EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case no 4100591/2020

Held at Dundee on 26, 27, 28 and 30 July and 2, 3 and 4 August 2021

10 **Employment Judge W A Meiklejohn**
Tribunal Member Ms F Paton
Tribunal Member Dr R A'Brook

15 **Mr A Greasley-Adams** **Claimant**
Represented by:
Dr C Greasley-Adams

20

Royal Mail Group Ltd **Respondent**
Represented by:
Dr A Gibson – Solicitor

25

30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's complaints brought under –

(a) section 47B of the Employment Rights Act 1996 ("ERA"),

35 (b) section 26 of the Equality Act 2010 ("EqA"), and

(c) section 27 EqA

do not succeed and are dismissed.

REASONS

1. This case came before us for an in person final hearing to deal with both liability and remedy. The claimant was represented by his wife, Dr Greasley-Adams. The respondent was represented by Dr Gibson. We sat on the dates listed above and took 5 August 2021 as a deliberation day.

Procedural history

2. The claimant's ET1 claim form (9-24) was presented on 1 February 2020 following ACAS Early Conciliation ("EC"). The date of receipt by ACAS of the claimant's EC notification was 9 December 2019 and the date of issue by ACAS of the EC certificate (25) was 16 January 2020. The respondent's ET3 response form (26-43) was lodged on 2 March 2020.

3. A preliminary hearing took place on 12 June 2020 (before Employment Judge McFatridge) for the purpose of case management. This confirmed that the complaints brought by the claimant were in respect of (a) detriment on the grounds of having made protected disclosures in terms of section 47B ERA, (b) harassment in terms of section 26 EqA and (c) victimisation in terms of section 27 EqA. The principal outcome was that the claimant was directed to provide Further and Better Particulars of his claim. The claimant complied on 7 July 2020 (102-183).

4. A second preliminary hearing took place on 11 August 2020 (before EJ Kearns) (184-186). The principal outcomes were that (a) the respondent was to issue a Scott Schedule and (b) following completion of that, the parties were to try and agree a list of issues.

5. A third preliminary hearing took place on 22 September 2020 (before EJ Kemp) (95-101). The principal outcomes were that (a) amended Grounds of Resistance (81-91) submitted by the respondent were accepted, (b) the claimant was ordered to provide a schedule of loss, (c) an application by the claimant for witness orders in respect of Mr C Gardner, owner of a business called Mr Fix It, and three of his staff was not granted (but, in the

case of Mr Gardner, deferred for discussion at a subsequent preliminary hearing) and (d) it was noted that the claimant would give his evidence first at the final hearing.

6. A fourth preliminary hearing took place on 6 January 2021 (before EJ R McPherson) (205-244). In advance of this the claimant had submitted (a) revised Further and Better Particulars (258-341) and (b) a Scott Schedule (187-197). These enabled EJ McPherson (at paragraphs 19-29 of his Note) to identify the matters complained of and which would require to be determined at the final hearing and the issues which the parties (and the Tribunal) would require to address. The principal outcomes were that (a) the claimant's revised Further and Better Particulars were accepted, (b) the respondent was directed to provide its response to those revised Further and Better Particulars and (c) the respondent was directed to inform the Tribunal if it wished further disclosure of medical records or a medical report in relation to the claimant's asserted injury to feelings. The claimant confirmed that a witness order in respect of Mr Gardner was no longer sought. The respondent provided revised grounds of resistance (342-354) on 27 January 2021. The respondent did not seek medical information relating to the claimant's alleged injury to feelings.

Disability status

7. It was a matter of agreement that the claimant is (and was at the relevant time for the purpose of these proceedings) disabled within the meaning of section 6(1) EqA. The claimant's impairment was stated within his preliminary hearing agenda (44-70) as Autistic Spectrum Disorder. He has been diagnosed with Asperger's Syndrome ("AS").

Claimant's complaints

8. Based on EJ McPherson's identification of the claims brought and our own assessment of these, we considered the claimant's complaints to be as set out in the paragraphs which follow.

Detriment

9. Firstly, detriment on the ground that the claimant had made protected disclosures in terms of section 47B ERA. The protected disclosures related to driver infringements. The detriments were being subjected to investigation for alleged bullying and harassment ("B&H"), the allegations of harassment being upheld and the claimant's reputation and record being tarnished by the decision to uphold the allegations where there was no right of appeal.

Harassment

10. Secondly, harassment in terms of section 26 EqA. The unwanted conduct (summarised from the Scott Schedule) was –

(a) the respondent's employees singling out the claimant, gossiping to each other about his disability and speaking in disparaging terms about the claimant's disability;

(b) spreading rumours that the claimant was looking out information about his colleagues and looking at personnel files, reporting this to Mr Walker during his B&H investigation and allowing such rumours to be used as evidence to inform Mr Walker's conclusions and to justify upholding the B&H complaints against the claimant;

(c) the respondent's employees discussing an episode at work linked to the claimant's autism, discussing this in the B&H investigation to discredit the claimant and degrade his reputation to Mr Walker (the aim of the B&H complaints being to have the claimant removed from the Stirling District Office); and

(d) the respondent's employees speaking to a customer (Mr Fix It) about behaviours linked to the claimant disability, and having further discussions about the customer potentially raising a complaint that the claimant had sexually harassed female employees of Mr Fix It.

11. The purpose or effect of the unwanted conduct was said to be discrediting the claimant and creating a degrading and hostile working environment for

him, bringing his credibility into question, damaging his character/reputation and employment record when those rumours were in part used to uphold the B&H complaints against him, creating a hostile environment where the claimant felt unable to report concerns, trying to ensure that the claimant was seen as somebody prone to harassing others by volunteering this information in the B&H case, causing the claimant emotional and financial detriment, causing the claimant to feel that his employment was under threat and causing the claimant to feel upset that his own B&H complaints were not being acknowledged and properly investigated nor responding to the claimant's claims that the complaints against him were a fabrication.

Victimisation

12. Thirdly, victimisation in terms of section 27 EqA. The protected acts were said to be those set out in section 27(2) EqA. The detriments (again summarised from the Scott Schedule) linked to one or more of the protected acts were said to be –

(a) being talked about negatively by the respondent's employees, allowing employees who bore a grudge against him to influence the claimant's employment opportunities, subjecting the claimant to B&H complaints and permitting information from a previous claim brought by the claimant to be used in part to justify upholding the B&H complaints against him, all creating a hostile working environment for the claimant;

(b) the claimant's duty being singled out for removal because Mr Knox and Mr McEwan disagreed with the outcome of judicial mediation in the previous claim, stress/distress caused by lack of job security and no longer being allowed to discuss his (C0T3) agreement with colleagues (including trade union representatives), putting the claimant at a significant disadvantage;

(c) the claimant's opportunities for overtime being curtailed and not treating the claimant equally in respect of such opportunities, not providing the claimant with the opportunity for full time hours on

driving, seeking out others to do overtime to prevent that overtime being given to the claimant, Mr Aien advising Mr Knox and Mr McEwan to bring their B&H complaints, hearsay being treated as evidence and the respondent's employees' role in the Mr Fix It complaint about the claimant as a means of limiting an overtime opportunity for the claimant;

(d) Mr Walker upholding the B&H case against the claimant partly because the claimant had raised the possibility of taking the respondent to the Tribunal; and

(e) failing to follow employment procedures, not dealing with issues timeously in line with policies, ignoring the claimant's concerns altogether, causing the claimant to lose out on overtime and the claimant being subject to ongoing harassment including the raising of fictitious B&H claims and complaints of sexual harassment.

List of issues

13. Drawing on EJ McPherson's identification of the issues and own assessment of these, we identified the issues which we had to decide as follows –

Whistleblowing detriment

14. Did the claimant make a qualifying disclosure in terms of section 43B ERA (which was a protected disclosure in terms of section 43A ERA), ie –

(a) was there a disclosure of information

(b) which in the reasonable belief of the claimant

(c) was made in the public interest and

(d) tended to show one or more of the matters specified at section 43B(1)(a) to (f)?

15. Did the claimant suffer any detriment by the respondent done on the ground that he had made a protected disclosure?

16. If so, what was the detriment and when, or over what period of time, did the claimant suffer it?

Harassment

5

17. Did the respondent engage in unwanted conduct related to the claimant's disability?

18. If so, did that conduct have the purpose or effect of violating the claimant's
10 dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

19. Was it reasonable for the conduct to have that effect?

15 20. If so, did the respondent take all reasonable steps to prevent the harassment from occurring?

Victimisation

20 21. Did the claimant do a protected act and, if so, what was it and when did he do it?

22. Did the respondent subject the claimant to a detriment because –

25 (a) the claimant did a protected act, or

(b) the respondent believed that the claimant had done, or might do, a protected act?

Time bar

30

23. Did the claimant present his whistleblowing detriment claim (or part of it) 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 to act is part of a series of similar act or failures, the last of them?

35

24. If not, was the complaint brought within such further period as the Tribunal considers reasonable if it was satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months?

5

25. Did the claimant present his section 26 EqA (**Harassment**) and/or section 27 EqA (**Victimisation**) complaints (or part of them) –

(a) at or before the end of the period of three months starting with the date of the act to which the complaint relates, or

10

(b) such other period as the Tribunal thinks just and equitable?

26. In addressing these time bar issues, account requires to be taken of the provisions relating to extension of time limits to facilitate conciliation before institution of proceedings in section 207B ERA and section 140B EqA.

15

Remedy

27. If any of the claimant's claims succeeds, what compensation should be awarded?

20

Applicable law

28. We set out in the following paragraphs the provisions of ERA and EqA engaged in this case (apart from those relating to time bar and remedy, to which we refer later).

25

Whistleblowing detriment

30

29. Section 43A ERA (**Meaning of "protected disclosure"**) provides as follows –

"*In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*"

35

30. Section 43B ERA (**Disclosures qualifying for protection**) provides, so far as relevant, as follows –

"*(1) In this Part 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) 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 a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

31. Section 43C ERA (**Disclosure to employer or other responsible person**) provides, so far as relevant, as follows –

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

(a) to his employer…."

32. Section 47B ERA (**Protected disclosures**) provides, so far as relevant, as follows –

"*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done –

(a) by another worker of W's employer in the course of that worker's employment….

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker –

(a) from doing that thing, or

(b) from doing anything of that description…."

Harassment

33. Section 26 EqA (**Harassment**) provides, so far as relevant, as follows –

"*(1) A person (A) harasses another (B) if –*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)….

(3)….

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are –

….disability…."

Victimisation

34. Section 27 EqA (**Victimisation**) provides, so far as relevant, as follows –

5

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

10

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

15

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith…."

