



EMPLOYMENT TRIBUNALS

Claimant: Mr Nigel Midgley

Respondent: Vossloh Cogifer UK Limited

Heard at: Hull (via CVP).

On: 26, 27, 28, 29 and 30 April 2021. 1, 2 June 2021. Deliberations 3 June 2021.

Before: Employment Judge T R Smith, Mrs Brown and Mr Langman.

Representation

Claimant: In person

Respondent: Mr Siddell QC (Counsel)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V-video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

RESERVED JUDGMENT

1. The Claimant was not subjected to any detriment done on the ground that he had made a protected disclosure or disclosures.
2. The Claimant was not dismissed for the reason that he made a protected disclosure.

RESERVED REASONS

The Evidence

1. An application was made by the Claimant on day one for specific disclosure of additional documents. For the oral reasons given by the Tribunal that application was refused.
2. The Tribunal had before it a bundle consisting of 974 pages, the “R” bundle.
3. This was supplemented, at the start of the hearing, with a further 93 pages from the Claimant, the “C1” bundle.
4. On day four the Claimant made an application to introduce a further document and the Tribunal agreed to its admission. The “C 2” bundle.
5. A reference to a number in brackets is a reference to a document in the R bundle unless otherwise stated.
6. The Tribunal had before it a total 170 pages of witness statements.
7. The Tribunal heard evidence from the Claimant, Mr Nigel Midgley, Ms Wendy Preston, managing director of the Respondent, Mr David Pulham, the Respondent’s safety health, environment and quality manager, Mr Gavin Winter the Respondents procurement manager, and Mr Anthony Marsden ,a selfemployed HR adviser, called by the Respondent.
8. The Tribunal considered all the evidence in the round, even if it has not specifically referred to each and every piece of evidence or document.
9. The Tribunal has not addressed each and every evidential dispute, only those matters required to determine the agreed issues.

The Issues

10. Although the case had been case managed, the Claimant disputed the list of issues set out in an order of Employment Judge Little.
11. The Tribunal determined, having heard representations from both parties, and for the oral reasons it gave, that the issues the Tribunal would determine were as set out below:-
12. Did the Claimant make one or more qualifying protected disclosures as defined by section 43B of the Employment Rights Act 1996 (“ERA96”)? The said disclosures were alleged to be in a business report compiled on 06 September 2019 and in a grievance raised on 13 November 2019.
13. In the business report the Claimant relied upon the following disclosure
 - *“Guarding is not adequate – PUWERs req’d”*. [PUWER is a reference to the Provision and Use of Work Equipment Regulations 1998].
 - *“Concerned about lock out tag out on site”*.

- “MHE [mechanical handling equipment] segregation-walkways worn away and routes need a review, no zebra crossing, access and egress from buildings – using main doors as pedestrian routes”.
 - “Fire risks and environmental(COSHH)-oil and control of substances – uncontrolled smoking on site, mixing and exposed chemicals(bund full of chem/water). No fire drills this year –2 req’d”.
14. The Claimant asserted that the disclosure tended to show that the health and safety of an individual has been, is being or is likely to be endangered (section 43B(1)(d) ERA96).
15. The second disclosure was in a grievance, dated 13 November 2019 and the failure of the Respondent to protect him adequately or at all from bullying and harassment by Mr Bray .
16. Once again the Claimant asserted that the disclosure tended to show that the health and safety of an individual has been, is being or is likely to be endangered (section 43B(1)(d)ERA96).
17. Was the Claimant subjected to one or more of the alleged detriments?
18. The detriments were recorded as follows:-
19. **Detriment one.** Mrs Preston responding to the Claimant raising a grievance against Mr Bray by saying words to the effect “*Is this the action of a senior manager?*”
20. **Detriment two.** The performance review process to which the Claimant was subjected. The Claimant contended that Mrs Preston wrote action points on the business report he had presented but did not relay them to him and thereafter used the failure to comply with the targets as reason to fail his probationary period.
21. **Detriment three.** The Respondent “*allowing*” a “*shop floor grievance*” (“the collective grievance”) to be submitted against the Claimant and by allowing what the Claimant describes as a “*verbal contractual grievance*” to be added to that grievance.
22. **Detriment four.** Not giving the Claimant a fair three-month formal probation review.
23. In particular: –
- Not sending the Claimant a letter before the meeting to advise that he might fail his probationary review, supported by evidence.
 - Utilising the collective grievance against him.
 - Failing to give the Claimant targets to achieve and then subsequently been failed on targets that were never set.
 - Failing to send the Claimant minutes of the meeting to countersign.
 - Only informing the Claimant two days after the meeting that he had failed his probation and it would now be extended to 08 January 2020.
 - A failure to hold an outcome of meeting.

24. **Detriment five.** Not giving the Claimant a fair four-month formal probation review.

25. In particular: –

- The review should have been after one month as set out in a letter of 06 November 2019, but was held on 15 November 2019.
- Not sending the Claimant a letter before the meeting with details of the content of the meeting.
- A calendar diary date was sent which only mentioned three points, what had gone well, what was not so good and lessons learnt and these points differed from the alleged points put to the Claimant at the meeting.
- A failure by Mrs Preston to support the Claimant regarding Mr Bray's behaviour.
- A refusal to call another employee, Joe Dowse, to the meeting who was the apparent source of information that he'd been asked to spy on staff by the Claimant.
- Failing to send the Claimant minutes of the meeting to countersign.

26. **Detriment six.** In so far as they are not properly part of the section 103A complaint, the Claimant described as detriments an unfair termination and his appeal against dismissal being hindered by the Respondent.

27. In particular:-

- A failure to provide feedback minutes actions from the Claimant's formal probation review.
- Only giving the Claimant 45 minutes to prepare for the meeting.
- Holding a hostile meeting where the Claimant's comments were brushed aside and the Claimant's witness and notetaker were encouraged to speak against him.
- Witness statements allegedly read out and used against the Claimant whereas no witness statements were actually read out.
- A failure to offer support.
- The failure to give the Claimant a copy of the minutes to sign.
- When the Claimant received the minutes they had been altered and amended and not informing the Claimant his contractual rights would be withdrawn if he did not work his notice.

28. If so, were all or any of those detriments done on the ground that the Claimant had made a protected disclosure? By virtue of section 48(2) ERA96 it was for the Respondent to show the ground on which any act, or deliberate failure to act, was done.

29. Were all or any of the alleged detriments part of a continuing act? If not, were they presented before the end of the period of three months beginning with the

date of the act or failure to act or within such further period as the Tribunal considers reasonable?

30. Was the reason, or if more than one the principal reason, for the Claimant's dismissal that he had made a protected disclosure? (ERA96 section 103A).
31. Whilst the evidence produced by the Respondent made reference to alleged subsequently discovered misconduct it was agreed that such matters would not be addressed at this hearing.

Terminology.

32. For the purpose of this judgement the Tribunal should briefly deal with the meaning of certain terminology which appears in the evidence and documentation.
33. "Lean" is a system that is designed to reduce waste and improve efficiency and effectiveness in production. It involves members of the workforce identifying a concern and then working collegiately to address that concern. The fact that those affected have worked together to agree a solution is perceived to result in a greater chance of the solution being effectively implemented.
34. "Gemba" is a name used by the Respondents for what are in essence daily workplace discussions with staff, and associated notes placed on notice boards.
35. "Mission control" is a board measuring about 20' x 10' which records the Respondents national, departmental, and some individual targets.
36. "RIE" is a reference to a rapid improvement event. This is a team activity to make improvements to an area/ machine or process. There were two events during the Claimants employment. One of those events concentrated on health and safety.
37. "AFNOR", is an external quality control accreditation. Inspectors visited the Respondent's premises and made assessments, including issues relating to health and safety on two occasions during the Claimants employment.
38. "NEBOSH" is the National Diploma in Occupational Health and Safety.
39. "COSHH" is the control of substances hazardous to health.
40. A "Red Tag" meeting is a regular weekly meeting held by the Respondent to discuss equipment and machinery that was in need of repair.

Findings of fact Background

41. The Respondent is engaged in the production and supply of materials to the railway industry.
42. There are four departments within the Respondents factory namely concrete, machine shop, layouts and maintenance.

