2019, about which she decided to take no formal disciplinary action, the claimant had "*issued various emails, letters, grievances, photographs, letting me know that you have reported me to various government departments regarding GDPR, health and safety breaches etc. You have also asked other members of staff questions about Sam Agar to raise grievances against him which I have been given evidence of. Our HR provider has tried on two separate occasions to arrange meetings with you to discuss and try to come to a conclusion. However you have without good reasons declined on both occasions.*" She then went on to say that the situation had become intolerable and that the general atmosphere in the workplace and staff morale was being affected. The claimant was told that he was being suspended on full pay with immediate effect from 8 January 2020. The claimant was told that the suspension was precautionary and did not imply any pre-judgment of the allegations and that this suspension was to be kept as brief as possible and under review.
110. In oral evidence, Mrs Wolstenholme confirmed that the claimant had been asked to attend the meeting at 16:40 on 8 January 2020 without any prior warning. Plainly, the letter of suspension at pages 117 and 118 had been pre-prepared. She said that the claimant made a "*hullabaloo*" on his way out.
111. When the claimant had the opportunity of cross-examining Mr McQueen, it was suggested that the purpose of the meeting had not been properly explained to the claimant beforehand. Mr McQueen said that the intention was to have an "*off the record*" discussion but record what was said in the form of a transcript. Hence, Mr McQueen made an audio recording of the meeting (as did the claimant). Mr McQueen said that the claimant had not given him and Mrs Wolstenholme chance to explain why they wished to make a record of the off the record conversation.
112. In the Tribunal's judgment, there is some merit in the claimant's complaint about how the respondent handled the meeting of 8 January 2020. It may have been better to explain to the claimant in advance that the purpose of the hearing was to have a without prejudice discussion in light of the ongoing disputes between the parties and that the without prejudice discussion would be recorded. There is nothing inherently wrong in recording without prejudice



discussions. Indeed, in the experience of the Employment Judge this is common. (Of course, the record of the without prejudice discussion may not be produced to the court or any other party without each side waiving without prejudice privilege). The claimant's concerns about the turn of events late on the afternoon of 8 January 2020 is understandable.

113. On 10 January 2020 the claimant wrote to Mrs Wolstenholme (pages 122 to 128). The claimant placed on the record the exchange summarised in paragraph 108 (of which the claimant had made an audio recording). He then asked for clarification of the grounds of suspension. He set out some of the history of the matter leading up to the suspension and suggested that the reason for it was because he had made protected disclosures. He also said that he had made a data subject access request to Pro Logic Computers Limited requesting data held by them about him and asking that they protect any data upon his work PC. The claimant said that he took this step because he had *"no confidence in you protecting the data it holds which could be used in possible future legal actions taken by the ICO, HSE and any Employment Tribunals."* The letter to Pro Logic Computers Limited is at page 120 of the bundle.
114. On 14 January 2020 the claimant provided a verbal statement to Sally Wade, a regulatory compliance officer of the HSE. The claimant was invited to telephone her following her email to him dated 13 January 2020 at page 128A. Sally Wade's email was of course in response to the claimant's disclosure at pages 560A to 560D. The claimant says that Sally Wade informed him that the HSE was to write to the respondent seeking information and possibly arranging a site visit.
115. Pages 129 to 132 contains statements dated 16 January 2020 from:
  - Carl Green, sales and new business manager.
  - Karl Hays, production operative.
  - Anne McQueen. (She is not an employee of the respondent but is, of course, Mr McQueen's wife. Her involvement in the matter arises out of the DVLA incident of 14 November 2019, Mrs McQueen having authority to drive one of the company cars).
116. Carl Green said in his statement that he wished to raise a complaint about the claimant. He said that, *"the last few months have been terrible to work with him and the atmosphere has dropped."* He put this down to the claimant's *"bullying and mental abuse"*. Mr Green said that he had never got on with the claimant and found him to be *"ignorant"*. He also complained about the claimant's handling of the DVLA information request in November 2019. Mr Green said that he was *"very upset that my private information has been accessed without my approval."*
117. Karl Hays complained that he had been a victim of bullying at the hands of the claimant. In particular, he complained that the claimant made numerous comments about Mr Hays' weight. This persisted to the extent that Mr Hays would not bring any lunch to work for fear of attracting the claimant's attention. He said that the claimant had become over-friendly with Mr Davies. He complained that the claimant asked Mr Hays whether Mr Agar had shown any pornographic pictures or videos to him. Mr Hays complained that the claimant was making the environment within the workplace toxic. He accused the

claimant of listening in to conversations, including upon one occasion by standing in one of the toilet cubicles with his ear to the wall. He complained that he (the claimant) was following individuals around the workplace and writing notes about them.

118. Mrs McQueen complained about the claimant's conduct of the DVLA issue that arose in November 2019. She complained that the claimant had handled her data in such a way as to break *"information governance principles"*.
119. Mr Agar also prepared a statement dated 16 January 2020 which is at page 380. Mr Agar complained about the claimant's conduct towards Carl Housecroft, general operative. He said that the claimant was extremely aggressive and provocative towards other members of staff. He said that he had heard that the claimant was asking members of staff if he (Mr Agar) had shown indecent images and videos of a pornographic nature to them during working hours. He also said that the claimant had become involved in the incident at the Christmas party between Mr Agar and Mr Davies. Mr Agar said that this had come to nothing but Mr Agar had had to undergo a period of suspension which he attributed to the claimant *"putting a spin on things"*. Mr Agar said that he intended to pursue a grievance complaint against Mr Davies.
120. Mrs Wolstenholme said, in paragraph 62 of her printed witness statement, that *"On 16 January 2020 I received statements from several members of staff"*. These are the statements just referred to and in addition statements from four other members of staff at pages 376 to 379. She said that she found the statement of Mr Hays in particular to cause her *"deep concern"*.
121. Several days later, on 21 January 2020, Mrs Wolstenholme received two statements from Mr Housecroft (pages 408 and 409). He complained that the claimant had been trying to elicit information from him about what may have been said to staff by Mrs Wolstenholme. He said that he had noticed that the claimant's behaviour had changed. He said that he, *"witnessed Mark trying to listen in on private meeting that Denise had been in."*
122. He also said that, *"just before Mark was suspended, he approached me quite aggressively when I was unloading an oil tanker. Both myself and the driver were present at this time, Mark ranted about Adomast not having first aid personnel on site. I do believe this was incorrect. Mark was reinforcing that we should not be working. The manner this was done in I thought was unprofessional."*
123. Mr Housecroft also mentioned his concerns about the relationship between the claimant and Mr Davies. He mentioned that he thought that Mr Davies was being influenced by the claimant *"to take matters further after the incident at Christmas"*. He added that following the claimant's suspension the *"workplace/atmosphere feels so much better without any problems or questions from other members of staff."*
124. In the statement at page 408, Mr Housecroft mentioned the claimant having *"had a massive input on [Mr Davies'] appeal letter"*. Mr Housecroft in fact prepared a third handwritten statement concerning the incident with the oil tanker driver. This is at page 410. Mr Housecroft said that the incident occurred on 8 January 2020. This was of course the date of the claimant's suspension from work.

125. The reference by Mr Housecroft to “*the appeal letter*” in page 408 concerns an appeal raised by Mr Davies against Mr McQueen’s findings upon a grievance raised by Mr Davies about Mr Agar on 7 December 2019. Mr McQueen did not uphold the grievance. Mr McQueen’s decision letter was sent on 18 December 2019. Mr Davies appealed by letter dated 2 January 2020. The appeal hearing took place on 22 January 2020. The minutes of the appeal hearing are at pages 546 to 548. At the bottom of page 546 it is noted that Mr Davies chose not to be accompanied at the appeal. He said that he had asked the claimant to accompany him but that was refused upon the basis that at that point the claimant was suspended from his employment. The contents of Mr Davies’ grievance was not before the Tribunal. In any case, the Tribunal needs to be careful not to be drawn into satellite disputes concerning other employees. What may be concluded from the material before the Tribunal is that relations between Mr Davies on the one hand and other employees of the respondent on the other (particularly Mr Housecroft) were far from cordial.
126. On 20 January 2020 Mrs Wolstenholme wrote to the claimant (pages 134 and 135). She issued an invitation for the claimant to attend a grievance hearing on 24 January 2020. This was to be chaired by Mrs Darnell with Miss Biglen in support to act as a note taker. Mrs Wolstenholme sought to categorise the claimant’s concerns. She identified there to be eight complaints which are set out at page 135.
127. On 22 January 2020 the claimant wrote to Mrs Wolstenholme (pages 136 and 137). He complained that the letter at pages 134 and 135 had been hand delivered to him at 17:50 on 21 January 2020 by the accounts apprentice, Mohammed Fazil Reza. The claimant complained that the letter had been delivered outside normal working hours. The claimant mentioned that he needed to be in contact with Mr Davies as he (the claimant) had agreed to be his companion during his appeal process for his grievance against Mr Agar. The claimant reiterated that he had made a data subject access request to Pro Logic Computers Limited and that he had been in touch with the Health and Safety Executive, the Information Commissioner’s Office and the Environment Agency during his period of suspension. The letter at pages 136 and 137 was copied to the ICO, the HSE, ACAS and “*Legal*”.
128. Another letter also dated 22 January 2020 was sent to Mrs Wolstenholme by the claimant. This is at pages 138 and 139. The claimant complained that in the staff handbook it was anticipated that a period of suspension would normally be no longer than two calendar weeks. The claimant wrote this letter upon the 14<sup>th</sup> day of his suspension. The claimant asked whether Mrs Wolstenholme had carried out a review of the suspension and whether she had conducted an investigation. He said to her that a “*failure to answer these questions would be seen as a major breach of my contract of employment with Adomast Manufacturing Limited.*”
129. A third letter dated 22 January 2020 was sent to Mrs Wolstenholme by the claimant (pages 140 and 142). Again, this letter raised a complaint about the method of delivery of the letter of 20 January 2020 (described by the claimant as a ‘*contemptible*’ act). The claimant requested the right to be accompanied at the meeting with Mrs Darnell by a companion from his previous employer Laing O’Rourke. The claimant went on to say that, “*at any grievance meeting, the list of my concerns will not be exhaustive as I stated in my letters of 6 and 12 December 2019. The fact that acts of victimisation, bullying and*

*harassment are still taking place on a daily basis and/or well documented.”* The claimant accused Mrs Wolstenholme of frustrating and delaying the process and of “*cherry picking*” which issues she was choosing to address in correspondence.