20

Evidence

35. We heard evidence from the claimant. For the respondent we heard evidence from –

25

- Mr M Aien, Delivery Office Manager ("DOM")
- Mr J Knox, Operational Postal Grade ("OPG") and CWU representative
- Mr S Walker, Independent Case Work Manager, HR Services

30

- Ms V Stevens, Service Manager Appeals & Employment Tribunals (now retired)
- Mr R McEwan, MGV Driver ("MGV" means medium goods vehicle) and CWU representative
- Mr B Fowler, Delivery Line Manager

35

- Ms J Simmons, Day Off Cover Manager
- Mr I Robertson, MGV Driver

- Mr I Kerr, MGV Driver
- Ms S Bennett, DOM Support
- Mr A Harris, Post-box Strategy Planning Manager
- Mr G Kelly, Production Control Manager

5

36. The evidence in chief of all of the above witnesses was contained in written witness statements. These were taken as read in accordance with Rule 43 of the Employment Tribunals Rules of Procedure 2013.

10 37. We had a joint bundle of documents extending to around 900 pages. We refer to these documents above and below by page number. The claimant provided an updated schedule of loss before the start of the hearing. We also had (a) a Statement of Facts from the claimant and (b) a Chronological Statement from the Respondent. The claimant's Statement
15 of Facts was adopted by him as part of his evidence in chief.

Findings in fact

38. The claimant commenced employment with the respondent on 20 October
20 2008. He is currently employed as a part-time MGV Driver working 30 hours per week.

39. The MGV driving grade is known as a "*specialist*" grade. This is as opposed to a non-specialist grade such as OPG. Those at OPG grade
25 are the postmen/postwomen who deliver mail on foot or in a smaller van. Special qualifications are required to drive an MGV vehicle. Some OPG employees (including Mr Knox) possess those qualifications and are therefore able to drive an MGV vehicle.

30 40. The respondent provides a postal service across the UK for delivery of letters and parcels. This includes collection of items from post-boxes and Post Offices and distribution of mail. It also includes collection of items from customers who have contracted with the respondent for that service.

35

Claimant's previous claim

41. The claimant brought a claim (the "previous claim") against the respondent in March 2018 (case no 4103456/2018) which was settled following judicial mediation in July 2018. The agreed terms of settlement were recorded in a COT3 agreement dated 2 and 6 August 2018 (355-358).

42. The COT3 agreement provided for payment of a Compensation Payment (the amount of which was redacted in the version within the joint bundle) and contained the following provisions –

> "*4 The Respondent agrees that the Claimant will be assigned the MGV driving duty number 8 (the "**Duty**") which will be undertaken between the hours of 14.30 and 20.30, Monday to Friday. The Duty is based at Stirling Delivery Office. The Claimant agrees to accept the Duty. The Claimant will begin carrying out the Duty the Monday following the day on which the change to the Claimant's contract narrated at clause 5 below has been processed and confirmed in writing to the Claimant.*
>
> *In accepting the Duty the claimant does not waive any right to apply in the future for MGV posts which are advertised, whether these be, full-time or part-time. The Respondent shall deal with any such application fairly and in line with the relevant policies of the Respondent. The Claimant is also willing for business needs, and through mutual agreement only, to undertake an MGV driving duty in the Stirling Delivery Office other than Duty 8 on a temporary basis.*
>
> *5 The Claimant's contractual hours will be increased from 28.5 hours to 30 hours per week and his contract of employment will be amended accordingly. The Respondent confirms that the first step in the Respondent's internal process for amending the Claimant's contract of employment has been taken.*
>
> *6 In the event that there is future change in the Stirling Delivery Office which impacts the MGV driving duties, the fact that the Claimant is disabled and that as a result occupational health recommends the Claimant carry out a regular shift pattern which is either an afternoon*

or late shift will be taken into account and necessary reasonable adjustments will be made.

*7 The Respondent agrees that the work currently undertaken by the Claimant, which is part of duty 1 Cecil Street (“**Duty 1**”), will be incorporated back into Duty 1 at the time the Claimant stops undertaking this work. The Respondent agrees that in addition to the Duty, the Claimant will be given first refusal of any overtime on Duty 1 at Stirling Delivery Office. In the event the Respondent calls the Claimant in order to offer him overtime on Duty 1 and the Respondent is unable to get in touch with the Claimant, the Respondent shall be entitled to offer the overtime to other employees at Stirling Delivery Office.*

8 Subject to the Respondent’s legal obligations, the process operated from time to time in the Stirling Delivery Office for allocating overtime of MGV driving duties (excluding night shifts) will be applied equally to the Claimant and those employees in the Stirling Delivery Office who have the necessary qualifications to drive an MGV vehicle. Subject to the Respondent’s legal obligations, the process operated from time to time in the Stirling Delivery Office for allocating overtime of non-specialist duties will be applied equally to the Claimant and other employees in the Stirling Delivery Office. Subject to the Respondent’s legal obligations, if the Claimant expresses a wish to undertake overtime, the Respondent agrees not to exclude the Claimant because of assumptions that the Claimant is unable to undertake work during specific attendance times. To that effect, subject to the Respondent’s legal obligations, the Claimant will be considered for overtime on any day of the week, including weekends, that the Claimant has expressly indicated to the Respondent he is willing to undertake….

14 Subject to clause 15, the Claimant agrees to keep confidential and not directly or indirectly to reveal or disclose the fact and terms of this Agreement to any third party (including but not being limited to existing or former employees of the Respondent) except where disclosure is to HM Revenue and Customs, required by law or (where necessary or appropriate) to their legal or professional advisers or to the Claimant’s

immediate family (who shall be bound by an identical duty of confidentiality).

15 Notwithstanding clause 14, the Claimant shall be entitled to disclose to third parties that he has been assigned the duty and if necessary to enforce his rights under clause 7 and 8 above, that he has first refusal of overtime on Duty 1 and that the processes for allocation of overtime will be applied equally to the Claimant, provided all other terms of this Agreement remain confidential."

43. A further outcome of the previous claim was that steps were to be taken to arrange mediation between Mr P Turner, who we understood to be the DOM at Stirling Delivery Office at the time of the previous claim, and the claimant. This did not take place because Mr Turner did not return to the Stirling Delivery Office.

Mr McEwan complains

44. Mr McEwan sent an email to Ms S Ward on 9 August 2018 (621-622) in which he complained about a number of matters relating to the claimant. These included (a) an alleged assertion by the claimant that he should have been given a shift allocated to Mr McEwan and (b) the circumstances in which the claimant obtained MGV driver status, said to have involved ignoring procedures agreed between the respondent and the CWU. We understood that Ms Ward spoke with Mr McEwan about his concerns and these were taken no further.

45. We were satisfied that as at 9 August 2018 Mr McEwan was unaware of the settlement of the previous claim. This was confirmed by Mr McEwan's reference in his email to the claimant continuing "*to talk to other members of staff about his case saying myself and my colleague John Knox will be cited to appear in a case involving himself and Royal Mail, people will be getting dismissed and he will be financially compensated".* The fact that Mr McEwan was referring to being "*cited to appear"* was not consistent with his having knowledge that the previous claim had been resolved.

46. The claimant's evidence included the following –

"I wasn't aware at the time, but I now know that Ross McEwan (CWU representative) wasn't happy with the last case. Just days after the COT3 was signed, he had written to the office manager, delivery area manager and her boss, as well as to others in the CWU about me. Ross seemed to be telling these people that there were going to be consequences for what happened."

47. We were satisfied that Mr McEwan had been referring to events that predated the COT3 and was not expressing a view about that agreement, of which he was as at 9 August 2018 unaware. The claimant's perception that Mr McEwan was reacting to the COT3 agreement was incorrect.

Claimant's contract updated

48. On 3 December 2018 Ms K Rollings, Employee Change Manager within the respondent's HR Services, wrote to the claimant (491-492) detailing changes to his terms and conditions of employment. The new terms, stated to be effective from 30 July 2018, were expressed as follows –

"Job Title	*Postman/Postwoman*
Business Unit	*RM Letters*
Substantive Grade	*MGV*
Weekly Pay	*£516.45*
Hours of Attendance	*30.00*
Work Location	*Stirling DO"*

49. The claimant took issue with what he saw as a change in his job title from MGV Driver per his then current contract of employment (474-490) to Postman. We did not regard this as material. The key element in the new terms (with regard to the claimant's status) was the substantive grade of *"MGV"* which indicated that he remained an MGV Driver.

50. Included in the joint bundle was a document headed "*Variable Hours & Overtime Report*" (857) in which the claimant's "*Employee Subgroup"* was shown as "*Operations"* rather than *"Professional Drivers".* Again we did

not regard this as material. The document was undated which was unfortunate because, unlike the graphs relating to overtime (814B-814D) provided by the claimant, it showed the amount of overtime hours worked by each of the MGV drivers. In contrast, the claimant's graphs (at 814C-814D) compared his overtime average with *"Total Overtime Average"* which was described (at 814C) as "*The total number of overtime hours available in the office"*, ie including OPG overtime, rather than a comparison only with other MGV drivers.

Management changes

51. In or around November 2018 Mr S Tonner became the Stirling DOM. He was made aware of the terms of the claimant's COT3 agreement.

52. In March 2019 Mr Aien became the Stirling DOM. Mr Aien told us that part of his role was to save money by seeking to improve the efficiency of the Stirling office. Unlike Mr Tonner, Mr Aien was not initially advised about the claimant's COT3. We accepted Mr Aien's evidence that he only became aware of it in or around June 2019. He was prompted to ask about it when he received an email from the claimant dated 8 June 2019 (493-494) which made reference to *"the legally binding COT3 agreement related to my post".* It was apparent from the terms of that email that the matters about which the claimant was concerned were (a) the revision affecting post-boxes on Duty 8 (to which we refer in more detail below), (b) compliance with the Professional Drivers Agreement (to which we also refer below) and (c) allocation of Duty 1 packets (a reference to clause 7 of the COT3).

53. The information Mr Aien obtained about the claimant's COT3 came from Mr H Aitchison who we understood to be Mr Aien's line manager. Mr Aien was not provided with a copy of the COT3 but rather Mr Aitchison emailed him with *"the key parts of the agreement".* Mr Aien "*gave a basic understanding of the points in the COT3 to the line managers in Stirling Delivery Office".*

54. Mr Fowler had been a Deputy Manager in Falkirk Delivery Office. He moved to Stirling in April 2019, initially as Deputy Manager, becoming Delivery Line Manager in June 2019. Mr Aien told us that Mr Fowler and Ms J Williamson were the claimant's first line managers and, as DOM, he was the claimant's second line manager.

Resourcing

55. Mr McEwan said that there was a national agreement in place under which CWU representatives were involved in weekly resourcing meetings with management. When Mr Aien was finding his feet as Stirling DOM between March and May 2019, the resourcing meetings with Mr McEwan were initially conducted by Ms Simmons but Mr Aien took over from around June 2019.

56. Mr Aien explained that, in terms of resourcing, Mr McEwan dealt with distribution only and Mr Knox dealt with delivery only. Distribution involves mail being taken by MGV to Edinburgh or Glasgow mail centres, referred to as a *"road run"*. Duty 8 undertaken by the claimant was "*hybrid"* in the sense that it included both collection of mail from post-boxes and a road run. "*Delivery"* refers to the work undertaken by postmen/postwomen of OPG grade.