43. The Respondent operated a flat management structure. Mr James Finlay commercial and HR manager, Mr David Walters technical/service manager, the Claimant, Mr Gavin Winter procurement manager, Mr David Pulham SQHE manager and Mr Peter Mist, new work/maintenance manager all reported direct to Mrs Preston, the Respondent's managing director.
44. The Claimant had two direct reports namely Mr Robert Whitehead the production manager (machine shop) and Mr Simon Bray production manager (concrete). Mr Whitehead and Mr Bray occupied the same managerial level.
45. The shop floor is unionised.
46. The Claimant commenced employment with the Respondent on 08 July 2019 as its operations manager.
47. He had over 25 years' experience in production and operation management and experience in lean.
48. He is NEBOSH qualified, as is Mr Pulham.
49. It is appropriate to record that the Claimant knew another employee, Mr Roddis, had reported a concern to the Health and Safety Executive ("HSE") prior to the start of his employment and had suffered no detrimental action whatsoever by the Respondent, even though the Respondent was aware of his identity.
50. The Claimant was issued with a statement of terms and conditions (68 to 73).
51. The Claimant's employment was subject to a three-month probationary period.
52. Either on commencement, or within a few days of the commencement of employment, the Claimant was told by Mrs Preston to concentrate on building relationships with the workforce and also to integrate the new concrete production line. He was advised that the shop floor manager in concrete production, Mr Bray had not been performing well. However he had performed well in the past. It was perceived that prior to the Claimant's appointment Mr Bray had to report to both the managing director and the operational manager which may have led to confusion on his part as to priorities and impacted on his performance. **Principle events**
53. The Claimant sensibly began his role by seeking to understand how the workforce worked and analysing various metrics.
54. In about July 2019 the Claimant called a shop floor meeting when a discussion took place as regards overtime. The Claimant told the workforce he considered they worked a lot of overtime and it was sometimes unnecessary. The workforce, perhaps mistakenly, understood the message to be that there was to be no more overtime and were concerned. That concern reached Mrs Preston who spoke to the Claimant, because there was budgeting for overtime and the Respondent operated in a time critical

industry with peaks and troughs, and often overtime had to be worked. She stressed to him the need to ensure that the shop floor understood that there was no overtime ban and what they perceived to be the situation was a miscommunication or misunderstanding. She was concerned that as autumn and winter were approaching, which were historically the busiest time of the year for the Respondent, that the workforce were available to work overtime when required.

55. During the first few weeks the Claimant considered that there was inequality in terms of pay between the machinists and other shop floor workers. He considered the machinists were underpaid. For whatever reason some of the workforce understood the Claimant to mean that those on a higher grade would be downgraded, although the Tribunal did not find that was what the Claimant said. Again this was brought to Mrs Preston's attention and she challenged the Claimant who assured her he had not said there would be any pay cuts. Mrs Preston made it clear that she expected the Claimant to resolve this misunderstanding.
56. Thus, within a few weeks of the Claimant commencing employment, there were two clear examples of a misunderstanding in respect of communications between the Claimant and the workforce, and these were known to Mrs Preston.
57. In the same month the Claimant was allocated with an investigation into the behaviour of another employee, Mr Mathieson. During the course of that investigation, on 26 July 2019, Mr Mathieson gave the Claimant a document. The document was not before the Tribunal. Mr Mathieson subsequently left the Respondents employment but made a complaint that a grievance he'd given to the Claimant on 26 July had not been processed. The Claimant contended it wasn't a grievance and in any event Mr Findley had told him to simply put it in his drawer so he didn't do anything. This contradicted the Claimant's evidence that he had addressed the issue at the time (paragraph 22). The Tribunal considered that it was more likely that the Claimant saw this as a tactic by Mr Mathieson to delay his investigation and deliberately ignored it. It reached this conclusion for three reasons. Firstly on the basis of an email the Claimant subsequently sent to Mr Mathieson on 11 October 2019 (545) in which the Claimant apologised for not addressing his concerns. Secondly the unreliability of the Claimant's evidence as to whether he had or had not previously addressed the document. Thirdly the Tribunal also took into account the comment the Claimant made at a meeting on 27 November 2019 (128) when the Claimant admitted he should have followed up the grievance but did not.
58. Jumping ahead in the chronology for a moment the Tribunal found Mrs Preston was aware that Mr Mathieson was displeased that his grievance had been simply ignored and she knew of this, at the latest by 11 October 2019.

59. Returning to the chronology the Claimant embarked on pre-booked holiday from 31 July 2019 to 16 August 2019. This overlapped with Mrs Preston's own annual holiday which commenced on 05 August 2019 and terminated on 19 August 2019.
60. On 04 September 2019 Mr Whitehead spoke to the workforce following a discussion he'd had with the Claimant. He made it clear to the workforce he was passing on the Claimant's instructions. The workforce understood the management message was that they would be required to work two extra hours, indefinitely, and if they did not, they faced disciplinary action. It is proper to record that a collective agreement had been entered into between the recognised union and the Respondent which allowed the Respondents to require staff to work two extra hours.
61. It may be that Mr Whitehead misquoted the Claimant or that there was a misunderstanding by the workforce. Whatever the true situation the workforce were extremely disgruntled (as will be seen later in this judgement) and blamed the Claimant for this sudden change of affairs in respect of overtime, with no discussion, so they could re-organise their domestic affairs.
62. The message that the Claimant had allowed to be conveyed was in any event misleading, as it suggested the additional two hours had to be worked indefinitely, whereas they were only needed for the following week. As was recorded in the notes of 27 November 2019 Mrs Preston was concerned that the Claimant had permitted a misleading message to be conveyed without checking all the facts (129) and she was left to personally apologise to the workforce to seek to resolve the matter.
63. The Claimant prepared a report of his impressions of the business in his first two months. This is the business report (79 to 80 and 493) referred to in the list of issues. There is a dispute as to whether Mrs Preston asked the Claimant to feedback his initial impressions after two months or whether this was something the Claimant did on his own initiative. It matters not. Suffice to say he prepared the report and a meeting was arranged with Ms Preston to discuss his findings on 06 September 2019 (78).
64. In essence the business report was a document covering a variety of risks the Respondent faced or could face. It was not limited to simply health and safety.
65. The Tribunal is satisfied the Claimant made the disclosure as set out below, in writing to Mrs Preston and as the managing director she was the appropriate person to raise matters, having regard to the flat management structure and her acceptance that she had ultimate responsibility for health and safety at the Respondent's premises. The disclosures were: –

"Guarding is not adequate – PUWERs req'd". PUWER is a reference to the Provision and Use of Work Equipment Regulations 1998.

"Concerned about lock out tag out on site"

“MHE segregation-walkways worn away and routes need a review, no zebra crossing, access and egress from buildings – using main doors as pedestrian routes”

“Fire risks and environmental(COSHH)-oil and control of substances – uncontrolled smoking on site, mixing and exposed chemicals(bund full of chem/water). No fire drills this year –2 req’d”

66. At this point it is appropriate to interject, as it is relevant to the reasonableness of the Claimant’s belief that he stated in his witness statement (paragraph 22) that there was an ongoing health and safety issue on the machine lift. He described the concrete team as having to endure *“horrible working conditions”* However this did not form any part of his disclosure in his business report and he knew the HSE had visited the Respondent’s premises and found no breach of the law (150).
67. There was a discussion in respect of the business report. In respect of the health and safety issues the Tribunal was satisfied that Mrs Preston did ask the Claimant whether there were any legal breaches on the matters that he had outlined to which he answered in the negative. Whilst the Claimant alleged this had been added at a later date to Mrs Preston’s notes the Tribunal did not accept that claim. The Tribunal reached this conclusion having looked at the business report that Mrs Preston had annotated. There were numerous annotations which were wholly consistent with an open discussion about a very wide-ranging issues. The Tribunal also considered it of significance that none of the health and safety issues were marked as requiring any form of urgent attention. Other matters that had nothing to do with health and safety were marked as urgent or with similar words.
68. Mrs Preston accepted that his health and safety concerns should be addressed. She told him that she would leave it to him to ensure that the concerns were addressed either personally or via delegation or be brought up at the next RIE. This is wholly consistent with her evidence that she was assured by the Claimant that there were no legal breaches and nothing was urgent or required immediate attention. They were simply matters that should, in due course, be addressed. She did not ignore them. She displayed no angst or anger that the points had been raised. It is for the above reasons why Mrs Preston did not give the Claimant a copy of her notes because no immediate action plan was being set for the Claimant. He had his own copy and was expected to work through matters.
69. It is appropriate to add at this juncture that whilst the Claimant referred to a number of health and safety issues in his business report, almost the entirety of his evidence was directed towards the guarding issue.
70. Although subsequently the Claimant contented that he made very serious allegations as regards the guarding of machinery to Mrs Preston that is not consistent with his own evidence. The Tribunal relied upon the following examples to support that conclusion.