130. The claimant took issue with Mrs Wolstenholme suggesting that the grievance hearing commence at 11am on 24 January 2020 in circumstances where the claimant had informed her that his chosen companion could not attend until 4pm that day. He also took exception to the concluding sentence of Mrs Wolstenholme’s letter of 20 January 2020 in which she had said that were the claimant to fail to attend the hearing without good cause the respondent may have to consider his grievance withdrawn. In the claimant’s third letter of 22 January 2020 at pages 140 to 142, the claimant accused Mrs Wolstenholme of adopting “*bullying tactics.*”
131. The grievance hearing went ahead on 24 January 2020. It commenced at 11am. In the event, the claimant’s chosen companion from his previous employer was unavailable. The claimant was therefore accompanied by Mr Davies. This was the first time that Mrs Darnell had met either the claimant or Mrs Wolstenholme. The minutes of the grievance hearing are at pages 387 to 394. The minutes record Mrs Darnell introducing herself and giving “*a bit of background about her role*”.
132. She expands upon this in her printed witness statement. She says:

*(4) I am employed by Citation Limited as a HR Consultant, been employed for just over five years. I have been in the HR sector for 22 years, employed and experienced in generalised HR and undertaking grievance investigations. Citation Ltd is a Employment Law & Health & Safety Consultancy service. Adomast Ltd is a client of Citation.*

*(5) Citation Ltd provides a separate service called ‘On Site HR’ to its clients. Any service provided is subject to an ‘ethical wall’ in place between any consultant who attends to provide the service and the client engaging the service. All information received is treated confidentially and the consultant’s role is to act impartially”*

The claimant suggested to Mrs Darnell that Citation Limited had a vested interest in the outcome of the grievance and that she was therefore not impartial. Mrs Darnell explained that there was effectively what is often known as a “*Chinese Wall*” between “*On Site HR*” on the one hand and other sections or departments of Citation on the other. She pithily observed that she had no more a vested interest in the matter than had the claimant in succeeding with his claim before the Tribunal. Mrs Darnell explained that a separate fee is payable by the client to “*On Site HR*” for their services which are not covered by the annual fee payable by the client to Citation for employment law and health and safety consultancy generally.

133. The Tribunal has already observed that Mrs Wolstenholme endeavoured to distil the claimant’s complaints in her letter of 20 January 2020 (at pages 134 and 135). She identified there to be eight grievances. Mrs Darnell says that she sought clarification from the claimant as to whether the eight grievances were those that he wished to pursue. Her account is that upon her doing so, the claimant said that he had a full statement prepared for the hearing. He then went out to his car and returned with what Mrs Darnell describes as “*a*

*big pile of paperwork*". These documents are at pages 145 to 375 of the bundle.

134. The claimant proceeded to raise 23 grievances with Mrs Darnell. It is not necessary to set them all out in these reasons.
135. Arrangements were made to photocopy the documents. A copy of the claimant's grievance (pages 145 to 375) was made that morning and was provided for Mrs Wolstenholme. She signed a written agreement prepared by Miss Biglen not to share the material with anybody else. A record of the agreement is at pages 491 and 492.
136. Mrs Wolstenholme does not dispute that she shared a copy of the material at pages 145 to 375 with Mr Sherling. Mrs Wolstenholme considered that the agreement freely entered into by her on 24 January 2020 did not preclude her from so doing given that Mr Sherling, in his capacity as owner of the business, needed to be privy to all information. The claimant took the view that Mrs Wolstenholme acted in breach of the agreement and in bad faith by copying the material and sharing it with him.
137. It appears from the notes of the grievance hearing at pages 387 to 394 that all 23 of the claimant's grievances were considered and discussed between the claimant and Mrs Darnell. Mrs Darnell did not consider that a significant amount of time was lost to undertake the copying.
138. The claimant in fact had made a request for all employees to leave the office in order that the copying exercise could be undertaken. The claimant was concerned that others should not see the material. The claimant's request was agreed. Mrs Darnell considered there to be little risk of others seeing any material upon the photocopier in any case as it was positioned away from prying eyes. Mrs Darnell said that she formed the impression that Mrs Wolstenholme was unhappy about the claimant's request to clear the office while the copying was undertaken.
139. When the parties returned to the meeting room to resume matters after the copying exercise had been undertaken, they discovered that Mr Davies had left the premises. His departure was precipitated by him receiving a text message from Mr Housecroft. The exchange of texts may be found at pages 549 to 551. Mr Davies had to leave urgently to remove his belongings from his flat which is owned by Mr Housecroft. It is apparent from the exchange of texts that Mr Davies' and Mr Housecroft's relationship had deteriorated to such a degree that they were on much less than friendly terms. The claimant was happy to continue the grievance hearing without a companion.
140. On 27 January 2020 Mrs Wolstenholme wrote to the claimant (page 552). She thanked him for attending the grievance hearing on 24 January 2020. She confirmed that his suspension was ongoing as a precautionary measure upon full pay. She said, "*we believe the best way to proceed is to deal with your grievance first and foremost. We will then be inviting you to a meeting to discuss our concerns and determine if further action is required.*"
141. On 28 January 2020 the claimant emailed Mrs Darnell (pages 554 to 555). The claimant opened by thanking her "*for the professional manner in which you and Katherine [Biglen] conducted the hearing on Friday [24 January 2020] under some pressure.*" The claimant then explained the circumstances of Mr Davies' departure as connected with the need for him to remove his

belongings from Mr Housecroft's property. The claimant mentioned that Mr Housecroft (in the text at page 550) had apparently taken exception to Mr Davies accompanying the claimant to the grievance hearing. The claimant said that he had a suspicion that Mrs Wolstenholme had informed other employees that Mr Davies was accompanying the claimant to the grievance hearing. The strong inference was that Mr Davies was being deterred from so doing. The claimant also complained about Mrs Wolstenholme being "*caught red handed*" copying the claimant's grievance for the benefit of the owner of the business against Mrs Darnell's "*instructions*".

142. Mrs Darnell then undertook a number of telephone interviews with the respondent's employees. On 4 February 2020, she interviewed the employees named in paragraph 15(1) of her witness statement. The notes of interview are at pages 395 to 404. On 7 February 2002, she interviewed those referred to in paragraph 15(2). The notes are at pages 405 to 410. Amongst those interviewed on 7 February 2020 was Mr Housecroft. She interviewed Mr Green on 12 February 2020 (pages 414 to 415).
143. Unfortunately, Mrs Darnell omitted from her printed witness statement a number of other interviews with employees. These were added to the bundle during the course of the proceedings and may be found at paragraphs 576 to 589 and 591 to 597. The documents at pages 591 to 597 are the record of interviews with Miss McKeefery and Mr Hays. These were conducted on 4 February 2020. Those at pages 576 to 589 were conducted on 7 February 2020. Amongst those interviewed on that date were Mr McQueen, Mr Agar and Mr Hays. Mrs Darnell said that she had not interviewed Mr Davies because he was absent through ill health.
144. Mrs Darnell interviewed Mrs Wolstenholme on 12 February 2020. The interview was adjourned and reconvened on 26 February 2020. It was then adjourned again and the final part of the interview took place on 27 February 2020. Mrs Darnell mistakenly referred to the second meeting having taken place on 13 February 2020 in her printed witness statement.
145. For the sake of completeness, a follow up meeting took place with Mr Housecroft on 3 March 2020. A record of that meeting is at page 432.
146. Mrs Darnell did not have before her the statements referred to in paragraphs 115 to 120 above at pages 129 to 132 and 376 to 380. Essentially, she conducted her own enquiry.
147. On 12 February 2020, Sally Wade of the Health and Safety Executive visited the respondent's site. A follow up email dated 3 March 2020 addressed to Mrs Wolstenholme is in the bundle at pages 493 and 494. Various recommendations were made around the need to conduct risk assessments and the safe storage and labelling of dangerous substances and installing bunding (a form of barrier) around the racking system to prevent accidents. Sally Wade concluded, "*I have emailed Mr Wakefield advising him that we are not planning to re-visit the site as we are satisfied that the matters raised have been or are being dealt with and provided him with the same details (as above) about disclosure of information.*"