57. Meetings between Mr Aien and Mr McEwan continued to be held on a daily basis. Meetings between Mr Aien and Mr Knox had reduced in frequency and were normally held weekly. We were satisfied that the main objective of these meetings was to ensure that work requiring to be undertaken within the Stirling Delivery Office was adequately resourced. The final decision on resourcing matters (including allocation of duties) was a management one.

Professional Drivers Agreement

58. This is a national agreement between the respondent and the CWU (405-433). It was entered into in the context of EU transport legislation and introduced the status of Professional Driver.

59. Alongside this there is the Professionalising Area Distribution ("PAD") Initiative. Included in the bundle was the Joint Statement between Royal Mail National and Regional Logistics and the Communication Workers Union on Terms of Reference for the Progression of the PAD Initiative dated 11 May 2016 (434-438). Also in the bundle was the Joint Statement between Royal Mail and the CWU on the Future of Area Distribution, Annex A (439-444). This included the following (under MGV Pay) –

"*To clarify, as agreed within the Professional Drivers' Agreement….*

- *Individuals who perform MGV work on either a rotational or fixed duty basis and who are therefore covered by the Road Traffic and Working Hours Directive will in the first place, be asked to perform any MGV work that becomes available on an ad-hoc basis. In the exceptional circumstances where this work cannot be performed by anyone from these categories, an OPG with the necessary licence can be requested to perform this work on an ad-hoc basis. In these circumstances individuals will receive the relevant Substitution/Overtime Payment for the day."*

60. This underpinned part of what the claimant was raising in his email to Mr Aien of 8 June 2019 (see paragraph 52 above). He was concerned that Mr Knox as an OPG was being given driving work which he believed that he as a Professional Driver was entitled to be offered first.

Infringements

61. MGVs require to be fitted with a tachograph. A tachograph is a device fitted to a vehicle that automatically records its speed and distance, together with the driver's activity selected from a choice of modes. At the start of his shift the driver downloads his card and inserts it into the tachograph in the vehicle he is using.

62. The respondent uses a system called Vision, facilitated by the Freight Transport Association, which monitors tachograph information and identifies driver infringements. An infringement is a non-compliance with

the applicable driver regulations. There are EU Regulations and UK Regulations. The EU Regulations are stricter than the UK ones, for example in terms of the minimum weekly rest break a driver must take.

63. Infringements can occur due to driver error. The driver may forget to insert his card into his vehicle's tachograph at the start of his shift. He may fail to enter rest/meal breaks. These will be identified as infringements. While the Regulations should be fully complied with, it would not be unreasonable to regard such infringements as less serious than, for example, a driver actually exceeding the maximum permitted driving hours or failing to take the minimum rest break. Within the Vision system there is a facility to make manual changes and this was used by the respondent to correct infringements due to driver error.

64. The Vision system generates a record of driver infringements. These go to the driver's manager who is expected to speak to the driver about them. They are also monitored centrally by the respondent. The evidence indicated that Mr Knox probably had more infringements than other drivers (but did not disclose the nature of those infringements).

65. Mr P Bullen was recruited in or around May 2019. He was an MGV driver but was also tasked with compliance. He worked two day shifts and two night shifts. We found that it was inevitable that his recruitment as an additional MGV driver would have reduced the amount of overtime available to others who were qualified to drive an MGV vehicle. Prior to Mr Bullen's arrival, Mr Kerr dealt with compliance. This involved printing off infringements and passing them to the appropriate manager. Mr Kerr continued to be involved in this after Mr Bullen's arrival.

Discussion of infringements

66. The claimant's position was that from around the end of May 2019 Mr Kerr began to pass on to him information about driver infringements, including those of Mr Knox. The claimant spoke with his managers (and colleagues) about these. According to the claimant, the managers then passed on to Mr Knox that the claimant was talking about his infringements. Mr Kerr

denied being the source of the claimant's information. Mr Walker did not accept that – "*Ian Kerr was a clear concern as he seemed to be doing the sharing of information which he shouldn't have been doing".* We found that Mr Kerr had been sharing driver infringement information with the claimant. In so finding we regarded the evidence of the claimant about this matter as more credible than that of Mr Kerr (and we comment below on Mr Kerr's credibility).

67. The claimant appeared to believe that Mr Kerr was sharing driver infringement information with him in the knowledge that the claimant would speak to managers about this and that the managers in turn would feed back to Mr Knox that the claimant was talking about him. We found no evidence of any sort of conspiracy of this nature. The claimant was unhappy that he was not getting as much overtime as he believed he should have done. He suspected that Mr McEwan and Mr Knox were influencing the managers in relation to the allocation of overtime, to his disadvantage. He believed that the allocation of work to Mr Knox as an OPG was in breach of the Professional Drivers Agreement. He also believed that driver records were being falsified.

68. Mr Fowler's evidence was that the claimant *"would come down to the bottom office where I work and would constantly be talking about John Knox, saying he was breaking rules. This occurred 2 or 3 times a week. He mentioned Jim Thompson and Ian Robertson falsifying digital tachograph just the once."*

Allocation of overtime

69. The claimant had two particular areas of concern about how overtime was being allocated. One of these was Duty 1 packets. The claimant was concerned that this work was being given to other employees rather than to him. He cited the example of Mr Robertson doing these during his normal (as opposed to overtime) working hours. We saw this as consistent with Mr Aien's desire to improve efficiency, ie resourcing this work without paying overtime. It did not in our view breach the claimant's COT3 agreement as it did not involve overtime for Duty 1 packets.

70. The claimant also complained that Duty 1 packets were being given to employees who had signed up to do LAT packets ("*LAT*" standing for late acceptance time) and to employees undertaking Duty AG1 on Saturdays. We understood that the Saturday duty was "*scheduled attendance"* which attracted an enhanced rate of pay. Our view of this was that if the employee doing Duty 1 packets was receiving an enhanced rate of pay for doing Duty 1 packets, that arguably engaged clause 7 of the COT3 agreement, meaning that the claimant should have been given first refusal.

71. The other area of concern to the claimant was the Saturday duty. He believed that Mr McEwan had deliberately brought Mr Robertson in to cover this to stop him (the claimant) from doing overtime. We understood this was in or around July 2019. Mr McEwan explained that he had foreseen a problem because both he and the claimant were to be on annual leave and Mr Thompson was on nightshift (and so unable legally to do overtime on a Saturday). He had asked Mr Robertson, who did not normally work on a Saturday, to cover the Saturday duty. The decision to allocate Saturday work to Mr Robertson would have been a management one.

72. When the claimant returned from holiday he saw that Mr Robertson had done the Saturday shift and, according to Mr McEwan, he *"made the allegation I was colluding against him to stop him from doing overtime as he saw it as reducing his opportunity for overtime".* Mr Robertson thereafter continued to be one of the drivers who did the Saturday overtime. We were satisfied that this was an operational matter and there was no collusion against the claimant. It seemed to us that Mr Robertson was as entitled as the claimant to fair and equal consideration for overtime (other than Duty 1 packets).

73. We also had evidence that the claimant had spoken to Mr Fowler resulting in Mr Fowler removing Mr Knox's name from the whiteboard in the managers' office where overtime was recorded. Mr Fowler did this on the basis of the claimant telling him that Mr Knox would be over his hours.

When Mr Fowler spoke to Mr Knox about this, Mr Knox explained why it was incorrect to say that he was over his hours but indicated that if the claimant wanted to do the shift *"then let him".*

5 ***Claimant's email of 1 August 2019***

74. The claimant believed that from May/June 2019 his opportunities to maximise his driver earning opportunities were reduced. Following up on his email to Mr Aien of 8 June 2019 (493-494 – see paragraph 52 above) 10 the claimant emailed Mr Aien on 1 August 2019 (495-496) and provided examples of what he contended were breaches of the Professional Drivers Agreement –

"*When there are two drivers absent from work on leave, then Jim 15 Thompson (who although an OPG member of staff covers the reserve work) would rightly cover one shift. The other shift could be covered by myself, providing the opportunity to increase my earnings and the earnings of other drivers. This could easily be done by putting out the collection (D8) to others, and asking either Alfie, Mark, or Paul 20 (Wed/Thu) to cover my road run. If it was Mark that was off I could also still complete my own road run if required. Instead what is happening is Jim Thompson is covering one, and John Knox (an OPG) is being removed from his delivery shift to take up the driving opportunity. This means that an OPG is having their opportunities for 25 earnings maximised (through substitution/evening allowances) but the MGV drivers are being denied the opportunity to maximise their earning. This is a breach of the professional drivers agreement and it is not effective given that substitution and evening allowance would not need to be paid if the MGV drivers covered this.*

30 *When a driver calls in sick or unexpectedly can not fulfil their shift, there is a further opportunity to maximise driver earning opportunities. Again the same approach of carving up my shift as above, would allow for that driving shift to be covered by a driver rather than an OPG. This again is a breach of the Professional Drivers Agreement as 35 opportunities to maximise earnings are denied in favour of providing the work to OPG staff."*

75. The claimant also complained in his email about how Duty 1 packets were being resourced, alleging that this breached his COT 3 agreement.

5 76. In the course of his evidence the claimant referred to this email as his "*grievance*" but we did not believe that this was, nor was it intended by the claimant to be, the raising of a grievance so as to engage the respondent's Grievance Policy (401-404). We say that because the claimant stated in the first paragraph of his email to Mr Aien of 1 August 2019 –

10

> "*….I am writing to you once again to ask for you to give consideration and a written response to below before pursuing it further through the grievance procedure.*"

15 ***Derogatory comments***

77. The claimant believed that his colleagues would gossip about his disability. We had no direct evidence of this. We believed that the claimant's colleagues were aware of some behaviours on his part which

20 were probably connected with his AS. In his interview with Mr Walker, Mr McEwan described the claimant as "*complex, he claims to have an autistic spectrum, he can be nosey, quite demanding at times".* Mr Knox referred to the claimant as "*difficult".* Mr Robertson's evidence included "*So basically once the claimant has got something in his head he will not leave*

25 *it alone".*

78. We did have evidence of one derogatory comment about the claimant. Mr Kerr sent an email to Mr Aien in the early hours of Saturday 25 May 2019 (492B) which concluded –

30

> "*This man A.G.A. is poison and certainly worth a watching, please seek advice before dealing with him."*

79. The context was stated by Mr Kerr to be that on the previous day *"I had*

35 *Adam Greasley-Adams berating at me that our colleague John Knox was not on our FTA tacho system….".* The reference to the claimant as

"*poison"* indicated a degree of antipathy towards the claimant. In the course of his evidence Mr Kerr said that he had heard others speaking about the claimant in derogatory terms but, despite being pressed by me to elaborate and put on notice that he was not enhancing his credibility as a witness, declined to give examples.