71. Firstly the assertion by Mrs Preston that she was assured by the Claimant there were no legal breaches is consistent with her notes (80).
72. Secondly the Claimant contended that the health and safety issues he raised at the meeting on 06 September 2019 were not discussed at the three-month review. The Tribunal is satisfied that lends even further weight to the evidence of Mrs Preston that the Claimant said the matters were not urgent and he was left to address them. She did not regard them as an urgent action point because of the assurances she had been given by the Claimant. In fact they never featured, at all, in any of the subsequent performance management of the Claimant.
73. Thirdly there was an up-and-coming RIE later that month to deal with health and safety. The RIE team, which included the Claimant, sifted prior to the event a number of health and safety issues and ranked them in order of priority. The Tribunal noted the Claimant did not push for all of his concerns to appear on the RIE. This adds credibility to Mrs Preston's account that the Claimant did not believe there were any serious health and safety breaches.
74. Fourthly the Claimant led an AFOR audit on 11 November 2019 but did not alert the auditors to the serious issues he alleged existed and nor did they find any.
75. Fifthly the Tribunal placed weight on an internal email Mrs Preston sent to her superior on 06 December 2019 (616), before the Claimant had even contacted ACAS prior to issuing proceedings, to support its findings.. The email read *"On 6th September I had a two month review with Nigel [the Claimant]. Nigel presented some objectives that he would like to tackle (no urgent matters) and I agreed that he could proceed and he was to lead these. I also mentioned during this review my disappointment in the IR [industrial relations] issues he had caused and that the situation could have and should have been handled better. He must work to improve the situation"*.
76. Sixthly the Claimant did not report matters to the HSE although he contended the issues were very serious. Indeed he went as far as to say that it was the most dangerous manufacturing environment he had worked in, in 25 years, and his concerns were being ignored. He knew that no detrimental treatment had occurred to Mr Roddis when he took a similar step. He was asked eight times in cross examination why he did not make a report, given in his evidence the situation was so serious it was *"keeping him awake at night"*. He failed to give any cogent or rational reason.
77. Seventhly the Claimant was asked at his subsequent appeal from dismissal by Mr Marsden if the alleged breaches were serious, to which the Claimant said he was not sure. (paragraph 43 of Mr Marsden statement). That evidence was unchallenged.
78. Eighthly the Tribunal noted that the first disclosure did not form part of the Claimants appeal against dismissal timeline (151). If the alleged disclosure did form, in the Claimant's mind, a reason why he was dismissed such an

omission is difficult to understand. It only forms part of the Claimants appeal on 27 January 2019 after the visit by the HSE as the central reason for the termination of his employment (195).

79. At the meeting on 06 September Mrs Preston raised concerns in respect of workforce disharmony, particularly in respect of overtime working and pay grading. She fairly accepted it might well be an issue of perceived miscommunication but stressed that industrial relations and good communication were a key element of the Claimant's role and he needed to resolve matters.
80. On 09 September 2019 a total of 19 shop floor workers signed a collective grievance directed solely against the Claimant (81/82). The basis of the grievance was that on 04 September 2019 the machine operators contended they were told on the Claimant's instructions they would have to work an additional two hours per shift for the foreseeable future and if they failed do so it would result in disciplinary action for gross misconduct.
81. A discussion took place between representatives of the shop floor workers and Mr Finlay. The representatives indicated they wanted union representation before they entered into discussions with management. They also stated they wanted adding to the grievance "*clarity of the two hours extending shift and duration and reason for extension*". It is this latter matter which the Claimant referred to as the "*verbal contractual grievance*". This was added to the grievance by Mr Findley.
82. On 19 September 2019 a number of events occurred.
83. Firstly a number of employees, by letter of the same date, sought a meeting with Mrs Preston because they believed they deserved higher grading because they were skilled and were paid less than workers in the layout department who they perceived to be less skilled. The letter was signed by 16 employees.
84. Secondly there was a meeting between the Claimant, Mrs Preston and Mr Pulham in respect of concrete production. Mrs Preston was concerned as to the operational management in respect of concrete production.
85. Thirdly an AFNOR inspection took place. At no stage during this inspection, when the Claimant met the inspectors, or at a subsequent inspection on or about 11 November 2019 did the Claimant highlight any health and safety concerns as per his first disclosure.
86. On 23 September the Claimant Mrs Preston met representatives of the workforce as regards pay grading. The outcome was the Claimant would look into matters and the Claimant did so, producing a detailed paper (519).
87. Mrs Preston was sufficiently concerned as to the concrete production issue to email the Claimant as regards the matter on 25 September 2019 (83) with a detailed action plan of what she wanted him to address. The Tribunal considered that there was merit in the evidence Mrs Preston that she was

the managing director and had expected operational matters would be resolved by the Claimant. She did not expect to have to be involved in day-to-day production issues.

88. Between 30 September 2019 and 04 October 2019 the Respondent conducted a RIE. The RIE concentrated upon health and safety. This involved approximately 11 selected employees with their roles being backfilled so they could fully concentrate upon the event. Prior to the start of the event there had been a number of preparation days. The Tribunal was impressed by the nature of this event. It added credence to the Respondent's assertion that it took health and safety seriously, having regard to the length of the event and the cost of backfilling substantive posts to ensure there was a good representative body of the workforce present, who concentrated solely on the issues to be discussed.
89. Mr Pulham attended the preparation days and was concerned as to the Claimant's lack of involvement to such an extent that he reported the matter to Mrs Preston, probably on 26 September 2019, but in any event prior to the formal commencement of the RIE.
90. The Tribunal did not find Mr Pulham to be a man who had any particular antagonism towards the Claimant. In fact Mr Pulham's first concern had been, that given the Claimant's experience and background, it would be more of an issue trying to ensure the Claimant did not dominate the event. The Tribunal considered Mr Pulham only reported the matter because he genuinely considered it was serious.
91. Before the start of the RIE Mrs Preston checked with both Mr Pulham and the Claimant that the proposed list of the most serious health and safety matters to be considered was in their view appropriate, to which they both agreed. Machine guarding did not feature.
92. During the first week of the RIE Mr Pulham considered that the contribution of the Respondent remained poor, particularly as regards the creation of information boards and felt unable to give the Claimant any positive feedback. Mr Pulham claimed he was later told that the Claimant had been criticising him in the presence of more junior staff. It was clear from Mr Pulham's evidence he was particularly upset as to this latter concern as he considered it undermined his position. If true, it had the potential to do so. He passed on his concerns to Mrs Preston.
93. On 07 October 2019 Mrs Preston emailed the Claimant asking to progress the pay grade review (524).
94. On 08 October 2019 there was the three-month review with Mrs Preston. The Claimant challenged the authenticity of the documents Mrs Preston relied upon. The Tribunal is satisfied that she created part of the documents before the meeting, including collating information from other senior managers which she noted down on post-it notes and part there-after. This included the

spreadsheet which was in a traffic light format (84) setting out where she perceived the Claimant was satisfactory at, required to work further on, or had not satisfied her requirements. Although the traffic light document was not produced until after the meeting, the contents that lead to its production were discussed with the Claimant. Mrs Preston provided a balanced assessment and noted a number of areas where the Claimant had provided perfectly satisfactory performance. The meeting was not perfunctory. As the Claimant himself accepted they discussed a great many points (statement paragraph 161).

95. The outcome was that the Claimant's probationary period was extended for a further three months, as evidenced by a letter dated 10 October 2019 (87). The letter is consistent with Mrs Preston's account of the meeting.

96. The reason given for the extension were as follows: –

"This extension is to provide adequate time to allow resolution of the outstanding grievance raised against you on the 9 September 2019 [the collective grievance] along with an improvement in the industrial relations with the workforce primarily in the machine shop.

In addition, a number of tasks/targets have not been fully completed during the probationary period. However, it is clear that HR issues, process delays and other hindrances may have affected your ability to complete these therefore I do not feel that the status of tasks/targets at the end of the threemonth probation (sic) period is a true reflection of your performance. Extension of your probationary period will allow time for these tasks to be completed giving me a fair view of your performance at the end of the extension.

I have attached a schedule of tasks/targets which we discussed [this was the traffic light document]... we will review this on a monthly basis..."

97. If Mrs Preston wished to terminate the Claimant's employment here was an opportunity because the Claimant had displayed areas where improvement was required. However she did not. The Tribunal concluded that Mrs Preston extended the Claimant's probationary period because she genuinely considered that whilst the Claimant had not met all his targets there were mitigating factors, potentially, out with his control and it was unfair to make an assessment of him at that stage in his employment. This points away from the first alleged protected disclosure having any influence whatsoever on her decision making.