148. On 14 February 2020, the respondent terminated the claimant's employment. The letter giving notice of termination is at pages 143 and 144. It is necessary to set this letter out in full. Mrs Wolstenholme wrote:

*"I have increasingly grown concerned about your behaviour and attitude towards me and your colleagues. Your behaviour towards both the staff and the company has made the atmosphere in the office intolerable and is having a seriously detrimental effect on the running of the business. It has become so intolerable that I had to make the decision to close the business two days earlier before Christmas than planned and in addition, led to the decision to suspend you last month. As a result, I do not see any way forward other than to terminate your employment.*

*I consider your working relationship with me and your colleagues to have irretrievably broken down. We consider ourselves to be a very close-knit team and it saddens me to find us in this position. I have recently been made aware of further concerning instances of you upsetting several members of staff. Your constant confrontational approach continues to make people very uncomfortable. Ordinarily, I would want to sit around a table with someone if they were behaving in a manner that caused me such concern and, in the appropriate situation, consider some form of mediation. However, your recent behaviour in particular has led me to feel unable to do this given your unreasonableness.*

*You have raised at least 23 grievances which we have sought to deal with by an external consultancy. However, you have continued to raise further grievances and despite trying to investigate and deal with these, we do not see a way forward. We accept that an employee is fully entitled to raise a grievance, but unfortunately it has reached a point where we cannot continue. Unfortunately, this situation is having such a detrimental effect on the welfare of colleagues and my own health that I believe that we cannot continue to work together. I do not make this decision lightly and it is extremely disappointing that it has come to this, but I am left with no alternative other than to terminate your employment for some other substantial reason ie an irretrievable breakdown in trust and confidence. You are entitled to one month's notice, which will be paid in lieu. You will also receive pay for any holiday accrued but not taken."*

149. Mr McQueen said, in paragraph 49 of his witness statement, that he agreed *"with the decision taken by Mrs Wolstenholme. The claimant's conduct towards her and members of staff was deplorable. I have seen her reduced to tears by his aggressive conduct. The situation could not continue, not only for her well-being as MD of the company but also the welfare of the staff."* Mr McQueen said that he was a party to the decision to terminate the claimant's contract of employment.
150. The letter of dismissal did not contain any right for the claimant to appeal against Mrs Wolstenholme's decision. Mrs Wolstenholme said that a draft of the termination letter had been prepared by Citation. This included a right of appeal which she had chosen to remove. She accepted this to be her decision. She said in oral evidence that she *"couldn't take anymore. It was untenable. I and the staff were not coping well. I took the right of appeal out."*

151. The letter of termination was sent to the claimant at 16:55 on 14 February 2020. On the morning of that day, the claimant was called by Mr Ralph Bolton of the Environment Agency. According to paragraph 43 of his witness statement, the claimant was told by Mr Bolton that the Environment Agency was going to visit the respondent's site on 10 March 2020 in order to follow up on the claimant's report of 10 December 2019.
152. There was a further discussion between the claimant and Mr Bolton on 2 March 2020. The claimant emailed Mr Bolton that day (page 565). The claimant advised Mr Bolton that following the discussion of 14 February 2020 the claimant's contract of employment had been terminated later the same day.
153. On 17 March 2020 Mr Bolton emailed the claimant (page 565). Mr Bolton says that he had instructed the respondent to arrange for the removal of the IBCs containing potentially hazardous waste stored on permeable ground to a suitable site and to make suitable arrangements for the storage of IBCs in future. Mr Bolton said that he had also asked the respondent to have the interceptor tanks inspected and cleaned out. Mr Bolton said that the respondent had, *"agreed to carry out these actions and provide evidence that they have done so. As the company have co-operated in reducing the pollution risks of the site, we do not intend to take any further action providing these measures are carried out."*
154. Mrs Darnell sent a copy of her grievance outcome report to Mrs Wolstenholme on 22 March 2020. This is at pages 435 to 450. Mrs Darnell listed the 23 points of grievance. These are numbered 1 to 23 at pages 436 and 437. She also considered five additional preliminary points (which Mrs Darnell refers to as *'preamble points'*). These are lettered A to E inclusive at page 436. One of these was an allegation raised by the claimant against Mrs Wolstenholme that she uses a *"poke the bear"* management style and that she was *"looking for a fight"* with him. In total, therefore, some 28 grievances were considered by Mrs Darnell.
155. She upheld the first numbered grievance which was that the claimant had not been provided with a clear job description. She recommended a job description be placed upon the file to refer to as best practice. She did not uphold the claimant's other grievances which she found to be unsubstantiated.
156. Mrs Darnell says the following in her witness statement:
- "(19) I remember from all the interviews, I found certain aspects of the claimant's behaviour as reported to me by staff and Mrs Wolstenholme to be very disturbing. In effect, it equated to stalking. She informed me that he would wait for everyone to leave on a day to day basis and then from what she told me he would hand her a letter which would contain another complaint. The notes at page 418 detail the conversation with Mrs Wolstenholme.*
- (20) In the meeting I had with the claimant on 24 January 2020, he came across in the meeting as very controlling and a bully. His manner was very matter of fact, I am right and you are wrong. I would be quite scared to be in a room with him on my own. He came across this way. Whatever you say to him he would not agree with."*



157. Mrs Darnell said (at pages 449 and 450) (forming part of her grievance outcome report) that the claimant's behaviour "*was extremely disruptive and appears at times to amount to bullying or victimising of a senior manager and other colleagues.*" Mrs Darnell was aware (when she completed her report) that the claimant was no longer in the respondent's employment. She said that if the claimant was still in the business then she would "*strongly be recommending that a disciplinary investigation is carried out with regard to some of the serious allegations that were brought to my attention during my investigation.*" She considered that the claimant had been "*goaded*" Mrs Wolstenholme and had made things extremely difficult for her. She fairly acknowledged, in evidence given during cross examination, that her criticism of the claimant going about his business carrying a clipboard may have been harsh given the nature of his role and that the claimant had offered her and Miss Biglen sandwiches from his own provisions during the course of the day.
158. On 27 March 2020, Mrs Wolstenholme wrote to the claimant. She tendered to him Mrs Darnell's report accompanied by the record of the interviews carried out by Mrs Darnell. She told the claimant that she agreed with Mrs Darnell's recommendations. Her letter is at pages 433 and 434. (Although the letter is dated 27 March 2020 it appears that the report was in fact emailed to the claimant on 30 March 2020 (page 558)). The claimant was not afforded any right of appeal by Mrs Wolstenholme in her letter at pages 433 and 434. The claimant pointed out that Mrs Darnell had anticipated that the claimant would be afforded a right of appeal. She said so on the final page of her report at page 450. Again, Mrs Wolstenholme decided against affording the claimant such a right.
159. The claimant pointed out that the statements at pages 576 to 589 were not in fact enclosed with Mrs Wolstenholme's letter at pages 433 and 434. Mrs Wolstenholme accepted that this was an oversight upon her part.
160. The Tribunal will now refer to several extracts from the interview meetings conducted by Mrs Darnell. It is no part of the Tribunal's function to interrogate these documents for itself. The Tribunal will only refer to those passages highlighted by the parties:
- (1) Rob Rushforth, production operative, said (at page 395) that there had not been "*a very nice atmosphere*" over the past six months.
  - (2) Nathan Taylor, sales administrator, referred (at page 398) to the incident of 28 November 2019. He said that when the claimant and Mrs Wolstenholme spoke after that incident the claimant "*seemed aggressive and Denise seemed pretty calm.*" Mr Taylor said that the pair were "*sending emails to each other, and he came back into the office and Denise was crying and he was shouting and that seemed aggressive towards Denise.*"
  - (3) Mr Reza said (at page 404) (in connection with the conversation of 29 November 2019 around the factory keys) that, "*...Mark came and stood right at Denise's desk, shouting in a very loud voice, saying he was being victimised and bullied. Mark was red, Denise was telling him to go away and she was crying.*"
  - (4) Matt Lloyd, production operative, said (at page 406) that the claimant, "*would tell jokes, some of the jokes were inappropriate. He took the micky*

*about my shoes, I was bullied as a child, so it affected me, I didn't say anything as Mark is a manager, I keep my head down, don't want any friction. I took the shoes home and threw them in the bin.*" He went on to say that the claimant *"took the mick out of one of the drivers about his weight, and talked about how much food he eats in the morning"*.

(5) Mr Housecroft said (page 412) that the claimant made, *"sexual jokes towards Stephen [Davies] about the size of his penis"* and, *"most of the time it was towards Steve/Davies] but Karl Hays' weight I heard him joke about that before."* Mr Housecroft went on to say that, *"Karl didn't take it well, Steve gave it back but Karl stopped bringing snacks in for work so I could tell it was bothering him."* Mr Housecroft also confirmed that Mr Lloyd had been upset over the claimant's comments about his (Mr Lloyd's) shoes.