80. The claimant was not aware of Mr Kerr's email prior to bringing his claim. Mr Knox had disclosed it (and one or two other emails from Mr Kerr) when he was interviewed by Mr Walker. When reviewing the notes of that interview Mr Knox had deleted the reference to these mails. Mr Walker had however photographed the email of 25 May 2019.

81. Our view of this was that, on the balance of probability, there were some conversations amongst his work colleagues about behaviours displayed by the claimant which were linked to his AS, although we cannot be sure whether they were aware of that connection. However, we had no evidence apart from Mr Kerr's email about what was said, when and to whom.

Personal files

82. The claimant was known to spend time in the room where Mr Bullen worked. There was a perception that this was why the claimant came to have information about driver infringements. Personal files had been relocated to this room. These contained details of driver infringements. They were kept in an unlocked cabinet.

83. Mr McEwan became aware that his medical records were contained in the file relating to his infringements. He was concerned about people seeing his sickness record. According to Mr Aien, Mr McEwan's reaction was "*explosive".* Mr McEwan's evidence to us was that "*I was quite concerned that the claimant was constantly in the office and I thought he might have had access".* We had no information as to when this occurred but we thought it likely that it was in the period of May-July 2019.

Incident involving Ms Williamson

84. We had evidence about an incident involving the claimant and Ms Williamson. Mr Knox described it in these terms, referring to his interview with Mr Walker –

> "*I have also referred here to the Claimant chasing Jane Williamson across the yard. I am asked why I brought up that point to Simon Walker. Jane was going on about it. She had been running across, doing a road run, and the Claimant had wanted to do the road run and the Claimant had ran across to Jane saying that he would do it. It was nothing to do with me personally and nothing against the Claimant personally. I probably should not have mentioned that to Simon Walker. Jane Williamson was kind of scared of the way the Claimant had approached her or that was what I had heard."*

85. This was said on the claimant's behalf to have been an episode linked to his autism. We had no other evidence to support that. According to the notes of Ms Williamson's interview with Mr Walker (a) this incident occurred during the third week of July 2019 and (b) Mr Aien spoke to the claimant who then came to apologise to Ms Williamson for his behaviour.

Revision

86. There is a national project, agreed between the respondent and the CWU, which involves identifying post-boxes where the volume of mail is such that it is more efficient to remove the post-box from an evening collection and instead have it cleared by a postman or postwoman who is doing deliveries in the morning. The post-boxes with low mail volume are identified by a national team. This exercise highlighted a number of post-boxes within the area covered by the Stirling office which were within scope for the process known as "*revision"*.

87. At this point Mr Harris became involved in his role as Post-box Strategy Planning Manager. This was in or around April 2019. According to Mr Harris, some 30 post-boxes in the Stirling office area were identified.

There was some inconsistency in the evidence as to how many of these were within the claimant's duty but we did not regard the exact number as material.

88. There are six phases in the revision process. The first of these involves a meeting between managers, the CWU representative and Mr Harris. This took place on 10 April 2019. Mr McEwan attended as the CWU representative. There is a facility for the CWU to challenge the inclusion of specific post-boxes and this may lead to a counting (of mail) process. Mr McEwan alerted the claimant to the fact that his duty was impacted. Mr McEwan's evidence was that the claimant said that "*we can't do that because of his agreement with the business".*

89. The next stage in the revision process involved Mr Harris using a tool called Geo Route. This entailed Mr Harris inputting details of the post-boxes to be removed from evening collection. The system would then generate new routes for the Stirling office area excluding the post-boxes being removed from evening collection. This was based on efficiency. The next step was dialogue with the CWU representative which was, in effect, the input of local knowledge *"to tailor the routes produced by Geo Route".*

90. The outcome of the revision was that the claimant's collection duty was to disappear altogether. It was proposed that the remaining collection element of the claimant's duty would be merged with a Denny route to create a full-time route within the Denny District Office area. The revision process did not directly affect the MGV driving element of the claimant's duty. That would require a separate process called a *"paragon revision".* According to Mr Harris, the revision affecting the claimant's duty "*stopped because of a national disagreement and then Covid-19 hit".* The revision had not taken place at the time of the hearing before us. The process had however caused the claimant increased anxiety and we understood that this was due to his AS.

Bullying and harassment complaints

91. Around the start of August 2019 there was a conversation between Mr Aien and Mr McEwan. According to Mr McEwan, Mr Aien said "*I think we will be getting cited again"* and made reference to the claimant possibly raising a grievance against Mr McEwan or the CWU. Mr Aien's evidence was that it was "*highly unlikely"* that he would have told Mr McEwan that the claimant was raising a complaint that Mr McEwan was preventing him from getting overtime.

92. Our view of this was that, irrespective of the actual words used, Mr Aien had given Mr McEwan to understand that the claimant was complaining about him and that there was the possibility of legal action. Mr Aien said that Mr McEwan gets "*pretty heated up about Court cases"* and "*took it personally".* Mr McEwan said that he *"came over all hot and sweaty".* Mr Aien said that he "*looked pretty bad".* Mr McEwan then consulted his GP and had a period of absence from work, the reason for absence being (according to the notes of Mr McEwan's interview with Mr Walker) work related stress.

93. On 5 August 2019 Mr McEwan submitted a form H1 to initiate a B&H complaint against the claimant (610). His complaint was expressed in these terms –

> "*Incidents started last summer from Mr Adam Greasley-Adams.*
> *Accusations of coluding (sic) against him.*
> *Threats against me of legal action.*
> *Constantly discussing myself and my duty with other members of staff.*
> *Threats of grievances against me.*
> *Obstructing my role as CWU rep."*

94. The respondent's practice on receipt of a B&H complaint is to have someone from HR contact the complainer to discuss the complaint. This was done and recorded as "*Additional Information As Expressed By Complainant"* (611) as follows –

"*Ross says that Adam is constantly harassing him about threatening to raise complaints and reporting him to DVSA.*
He is always questioning his driving.
He talks to everyone about Ross's duty which is not his business.
He interferes.
Constant threats of reporting him.
Obstructing his role.
The accusations are constant and Ross feels harassed by his erratic behaviour.
It never stops.
Ross is now off work.
He avoids contact with him if he can.
Informal would not work so he does wish to make his complaint formal.
Outcome: To stop this behaviour and maybe for Adam to be moved.
Logged as a formal B&H."

95. On 7 August 2019 Mr Knox submitted a form H1 to initiate a B&H complaint against the claimant (503). His complaint was expressed in these terms –

"*Adam Greasley-Adams; constantly berating myself; telling other OPGs with regards to my driving infringements; claiming I am not a driver; saying I am deliberately stopping him from O/T.*
Was advised by a manager to put in H1 as this was a grievance.
I have emails regarding this person constantly victimising myself; he has some form of personal vendetta against myself."

Mr Knox also provided some supplementary information with his H1 form (504).

96. The "*Additional Information As Expressed By Complainant*" (505) in Mr Knox's case was as follows –

"*He feels that Adam's behaviour stems back to early 2018, where a complaint was put in and Adam was not happy with the outcome.*
From this time John has been targeted by Adam.

Adam is not a driver due to having issues with his Licence and John is a driver.
He speaks to everyone about John and he is always threatening to report John to the DVSA.
5 *He has spoken about John personal work data to others.*
Adam has been coming into work at night when no managers are around and he is striking Johns name from the overtime list and adding his own name.
Adam thinks John should not be a driver.
10 *It [is] the constant targeting which John is now fed up with.*
He says that when he is on delivery he does not see him, it is when he is working in distribution.
He does not speak to him.
He has never challenged him about his behaviour.
15 *Managers are aware of what is going on.*
He was told by manager Malcolm Aien (who currently shows on PSP grievance ref 80027115473) to put in the H1.
Preferred Outcome: Someone needs to address this behaviour.
As he does not speak to him informal would not work, he would like a
20 *formal investigation.*
Logged as a formal B&H."

Bullying and harassment investigation

25 97. Mr Walker was appointed by Ms Stevens to carry out an investigation into the complaints submitted by Mr McEwan and Mr Knox. He was selected because, unlike Ms Stevens who had been involved in the previous claim, he was not familiar with the claimant. He had come in contact with Mr Fowler in a previous case but we were satisfied that this did not undermine
30 the process.

98. Mr Walker's investigation comprised the following interviews –

35

Name	Date of interview	Notes (in bundle)
Mr McEwan	21 August 2019	615-620
Mr Knox	21 August 2019	510-514
Mr Aien	28 August 2019	546-550
Mr Fowler	28 August 2019	551-554
Claimant	28 August 2019	573-577
Ms Bennett	29 August 2019	555-557
Mr Robertson	29 August 2019	558-560
Mr M Logie	29 August 2019	561-562
Ms Williamson	29 August 2019	563-566
Mr Kerr	29 August 2019	567-569
Mr Bullen	29 August 2019	570-572
Ms Simmons	4 September 2019	578-581

99. Mr Walker shared his interview notes with each interviewee and with the claimant. He incorporated amendments requested by the interviewees. When he wrote to the claimant with the witness statements on 2 September 2019 (527) the claimant pointed out that he had not interviewed Ms Simmons, and he then did so.

100. The claimant prepared a "*Reaction and Commentary*" document (533-544) which he sent to Mr Walker. In this he asked Mr Walker, in considering his findings, to look into three questions –

- *The timing of the complaints in respect of the grievances I submitted and whether there are any concerns that this has been raised as a response to me having raised issues with management?*
- *If you believe that management have been proactive in disclosing confidential information, that has fuelled any negative feelings towards myself and has contributed to this case being submitted?*

- *If you believe that these individuals have personal issues with myself, has engaged in any discriminatory behaviour linked to myself, or has been engaging in behaviours that are likely to create a hostile working environment for myself?*

5

101. Mr Walker wrote to Mr Knox on 16 September 2019 (587) enclosing his case report (588-603). He summarised the four aspects of Mr Knox's complaint and set out his conclusions in these terms –

10 "*What became apparent to me very early in these investigations was that related to this complaint were historical events involving Royal Mail Group and Mr Greasley Adams that I understand were concluded by means of a confidential legal agreement between Royal Mail & Mr Greasley Adams. I made it clear to both parties on meeting them that*
15 *whilst I was made aware of this history, I had not had sight of any documents relating to those events as those matters had been concluded and it would not be proper to reopen them in these investigations.*

I will deal now with the first part of the allegation that Mr Greasley
20 *Adams has been seeking information about the amount of time Mr Knox spends performing MGV duties.*

Mr Greasley Adams told me that he has raised issues about how shifts are being allocated, including where that leads to overtime for other drivers, if Mr Greasley Adams believes that the way in which shifts are
25 *being allocated is not correct and/or in line with the Professional Drivers Agreement. Sharon Bennett told me that Mr Greasley Adams does regularly look at the overtime sheets to find out what overtime others are carrying out. Ian Kerr told me that Mr Greasley Adams is interested in the hours that others are performing, including Mr Knox.*

30 *The evidence presented does suggest that Mr Knox is one of those who Mr Greasley Adams has singled out with his enquiries about how MGV duties are allocated, and in particular overtime involving MGV work.*

The second part of Mr Knox's allegation is that his name has been
35 *removed from scheduled attendances by Mr Greasley Adams.*

Mr Greasley Adams denied that he has ever removed Mr Knox's name from the overtime or scheduled attendance board. Barry Fowler told me that Mr Greasley Adams had asked Mr Fowler to remove Mr Knox's name from the board. Mr Knox similarly told me that this is what he had been told by Mr Fowler.