98. Even on the Claimant's own case if the reason his probation was extended was due to the collective grievance that had nothing whatsoever to do with the Claimant's first alleged protected disclosure.

99. On 24 October 2019 Mr Bray raised a grievance against the Claimant (89). The grievance followed a meeting between Mr Bray and the Claimant where the Claimant had challenged Mr Bray's whereabouts. Mr Pulham was present

and considered both parties were blunt, with Mr Bray raising his voice and walking out of the room.

100. On or about 08 November 2019 (813 to 814) following an investigation conducted by Mr Winter a decision was taken that the grievance was not upheld. Again the fact that Mr Winter found in the Claimant's favour points away from the suggestion of the Claimant that there was some form of conspiracy or cover-up by senior management to dismiss him because of his first alleged protected disclosure.
101. On the same day a meeting took place between the Claimant and the concrete team (574 to 575).
102. On 12 November 2019 Mrs Preston emailed the Claimant as regards the issue of concrete production (96). It will be recalled that Mrs Preston had previous concerns with the Claimant's management of concrete production.
103. The Claimant met Mr Winter and Ms Preston on 15 November 2019. The purpose of the meeting was to give feedback as regards Mr Brays grievance.
104. On the balance of probabilities the Tribunal found Mrs Preston made it clear to the Claimant that she was unimpressed by Mr Bray's grievance and believed it was to hinder the Claimant undertaking a performance review against him.
105. The Tribunal considered this demonstrated Mrs Preston approached matters in an even-handed manner and supported the Claimant in respect of the unsubstantiated grievance by Mr Bray.
106. The Claimant then produced a document (98 to 100) and stated he was considering raising a grievance against Mr Bray. The letter was neither signed nor dated. It was shown to Mrs Preston and the Claimant contended this was his second protected disclosure. The document repays careful study and the Tribunal had full regard to it, in its entirety.
107. The central thrust of the document was that the Claimant wanted Mr Bray to be disciplined as he considered his conduct amounted to gross misconduct. He referred to the allegations made by Mr Bray as being false and "*defamation*" of his character. The Claimant emphasised that he felt his character and good name had been besmirched. Even on the Claimant's own document, at its highest Mr Bray had allegedly said that he didn't "*fucking*" like the Claimant and walked away and was irate and aggressive. The aggression appears to be limited to walking out of one meeting and swearing whilst doing so. There was no reference to any aggression directed towards the Claimant. There is nothing in the document to suggest that Mr Bray was a physical threat to anyone.
108. The extensive phone messages between the Claimant and his wife (209 to 254) do not disclose the Claimant considered he was threatened or endangered by Mr Bray.

109. The Claimant said that the reason for the document was *“just in case I found myself in the position where I needed to defend myself physically”*
110. The Claimant indicated he did not intend to pursue his grievance and it should be treated as withdrawn. In the Tribunal’s judgement the Claimant had anticipated that Mr Bray’s grievance against him would be upheld and therefore drafted a document to bring to the meeting to make a counter allegation. When he found that he was exonerated it was for that reason that he did not pursue the matter.
111. At that meeting on 15 November 2019 Ms Preston did say to the Claimant words to the effect *“is this the action of a senior manager”*. This was in respect of the Claimant’s proposed draft counter grievance against Mr Bray. However in the Tribunal’s judgement, the context is important. The Claimant had not indicated he wanted to raise a formal grievance and Mrs Preston was concerned it appeared the Claimant’s proposed grievance was in retaliation to that previously lodged by Mr Bray against the Claimant. She queried whether the counter grievance would achieve anything and suggested it would not help the relationship between the two of them working together particularly as there was to be a joint meeting facilitated by Mr Winter in four days’ time which it was hoped would repair any relationship difficulties. The Claimant accepted that that a counter grievance was unlikely to improve his relationship with Mr Bray and withdrew it.
112. The Tribunal noted Mrs Preston spoke to the Claimant to assure herself that he was content to work with Mr Bray and the Claimant indicated he did not feel at risk or unsafe but was probably overthinking things. This tallied with the evidence of Mr Winter (paragraph 15)
113. Following the meeting that morning to discuss the Claimant’s counter grievance a further meeting took place at 1.30pm between the Claimant and Mrs Preston to discuss the Claimant’s work; this was the four-month review (101 to 106).
114. At the meeting there was a discussion of what had gone well and what had not gone well and what lessons have been learnt. The Tribunal noted that Ms Preston was satisfied with the Claimant in respect of five specific issues. However she remained concerned, in general terms, as to the Claimant’s ability to read situations, communicate and manage staff. She considered the Claimant did not take responsibility for his actions and that he did not have the experience that the Respondent was seeking. Mrs Preston had evidence from Mr Pullman of the Claimant’s lack of engagement at meetings and with colleagues. She had details of the concerns raised by Mr Winter. Whether Mr Pulham and Mr Winter were right or wrong is not a matter the Tribunal needed to determine. What is important to record is that Mrs Preston trusted both of them and accepted what they said. The Claimant accepted the collective grievance was outstanding. The Claimant accepted there was a discussion as regards the RIE and a failure to meet targets. He admitted

he had not addressed the issue of the GEMBA boards. He accepted there was an issue attending the Wednesday meetings (which the Tribunal thought might be the red tag meetings)

115. Whilst Mrs Preston did not specifically mention the Matheson issue by name, part of her concern related to general industrial relations issues and her concern of the delay in the Claimant addressing the matter. This had to be seen in the light of the concerns of apparent miscommunication with the workforce and failure of the Claimant to immediately seek to clarify matters if instructions or messages he gave whether directly or indirectly were misunderstood.
116. Whilst the Tribunal concluded that Mrs Preston was acting unreasonably in expecting the Claimant to resolve the collective grievance, given he was the subject of the grievance, the Tribunal was satisfied that she genuinely believed there were multiple concerns. Neither alleged protected disclosure had any influence whatsoever on Mrs Preston's decision making.
117. The Tribunal rejected the Claimant's assertion that the notes produced by Mrs Preston of this meeting were forged.
118. Although the Claimant was to criticise the conduct of the meeting by Mrs Preston, in the Claimant's own email of 17 November 2019, (599), whilst expressing disappointment with the outcome of the meeting, he made no criticism of the way the meeting had been conducted. He did not even say that he felt the feedback was wrong. At its highest he said "*I'm gutted with the feedback*". The Tribunal was careful to weigh into consideration that the Claimant would not wish to antagonise Mrs Preston, but having had the opportunity of viewing the Claimant over a number of days, the Tribunal considered the Claimant was no shrinking violet and if there were serious issues, he would have set those out.
119. Mrs Preston did not come to a final conclusion following the meeting and indicated she needed to discuss matters with her regional manager and would then follow matters up with the Claimant. Again the fact that Mrs Preston wished to reflect and discuss with another senior manager to obtain a second opinion was an indicator, in the Tribunal's judgement, that she had not prejudged matters. If in any way the Claimants alleged protected disclosures had influenced Mrs Preston there was no need for such a discussion.
120. Following the four-month review further concerns arose.
121. Following the meeting Mrs Preston was informed by Mr Bray that the concrete team would not work that weekend (597). The background to the refusal was that five large tubs of concrete had set so work had come to a halt and they had built up during the week. On the balance of probabilities it is likely the concrete supervisor had raised this issue with the Claimant at the start of the week. At the time there was only one set tub. The Claimant had

not immediately addressed the concern of moving the concrete, hence the difficulty that had arisen.

122. On the Friday Mrs Preston specifically raised the matter with the Claimant but he did not resolve it and went home. Mr Winter in conjunction with Mr Pulham, temporarily remedied it within one hour, although too late to prevent the men refusing to work the weekend. Production was lost.
123. A further RIE started week commencing 18 November 2019 facilitated by Mr Winter. He considered that the Claimant acted inappropriately when discussing an issue of concrete production. The impact was such that a number of the RIE delegates walked off because they considered their involvement was pointless if a manager was simply to dictate how matters should be addressed. Mr Winter had to intervene to ameliorate the situation.
124. Mr Winter also considered the Claimant's participation to be weak with limited suggestions. He failed for example to complete what he regarded as a simple task, that was completing some manning charts. Mr Winter fed back his concerns to Mrs Preston.
125. On 25 November 2019 Mrs Preston wrote to the Claimant inviting him to a meeting on the 27th to discuss his future employment (118). The invitation letter made it clear his employment was at risk and set out five specific concerns.