(6) Mr Hays said (at page 596) that the claimant was *"walking around the factory following us around with a pad. It was like he didn't trust us"*. Mr Hays also said that the claimant and he *"had a bit of banter, he laughed about my weight. I laughed it off. But then he carried on and more recently he has done it and that has made me feel ashamed. He would question what I had got for lunch, he was getting on at me for eating to the point where I wouldn't bring my lunch in, it started as banter but it progressed and made me feel ashamed."*

161. Mrs Wolstenholme says, in paragraph 122 of her witness statement that, *"Following the submission of Mrs Darnell's report, I reviewed the contents of the witness accounts which have been provided by staff concerned me and essentially, reaffirmed to me that the working relationship with the claimant and employees had irretrievably broken down. I went to the staff and apologised to them for the claimant's conduct. I was told by Mr Karl Hays' wife that he had not eaten properly for over a week because of what the claimant had said to him about his weight."* She goes on to say in paragraph 123 that, *"Had I not terminated the claimant's employment on 14 February 2020, given the allegations of bullying which had been made by staff, he would have remained on suspension pending a disciplinary hearing for gross misconduct. I would have arranged for another HR consultant to have completed the disciplinary investigation which I believe would have been concluded within a period two to four weeks."*

162. From this evidence, it is plain that Mrs Wolstenholme did not have before her Stacey Darnell's report and the record of her interviews with staff at the time that she (Mrs Wolstenholme) took the decision to terminate the claimant's employment on 14 February 2020 (albeit that Mrs Darnell had conducted a grievance meeting with the claimant and several interviews with the respondent's employees and an initial interview with Mrs Wolstenholme).

163. Mrs Wolstenholme therefore based the decision to dismiss the claimant upon her own experience and the statements at pages 129 to 132 and 376 to 380. It is of course no coincidence that these statements were in the main produced on or around 16 January 2020. Mrs Wolstenholme accepted that she had asked members of staff for feedback and comment about their relationship with the claimant.

164. Mrs Wolstenholme and Mr McQueen both denied that the claimant having made protected disclosures was the reason or was the principal reason for their decision to terminate the claimant's contract of employment. The

claimant invited the Tribunal to draw an adverse inference against the respondent from the way in which the respondent dealt with matters within the purview of the three statutory agencies about which and to whom he made protected disclosures.

165. In her witness statement (in paragraphs 70 to 76) Mrs Wolstenholme addresses the issue of her dealings with the ICO. She refers to the email exchanges at pages 458 to 476 of the bundle. Amongst other things, the claimant alleged that the data provided by the respondent pursuant to the claimant's data subject access request did not include a copy of his holiday request and payroll information (including bank details). Mrs Wolstenholme explained her position to the ICO on 6 May 2020. On 22 May 2020, the ICO wrote to Mrs Wolstenholme (pages 462 and 463) to confirm that the respondent had complied with its data protection obligations. In the course of giving her evidence to the Tribunal, she appeared to be perplexed as to why the claimant was wanting the respondent to supply him with his own bank details.
166. The Tribunal now turns to the respondent's dealings with health and safety issues. Mention has already been made (in paragraph 21 above) that upon expiry of the claimant's first aid certificate the respondent had two certified first aiders: Mr Davies and Mr Hays. It has also been mentioned that on 6 January 2020 the claimant pointed out that due to a combination of sickness and holiday absence no first aid cover was available on site on 8, 9 and 10 January 2020. The claimant reiterated the point on 8 January 2020. The relevant emails are at pages 216 and 218 to 222.
167. About this, Mrs Wolstenholme says (in paragraph 83 of her witness statement) that "*Unfortunately, I could not get anyone trained up at such short notice. Therefore, I spoke to all staff to explain the situation and asked that everyone was extra vigilant. I also put my son down to be trained over the next few days. He had an excellent first aid background from his 10 years in the army and was an advanced army field medic. After I spoke to the staff, I was informed by Mr Carl Housecroft, that the claimant had been going round the factory to tell the staff that they did not have to work.*" It will be recalled that Mr Housecroft had also relayed to Mrs Wolstenholme the incident of 8 January 2020 in which the claimant reproached Mr Housecroft and the oil tank driver for working in circumstances where no first aid cover was available.
168. Mrs Wolstenholme then says that she in fact held a first aid certificate herself. This is at page 566 and is dated 15 March 2017. As the certificate lasts for three years, it was current in January 2020. Although she was not aware of the certificate's longevity at the time, Mrs Wolstenholme's evidence is that it follows that there was in fact a first aider on site all along.
169. In January 2020, of course, Mrs Wolstenholme was not aware that she in fact had a first aid certificate. Further, as late as 15 October 2020 (in dealings with the Health and Safety Executive) she says that she did not hand up a copy of her first aid certificate believing that it was not current in the early part of 2020. The HSE, in any case, took no action against the respondent arising out of this aspect of matters.
170. The claimant said during the hearing that he believed that the first aid certificate at page 566 was a forgery. The claimant chose not to pursue that contention before the Tribunal. A finding that Mrs Wolstenholme had

presented the Tribunal with a forged document would be one with profound implications for her and for the respondent. Consequently, there would have been a heavy burden of proof upon the claimant about this issue.

171. More generally, Mrs Wolstenholme said that she takes health and safety matters very seriously. The Tribunal has already mentioned that the respondent pays an annual subscription to Citation. This subscription extends to an annual health and safety audit examples of which are in the supplemental bundle. Further, the Tribunal remarks upon the number of health and safety notices upon the notice boards featured in the photographs taken during the course of Citation's audits.
172. Mrs Wolstenholme says in paragraph 92 of her witness statement that, "*There are financial considerations – so it has to be budgeted for. An example would be DSEAR [‘The Dangerous Substances and Explosive Atmospheres Regulations 2002’] firstly finding the appropriate specialist and secondly, whether it was required due to the chemicals on site. The legislation also has a number of grey areas, so it is not clear. We have never had any safety or prohibition notices issued by any of the regulatory authorities. The 2018 H&S visit by Citation [in the supplemental bundle commencing at page 132] identified that a[n] assessment under DSEAR would need to be carried out. It was raised along with other points by the claimant. It was discussed and looked into. I called the fire station about it, they informed me that they did not do it and the company needed to look into engaging an independent company. The cost was quite a lot, but this was not an issue. However, we looked at the products we had, and the volume and it transpired that we did not need one*".
173. It was put to Mr McQueen by the claimant that Citation observed, during the 2019 health and safety audit, that a DSEAR assessment had still not been undertaken. He referred to the entry at page 165 of the supplemental bundle. Mr McQueen said that arrangements had been put in place for such an assessment to take place but this had not yet been formalised. On 3 March 2020, Sally Wade observed in her email of that date (page 493) that a specific risk assessment as advised by Citation with reference to DSEAR should be undertaken. The HSE were satisfied that the matters raised in Sally Wade's email of 3 March 2020 had been or were in the process of being dealt with and that no further action was to be taken by the HSE.
174. In her email of 3 March 2020, Sally Wade advised the respondent to review the storage of materials. She was concerned that storage of flammable substances is better done outside. She also advised the respondent to check the labelling of the IBC containers.
175. The claimant contends that the IBC containers raised an issue that was being ignored by the respondent. Mrs Wolstenholme says, (in paragraph 114 of her witness statement) that she had not ignored the issue. The claimant had obtained quotes for removal of the IBCs. The spreadsheet containing the quotes is at page 567. She says that the claimant informed her that the price was the same for 18 IBCs as it was for the 12 IBCs that the respondent had for collection at that time. It is her case that the claimant advised her to wait until the respondent had accumulated a full load of 18 IBCs. Obviously, that would be much cheaper per unit.

176. Mrs Wolstenholme says that then she made enquiries of local disposal companies who told her that as they frequently pass the industrial estate where the respondent was based, individual IBCs could be picked up from time to time. Mrs Wolstenholme therefore refutes the claimant's contention that the respondent adopted a lax attitude towards the waste IBCs.
177. Mr McQueen gives corroborative evidence of Mrs Wolstenholme's account in paragraph 16 of his witness statement. In paragraph 17 he goes on to say that there was nothing "*specifically dangerous about the storage of the waste products. The integrity of the waste containers was intact. It was stored well out of the way from the daily fork lift truck traffic so the risks of any possible accidental damage or leakage was minimal.*"
178. He goes on to say in paragraph 18 that, "*All our IBCs are UN approved containers, there is a health and safety practice, the UN approved ones are more robust and, these are the ones that the company uses.*"
179. Mr McQueen says in paragraph 19 of his witness statement that there was no lack of integrity from the IBCs such as to cause the leakage which resulted in the Environmental Agency visit to the premises in 2017.
180. On 17 November 2020 Mrs Wolstenholme emailed Mr Bolton of the Environment Agency. She enquired whether the respondent needed a waste storage licence in order to store the IBCs. Mr Bolton replied on 18 November 2020. He drew to her attention that the Landfill Directive (1993/31/EC) sets time limits for the storage of waste. This is three years if destined for disposal or three years if destined for recovery. A landfill permit is required to store waste for a longer period. The email exchanges are at pages 487A to 487B.
181. Mr Bolton noted that he was unable to confirm that "*no one from the Environment Agency visited [your] site to advise on your IBC storage. I can only confirm that we have no record of any advice given on our national incident recording system.*" Thus, it is noteworthy that no concerns were raised by the Environment Agency about the IBCs. Mr McQueen said that following the Environment Agency visit in March 2020 the older IBCs were disposed of by the respondent. (There was a disagreement between Mr McQueen and the claimant as to whether or not IBCs had been brought from the respondent's former site in Shafton to the premises in Carlton).
182. In oral evidence, Mrs Wolstenholme, when commenting about her interaction with the three governmental agencies in question and her approach to matters within their remit, that the respondent had signed up with Citation for seven years to advise upon health and safety matters. She recalled that on 12 March 2020 she discussed environmental issues with Mr Bolton. She can recall the date very well because she was in the Houses of Parliament in order to collect an industry award. She said that Mr Bolton had told her that the respondent had done nothing wrong. She invited him to look around the premises. Mr Hays showed him round. Mr Bolton identified issues with the IBCs and the interceptor tank. Mrs Wolstenholme says that the respondent took steps to remove the IBCs and clean out the tank.
183. She also said that she was not "*peevied*" that the claimant had raised issues with either the HSE or the Environment Agency. She expressed a similar sentiment about the ICO. She commented that she had had a number of dealings, following the claimant's reference of matters to the ICO, with officials

at the ICO with whom she got on well to the extent of being on first name terms with them.