On balance I've formed the view that there is not enough evidence to support that Mr Greasley Adams has personally removed Mr Knox's name from the scheduled attendance board.

I will deal with the third and fourth parts of Mr Knox's allegation together. The third part is that Mr Greasley Adams threatened indirectly that Mr Knox will be reported to VOSA for breaching driving hours; and the fourth part is that Mr Greasley Adams has been discussing confidential information relating to Mr Knox with other colleagues.

Mr Greasley Adams' position is that he has told managers that he will report Royal Mail but not John Knox personally if nothing is done by managers with regard to Mr Knox's driving infringements. Mr Greasley Adams denies ever suggesting that if Mr Knox's name isn't removed from the work board that he will report John Knox to VOSA. Mr Fowler told me that a few times Mr Greasley Adams had threatened to make a report to VOSA if names were not removed from the work board.

I understood that the confidential information which Mr Knox was referring to in his complaint were his driving infringements. Mr Knox told me that he has been told by several people that Mr Greasley Adams has been discussing his driving infringements with them. Mr Greasley Adams position is that he hasn't spoken to managers about Mr Knox's driving infringements and that he hasn't asked for information about Mr Knox's driving infringements. Mr Greasley Adams told me that Ian Kerr had shared with him about Mr Knox's driving infringements on several occasions. Ian Kerr's position was that Mr Greasley Adams would ask Mr Kerr about Mr Knox's driving infringements but that Mr Kerr would not tell him anything. Mr Kerr also told me that Mr Greasley Adams would check drawers and envelopes in the office. Mr Fowler, Ms Bennett and Mr Robertson all

told me that they have heard Mr Greasley Adams speak about Mr Knox's driving infringements.

On balance I've concluded that there is evidence to support that Mr Greasley Adams has been involved in conversations about Mr Knox's driving infringements. I am of the view that this coupled with the fact that Mr Greasley Adams has raised the possibility of making a report to VOSA in relation to Mr Knox's driving infringements, was a reasonable basis for Mr Knox to feel indirectly threatened that he would be reported to VOSA. There is not though enough evidence to support that Mr Greasley Adams threatened to report Mr Knox personally to VOSA….

I accept that the position of Mr Greasley Adams is that he is simply expressing his view that agreements, such as the Professional Drivers Agreement are not being adhered to. It should be stated that I also believe Mr Greasley Adams thinks his enquiries are entirely reasonable and Mr Greasley Adams has also raised his concerns with management (I understand that management are in the process of compiling a response to Mr Greasley Adams). Nevertheless, considering Mr Greasley Adams' behaviour as a whole, I believe that it has had the effect of violating Mr Knox's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, albeit I have not formed the view that this was intentional. In my view Mr Greasley Adams' enquiries or concerns have focussed more on the activities of Mr Knox and I do not believe it is unreasonable for Mr Knox as a result to feel targeted by Mr Greasley Adams and to have consequently experienced increased levels of stress & anxiety.

Therefore in conclusion and based on the evidence and points considered above I uphold John Knox's complaint to the extent that I believe that he has been harassed by Mr Greasley Adams."

102. Mr Walker made a number of recommendations which can be summarised as follows –

1. All drivers (whether MGV or OPG) should be told not to discuss colleagues' infringements.
2. Access to the Vision system in Stirling to be limited to appropriate users only.
3. Appropriate users to sign a local agreement about the need for confidentiality of Vision data.
4. Independent mediation between Mr Knox and Mr Greasley Adams to be explored.
5. Mr Greasley Adams to be told not to reference his legal agreement in work related discussions with Mr Knox and others. Any concerns should be raised with the DOM.
6. Management to respond to Mr Greasley Adams' concerns about how shifts are being allocated.

103. Mr Walker wrote to Mr McEwan on 18 September 2019 (623) enclosing his case report (624-631). He began his conclusions with the same first paragraph as for Mr Knox, and continued in these terms –

> "*In my view, the evidence presented does suggest that Mr Greasley Adams will engage in dialogue with others that could reasonably be considered as demeaning or disrespectful to a third party that is being talked about and whilst Mr McEwan may not be party to these discussions first hand, due to the circular conversations that are occurring he is being advised of these comments by others. While Mr Greasley Adams denied saying to anyone that he should have Mr McEwan's job, Ms Bennett told me that Mr Greasley Adams had said that Mr McEwan had taken Mr Greasley Adams job and Mr Logie told me that Mr Greasley Adams had said that Mr McEwan should never have been given the job that he has. I also understood from what Ms Bennett told me that Mr Greasley Adams would make comments about Mr McEwan fairly regularly. Therefore on balance I've concluded that Mr Greasley Adams has made comments to third parties suggesting that Mr McEwan shouldn't have the duty that he has and/or that Mr Greasley Adams should have it instead. This is on the face of it a clear questioning of the competence, capability and*

professionalism of Mr McEwan and it is not unreasonable to believe that having been informed of this by another colleague Mr McEwan felt demeaned by such comments.

In addition, Mr Greasley Adams accepts that he has referenced his legal agreement and going back to the Employment Tribunal when speaking with Mr McEwan about potential changes that were being considered for Mr Greasley Adams' own duty. I do not believe that Mr Greasley Adams directly threatened to raise legal proceedings against Mr McEwan personally. However, I believe it was reasonable for Mr McEwan to think that the legal action referred to by Mr Greasley Adams might include action against Mr McEwan personally. I believe this caused Mr McEwan increased levels of stress & anxiety.

I am of the opinion that the behaviour referenced above of Mr Greasley Adams was not done with the intent of violating Mr McEwan's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Nevertheless, I am content that Mr Greasley Adams' behaviour described above has had that effect.

Therefore in conclusion and based on the evidence and points considered above I uphold Ross McEwan's complaint in so far as I have formed the view that he has been harassed by Mr Greasley Adams."

104. Again Mr Walker made a number of recommendations which can be summarised as follows –

1. Mediation between Mr McEwan and Mr Greasley Adams to be explored.
2. Mr Greasley Adams to be told not to reference his legal agreement in work related discussions with Mr McEwan and others. Any concerns should be raised with the DOM.
3. Mr Greasley Adams to refrain from saying to Mr McEwan and others that Mr McEwan should not have his duty or that Mr Greasley Adams should have it instead.

105. Mr Walker met with the claimant and Dr Greasley-Adams on 18 September 2019 to advise them of his decisions in relation to the complaints of Mr McEwan and Mr Knox. A note of that meeting was prepared (607). This indicated that both the claimant and Dr Greasley-Adams made reference to the claimant's own complaints against Mr McEwan and Mr Knox.

Events following grievance outcomes

106. Shortly after his meeting with Mr Walker on 18 September 2019 the claimant submitted a document (505B-505N) which set out criticisms of Mr Walker's decisions under a number of subject headings –

- Flaws in investigation process
- Concerns that these bullying and harassment cases were raised as a response to me raising a grievance and speaking up about John Knox breaching driving regulations
- Management being proactive in disclosing confidential information and in doing so creating a hostile working environment for me, which has ultimately resulted in the complaints being raised against me and for my employment to be tarnished with the findings being upheld
- The evidence that the individuals have engaged in the following bullying, harassment and discriminatory behaviours against me

In this document the claimant accepted that the respondent's B&H procedure did not allow for him to appeal against Mr Walker's decisions.

107. On 23 September 2019 Mr Aien emailed the claimant (635) acknowledging that he had still to respond to the claimant's emails of 8 June 2019 and 1 August 2019. He responded on a number of points, referencing the claimant's COT3 agreement, and indicated that he intended to respond on the other points raised by the claimant on his return from holiday.

108. The claimant responded to Mr Aien on 23 September 2019 (634). He was clearly concerned about his future employment with the respondent. He referred to Mr McEwan and Mr Knox as *"the individuals ….who….tried to have me removed from the office".* That was understandable as it was apparent that Mr McEwan and Mr Knox would have been happy to see the claimant moved. However, and in fairness to them, the evidence disclosed that they had made enquiries about the availability of a driving job for the claimant based in Edinburgh which would have allowed him to use his class 1 licence. They perceived that as being for the claimant's benefit.

109. It is convenient to deal here with Mr Aien's response to the claimant's email of 1 August 2019. This was contained in his email to the claimant dated 24 January 2020 (698). The delay was explained, at least in part, by the time taken to obtain advice on the Professional Drivers Agreement as disclosed in emails between 4 November 2019 and 6 December 2019 (639B-639J). Mr Aien told the claimant that –

> "*….the manner in which the allocation of MGV driving work has been done in Stirling DO (i.e. with OPGs who can drive MGV vehicles being offered MGV driving work at times) is not in breach of the Professional Drivers' Agreement. In so far as additional driving opportunities that count as overtime, this will continue to be offered equally to all of those who are able to drive an MGV vehicle."*

Claimant submits grievance

110. The claimant submitted a Stage 1 Grievance Form on 4 December 2019 (640-644). The claimant expressed his grievance as –

> "*In a recent bullying and harassment investigation Mr Walker failed to acknowledge or make recommendations about evidenced bullying/harassment/disability discrimination I am a victim of."*

111. The claimant asked that –

"The full interview notes gathered during Mr Walker's investigations are looked at by another bullying and harassment investigator/Mr Walker's manager with a view to making comment on whether there is indeed evidence that I have been subjected to bullying/harassment or discrimination in the workplace.

Appropriate recommendations and actions are taken that will ensure that individuals concerned are not allowed to continue in these behaviours."

112. The substance of the claimant's grievance was set out under three headings –

    1. The actions of management disclosing confidential information constitute harassment as it has created a hostile and threatening working environment for me.
    2. Mr McEwan and Mr Knox (and possibly Mr Kerr) spread rumours about me to other employees and customers and should be considered as harassment. I should be free to work without being gossiped about and without rumours being spread about me.
    3. Mr John Knox and Mr Ross McEwan have made negative comments about my disability to others, and I am being singled out in questioning the overtime I work because the individuals disagree with the terms of the COT3 agreement following previous challenges to discrimination in court.

113. It was decided that Ms Stevens would deal with the claimant's grievance. Ms Stevens wrote to the claimant on 19 December 2019 (653) inviting him to a meeting to be held on 3 January 2020.

Mr Fix It complaint

114. Mr Fix It was a trade customer of the respondent. Regular collections of mail were made from their premises in Grangemouth. On occasions these were done by the claimant as overtime. The owner of the business was Mr Gardner.