"You have failed to complete actions assigned to you in the Safety RIE which gives a negative impression of the Company's commitment to Safety and Lean improvements.

There have been HR issues which have not been dealt with in a timely and effective manner for which you have part responsibility for.

Serious employee relations issues have arisen which you have failed to take control of and manage, resulting in production delays, loss of morale and trust by the workforce and loss of confidence from the management team.

There has been a breakdown in relationships between yourself and your direct reports for which you have part responsibility for.

You have failed to take ownership and demonstrate leadership of key issues."

126. The Claimant was advised he could be represented.
127. On the same day, after receipt of the above letter, the Claimant conducted various Internet searches as regards whistleblowing and the HSE (887 to 972). The Tribunal completely rejected the Claimant's assertion that this was mere happenstance because there had been some form of health and safety incident in the yard. This did not explain the nature of the searches he undertook and also the fact that he took certain photographs. The Tribunal is reinforced in that view by the fact the Claimant also searched for details of the whistleblowing policy involving both the Respondent and its main

customer, Network Rail (915). In dealing with this matter the Tribunal found the Claimant's evidence wholly unconvincing. He sent documentation to his home email address. He did so in the Tribunal's judgement because he considered his employment was threatened, not because of any genuine concern as to health and safety. The Tribunal took this into account in as a relevant factor which led it to make an adverse finding in respect of the Claimant's credibility.

128. A meeting was held on 27 November 2019 to consider the Claimant's performance and he invited Mr Winter as his witness. Mr Pulham was present as a note taker. Mrs Preston raised as part of the discussion concerns that the Claimant had apparently asked a new employee Mr Joe Dowse to monitor staff and what breaks they took and to report to him. This was flatly denied by the Claimant although Mr Winter interrupted to contradict the Claimant because he himself claimed he had witnessed such a discussion.
129. The Tribunal is satisfied that whilst there are some differences between the notes of Mr Pulham and Mrs Preston, not only in terms of formatting but also in terms of occasional content, they were broadly accurate. There are occasional additions made by Mrs Preston but the Tribunal found Mr Pulham's explanation there were occasions when he missed something as being plausible. Looked at in the round the differences were not such as to cause any serious concerns to the Tribunal.
130. The Tribunal was satisfied that Mrs Preston had genuine concerns, following the meeting, as to the Claimant's performance.
131. The Tribunal did not discount that there may have been an element of unfairness in the investigations undertaken and the process used, contrasted with a case of an employee who had two years continuous employment. An employer is entitled, if it wishes, to take rather a more broad -rush approach with a probationary employee. So whilst the Tribunal has some sympathy with the Claimant, for example as it is already mentioned in respect of him being expected to resolve the collective grievance, the Tribunal was satisfied that the conduct of Mrs Preston was in no way influenced by the Claimant's two alleged protected disclosures. She would have acted in an identical manner with another employee of this level who had not made any alleged protected disclosures.
132. On 27 November 2019 the Claimant was dismissed by Mrs Preston (119 to 124,125 to 135) and the dismissal was confirmed in writing on 28 November 2019 (138 to 139).
133. The Claimant was dismissed forthwith with a payment in lieu of notice. Despite the Claimant's protestations the Tribunal concluded that the effective date of termination was 27 November 2019, having regard to the content of the letter of dismissal.

134. On 03 December 2019 the Claimant lodged his grievance against Mr Bray, (142 to 143), a grievance against Mrs Preston (144 to 146) and also made a whistleblowing complaint to the Respondent and formally appealed his dismissal (147 to 152).
135. An independent HR consultant, Mr Marsden was appointed to handle the Claimant's appeal and grievances. The Claimant objected to his involvement because he did not consider him senior to Mrs Preston. He also contended that Mr Marsden must have been biased because he was being paid by the Respondent.
136. On the former contention the Tribunal considered seniority was irrelevant given Mr Marsden was wholly independent of the Respondent and noted his unchallenged evidence that he had overturned decisions of senior employees in other assignments.
137. On the latter contention the Tribunal rejected the contention that, simply because Mr Marsden was paid by the Respondent, he was either consciously or subconsciously biased against the Claimant. He was a professional man with a professional reputation to uphold.
138. The Claimant objected to Mr Marsden's proposed approach of dealing with the grievances and appeal together. Mr Marsden considered they were intrinsically linked. The Tribunal was satisfied Mr Marsden had reasonable grounds to take that view, having regard to the ACAS code of practice, and the basis of the appeal and grievances.
139. However following representations made by the Claimant to a Mr Nordstrom (the Respondents regional operations director) Mr Nordstrom appointed Mrs Veronique Dolbeau to look at the Claimant's grievances which she rejected. The Claimant may well have justifiable concerns that he was not interviewed in connection with his grievances but the Tribunal observed that the Claimant did not content that he was subjected to a detriment in the way any of his grievances were investigated.
140. Following the termination of the Claimants employment he contacted the HSE who carried out an inspection on 14 January 2020. Subsequently the HSE issued, on or about 29 January 2020 (315 to 317) notification of seven material breaches and three improvement notices. Two notices related to guarding of machinery.
141. Ultimately Mr Marsden held an appeal with the Claimant on 28 January 2020 when the Claimant's appeal was dismissed following further investigations undertaken by Mr Marsden (273 to 283, 331 to 334 and 284 to 294 and 336 to 342).
142. Mr Marsden did not believe that the first alleged protected disclosure played any part in the Claimant's dismissal having questioned Mrs Preston and heard evidence from the Claimant. He accepted the issue of machine guards was discussed on 06 September 2019 but the Claimant told him he was "*not*

sure whether it was serious". The Claimant had not contended when he was dismissed that one or more protected disclosures played any part in his dismissal.

143. Turning to the second alleged protected disclosure Mr Marsden found that no formal grievance was actually submitted prior to dismissal. The Claimant only raised a formal grievance against Mr Bray after termination.
144. At no stage during cross examination was it put to Mr Marsden that he was influenced in any way by the Claimant's alleged protected disclosures. The thrust of the lengthy cross examination, totalling one day, focused on the fairness or otherwise of the approach taken by Mr Marsden and his findings.
145. On 10 February 2020 the Claimant was informed that his appeal and grievances had been dismissed (336 to 342)
146. The Tribunal found, having carefully weighed up all the evidence of the appeal process that Mr Marsden conducted the appeal in a fair and balanced manner. His outcome letter was well reasoned and balanced. His notes showed that he carried out investigations after having spoken to the Claimant. Indeed he was placed in difficulties because the Claimant was only prepared to spend 90 minutes with him at the appeal. The Claimant indicated that he was taking legal advice and issuing Tribunal proceedings. It was unfair now to criticise Mr Marsden if he failed to deal with every tiny detail when the Claimant was asked to set out his concerns and to address them and only did so in a generalised way during his limited meeting with Mr Marsden.
147. Whilst the Claimant was to criticise the delay in the process, much of that was the result of the Claimant objecting to Mr Marsden dealing with his appeal and disputing whether it was reasonable to deal with his appeal and grievance together. In addition European executives from the Respondent's holding company were also involved. There was no excessive delay by the Respondent.

Time limits

148. The Claimant contacted ACAS on 10 February 2020 149.

The early conciliation period ended on 06 March 2020 150.

The claim form was presented on 15 March 2020.

151. On the face of matters any detriment prior to 11 November 2019 was out of time.
152. The Claimant had taken legal advice on at least two occasions as to his employment situation but was remarkably vague as to when he took such advice. What is clear is that he must have taken legal advice prior to 27 January 2020, given the content of his email to Mr Marsden (201) and again before he submitted his claim form. His solicitor had told him of the Tribunal time limit.

153. The Claimant produced no evidence that there were continuing acts.
154. The Claimant produced no evidence as to why it would not have been reasonably practicable to presented his claim within time, in respect of the detriments that were out of time.

Submissions

155. Both parties provided written submissions upon the issues of fact the Tribunal was required to determine.
156. The Tribunal means no disrespect to either party by failing to address each and every one of those submissions. It has taken the submissions into account when reaching its judgement.
157. Not unnaturally the Claimant did not make any submissions as to the law.
158. Mr Siddell QC had usefully produced, at the very start of the hearing, and provided to the Claimant and the Tribunal, his interpretation of the relevant legislative background (“the legal skeleton”).
159. He produced one authority, **Chesterton Global Ltd-v- Nurmohamed 2017 EWCA Civ 979** and particularly directed the Tribunal to paragraphs 27, 29 and 30 of the judgement of Lord Justice Underhill.
160. The Tribunal does not intend to repeat the contents of the legal skeleton. Mr Siddell QC, in the Tribunal’s judgement very fairly set out the relevant law and the appropriate tests to be applied both in respect of detriment and automatic unfair dismissal.
161. To the extent there is a difference between Mr Siddell QC’s submissions and the Tribunal’s judgement the difference relates to the application of the facts as found ,to the law.