184. It is not in dispute that the claimant was dismissed on 14 February 2020 without the respondent following a procedure of process. It is part of the claimant's case that had a procedure been followed, the claimant would have been able to challenge the evidence of several of the employees who had made adverse comments about him.
185. The claimant did not dispute that he had engaged in "*banter*" (as the claimant put it) with Karl Hays about his weight. The claimant said that he would have put it to Mr Hays (had he had the opportunity to do so) that this was no more and no less than workplace banter. The claimant observed that Mr Hays had on many occasions passed comment about the claimant's physical resemblance to the well-known popular music duo '*The Proclaimers*'. The claimant would also have put it to Mr Hays that he gave Mr Hays favourable appraisals in September 2018 and April 2019 and that there was no issue with their working relationship. Mrs Wolstenholme refuted this and said that on one occasion Mr Hays had complained that the claimant had come to work wearing shorts at the same time the claimant had prohibited Mr Hays from so doing.
186. The claimant suggested to Mrs Wolstenholme that had he had the opportunity he would have sought to undermine the credibility of Mr Housecroft upon the basis that the claimant knew that Mr Housecroft had given misleading information to the respondent during his recruitment process. The claimant suggested therefore that Mr Housecroft had a vested interest in seeing the back of the claimant.
187. The claimant also took issue with Mrs Wolstenholme's evidence (in paragraph 58 of her witness statement) and Mr McQueen's evidence (in paragraph 45 of his witness statement) that staff had told Mrs Wolstenholme that they had seen the claimant listening in to conversations from the toilet and the canteen. The claimant contended that this evidence was not credible.
188. The allegation of listening in to conversations through the toilet wall was based upon Mr Hays' account given in his interview with Stacey Darnell of 7 February 2020 (at pages 595 to 597). The claimant pointed out to Mr McQueen that Mr Hays said to Mrs Darnell that he had only used the downstairs toilet (from which the claimant allegedly listened in to conversations) on one occasion. It was suggested therefore that it was simply too much of a coincidence that upon that one occasion when Mr Hays used those facilities he saw the claimant in a cubicle surreptitiously listening in. (Mr Hays had of course made a similar allegation in the statement of 16 January 2020 at page 131).
189. The claimant also put to Mrs Darnell that she had omitted to ask Mr Housecroft (in his interview of 7 February 2020) about his dealings with Mr Davies and his alleged intimidation of him. Mrs Darnell took the view that the dispute between them was a private affair. The claimant's point was that this impacted upon Mr Housecroft's credibility (as did the issue of his conduct during the recruitment process).
190. The claimant suggested to Mrs Darnell that Mrs Wolstenholme had effectively put words into the employees' mouths, in particular of the atmosphere being toxic. It was suggested that the employees were effectively being coerced into making adverse comments about the claimant for fear of losing their jobs.

Mrs Darnell replied that if the claimant's theory were to be correct, then everyone to whom she spoke had lied and yet *"people were saying similar things."*

191. The claimant suggested to Mrs Wolstenholme that she would do whatever it took to get him out of the business. He suggested that she had form for this, having dismissed other employees whom she wished to see the back of. One of these was Gareth Sacre. His contract of employment was summarily terminated on 17 October 2018. The letter of dismissal is at pages 573 and 574. It was alleged (and found by the respondent) that Mr Sacre had committed acts of gross insubordination and had been grossly insubordinate towards Mrs Wolstenholme.
192. It was put to the claimant that towards the end of his period of employment (and prior to his suspension) the overall atmosphere within the respondent was bad. The claimant said that he had *"lost 100% trust in Alisdair McQueen and Denise Wolstenholme for the way they were carrying on the business."*
193. On any view, it was plain that matters were deteriorating. An issue as simple as the delivery by the claimant of letters to Mrs Wolstenholme became a point of contention. Mrs Wolstenholme said, in paragraph 55 of her witness statement, that the claimant *"...would come into the office with an envelope, smile at me and put it in his desk drawer. He would then wait until five to five in the evening and when everyone had left the office, he would come over to my desk and hand me a letter. If I did not hold my hand out he would put it in my face so I had to take it, his manner was very intrusive. If I put my hand out as he approached the desk to take the letter, he would leave it on the desk"*. The claimant's account is that he kept the letters in his car and gave the letter to Mrs Wolstenholme at the end of the working day in order to preventing her involving other members of staff and waving the letter around *"like a flag"*.
194. There were accusations and counteraccusations around breaching the GDPR in connection with the visitors' book and holiday request forms. The claimant's case was that these were left on display for all to see which was a breach of the GDPR. The claimant took photographs of what he found. Mrs Wolstenholme said that she had spoken to the ICO who said that there had been no breach of the GDPR by the respondent. On the contrary, she said, the ICO told her that the claimant had breached the GDPR himself by taking photographs of the documents.

### **Summary of the relevant law**

195. The Tribunal now turns from its findings of fact to a consideration of the relevant law. As summarised in paragraphs 3 and 4 of these reasons, the claimant pursues complaints of ordinary unfair dismissal and automatically unfair dismissal.
196. Claims of ordinary unfair dismissal require the Tribunal to consider: firstly, whether the employer's reason for dismissal is one of the potentially fair reasons set out in section 98(1) and (2) of the 1996 Act; and secondly (if the reason is potentially fair) whether, in the circumstances of the case, the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee pursuant to section 98(4).

197. Section 98(4) says that the determination of the question of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) 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 the reason as sufficient for dismissing the employee, and shall be determined in accordance with the equity and the substantial merits of the case.
198. In sum, it is for the employer to show the potentially fair reason for the dismissal of the employee. Should the employer satisfy the burden upon it to show the potentially fair reason, then the Tribunal will determine whether the employer acted reasonably in treating that reason as a sufficient reason for the dismissal of the employee. There is no burden of proof upon either party upon the question of reasonableness. That issue is one for the Tribunal.
199. The Tribunal will therefore decide whether, based upon the information before it, the employer entertained a reasonable belief in the permitted reason, whether that belief was held upon reasonable grounds and was reached after carrying out as much investigation into the matter as was reasonable given the circumstances. The Tribunal will then decide whether procedures were fair overall and whether it was fair to dismiss the employee for that reason.
200. If the Tribunal thinks that a reasonable employer could have dismissed the employee in the circumstances then the dismissal will be fair. In order for the dismissal to be held to be unfair, the Tribunal must decide that no reasonable employer would have dismissed the employee in the circumstances. Linked to this, the Tribunal must not substitute its own decision for that of the employer. It is not permissible for the Tribunal to decide that it would have chosen a different course from that chosen by the employer. If a Tribunal thinks that one reasonable employer could have dismissed the employee but another could reasonably not have dismissed then the unfair dismissal claim will fail. This is because the dismissal of the employee will fall within the band or range of reasonable management responses.
201. The range or band of reasonable management responses test applies to the whole of the Tribunal's enquiry. A dismissal may be unfair if it fell outside the range of reasonable responses to dismiss the employee for that reason or because unfair procedures were followed in the dismissal process. The question always is whether a reasonable employer may have acted in the way that the employer in the case acted and made the decisions that the employer made.
202. Dismissals may be unfair purely because an unfair procedure was followed even if there was a good reason to dismiss the claimant. Normally, a dismissal will be unfair if procedural safeguards are not invoked. However, where an employer can reasonably conclude that a proper procedure would be utterly useless or futile it may be acting reasonably in not putting one in place. This is a matter for the Tribunal to consider in the light of the circumstances known to the employer at the time of the dismissal. The test for the Tribunals to use is an objective one. The Tribunal must ask whether an employer, acting reasonably, could have made the decision that it would have been futile to follow proper procedures.
203. The issues in this case were set out in paragraph 8 of these reasons. In paragraph 8.3, Employment Judge Little recorded that if the dismissal is not



found to be automatically unfair then an issue will arise as to whether the respondent can show a potentially fair reason to dismiss (that is a reason within the Employment Rights Act 1996 sections 98(1) and (2)).