115. On 4 December 2019, when Mr Kerr and Mr Thompson were collecting mail from Mr Fix It, Mr Gardner spoke to them about complaints from his staff relating to the claimant. Mr Kerr sent an email to Ms Simmons, copying in Mr Aien and Mr Fowler, about this (655). On 5 December 2019 Mr Gardner emailed Ms B Train who we understood to be the Key Account Manager for Mr Fix It (647). In his email Mr Gardner raised an issue about the claimant's behaviour and requested that the claimant *"no longer comes to collect my mail".*

116. Ms Train forwarded Mr Gardner's email to Mr Aien on 6 December 2019 (647). Mr Aien spoke to the claimant about this matter on 6 December 2019. Mr Aien removed the claimant from attending the Mr Fix It premises. There was then email correspondence between the claimant and Mr Aien (648-650) with Mr Aien indicating that he would deal with the matter on his return from annual leave on 13 January 2020.

117. Mr Aien conducted an investigation. He visited the Mr Fix It premises twice in December 2019. He had destroyed the notebook which contained his handwritten notes of his conversations during these visits but there was a typewritten note recording the second visit when he spoke to Mr and Mrs Gardner (757-758). Mr Aien met with the claimant on 21 January 2020 (687-693). He met with Mr Kerr on 29 January 2020 (737-739).

118. Mr Aien considered the possibility that Mr Kerr had in some way been involved in the complaint about the claimant but came to the view that he had not, and that it had been Mr Gardner who was complaining to Mr Kerr about the claimant. Mr Aien decided that there was no case to answer. He recorded this in a file note dated 3 February 2020 (758B).

119. It was apparent that the claimant believed that Mr Kerr and Mr Robertson had been instrumental in the bringing of the Mr Fix It complaint. We found no evidence to support that belief.

Grievance investigation

120. Ms Stevens met with the claimant and Dr Greasley-Adams on 3 January 2020. The notes of this meeting (665-677) included comments by Dr Greasley-Adams which Ms Stevens accepted. Ms Stevens met with Mr Walker on 28 January 2020. Mr Walker made some comments on the notes of this meeting (730-735) which again Ms Stevens accepted. Ms Stevens shared with the claimant the notes of her interview with Mr Walker. The claimant made extensive comments (742-751).

121. Ms Stevens wrote to the claimant on 21 February 2020 (759) enclosing her grievance outcome report (760-774). She addressed the points raised by the claimant. Her decision was that the claimant's grievance against Mr Walker was not upheld. She set out her reasons for reaching that conclusion in her outcome report. Her report included the following paragraph (at 773) –

> "*Overall, I have found no evidence from my review of the case file to support that Mr Greasley-Adams has been subjected to bullying, harassment or discrimination in the work place. Clearly there is a poor working relationship between Mr Greasley-Adams, Mr Knox and Mr McEwan which has gone on for some time and to build on this Mr Walker put forward recommendations to address this. Having considered Mr Walker's investigations in this case, I have come to the conclusion that Mr Walker worked hard to find a solution that he felt would benefit Mr Greasley-Adams, Mr Knox and Mr McEwan. I note Mr Walker's recommendations for both cases and concur these are appropriate recommendations to help build the working relationship between Mr Greasley-Adams, Mr Knox and Mr McEwan. Rather than use the internal mediators Royal Mail has agreed to fund and bring in an external mediator to facilitate these sessions, I am aware that [there are] some positive progress is being made around this mediation and I would encourage this to take place. Mediation in my view would be the ideal resolution to address issues Mr Greasley-Adams has raised through this grievance, this will support and help Mr Greasley-Adams, Mr Knox and Mr McEwan to work together going forward.*"

Particular concerns of claimant

122. We pause to comment on three matters which appeared to be of particular concern to the claimant. The first was whether the B&H complaints by Mr Knox and Mr McEwan were submitted in response to the claimant's email to Mr Aien of 1 August 2019 (495-496). Linked to that was whether Mr Aien had told Mr McEwan and Mr Knox to raise complaints.

123. Our view of this was that even if the email of 1 August 2019 had been shared, and it seemed to us on balance unlikely that it was, the thrust of it was alleged breaches of the Professional Drivers Agreement. It seemed to us improbable that such an email would be the catalyst for the complaints submitted by Mr McEwan and Mr Knox. Both Mr McEwan and Mr Knox used the word "*constantly*" in their H1 forms. It appeared to us that both were complaining about what they perceived as incessant behaviour by the claimant over a period of time.

124. We noted that Mr Knox referred in his H1 form to being "*advised by a manager*" to submit his form. Mr Aien's evidence was that both Mr McEwan and Mr Knox had spoken to him about the claimant and he had, as he normally would in such circumstances, explained that they could raise a grievance or bring a B&H complaint. We did not believe that Mr Aien had actively encouraged Mr McEwan and Mr Knox to submit their complaints. It seemed to us that Mr Aien had done no more than advise them on how to submit complaints that they were already minded to make. Having observed them as witnesses, we believed that Mr McEwan and Mr Knox were well able to decide on this for themselves.

125. The second point of concern was that Mr McEwan had spoken about the events which led to the previous claim when interviewed by Mr Walker, when Mr Walker's investigation was supposed to focus only on more recent matters. Our view of this was that Mr McEwan had wanted to speak about earlier events and Mr Walker had not stopped him from doing so, but had not attached weight to this when reaching his decision.

126. The third matter related to the claimant raising with Mr Walker his own allegation of B&H against Mr McEwan and Mr Walker. This was referenced in the *"Reaction and Commentary"* document sent by the claimant to Mr Walker (see paragraph 100 above, third bullet point). The respondent's Stop Bullying and Harassment Investigating Manager's Guide (386-393) states (at 391) –

> "*In some cases, the respondent can make a counter-accusation.*
>
> *If this happens let the respondent know that their complaint will be taken seriously. These concerns need to be properly investigated and that would form part of a separate set of interviews."*

127. Mr Walker accepted that there had been a counter-accusation by the claimant and that he did not take steps to initiate an investigation of that. Our view of this was that Mr Walker did not ignore the claimant's allegations about the behaviour of Mr McEwan and Mr Knox. Rather, he took the view that this would best be addressed by mediation. Referring to comments made by Mr McEwan that the claimant was "*complex"* and *"claims to be on the autistic spectrum"* Mr Walker said this –

> "*I did consider if these comments demonstrated potential bullying and harassment on the grounds of disability against the Claimant and I believed that having had the overarching view of everything that I had, notwithstanding each side's position, that the most appropriate route through this would be for them all to talk about it instead of digging the trenches deeper."*

128. This was echoed in later passages from Mr Walker's evidence when he referred to his decision (to propose mediation) as being "*fundamentally to rebuild bridges".* He also said –

> "*I was not imposing a sanction in any shape or form. It was not on the Claimant's permanent record, and my recommendations were all remedial actions. I didn't see the need for the Claimant to be removed from the delivery office, as had been suggested to me, and I believed*

that it was possible to get back to them having a positive working relationship."

Claimant appeals grievance outcome

5

129. The claimant sent a text message to Ms Stevens on 21 February 2020 (775) in these terms –

"*I have received your email and challenge the findings. There is increasing evidence I am being bullied and suffering detriment at work. I am upset that these people can work together against me and my concerns are never believed or taken seriously. I do not feel I can take place in mediation. I am sure the truth will come out in the court case and the judges will see what actually is happening, when there is no transparency, deliberate withholding of information (mr fix it), hearsay being accepted as truth and no acceptance of my situation I can't see there being any point of conciliation and will inform acas accordingly. I will put this information to you in email also."*

130. This was treated by Ms Stevens as an appeal against her grievance outcome. In her response to the claimant on 24 February 2020 (775) she encouraged him to participate in mediation with Mr McEwan and Mr Knox.

131. Mr Kelly was appointed to deal with the appeal. He sent an email to the claimant on 10 April 2020 (776-777) seeking to establish the claimant's grounds of appeal. The claimant emailed him on 10 April 2020 (776) attaching a document (664B-664M) in which he set out his concerns about the outcomes of both Mr Walker and Ms Stevens.

132. Mr Kelly responded to the claimant by email on 30 April 2020 (786-787). He offered to progress matters face to face or by video conference. In his reply of 1 May 2020 (784-786) the claimant indicated a preference for email. There were further exchanges of emails on 8 June 2020 (781-783) and 14/15 June 2020 (779-780).

35

133. Mr Kelly took quite some time to deal with the claimant's appeal. This was to some extent justified by the amount of documentation which he required to review and digest. Annual leave and the Covid-19 pandemic also impacted on the timescale. Mr Kelly wrote to the claimant on 9 October 2020 (788) enclosing his Grievance Appeal Outcome Report (789-794). He did not uphold the claimant's appeal.

134. After setting out his reasons, Mr Kelly recorded his conclusion in these terms –

> "*Having reviewed both the bullying and harassment case files and the grievance summary report and interview notes I have determined that [the] Ms Stevens has captured and correctly assessed all points relating to Adam's raised issues. Ms Stevens has diligently identified where there were some flaws however also been able to demonstrate through following up with Mr Walker and through an application of logic and reasoning in her summary report that where there were flaws there was no instance where this would've impacted upon the decision.*"

135. Mr Kelly made two recommendations (at 794) –

> *"1. Mediation between Mr Greasley-Adams and Mr Knox and Mr McEwan is fully explored with an attempt made to reach a successful settlement that allows for all parties to agree a way forward to work together in the unit.*
>
> *2. Should there be no successful outcome to the mediation then it is necessary for an independent investigations team to follow up with Adam and ascertain if he still wishes to pursue a separate bullying and harassment investigation for behaviours towards him."*

Claimant's attitude to overtime

136. The evidence indicated that there was ample overtime available within the Stirling Delivery Office but the bulk of it was for OPG work in delivering mail, and there was a perception that the claimant as an MGV driver was

not keen on this type of overtime. The claimant had a focus on adherence to his COT3 agreement in terms of getting first refusal on Duty 1 overtime and equal treatment in terms of MGV and non-specialist overtime. He also had strong views about the application of the Professional Drivers Agreement.

137. Ms Stevens expressed the view in her grievance outcome that the claimant was "*driven by money".* This echoed Mr Walker's view. They believed that the claimant had tried to get others, particularly Mr Knox, excluded from carrying out overtime so as to increase the claimant's own opportunities for overtime, for financial gain. Our view of this was that personal financial gain was a significant driver for the claimant and that this, rather than genuine concern about public safety, was the motivation for his actions in seeking to have other drivers (particularly Mr Knox) excluded from overtime driving opportunities.

Mediation

138. The respondent appointed Mr A Boyd to conduct the mediation between Mr McEwan, Mr Knox and the claimant. Mr Boyd met with Mr McEwan and Mr Knox, and with the claimant and Dr Greasley-Adams. He reported this is an email to Mr Walker on 26 January 2020 (720). He proposed to have a joint mediation with Mr McEwan and the claimant, and a separate mediation with Mr Knox and the claimant.