The Law

162. As the Claimant is a worker he must surmount two hurdles
163. Firstly the Claimant must establish a qualifying disclosure as defined by section 43B of the Employment Rights Act 1996.

“.....a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:-

 - (a) ...
 - (b) ...
 - (c) ...
 - (d) *that the health or safety of any individual has been, is being or is likely to be endangered....”*
164. Secondly in order to be a protected disclosure, a qualifying disclosure must be made only to the category of persons set out in the ERA96. Six different ways are set out, namely in section 43C, 43D 43E, 43F 43G and 43H. It is

- not disputed the Claimant fulfilled the second requirement in the manner of his reporting.
165. Thus the central question is whether there was a qualifying disclosure. His concept has been which has been subject to significant judicial guidance.
166. The Tribunal noted the decisions in **Chesterton Global Ltd -v- Nurmohamed [2017] EWCA Civ 979**, **Ibrahim -v- HCA International Ltd [2019] EWCA Civ 2007**, **Babula -v- Waltham Forest College [2007] EWCA Civ 174**, and **Kilraine -v- London Borough of Wandsworth [2018] EWCA Civ 1436** and considered the following principles were derived from those decisions
167. Firstly there was not a rigid dichotomy between information on the one hand and an allegation on the other. For a statement to be a qualifying disclosure there must be sufficient factual context and specificity to show that one of the matters listed in section 43B (1) was engaged
168. Given the possible intertwining of information and allegation the context and the circumstances of the alleged disclosure must be considered carefully by the Tribunal having heard all the evidence
169. *“...Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). (Para 35 Kilraine)*
170. The Court of Appeal stressed that the context in which a disclosure was made could be significant. *“It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in para. [24] in the Cavendish Munro case, the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with Health and Safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made”.*
171. Secondly there is both a subjective and objective element to the belief, the subjective element is the worker must believe that the information disclosed tends to show one of the six matters listed in subsection 43B (1) and objective element is the belief must be reasonable. In looking at the subjective element the personal circumstances of the worker must be examined so the question is whether it was reasonable for him to believe what he alleges.

172. The belief can be reasonable even if wrong as there may be more than one reasonable view as to whether a particular disclosure is in the public interest. The use in the statute of the word "*likely*" does not mean the worker must be right, or that, objectively, the facts must disclose a wrong doing as set out in section 43 B (1) (a) to (e)
173. The worker simply has to show the reasonable belief was in the public interest and that means the disclosure does not cease to qualify for protection simply because the worker refers to matters which the Tribunal found was not in their head at the time they made the disclosure.
174. Thirdly if the whistle blower has a genuine and reasonable belief that the disclosure is in the public interest that does not have to be the predominant motive for making it.
175. Factors that could be taken into account when addressing the public interest question could include, firstly the number in the group whose interests the disclosure served, the nature of the interest affected and the extent to which they were affected by the wrongdoing. Thus disclosure of wrongdoing directly affecting a very important interest was more likely to obtain protection than a disclosure of a trivial wrong. Secondly the nature of the wrongdoing disclosed, if it was deliberate rather than inadvertent it was more likely to be in the public interest. Thirdly the identity of the wrong doer namely the larger and more prominent the alleged wrongdoer the more likely it may be that the disclosure is in the public interest.
176. The ERA96 then sets out the protection offered to a whistle-blower. The protection covers not only been subjected to a detriment but also dismissal.
177. Starting with detriment the relevant statutory provisions are found in section 47B ERA96 which states as follows:-
- "(1) A worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure...*
- (2) This section does not apply where—*
- (a) the worker is an employee, and*
- (b) the detriment in question amounts to dismissal within the meaning of Part X. "*

Three points arise from that definition.

178. The first is what amounts to a detriment?
179. The test for detriment is whether a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to 'detriment', see **Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.**

180. The second point is one of causation and burden of proof. Section 48 (2) ERA 96 makes it clear that it is “*for the employer to show the ground on which any act, or deliberate failure to act, was done*” The correct test therefore is whether the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer’s treatment of the worker. This will require a careful evidential analysis, for example, is the detriment due to the worker having made a protected disclosure or is it because the way the worker has made that disclosure, see **NHS Manchester -v Fecitt Court of Appeal 2012 ICR 372**.
181. Once the employer satisfies the Tribunal it acted for a particular reason, that discharges the burden of showing that the prescribed reason played no part in it. It is only if the Tribunal considers that the reason given was false or the Tribunal was given something less than the whole story that it was legitimate to infer discrimination.
182. The third point relates to where the division exists between a detriment and dismissal. The point is important given the different tests applicable.
183. The answer is found in **Timis and another-v-Osipov [2019] IRLR 52** at paragraph 91 which reads as follows: –
- “The foregoing analysis has been regrettably dense, but I can summarise my essential conclusions as follows:*
- (1) It is open to an employee to bring a claim under s 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, ie for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under s 47B(1B). All that s 47B(2) excludes is a claim against the employer in respect of its own act of dismissal.*
- (2) As regards a claim based on a distinct prior detrimental act done by a coworker which results in the Claimant's dismissal, s 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply.”*
184. If what is asserted to be a detriment could be compensated under the unfair dismissal protection then the exclusion applies. If it does not then the exclusion does not apply.
185. Next the Tribunal examined the position as regards dismissal under section 103A ERA 96 which states: –
- “An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”*
186. As the Tribunal has already observed the test is different from that in respect of a detriment. Here the alleged protected disclosure or disclosures must be the sole or principal reason for the Claimant’s dismissal and the burden of proof is upon the Claimant, see **Maud-v-Penwith [1984] ICR 143**.

187. Finally the Tribunal looked at the position in respect of time, given a jurisdictional point was raised by the Respondent in respect of the detriment element of the Claimants claim. 188. Section 48 ERA96 states:-

“(1A) A worker may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of section 47B...

(2) On [such a complaint] it is for the employer to show the ground on which any act, or deliberate failure to act, was done;

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

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

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

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

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

(b) a deliberate failure to act shall be treated as done when it was decided on;

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

189. This has to be read in conjunction with the extension of time provisions in respect of ACAS early conciliation.

190. If a complaint is out of time the burden of proof is upon the Claimant to explain why time should be extended. There are two elements that must be surmounted, the first that it was not reasonably practicable to present within time and then and only then if it was not reasonably practicable that the complaint was then presented within such further time as the Tribunal considered reasonable.

191. The Tribunal noted that reasonably practicable meant reasonably feasible, see **Palmer -v- Southend -on-Sea BC [1984]IRLR 119**. In respect of the second element there is no fixed time period and the claim must be considered on its facts in the light of the employee’s explanation, see **Marley(UK) Ltd -v- Anderson [1996] IRLR 163**. In practice a Claimant is expected to act with due expedition, **Nolan -v-Balfour Beatty Engineering Services UKEAT/0109/11**.

Discussion and conclusion General observations

192. The Claimant's case was built upon the premise that Mrs Preston "created" performance issues to justify his dismissal along with other senior employees, including Mr Pulham, Mr Winter, Mr Mist and Mr Bray. In addition they deliberately falsified evidence. He made a similar allegation against Mr Marsden, who was not an employee of the Respondent, and Mr Siddell's instructing solicitor, who the Claimant contended tried to hide falsified notes. The Claimant also contended the grievance procedure supplied to him was a false document and there had been a deliberate falsification of minutes. The Tribunal considered it relevant that although the Claimant referred to various documents being forgeries he did not produce any notes he had taken at the time. He appeared to rely on his own memory.
193. If the Claimant's allegation was true it would require a sophisticated conspiracy. The Tribunal was mindful that there are rare cases where such conspiracies may well exist. It therefore approached the allegation with an open mind.
194. Pulling all the evidence together, including those already referred to in its findings of fact the Tribunal had no hesitation in rejecting any suggestion of a conspiracy perpetrated against the Claimant. He failed to accept that others could genuinely hold a view that did not accord with his own. **Was there a disclosure within the meaning of section 43B ERA 96 The First disclosure.**
195. The Tribunal is satisfied that in isolation the Claimant's business report could amount to a disclosure of information. Whilst relatively staccato like, when given its natural meaning there was sufficient precision for it to amount to information, as described case law.
196. However the business report must to be looked at in conjunction with the discussion the Claimant held with Mrs Preston and taken together to determine whether there was a disclosure..
197. It is important to emphasise that under the wording of the statute it is not enough for their simply to be information but it also must "*tends to show*" a matter falling within 43 B (a) to (e) ERA96. The two are grammatically linked.
198. The information the Claimant disclosed did not tend to show a breach of health and safety and nor was any subjective belief of the Claimant that it did, was reasonable.
199. Particular factors that the Tribunal took into account in reaching this conclusion were as follows: –
200. Firstly the Claimant himself told Mrs Preston there was not a breach.
201. Secondly the Claimant did not pursue his concerns at the RIE specifically set up to look at health and safety.