204. Section 98(2) provides four potentially fair or permitted reasons for the dismissal of an employee. One of those four is conduct. Although pleaded as a permitted reason, conduct was not relied upon by the respondent at the hearing. None of the other three permitted reasons in section 98(2) are relevant.
205. It follows therefore that the respondent seeks to rely upon section 98(1). This provides that in determining whether the dismissal of an employee is fair or unfair it is for the employer to show a substantial reason of a kind such as to justify the dismissal of the employee holding the position which they held. This is commonly referred to as "*some other substantial reason*". It is a catch-all category covering dismissals that do not fall within any of the four permitted reasons in section 98(2).
206. It is for the employer to show that the substantial reason for dismissal was a potentially fair one. Once that has been established, it is then up to the Tribunal to decide whether the employer acted reasonably under section 98(4) in dismissing for that reason. The Tribunal will decide the fairness of the dismissal by asking whether the decision fell within the range of reasonable responses that a reasonable employer might adopt. This will involve a consideration of matters such as whether the employer was consulted, warned and given a hearing and/or whether the employer searched for suitable alternative employment.
207. The "*some other substantial reason*" ground for dismissal (which is often abbreviated as "*SOSR*") is often invoked where the trust and confidence necessary for the employment relationship to function has broken down irretrievably. The Tribunal must identify why the employer considered it impossible to continue to employ the employee. A breakdown in trust and confidence is not a convenient label to stick on any situation in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is unavailable or inappropriate. Therefore, there must be substance to the employer's case that there has been a breakdown in working relations and not merely an assertion that such is the case.
208. During the course of the hearing the Tribunal referred the parties to the case of **Gallagher v Abellio Scot Rail Limited** [UK EATS/0027/19]. This was a case in which there was a breakdown in relations between the employee and her manager. It was not in fact in dispute that there was a breakdown in trust between them.
209. The real point of interest in the case for present purposes is that the employee's employment was terminated summarily with a payment in lieu of notice and that the decision was taken by the employer to dismiss her without following any procedure and without giving her any right of appeal against the dismissal. It was held by the Employment Appeal Tribunal (Choudhury P presiding) that it was open to the Tribunal upon the evidence before it in the case to determine that there had been a breakdown in trust and confidence. Further, it fell within the band of reasonable management responses to dismiss

the employee without giving her the benefit of a hearing or an appeal against dismissal. The EAT said (in paragraph 51) that:

*“Dismissals without following any procedures will always be subjected to extra caution on the part of the Tribunal before being considered to fall within the band of reasonable responses. Despite [counsel for the employee’s] careful and thorough submissions, I am satisfied that this Tribunal did exercise such caution and came to a conclusion that was open to it on the evidence that it heard.”*

The Employment Appeal Tribunal noted (in paragraph 46 of the case report) that, *“The Tribunal went further than merely concluding that the procedure would not serve any useful purpose and went on to state that ‘if anything it would have worsened the situation.’”* The Tribunal heard the evidence over a number of days and was well placed to form views as to the position between the two protagonists at the time of the claimant’s dismissal. Its conclusion that a procedure would have ‘worsened’ the situation was open to it in the rather unusual circumstances of this case.”

210. The Tribunal now turns to the claimant’s complaint that the reason or (if more than one) the principal reason for his dismissal is that he made qualifying protected disclosures. Should the Tribunal find that the reason or the principal reason for the claimant’s dismissal was that he done so, then the issue of reasonableness does not arise. The dismissal will be automatically unfair. This is because dismissal for making qualifying protected disclosures is one of the proscribed reasons for the dismissal of an employee.
211. The first issue is whether the claimant made disclosures which qualify for protection and if so whether the disclosure was made to one or more of the persons or bodies set out within the relevant parts of the 1996 Act.
212. It is to Part IVA of the 1996 Act to which we look for the definition of protected disclosure and those to whom a disclosure may be made in order to qualify for protection. (Part IVA of the 1996 Act was inserted into the 1996 Act by the Public Interest Disclosure Act 1998).
213. To be a protected disclosure, it is necessary for the claimant to have disclosed information. Complaints, allegations and comments may or may not contain information.
214. The disclosure may be made orally or in writing. The employee need not follow any special whistle blowing procedure even if the employer has such a procedure in place. It does not matter that the employee tells those to whom they make the disclosure something of which they were already aware.
215. The information must, in the employee’s reasonable belief, tend to show one or more of the matters listed in section 43B (1) of the 1996 Act. These are often referred to as the *“six relevant failures”*. Of those six, four are relevant in this case. These are:
  - (a) *That a criminal offence has been committed, is being committed or is likely to be committed;*
  - (b) *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*

(c) *That the health or safety of any individual has been, is being or is likely to be endangered.*

(d) *That the environment has been, is being or is likely to be damaged.*

216. It is not necessary for the Tribunal to decide whether in fact the relevant failure has occurred, is occurring or is likely to occur. The issue is whether the employee had a reasonable belief in the relevant failure in question. It is not necessary for the employee to prove the validity of their concerns. The Tribunal does not have to decide that the concerns were correct, merely that the employee reasonably held a belief that they were.
217. The Tribunal must also consider whether the disclosure was, in the employee's reasonable belief, made in the public interest. Again, the question is not whether the disclosure was in fact in the public interest. The Tribunal must decide whether the claimant believed the disclosure to be in the public interest and that it was reasonable to believe that. It does not matter if the disclosure was also made in the claimant's own interest. What is in the public interest is considered by reference to all the circumstances including: how serious was the matter; how many people might be affected; and the identity of the wrongdoer. *'The public'* in this context may be the public at large or may simply be other people employed by the same employer.
218. In order to acquire protection, the relevant disclosure must be made to one or more of the persons and bodies identified in Part IVA of the 1996 Act. These include the employer. Protection also extends to disclosure of information to "*prescribed persons*". The disclosure will qualify for protection in circumstances where the employee makes disclosure to a prescribed person where they reasonably believe that the relevant failure falls within any description of matters in respect of which that person is so prescribed and that the information disclosed, and any allegation contained in it, are substantially true. It is not in dispute that the ICO, the Health and Safety Executive and the Environment Agency are all prescribed persons for the purposes of Part IVA of the 1996 Act.
219. Once the protected disclosures are identified and the employee shows that the disclosure was made to one or more of those set out in Part IVA of the 1996 Act, the Tribunal has to decide whether the reason or the principal reason for the dismissal was one or more of the disclosures. In a case such as this where the employee advances a case that the reason or principal reason was other than that advanced by the employer, an evidential burden is acquired by the employee to show, without having to prove, that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason advanced. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer, which must prove on the balance of probabilities which of the competing reasons was the principal reason for dismissal. *(The law upon the burden of proof in whistle blowing cases as just recited is applicable where, as here, the employee has more than two years' service. The position is different where the employee does not have sufficient continuity of service to bring a complaint of ordinary unfair dismissal).*
220. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the dismissal complained of, it may be appropriate for the Tribunal to draw inferences as to the real reason for the

employer's actions upon the basis of the Tribunal's findings of fact. Adverse inferences may be drawn, for example, by an employer's negative reaction to the disclosure, negative treatment of the employee after the disclosure and worse treatment of the claimant in comparable circumstances before and after the disclosure (in and of itself and/or compared with the treatment of colleagues who have not made a disclosure).

221. Should the claimant succeed with either or both of his complaints of unfair dismissal when the Tribunal will go on to consider remedy. The claimant is not seeking re-employment in this case. It follows therefore that the Tribunal is concerned with the provisions of section 118 to 126 of the 1996 Act. These provisions set out the statutory basis upon which for the Tribunal to deal with any remedy issue as may arise in an unfair dismissal case. The monetary remedy will consist of a basic award and a compensatory award.
222. Dealing firstly with the compensatory award, upon a complaint of ordinary unfair dismissal the Tribunal shall consider whether an employee would still have been dismissed even if a fair procedure had been followed and/or whether the particular employer may have fairly dismissed the employee at a determinate point in any event. If the Tribunal considers that that would have been the case then compensation can reflect the chance that the employee would have lost their employment in any case. This is by application of section 123(1) of the 1996 Act which provides that the amount of the compensatory award shall be in such an amount as the Tribunal considers just and equitable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to actions taken by the employer.
223. There is no scope for such a reduction (often referred to as a "*Polkey*" reduction) upon procedural grounds in a case of automatically unfair dismissal. The issue does however often arise in a complaint of ordinary unfair dismissal. The question in such a case is to look at what would have happened had the correct procedure been applied.
224. There is scope for a *Polkey* reduction in cases of automatically unfair dismissal to reflect the chance of the employment ending at some determinate point in the future in any case.
225. By section 123(6) of the 1996 Act the Tribunal may reduce the amount of the compensatory award by such proportion as it considers just and equitable where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant. In determining whether to reduce an employee's unfair dismissal compensation on grounds of contributory fault, the Tribunal must firstly make a finding that there was conduct on the part of the employee in connection with their unfair dismissal which was culpable or blameworthy. In this context, culpability extends to conduct which may be said to be perverse, foolish or bloody minded. Secondly, there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by action that was culpable or blameworthy. Thirdly, there must be a finding that it is just and equitable to reduce the assessment of loss to a specified extent. This provision applies in the case of both automatic and ordinary unfair dismissal.

226. By section 122(2) of the 1996 Act, when the Tribunal considers that any conduct of the complainant before dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly. Although culpable or blameworthy conduct must be found in order to enable the Tribunal to make such a reduction from the basic award, there need be no causal connection between the impugned culpable or blameworthy conduct on the one hand and the dismissal on the other.
227. When making findings of fact, it is generally accepted that the witness's appearance and behaviour in the Tribunal are unreliable ways of assessing a witness's evidence. That said, it is permissible for the Tribunal to take account of the way in which the case was conducted by a party upon the question of the credibility of the views of that party or the other party. For example, in **Eszias v North Glamorgan NHS Trust** [UKEAT/0399/09] HHJ Keith observed, about the employee in that case, that he was, "*a man of considerable charm, but he is also someone who struck us as being inclined to take a blinkered view of what people think of him and as someone who sees things starkly in terms of black and white. The fervour with which he sought to put right what he genuinely sees as the injustice of his dismissal has bordered at times on the obsessive.*" This too was a case in which the employer asserted SOSR as the reason for Mr Eszias' dismissal. The Employment Tribunal in that case concluded that the reason for dismissal was the breakdown of working relationships and not because of protected disclosures which Mr Eszias had made. Hence, the dismissal was not automatically unfair. The Tribunal concluded that the dismissal of him was fair in the circumstances. Although by no means at the forefront of the Employment Appeal Tribunal's deliberations in the case, it is plain that the EAT felt fortified in upholding the Employment Tribunal's decision upon the basis of their perception of Mr Eszias' demeanour before them.