139. These sessions did not take place because the claimant decided he would not participate. The claimant described his decision in these terms –

> "*I withdrew from the mediation that had been arranged. Ross and I were talking again and things seemed normal. The mediator wasn't sure things could be worked out with John and so I didn't see the merit in going forward. As it is John now speaks to me as well. When I withdrew from the mediation it was clear to me that the issues I was experiencing were not just at the hands of Ross and John. It was clear to me that others, such as Ian Kerr, were also involved. I feel that my employers need to step in and make sure this stops."*

Comments on evidence

140. It is not the function of the Tribunal to record every piece of evidence presented to it, and we have not attempted to do so. We have sought to focus on those parts of the evidence which we considered to have the closest bearing on the issues we had to decide. Accordingly, as will be apparent to the parties, we have not referred to some aspects of the evidence which was led. For example, we have not made findings in fact about the exchange between Mr Fowler and the claimant relating to a vehicle driven by Mr Knox being caught using a bus lane.

141. We considered that the claimant gave his evidence through the prism of his perception that he had been unfairly treated. He tended to place a negative interpretation on events for which there could be an alternative explanation. His belief that the Mr Fix It complaint had been orchestrated by Mr Kerr was an example. His reference to being singled out in the revision exercise was not credible but was reflective of that tendency. It may be that the claimant's perception was affected or influenced to some extent by his AS

142. Dr Greasley-Adams addressed in cross-examination discrepancies between what witnesses had said (a) to Mr Walker during his investigation of Mr McEwan's and Mr Knox's B&H complaints and (b) in their witness statements. It was entirely proper for her to do so. However those discrepancies did not in our view materially undermine the credibility of the respondent's witnesses. With the exception of Mr Kerr who was deliberately evasive as described in paragraph 79 above, we found that the respondent's witnesses spoke about events as they recalled them.

143. Ms Bennett found herself in some difficulty as she appeared to have no recollection of her own witness statement. We gave her time to read through it and she made some amendments to it. We then took an early lunch break to give Dr Greasley-Adams an opportunity to digest those amendments. It would have been more courteous to the Tribunal (and to

the claimant and his representative) if Ms Bennett had taken the time to read her own witness statement before coming to give her evidence.

144. Apart from Mr Kerr, we believed that the respondent's witnesses were generally credible. In particular, Mr Walker and Ms Stevens clearly took seriously the responsibility given to them respectively to investigate the B&H complaints against the claimant and to deal with the claimant's grievance. Their evidence was calm and measured and this we considered that this was reflective of the effort they put into discharging those responsibilities.

Submissions

145. We had written submissions from Dr Greasley-Adams and Dr Gibson. These were structured around the list of issues. We also heard oral submissions in supplement of these and in response to the other party's written submissions. The written submissions are available within the case file. We make some reference to the parties' respective positions when working through the list of issues below and so we do not consider that it is necessary to rehearse the written submissions here. We do however express our thanks to Dr Greasley-Adams and Dr Gibson for the evident care taken in preparation of their written submissions.

Discussion

146. We approached our deliberations by looking at the list of issues and addressing these in turn. We dealt firstly with the claim brought under section 47B ERA (**Protected disclosures**).

Did the claimant make a qualifying disclosure in terms of section 43B ERA (which was a protected disclosure in terms of section 43A ERA), ie –

(a) was there a disclosure of <u>information</u>

(b) which in the <u>reasonable belief</u> of the claimant

(c) was made in the <u>public interest</u> and

(d) <u>tended to show</u> one or more of the matters specified at section 43B(1)(a) to (f)?

147. The claimant's position was that he had disclosed information about driver infringements to his managers. The existence of those infringements tended to show (i) a failure to comply with a legal obligation (particularly EU driving regulations) and (ii) that health and safety had been endangered (of the driver, colleagues and other road users).

148. The claimant had a reasonable belief that this was in the public interest. There was an obvious risk if people were driving when tired due to not having taken the required breaks. He had referred to public safety, at least when making his disclosures to Mr Fowler. Although information about infringements was passed to the managers as part of the normal process, it was possible the claimant might have had information which was not known to the managers.

149. The respondent's position, under reference to ***Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT/0195/09*** and ***Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436***, was that the claimant was at no time disclosing information. He was prying and poking into other people's business in order to discredit Mr Knox. His allegations (of infringements) were not specific and he had made a lot of it up from his own flawed deductions. A disclosure of false information was not a disclosure of information in terms of section 43B ERA.

150. Our view of this was that the claimant had been an MGV driver for some years. His contract of employment (476-490) recorded that the date of commencement of employment under that contract (as an MGV Driver) was 3 August 2015. Driver infringements were nothing new. We could accept that disclosure to managers of driving infringements was a disclosure of information (even if the managers were or should have already been aware of the infringements). We could also accept that it was a disclosure which tended to show a failure to comply with a legal obligation and/or that the health and safety of an individual had been endangered.

151. Where we had difficulty in accepting the claimant's position was in the context of whether his disclosures of driver infringements were made in the public interest. Why would Mr Kerr start to tell the claimant about driving infringements in 2019 when he could have done so before then? Why did public safety become an issue for the claimant when he had been a driver, getting infringements himself, for some years?

152. What changed from March 2019 was that new managers came in to the Stirling office. Mr Aien was initially unaware of the claimant's COT3 agreement. He wanted to improve the efficiency of the office. The claimant perceived that he was not being treated fairly in terms of overtime opportunities and that his COT3 agreement was being breached. There was a history of tension between Mr McEwan/Mr Knox and the claimant as evidenced by Mr McEwan's email to Ms Ward of 9 August 2018 (621-622). The claimant was aware that they as CWU representatives were involved in discussions about resourcing.

153. It appeared to us that the claimant did not recognise that his overtime was impacted by the recruitment of Mr Bullen as an additional part-time MGV driver. He was unhappy that Mr Robertson did Duty 1 parcels within his own working hours (as opposed to overtime). The claimant also had an issue, based on his interpretation of the Professional Drivers Agreement, about driving overtime being given to an OPG who was qualified to drive ahead of an MGV driver.

154. Against that background, we believed that the real reason that the claimant was trying to get Mr Knox removed from driving was to enhance his own opportunities for overtime. That did not in our view engage the public interest. We therefore concluded that the claimant's disclosure of driving infringements was not in his reasonable belief made in the public interest and so was not a protected disclosure. Having regard to ***Babula v Waltham Forest College 2007 IRLR 346*** we were not satisfied that the claimant subjectively believed that his disclosures of driver infringements were in the public interest. That meant that we did not require to consider if the claimant's belief was objectively reasonable.

155. The evidence indicated that the claimant had also on one occasion mentioned to Mr Fowler that Mr Thompson and Mr Robertson were falsifying their digital tachographs. It seemed to us that this assertion was no more than a vague allegation. In ***Kilraine*** Sales LJ said (at paragraph 35) "*In order for a statement or disclosure to be a qualifying disclosure….it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection(1)".* The claimant's allegation lacked the necessary factual content and specificity. More was required, for example when the alleged falsification was said to have occurred and in what way it was alleged to have been done.

Did the claimant suffer any detriment by the respondent on the ground that he had made a protected disclosure?

156. In light of our finding that there was no protected disclosure, this became academic. However, for the sake of completeness, we address it. The threshold for detriment is a low one. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285*** Lord Hope of Craighead expressed it (at paragraph 35) thus –

> "*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment"…."*

157. The detriment contended for on behalf of the claimant was being subjected to an investigation for bullying and harassment on the grounds of the disclosures he made. The respondent's position was that they could not be criticised for investigating the two B&H complaints and to do so could not be said to amount to a detriment. In terms of section 47B(1) ERA, the worker's right is not to be subjected to detriment on the ground that the worker has made a protected disclosure.

158. Section 47B(1) does not protect the worker where *"but for"* the protected disclosure the detriment would not have occurred. While it could be

argued that "*but for*" his alleged protected disclosure the claimant would not have faced the B&H investigation, that did not mean that the investigation was on the ground of the protected disclosure. We agreed with Dr Gibson that the investigation was done on the grounds that the respondents' B&H policy required it.

If so, what was the detriment and when, or over what period of time, did the claimant suffer it?

159. This question also became academic and we deal with it briefly here (we return to it below in the context of time bar). As stated above the detriment was said to be the B&H investigation. Being subjected to that investigation could amount to a detriment.

160. It might be argued that the claimant had also suffered a detriment in terms of damage to his reputation because the B&H investigation found that there had been conduct of the claimant's which came within the definition of harassment and/or his record was tarnished. In this context we noted that no sanction had been imposed as an outcome of the B&H investigation and we were told (and accepted) that there was nothing on the claimant's personnel record to disclose that the investigation had taken place. In these circumstances, had it been necessary for us to do so, we would have found that the outcome of the B&H investigation was not a detriment.

161. It might also be argued that the absence of an opportunity for the claimant to appeal the outcome of the B&H investigation was a detriment. However, if that were so, the detriment would not be on the grounds of the alleged protected disclosure but because the relevant procedure did not allow for an appeal by the person against whom the B&H allegation was made.

162. We next considered the claim of harassment.

Did the respondent engage in unwanted conduct related to the claimant's disability?

163. We found it helpful to identify the alleged unwanted conduct by reference to the claimant's Scott Schedule (at 189-192). We have summarised this above (see paragraph 10) but we set out here in full the matters alleged to be unwanted conduct –

- *R employees singling out C, gossiping to each other about C's disability and speaking in disparaging terms about C's disability.*
- *C's disability means he is hyperattentive to surroundings (noticing more than perhaps others might) and means he will seek greater detail/further clarification in making sense of things (e.g. asking for detailed feedback on his own driving records to further consolidate driving regulation knowledge). R employees have an issue with C because of this characteristic, speaking disparagingly of C. R employees began spreading rumours that C was looking out information about his colleagues. When Mr McEwan, Mr Knox and Mr Robertson found personnel files lying out they reported C to management for having been looking at these (despite there being no evidence of such) and spread rumours of the same to other colleagues. This was further reported to Mr Walker as part of a bullying and harassment case that they believed C had looked at these files. R allowing rumours circulating, which are linked to C disability, to be used as evidence to inform the conclusions and to justify upholding a bullying and harassment case against C.*
- *C had, or was nearing an autistic episode at work, which had been exacerbated by the actions of management who had not had training to support people with autism in the workplace. R employees (Ms Williamson, Mr Knox, Ms Bennett, Mr Aien and possibly others) discussed this instance. Mr Knox speaking with Ms Williamson about the possibility of raising a harassment case against C. Subsequently discussing this in a harassment case raised by Mr Knox and Mr McEwan against C, to discredit and degrade C reputation to the investigator. The aim of the bullying and harassment case to have C dismissed or moved from Stirling DO.*

- *R's employees (Mr Knox and Mr Kerr, and possibly others) speaking to a customer (Mr Fix It) about behaviours linked to C's disabilities. On C reporting concerns of these discussions (which he believed were linked to his disability) R did nothing. It is believed that one point of discussion related to the incident with Ms Williamson….and so this is seen as a continuation of that behaviour. However, this may not have been the only behaviour or characteristics linked to disability discussed.*

It is known that R employees (names currently not known) had further discussion with the same customer, including discussions about the customer potentially raising a complaint and an email sent within Royal Mail about the same. That customer subsequently raised a complaint that C had sexually harassed all of the four female employees that worked for that customer.