202. Thirdly the Claimant did not raise it with the independent auditors. In fact he did not raise the concern again at any stage in the Tribunal's judgement. Given the Claimant described how serious matters were and that he was being kept awake at night worrying about matters his subsequent actions point away from him believing that there was a breach of health and safety.
203. Fourthly as the Tribunal observed, the alleged disclosure did not feature in his original appeal timeline.
204. Fifthly at the Claimant's appeal he said that he didn't know whether the breaches he was relying upon were serious. That rather adds further weight to the evidence of Mrs Preston as to what the Claimant discussed with her.
205. Sixthly whilst good faith is no longer required the fact the Claimant sent whistleblowing documentation to himself only after his employment was threatened points to the fact that the Claimant did not hold subjectively a genuine concern as to health and safety. He sought to reconstruct events to protect his employment or alternatively to obtain a remedy if he was dismissed. Linked to this, sight must not be lost of the particular position the Claimant was in. He was NEBOSH qualified and that is a relevant factor in judging his subjective belief.
206. Whilst at first blush health and safety issues may appear to engage the public interest, given that the workforce would be a section of the public, the Claimant, if the tribunal is wrong and he did make a disclosure, did not make it in the public interest. He discussed with Mrs Preston his business report which contained a great many other things with a view to seeking to impress her that he was a conscientious employee with the hope of passing his probationary period.

The Second disclosure

207. The Claimant relied upon a letter of 13 November 2020 (98 to 100) as constituting his second disclosure. Looking at the document in its entirety, whilst it contains an element of allegation it also contains an element of information. In particular the Claimant accused Mr Bray of submitting a false allegation against him and alleging that he's been subjected to bullying by Mr Bray. It gave details of the behaviour including specifics such as Mr Bray seeking to cause discord on the shop floor to discredit him. The Tribunal is satisfied it can fairly be described as a disclosure of information. There is a sufficient factual context contained within the document. The mere fact it contains an element of allegation is irrelevant applying the case law the Tribunal have already enunciated.
208. However the Claimant cannot show that the information "*tends to show*" that he reasonably believed that his or indeed anybody's health or safety was being or was likely to be endangered. There is no cogent evidence Mr Bray had threatened anybody else.

209. At its highest Mr Bray has simply sworn at the Claimant and walked out of the meeting. He did not threaten him with any form of violence, let alone use violence, and independent evidence of the incident suggested the Claimant was far from blameless.
210. The concern of the Claimant was that his reputation was being tarnished, not one of health and safety.
211. The fact the Claimant did not decide to immediately pursue the grievance until his employment had been terminated further points away from the Claimant subjectively having believed that health and safety was endangered or that it was reasonable for him to hold that belief.
212. If the Tribunal was wrong on the above points the Claimant has not established that he reasonably believed that the disclosure was in the public interest. There was no suggestion, having looked at the grievance in its entirety that there was any threat whatsoever to any third party. The Claimant concentrated particularly on he regarded as the defamatory remarks made by Mr Bray. There was no public interest in that. The only parties affected was the Claimant and Mr Bray. At its highest this was an internal grievance involving two employees.
213. For all the above reasons the Tribunal determined that the second disclosure was not one that attracted the protection under section 43B ERA 96.

Detriments and dismissal.

Detriments

214. The Tribunal considered it prudent, if it was held elsewhere that the first, second or both disclosures qualified for protection that it was appropriate to then go on to examine the issues of both detriment and dismissal.
215. The Claimant had considerable difficulty in articulating where he contended the detrimental treatment flowed from. The point is of more than academic interest given, if it was only the second disclosure, a number of the detriments the Claimant relied upon predated that disclosure. It would then follow that the second disclosure could in no way what so ever have had any impact on the relevant decision maker as it was not in existence.
216. Initially the Claimant said it all flowed from the second disclosure. He reiterated this in his statement when he said the real reason for his dismissal was his second disclosure which triggered Mrs Preston into drastic and immediate action (paragraph 12). Similar comments were repeated in an email of 03 December 2019 (144).
217. In the Claimant's letter of appeal against dismissal he did not attribute the first disclosure as having any impact upon any alleged detrimental treatment or dismissal and did not even mention it. (151). He instead concentrated on the second disclosure.

218. His claim form, drafted after having taken legal advice and having obtained the result of a subject access requests, asserted that it was the second disclosure that led to the change in Mrs Preston which in turn led to his dismissal. (19, paragraph 2).
219. When the Tribunal sought clarification from the Claimant he initially relied wholly on the second disclosure but then within seconds said the detrimental treatment all flowed from his first disclosure.
220. The Tribunal can understand that in some cases it may be difficult to see the reason for alleged detrimental treatment but here the Claimant had the benefit of an extensive bundle and the Claimant could not cogently point to any new document obtained via disclosure that led him to change his position. He could not explain why in his claim form he attributed all the detrimental treatment to the second disclosure but now relied heavily on the first disclosure.
221. The Tribunal considered this sudden change in position was because the Claimant realised the difficulty he faced having regard to the agreed issues if he was only to rely upon the second disclosure.

Detriment one

Asking the Claimant on 15 November 2019 is this the action of a senior manager.

222. The Tribunal has already found these words were said by Mrs Preston at the meeting on 15 November 2019.
223. In the Tribunal's judgement the words did not amount to a detriment in law as they were uttered after the Claimant had made it clear he was not pursuing a grievance against Mr Bray.
224. The words spoken by Ms Preston were in the Tribunal's judgement sensible management advice. In the particular circumstances of the case a senior manager pursuing a grievance against a more junior manager who had to work closely together was likely to lead to a further deterioration in the working relationship.
225. Even if the words spoken amounted to a detriment the Tribunal was satisfied that the comment had nothing to do whatsoever with any protected disclosure the Claimant may have made

Detriment two

The business plan dated 06 September 2019

226. The Claimant contended that Mrs Preston wrote action points on the business report he had presented but did not relay them to him and thereafter used the failure to comply with the targets as reason to fail his probationary period.

227. The Claimant was particularly critical of the comments made by Mrs Preston on his business report but given, on the Claimant's case, he never saw them until after dismissal, they cannot amount to a detriment.
228. In any event the Claimant had a copy of his own business report and had a discussion with Mrs Preston so knew what was discussed.
229. The comments added on Mrs Preston's copy of the business report were not used to dismiss the Claimant as he alleged. Whilst they fed into the formal three-month probation review, the Claimant was not dismissed at that review. His employment was extended and he knew exactly what targets he had as a result of the production of the traffic light document following the threemonth review.
230. To be clear the tribunal found that to the extent there was a discussion as regards health and safety Mrs Preston accepted the Claimant's assurance that the concerns were not serious and health and safety was never used as a target to which the Claimant was subsequently judged against.
231. The Claimant was not subjected to a detriment. The first disclosure in no way influenced the way Mrs Preston acted.

Detriment three

Allowing a shop floor grievance to be raised against the Claimant and allowing the addition of a verbal contractual grievance to be added on 09 September 2019

232. The Respondent had no control over whether a grievance was raised by the workforce. There was not a scintilla of evidence that the Respondent in some way encouraged 19 members of the shop floor to raise a grievance against the Claimant.
233. As a collective grievance had been raised the Respondents were duty-bound to address that grievance.
234. The grievance was expanded upon by the trade union representative to look at "*clarity of the two hours extending shift and duration and reason for extension*". That was so closely linked to the original grievance the Tribunal accepted there were very logical business reasons why all the concerns should be dealt with together. If they were not it simply meant that a further collective grievance would be raised. It was Mr Finlay who consented to the addition to the original grievance. There was no evidence before the Tribunal that Mr Finlay either directly or indirectly knew of the first disclosure made by the Claimant.
235. The Tribunal therefore concluded that any protected disclosure in no way influenced the Respondents behaviour.
236. If the tribunal is wrong on the above in any event the alleged detriment is out of time. The Claimant produced no evidence to show there was a series of events.