### **Discussion and conclusions**

228. The Tribunal now turns to set out the conclusions that had been reached in this case. The conclusions have been arrived at by applying to the findings of fact the relevant law as just recited.
229. In the Tribunal's judgment, the respondent had reasonable grounds upon which basis to believe that the working relationship with the claimant had entirely broken down. In the Tribunal's judgment, the breakdown came about during and quickly after the DVLA incident and the decision of the respondent to issue the claimant a letter containing words of advice about that matter (paragraphs 32 to 46 of these reasons). Sharp and mutually antagonistic exchanges took place on 14 November 2019.
230. The respondent had genuinely been prepared to tolerate what Mrs Wolstenholme described as the claimant's "*sharp corners*" (paragraphs 27 and 28). The Tribunal finds prescient Mr McQueen's observation that, "*things seemed to be ramped up a notch or two*" after the incident of 14 November 2019 (paragraph 64). Mistrust quickly began to seep into the relationship between the claimant and Mrs Wolstenholme. This pattern commenced as early as 19 November 2019 over the issue of the toolbox talk and then Mrs Wolstenholme's decision to hold meetings with members of staff

in the absence of the claimant on 21 November 2019 (paragraphs 51 to 53 and 80).

231. Mrs Wolstenholme's actions on 21 November 2019 precipitated the claimant's perception of hostility towards him from members of staff. This was a position which he maintained throughout the remainder of his employment with the respondent (paragraphs 55 and 138) (the latter being the claimant's conduct at the grievance meeting with Mrs Darnell on 24 November 2020 at which he asked for all members of staff to be vacated from the office in order that his grievance papers may be photocopied). The claimant's perception of hostility towards him led him to raise a grievance on 28 November 2019 (paragraph 55). He complained on two occasions of a perception of being subjected to daily victimisation and harassment (paragraphs 92 and 129).
232. The claimant's mistrust of the respondent was evidenced by his reluctance to accept the respondent's choice of representative to deal with the claimant's grievance (paragraphs 56, 74 and 83 to 85). Even at the hearing before the Employment Tribunal, the claimant maintained his position that Citation were not impartial (paragraph 132).
233. The claimant's perception of hostility towards him and the lack of partiality in the handling of the grievance process extended to his belief that Mr Davies had been deterred from acting as his representative at the grievance hearing on 24 January 2020 (paragraph 141).
234. The claimant's grievance was raised only seven days after Mrs Wolstenholme's meeting with the other members of staff on 21 November 2019. Matters then took a turn for the worse when the claimant encountered his grievance letter being displayed by Mrs Wolstenholme to Mr McQueen (with other members of staff present) on the same day (28 November 2019). These events are described in paragraphs 58 to 66 and 80. The respondent reasonably could take the view that the claimant was acting in disregard of the letter of advice of 15 November 2019 (paragraph 44) not to act in a confrontational and argumentative manner and was reneging on his acceptance that his conduct of the DVLA matter had been wrong (paragraph 64 (@ (33))). The claimant formed the view that effectively Mrs Wolstenholme was looking to manage him out: (paragraph 45).
235. The claimant then complained about this matter to the ICO. This is of course the claimant's right. However, the respondent's position is that the manner in which the claimant went about matters was destructive of trust and confidence. In the letter of 29 November 2019 (at page 77) the claimant referred to the incident of 28 November 2019, that he had complained to the ICO and had named within that complaint the members of staff who were present.
236. Further, the claimant marked the letter as having been copied to his solicitor. The claimant repeated this practice on other occasions (paragraphs 81 and 127). This conveyed to the respondent that the claimant was adopting a litigious approach to matters.
237. That the developing mistrust was mutual is evidenced by Mrs Wolstenholme's actions in asking the claimant for his factory keys within an hour of the grievance (dated 29 November 2019 at page 77) having been received by the respondent. The factual findings are at paragraphs 68 to 72 and 76 to 78. The short and petulant nature of the exchange around the factory keys is

noteworthy. The claimant's mistrust in the respondent has already been remarked upon culminating, upon the last occasion upon which the claimant was upon the respondent's premises (on 24 January 2020), in him asking Mrs Wolstenholme (through her representative) to clear the office in order that the photocopying exercise may be undertaken.

238. Matters were not assisted by the tone of some of the claimant's correspondence. On any view, at times this was somewhat assertive and demanding: see paragraphs 81, 82, 88 and 128.
239. Not only was the tone of some of the claimant's correspondence strident, he also raised a number of complaints over short and compressed periods. On a couple of occasions, several communications were sent by him to the respondent on the same day (on 6 December 2019 and 22 January 2020). The Tribunal refers to paragraphs 76, 79, 80 and 81, 82, 91, 93, 94, 95 and 127 to 129. This is not to say that some of the claimant's complaints were without merit. However, the fact remains that the respondent's management resources (which were limited given the small size of the respondent's organisation) were being stretched by the demands of dealing with the claimant's correspondence.
240. Matters culminated in the claimant greatly expanding upon the grievances which he had when he had the opportunity of addressing them at the meeting with Mrs Darnell on 24 January 2020. The number of grievances had expanded from 10 to 28: paragraph 154.
241. Matters got no better in the early part of 2020. Mrs Wolstenholme was faced with having to apologise to members of staff for the tone of the claimant's zero tolerance memorandum which he issued on 7 January 2020 (paragraph 97 to 102). Plainly, Mrs Wolstenholme and Mr McQueen then decided to suspend the claimant the next day.
242. The suspension meeting of 8 January 2020 was characterised by mutual suspicion. Each party was recording the meeting. The respondent mishandled matters by not informing the claimant of the purpose of it or giving him advance notice. That said, the claimant overreacted when informed that the meeting was off the record but would be recorded. The Tribunal accepts that this may have arisen from a misunderstanding on the claimant's part about the nature of without prejudice meetings and the common practice of recording them. The relevant factual findings are at paragraphs 104 to 108 and 110 to 112. What is plain from the meeting is that at this stage it took very little for the meeting to become unworkable and unviable. There was also a somewhat unsavoury aftermath to the meeting as the claimant was not allowed to remain upon the premises in order to read the suspension letter. On any view, the respondent's management wanted the claimant off the premises as quickly as possible.
243. The claimant then harboured suspicion that records upon his computer may be deleted. He took preventative steps (paragraphs 113 and 127).
244. Mrs Wolstenholme then solicited evidence from members of staff and obtained material evidencing their unhappiness. The material at paragraphs 115 to 124 was before her when she took her decision to dismiss the claimant. (The material referred to in paragraphs 154 to 158 and summarised in paragraph 160 was not of course before her and can therefore not have been

a factor in her decision to dismiss the claimant. This material does however corroborate Mrs Wolstenholme's evidence about staff unhappiness at the material time). In the Tribunal's judgment, Mrs Darnell was correct to observe (paragraph 190) that the claimant's theory that the whole of the respondent's workforce was telling untruths and had conspired to see him dismissed is not credible.

245. That the claimant had a very jaundiced view of Mrs Wolstenholme is evident from him accusing her of bullying and underhand tactics. Reference may be made to paragraphs 81, 129, 130, 154 and 191.
246. The claimant himself was of the view that he had completely lost trust and confidence in Mr McQueen and Mrs Wolstenholme (paragraph 192). Mrs Wolstenholme's views of matters were expressed in her letter to him of 14 February 2020 in which she communicated her decision to end his contract of employment. The letter is cited at paragraph 148. Plainly, there was complete loss of mutual trust and confidence between the parties.
247. By the end of the relationship, even straightforward and mundane tasks had become an issue. For example, there was the matter about the delivery of letters from the claimant to Mrs Wolstenholme (paragraph 193). The claimant also complained about the timing of the delivery of the letter of 20 January 2020 (paragraph 127) which he somewhat hyperbolically described as "*contemptible*" (paragraph 129).
248. The mutual antagonism and, it may be said, mutual dislike between the claimant and Mrs Wolstenholme was only too apparent during the course of the hearing. The tone was set very early on with a mutual disagreement about the provenance of the up-to-date staff handbook (paragraphs 22 to 24). It is noteworthy that the claimant's demeanour towards Mrs Darnell was much less hostile than it was when he was cross-examining Mrs Wolstenholme and Mr McQueen. Exchanges between the claimant and Mrs Wolstenholme were often '*tit for tat*': see for example the accusations and counter-accusations around the visitors' book and holiday forms: paragraph 194.
249. The demeanour of the claimant on the one hand and the respondent's senior management upon the other displayed during the Tribunal hearing towards one another (notwithstanding that some nine months had gone by since the claimant had been dismissed) lends credibility to the view taken by Mrs Wolstenholme that the relationship had broken down and was unworkable. Indeed, as has been said, the claimant appeared to agree with that, commenting that he too had lost all trust and confidence.
250. There is merit in the claimant's case that dismissing him without going through any procedure deprived him of the chance of questioning several of the respondent's witnesses (as laid out in paragraphs 184 to 190). However, the fact remains that even were the claimant to succeed (at a domestic hearing convened by the employer) in discrediting the evidence of Mr Housecroft altogether and Mr Hay's account of seeing the claimant listening in to conversations through the toilet wall, the fact remains that there is ample other evidence upon which basis the respondent could reasonably rely upon in order to conclude that the working relationship was at an end and had become untenable.