237. The Tribunal noted that he was aware of his rights and had sought legal advice.
238. The Claimant produced no evidence to demonstrate why it was not reasonably practicable for the Claimant to be presented within time. He therefore had not discharged the burden of proof upon him.

Detriment four

Not giving the Claimant a fair three-month probation review on 8 October 2019

239. In the Tribunal's judgement the Claimant confused the question of fairness or otherwise with whether the first disclosure operated on Mrs Preston's mind in any way in respect of the conduct of the meeting.
240. It is appropriate to note what the Claimant had previously said as regards this meeting.
241. In the Claimant's appeal document, when he referred to a timeline of key events (151) he made no reference, at all, to any complaint as regards the conduct of the meeting on 08 October 2019. In his supplemental appeal documents (195) he again made no reference to the conduct of the meeting. Similarly in the Claimant's claim form dated 15 March 2020, drafted after he taken legal advice (17) he made no specific complaint as regards the meeting on 08 October. This calls into question the Claimant's credibility as to what he now says was the detrimental treatment he received at this meeting. In the light of the above matters the Tribunal did not find the Claimant's account to be credible.
242. It is also appropriate to recall that this was not a disciplinary hearing. There was no obligation to provide the Claimant with a formal invitation to the meeting. There was no evidence that another employee on probation who had not made a protected disclosure would have received such an invitation.
243. Mrs Preston emphasised from the start of the Claimants employment the importance of industrial relations. Whether the collective grievance was justified or not she was entitled to be concerned that such a grievance had been raised by a large proportion of the shop floor and to discuss it with the claimant along with other industrial relations issues. She was entitled, having regard to this and the other information she had received, to raise questions as to the Claimants communication skills. The Claimant himself accepted at the meeting that there were areas where he could improve.
244. The Tribunal did not accept that the claimant did not understand what Mrs Preston required of him during the course of his probationary period.
245. The Claimant may be right that some of the information Mrs Preston had collated from others was not wholly accurate. However that is not the issue. As the Tribunal have repeatedly said this was not an unfair dismissal claim. Even if some of the information Mrs Preston relied upon was not wholly

accurate she did not know that. She genuinely believed the information she was given. She was in no way influenced by the Claimants alleged first disclosure.

246. Following the meeting the Claimant was given targets in the form of a traffic light document. He therefore knew those matters which had been fully achieved, partly achieved or had not been achieved. Applying the Tribunal's industrial knowledge that was a perfectly proper approach. Again there is no evidence that if the Claimant had not raised an alleged protected disclosure that Mrs Preston would have approached matters in any other way.
247. The Tribunal did not find the failure to send the Claimant notes of the meetings to amount to a detriment, as whilst disappointed, he raised no concerns at the time as to the conduct of the meeting or what was agreed. In any event the traffic light document was a summary of what was agreed. There was no need for an outcome meeting. Even if it is wrong on that point, again, the Tribunal is satisfied that had the Claimant not made alleged protected disclosure that Mrs Preston would have approached matters in exactly the same fashion.
248. The Tribunal did not find it a detriment that Mrs Preston took time to analyse the information she gathered at the meeting before deciding that, although the Claimant had not fully satisfied the probationary period she was prepared to extend the same. That, in the Tribunal's judgement was a measured approach and to the Claimant's benefit not detriment. There was no evidence that Mrs Preston would have approached matters in a different manner had the Claimant not made an alleged protected disclosure.
249. On the Claimant's own case he believed that he had not passed the probationary period principally due to the collective grievance. Even if that is right, which the Tribunal did not accept, the grievance had no connection whatsoever with the Claimant's first alleged protected disclosure.
250. In any event this detriment is out of time. The Tribunal repeats its previous conclusions in respect of time.

Detriment five

Not giving the Claimant a fair four month probation review on 15 November 2019.

251. The mere fact the review was not held exactly on the one calendar month anniversary of the three-month review, in the Tribunal's judgement cannot amount to a detriment. Had it been held earlier the Claimant's employment would have been terminated earlier. The slight extension of time gave the Claimant a further chance to impress Mrs Preston.
252. For the reasons already explained by the Tribunal the failure to send a detailed letter before the meeting, in the Tribunal's judgement had nothing whatsoever to do with any protected disclosures. Mrs Preston would have

acted in exactly the same way with an employee who had not made any protected disclosures but was on a probationary period. The Claimant knew the purpose of the meeting was to discuss his performance. The calendar entry invite received by the claimant summarise that. Mrs Preston wants to know what had gone well, not gone well and the learning points that the Claimant had assimilated. The Tribunal is satisfied that Mrs Preston adopted this format having spoken to Mr Marsden who gave general advice upon the sort of factors to discuss at a review meeting. When Mr Marsden gave that advice he was not aware the Claimant had made any alleged protected disclosures. Sight should not be lost of the fact the Claimant had the traffic light document so knew the issues that were likely to be discussed.

253. Had the Claimant been an employee with two years' service it may well have been that another employer might have called Mr Dowse to the meeting to understand his position as to whether he considered the Claimant was encouraging him to spy on the workforce. Another employer may take a different view, given the evidence it had from a senior manager. What is clear is that Mrs Preston believed it occurred and that had nothing whatsoever to do with any protected disclosures.
254. The Claimant was a senior manager. He received appropriate support.
255. Similarly for reasons already given by the Tribunal it considered that the failure to send minutes of the Claimant to countersign had nothing whatsoever to do with his protected disclosures. Mrs Preston would have acted in the same way even if any alleged protected disclosures had not been made. **Detriment six**

The unfair termination of the Claimant's employment on 27 November 2019 and the appeal against dismissal been hindered by the Respondent on 10 February 2020

256. Applying its legal analysis the protection of section 47B does not apply to the above as the exclusion in section 47B(2) (a) and (b) applies. The Claimant was an employee and the detriments he sought to rely upon matters that could be compensated by means of a dismissal award. Therefore they cannot be considered as detriments in law.
257. However to the extent that any of the matters referred to in detriment 6 are out with the definition of dismissal the Tribunal found they played no part whatsoever in the decisions taken in respect of the Claimant.
258. The Claimant knew what had happened at his formal review as he had been given a feedback letter.
259. He was not given 45 minutes to prepare. He was invited on 25 November to the termination meeting which took place on 27 November 2019. At no stage did the Claimant ever suggest he did not have time to consider matters or required an adjournment.

260. There was no cogent evidence that the Claimants witness or the notetaker were encouraged to speak against him. The principal interruption came from Mr Winter because he believed the Claimant was not telling the truth in respect of his conversation with Mr Dowse.
261. The Claimant did not ask for support but it is not clear what the Claimant was saying should have happened but did not happen.
262. The Claimant obtained a summary of the reasons for his termination in his dismissal letter. It was within the respondents right to decide whether or not he was paid in lieu of notice in accordance with the terms of his contract. The Respondent was entitled to take the view it was appropriate to make payment in lieu, given the Claimants seniority. The Claimant had no right to work his notice.
263. Nor did the Tribunal find, as it is already set out, that the notes produced of the dismissal meeting were not a reasonable summary of the events that occurred..

Dismissal

264. The Claimant cannot establish that the sole or principal reason for his dismissal was the alleged protected disclosures.
265. The reasons given for the Claimant's dismissal were genuinely held by Mrs Preston. The suggestion by the Claimant that Mrs Preston extended the probationary period to try and hide the fact that his alleged protected disclosures were the real reason for his dismissal was in the Tribunal's judgement, fanciful.
266. For fear of repeating itself even if the Claimant is right that Mrs Preston may at times have been misinformed by colleagues, the Tribunal was satisfied that she genuinely believed the information she was given. There was evidence from a variety of sources as to concerns in respect of the Claimant. It was for the Respondent to determine whether the Claimant performance, given his senior level, merited continuing the employment. The Claimant himself accepted that there were some faults (125 to 135). The Claimant accepted that he asked for a chance to put matters right That was a further admission that the Claimant accepted that he had made errors and it was the claimant's performance that was the real reason why Mrs Preston terminated his employment. The reasons Mrs Preston relied upon when not a sham. It is relevant also to note that between the four-month review and termination further incidents occurred, which Mrs Preston was entitled to regard as being serious, and in particular not dealing with the problems in concrete production and leaving when being asked to sort the matter out.
267. When the evidence is looked at in the round the Tribunal is perfectly satisfied that the reason or principal reason for the Claimant's dismissal was not any of his alleged protected disclosures.

Employment Judge Smith

Date 14 June 2021

RESERVED JUDGMENT & REASONS SENT TO
THE PARTIES ON