251. In the Tribunal's judgment, the respondent could, in the circumstances, reasonably conclude it to be untenable to continue the claimant's employment. The Tribunal takes into account that this is a small organisation of just 13 employees. The claimant was occupying a great deal of management time with his grievances and complaints. Even the most mundane and routine transactions were becoming contentious. The claimant's conduct had on occasions reduced Mrs Wolstenholme to tears. Mutual trust and confidence is at the heart of the employment relationship and here there was none upon either side. The sheer volume of the claimant's grievances (accumulated over a very short period of time from the middle of November 2019) and the conduct of the parties towards one another as described in these reasons meant that in reality there was no way back.
252. The claimant complains that the respondent acted outside the range of reasonable responses in failing to give him the benefit of a hearing before the decision to dismiss him was taken. In the Tribunal's judgement, this is one of those rare cases where the respondent could, acting within the range of reasonable management responses, conclude that a hearing would have been utterly futile.
253. The claimant is right to say that in the normal course, an employee should be given the benefit of a hearing before an employer decides to dismiss. This applies as much to SOSR dismissals as to any other. It would usually be outside the range of reasonable responses for an employer to simply dismiss the employee without informing the employee in advance that the employer was considering dismissal, setting out the basis upon which dismissal was contemplated and giving the employee the right to have their say.
254. In the **Gallagher** case, the Tribunal observed that the employer had reasonably concluded that the holding of a hearing would in fact make matters worse. Each case must of course be determined upon its own facts. However, the Tribunal finds that on the facts of the instant case, allowing the claimant a hearing may well have made matters worse. Mrs Wolstenholme anticipated difficulties with meeting the claimant in December 2019, hence her decision to involve Citation (paragraph 84). The suspension meeting held on 8 January 2020 deteriorated into mutual rancour literally within seconds of it commencing. The claimant was deeply suspicious of the respondent by the time of the grievance hearing before Mrs Darnell on 24 January 2020 to the extent of asking for all employees to be removed from the office in order that a task as mundane as photocopying may be undertaken where there was little risk of confidential documents being seen by others. It is difficult to see in the circumstances how a much more important hearing at which a decision may be taken about the claimant's future employment with the respondent could hope to proceed smoothly against the background of those experiences.
255. In conclusion therefore, the Tribunal finds that the respondent genuinely and reasonably believed that the working relationship had become untenable, acted within the range of reasonable management prerogative in concluding that a hearing would have been an exercise in futility (if not worse) and acted within the range of reasonable responses in dismissing the claimant. For similar reasons, the respondent also acted within the range of reasonable responses in not allowing the claimant a right of appeal. The right of appeal would have had to come before either Mrs Wolstenholme or Mr McQueen which, for the reasons already given, was an untenable proposition.

256. The Tribunal finds that the claimant has discharged the burden upon him to show that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason advanced by him (that the principal reason for his dismissal was as he had made protected disclosures). The Tribunal reaches its conclusion upon the basis that after drawing the respondent's attention to the fact of his disclosure to the ICO, within a very short space of time the respondent removed the claimant's factory keys from him. Further, the respondent's decision to dismiss the claimant came quickly upon the heels of the protected disclosures which the claimant made. This temporal connection coupled with the worse treatment of the claimant in comparable circumstances before and after the disclosure to the ICO (by the removal of his responsibilities to open and close a factory) persuade the Tribunal that the claimant has shown an issue which warrants investigation.
257. That being the case, the Tribunal shall go on to consider in further detail the claimant's complaint of automatic unfair dismissal.
258. The respondent accepts the claimant to have made three protected disclosures.
259. The first of these is that of 29 November 2019 to the ICO at page 77. The second is the disclosure to the Environment Agency of 10 December 2019 (paragraph 87). The third is the claimant's disclosure to the Health and Safety Executive of 8 January 2020 (paragraph 106). In the Tribunal's judgment, the respondent was sensible to concede each of these three matters to be protected disclosures. In each case, the respondent concedes the claimant to have had a reasonable belief in the fact that there were one or more of the relevant failures in each case and that it was in the public interest for the claimant to make the disclosures.
260. In each case, disclosure was made to the respondent in its capacity as the claimant's employer. Therefore, the claimant made a protected disclosure and complied with the obligation upon him (pursuant to section 43C of the 1996 Act) to make the disclosure to his employer. The respondent did not of course have a whistle blowing policy in place (or at any rate, the whistle blowing policy in the 2019 handbook was not yet in force). The claimant communicated the disclosures to Mrs Wolstenholme in her capacity as the respondent's managing director. That is sufficient for the disclosure to qualify for protection in law.
261. The respondent also concedes that the disclosure of 10 December 2019 and the disclosure of 8 January 2020 were made to the Environment Agency and the Health and Safety Executive respectively and accordingly were made to prescribed persons for the purposes of section 43F of the 1996 Act. No issue is taken by the respondent that the claimant did so believing that the allegations contained in them were substantially true.
262. The only controversial issue is whether the claimant's disclosure to the ICO of the matters referred to at page 77 were made to the ICO as a prescribed person as well as to the respondent. The Tribunal is satisfied that the claimant did report the matter to the ICO. The ICO wrote to the respondent on 18 March 2020 (page 458A) to notify the respondent of the claimant having raised a complaint with the ICO about GDPR matters. The Tribunal accepts that the documentation at pages 458 to 476 does not specifically identify the

complaints raised by the claimant with the ICO. However, given the zeal with which the claimant has pursued such matters it is unlikely, in the Tribunal's judgment, that no complaint was raised by him with the ICO about the incident which occurred on 28 November 2019. Indeed, this is inherently unlikely given the strength of feeling upon the part of the claimant which the incident engendered. The Tribunal therefore finds that not only did the claimant make a disclosure about that matter to the employer on 29 November 2019 he also did so to the ICO as the relevant prescribed person for the purposes of section 43F of the 1996 Act.

263. It follows therefore that the Tribunal is satisfied that the claimant made protected disclosures on 29 November 2019, 10 December 2019 and 8 January 2020 and that in each case the disclosure was made to the employer and to the relevant prescribed person. The claimant therefore made disclosures which qualify for protection. As has been said, the claimant has also discharged the evidential burden to show – without having to prove – there to be an issue warranting investigation and which is capable of establishing the competing automatically unfair reason advanced as being the principal reason for his dismissal: (this reason of course competes with that advanced by the employer that the claimant was dismissed for a substantial reason, that being the breakdown in the working relationship between the parties).
264. The claimant having satisfied the burden upon him to show a matter warranting investigation, the burden is upon the respondent to prove on the balance of probabilities which of the competing reasons was the principal reason for dismissal.
265. In these cases, there is often a dearth of direct evidence as to the employer's motives in deciding to dismiss the employee. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the dismissal complained of, it may be appropriate for a Tribunal in these circumstances to draw inferences as to the real reason for the employer's actions upon the basis of the Tribunal's findings of fact.
266. The Tribunal draws favourable inferences in favour of the respondent by reason of the following matters. Firstly, Mrs Wolstenholme engaged in positive dealings with the ICO (paragraphs 165 and 183). Secondly, the Tribunal is satisfied that Mrs Wolstenholme and Mr McQueen take their health and safety duties seriously. They arrange for an annual audit from Citation (paragraph 171). Secondly, the Health and Safety Executive were satisfied with the respondent's actions when the HSE followed up on the claimant's disclosures (paragraphs 172 to 174). Thirdly, Mrs Wolstenholme took seriously the claimant's concerns about the lack of first aid provision when he raised it on 6 January 2020 (paragraphs 96, 103 and 167).
267. Similarly, the respondent took seriously its dealings with the Environment Agency (paragraph 153). The Environment Agency was satisfied with affairs upon its site inspection in March 2020 (paragraphs 181 and 182). The respondent was anxious to do the right thing concerning its obligations under the Landfill Directive (paragraph 180) and in dealing with the IBCs (paragraphs 175-179).
268. These are not the actions of an employer which is reluctant to comply with its statutory obligations. The evidence is that there was no negative reaction from the respondent about the claimant having involved the statutory agencies.

269. These factors have to be weighed against the factors considered by the Tribunal in support of the respondent's case that it had reasonable grounds to believe that the working relationship had broken down. These are factors which are largely personal between the claimant and Mrs Wolstenholme and which firmly point away from the protected disclosures having been the operative cause of the respondent's decision to dismiss the claimant. Weighing the factors in favour of SOSR being the reason for the claimant's dismissal against the scant (if not non-existent) evidence in favour of the protected disclosures being the principal reason for the dismissal gives of only one answer.
270. Accordingly, the Tribunal concludes that the claimant's complaints of ordinary and automatically unfair dismissal fail. That being the case, the Tribunal need not go on to consider any remedy issues.

**Employment Judge Brain**

Date: 27<sup>th</sup> January 2021