164. We approached this by considering the extent to which the evidence indicated that the matters said by the claimant to be *"unwanted conduct"* actually happened. We found that there had been discussion amongst his work colleagues about the claimant's behaviour. This was in our view confirmed by the comments of Mr McEwan, Mr Knox and Mr Robertson as recorded at paragraph 77 above. We also found that this discussion included disparaging comments. Mr Kerr's refusal to disclose what was said (see paragraph 79 above) was unsatisfactory, his assertion that things were being said about the claimant being undermined by his unwillingness – or perhaps inability- to say what those things were.

165. The description of such discussion as "*gossiping"* was the claimant's terminology. We did not have evidence which allowed us to determine when disparaging comments were made nor how often nor what was said nor by or to whom. It seemed to us inevitable that work colleagues would talk about each other from time to time. The claimant himself gave an example of this when he said –

"*There was talk in the office as well that Alfie wouldn't drive again unless he had the work I was doing. Alfie had told me this himself."*

166. It appeared to us that the claimant had to some extent invited talk about himself by making reference to his agreement. It also appeared to us that the claimant's assertion about disparaging comments was made after the B&H complaints of Mr McEwan and Mr Knox had been submitted. It was not mentioned in his emails to Mr Aien of 8 June 2019 and 1 August 2019.

167. We found that the claimant perceived himself to have been "*singled out*" for discussion and disparaging comment. We did not believe that the revision exercise affecting the post-boxes within the claimant's duty could in any way be regarded as *"singling out"* the claimant. It was part of a national programme. It was being applied to the Stirling Delivery Office as a whole. The proposed removal of part of the claimant's duty was the output from a computer programme. The revision had in any event not happened.

168. In relation to the allegation that rumours had been spread about the claimant looking out information about his colleagues, we found that this stemmed from Mr McEwan's reaction to discovering that the personal file which contained his infringements was in an unlocked cabinet in an office where the claimant was known to spend time, and the file also contained his sickness records. The claimant was talking about driver infringements and Mr McEwan thought at the time that his information was coming from Mr Bullen. Mr McEwan said –

> "*My medical records ended up in the infringement file. I was quite concerned that the claimant was constantly in the office and I thought he might have had access. At the time it was a bit of paranoia on my side and due to the way the claimant was making me feel. Anyone could look at it. I could never prove it."*

Mr McEwan accepted that "*I probably did say to a few individuals that I thought he might have seen the medical records".*

169. Our view of this was Mr McEwan had been angry that his confidential information might have been accessed and made his feelings known. It was not surprising that this came up in the course of Mr Walker's

investigation. The claimant's description of this was "*spreading rumours".* It would be more accurate to call it an allegation by Mr McEwan about the claimant. Mr McEwan thought the claimant was "*nosey".*

170. Our view was that, irrespective of what Mr Kerr passed on, there was a practice of leaving printouts of infringements in plain sight in the office. This information was available to the claimant and anyone else who chose to look.

171. We did not believe that the respondent had allowed rumours linked to the claimant's disability "*to inform the conclusions and to justify upholding a bullying and harassment case"* against the claimant. Mr Walker mentioned in his grievance outcome for Mr McEwan a statement by Mr Aien that Mr Knox and Mr McEwan had said that the claimant was "*talking about their driving hours, infringement, a filing cabinet was found unlocked with personal files in it and Ross was concerned about people seeing his sick records"*. However, there was no reference to this in Mr Walker's conclusions (see paragraph 103).

172. The incident involving the claimant and Ms Williamson was described in the claimant's Scott Schedule in terms of the claimant having, or nearing, an autistic episode at work. This was said to have been "*exacerbated by the actions of management who had not had training to support people with autism in the workplace".* Our view of this was that the only management action was Mr Aien speaking to the claimant about the incident, after which the claimant apologised to Ms Williamson.

173. We found that this incident was discussed amongst the respondent's employees. If something unusual happens in the workplace it is likely to be discussed. For the person at the centre of that discussion, it is likely to be unwanted. That was the case here. Given that the incident happened, it was not surprising that it was mentioned during Mr Walker's investigation. It did not however figure in Mr Walker's conclusions.

174. The final element of what was said to be *"unwanted conduct"* related to the Mr Fix It complaint. We were not satisfied that employees of the

respondent had spoken to anyone at Mr Fix It about the claimant's disability. We had evidence that there had been a concern expressed about the claimant speeding at the Grangemouth premises and that Mr Knox and Mr Kerr had been involved in a conversation about this; it was no more than speculation by the claimant that this conversation had been in some way linked to his disability. There was no evidence that the incident involving Ms Williamson had been discussed with anyone at Mr Fix It. There was no evidence that Mr Kerr had in any way encouraged the Mr Fix It complaint.

175. In summary therefore, we found there had been *"unwanted conduct"* in the form of (a) discussion amongst the claimant's work colleagues about the claimant's disability, (b) Mr McEwan's allegation about the claimant in relation to his sickness records and (c) discussion about the incident involving Ms Williamson. We did not find that there was "*unwanted conduct"* in respect of the Mr Fix It complaint.

176. We next considered whether, to the extent that we found that there was unwanted conduct, it was related to the claimant's disability. Our view of this was that the conduct complained of did relate to the claimant's disability. We found confirmation of this in the comments about the claimant to which we have referred at paragraph 77 above.

If so, did that conduct have the <u>purpose</u> or <u>effect</u> of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

177. We were able without hesitation to find that none of the *"unwanted conduct"* was done with the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We noted Dr Gibson's observations in relation to Mr McEwan's comments about the claimant –

> "*It is axiomatic that someone accusing a person of bullying and harassment is going to say things which that person does not like. But that does not mean it is unwanted conduct related to the Claimant's*

disability. It is necessary conduct related to how Mr McEwan was feeling about having to deal with the Claimant. It cannot reasonably be said that the statements given in the course of a bullying and harassment investigation could violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant when the Claimant is given every opportunity to respond both by way of his own interview and to the statements themselves."

178. We agreed that what was said by interviewees during Mr Walker's investigation was not conduct which had the proscribed purpose. Mr Walker asked questions relevant to the complaints of B&H submitted by Mr McEwan and Mr Knox and the interviewees answered those questions. We did not find that those answers were intended to "*discredit and degrade"* the claimant's reputation. It was no more than the interviewees describing matters as they recalled them.

179. We believed that disparaging comments made about the claimant would, and did, have the effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. However, those comments had that effect only to the extent that the claimant was aware of them. We found that the claimant became aware of what his colleagues were saying about him only during the B&H investigation.

180. That the claimant was perceived negatively by his colleagues was confirmed by Mr Kerr's description of him in the 25 May 2019 email as *"poison"* and the references to his being *"nosey"* and "*difficult"*. But, as we said at paragraph 165 above, we did not have evidence from which we could determine when disparaging comments were made nor what was said.

181. Our view was that when the claimant learned of the comments made about him during the B&H investigation, he was offended by those comments. He became aware that he had been described as "*difficult"* and "*nosey"* and that there was talk about his having looked at personal files and about

the incident involving Ms Williamson. We felt there was an element of retrospective elaboration by the claimant when he referred to colleagues *"gossiping"* about his disability and *"spreading rumours".*

Was it <u>reasonable</u> for the conduct to have that effect?

182. This was a reference to section 26(4)(c) EqA – *"whether it is reasonable for the conduct to have that effect* – but we reminded ourselves that we also had to consider (a) the claimant's perception and (b) the other circumstances of the case.

183. We found that the claimant did perceive discussion/comments by his colleagues relating to his disability, the allegation based on Mr McEwan's belief that his sickness records had been accessed and discussion about the incident involving Ms Williamson as having the proscribed effect. He also perceived that his COT3 agreement was not being fully observed and that the respondent was not complying with the Professional Drivers Agreement.

184. With regard to the other circumstances of the case, an unusual element was the previous claim and the resulting COT3 agreement. It was apparent from his email of 9 August 2018 that Mr McEwan was unhappy about that case (although he was unaware at that date of the outcome of the judicial mediation). He was also unhappy about that outcome when he became aware of it.

185. A circumstance relating to the claimant's COT3 agreement was that, in our view, he spoke about it to a greater extent than the agreement itself permitted. Another circumstance relating to the COT3 agreement was that Mr Aien was not aware of it until some time after he became the Stirling DOM. Both of these circumstances contributed negatively to the sequence of events from May 2019.

186. The issue which we found most challenging to resolve was whether it was reasonable for the *"unwanted conduct"* to have the proscribed effect. We believed that Mr Walker conducted a reasonably thorough investigation

into the B&H complaints of Mr McEwan and Mr Knox. During that investigation, matters came to the claimant's attention to which he took offence. These were the matters we found to be *"unwanted conduct"* as detailed in paragraph 175 above.

187. We believed that the context in which the conduct, to which the claimant took offence, occurred was relevant. That context was an investigation into B&H complaints brought by two of his colleagues against the claimant. It was entirely appropriate that these allegations should be investigated.

188. It was inevitable that in the course of Mr Walker's investigation things would emerge which the claimant did not like. If Dr Gibson was meaning, in the passage we have quoted at paragraph 177 above, that this could not be unwanted conduct related to the claimant's disability, we did not agree. However, in the context of a B&H investigation, it was not in our view reasonable that the *"unwanted conduct"* should have the proscribed effect.

189. The investigation related to alleged behaviours of the claimant. When asked about those behaviours some of the interviewees were critical of the claimant. Some of that criticism appeared to us to be related to the claimant's disability. Perhaps the clearest example of this was Mr McEwan's description of the claimant as "*nosey".* We noted the reference in the claimant's Scott Schedule to his being "*hyperattentive".* This was described in terms of the claimant seeking "*greater detail/further clarification in making sense of things".* We do not say that is the same as being *"nosey"* but there appeared to us to be a similarity.

190. We did not believe that an employer should be constrained in carrying out an investigation into allegations of B&H because matters emerging from that investigation are then alleged by the subject of the investigation to be *"unwanted conduct".* Similarly, we did not believe that interviewees should be constrained from answering the questions put to them in the course of that investigation, provided they do so truthfully in accordance with their own view of the matters under investigation. Viewed in that context we

did not consider that it was reasonable for the *"unwanted conduct"* which we found in this case to have the proscribed effect.

191. In view of our findings set out above, we did not require to address the issue of *"If so, did the respondent take all reasonable steps to prevent the harassment from occurring?".* We turned to the claim of victimisation.

Did the claimant do a protected act and, if so, what was it and when did he do it?

192. In his Scott Schedule, the claimant listed the categories of *"protected act"* set out in section 27(2) EqA. He indicated that his protected acts fell under subsections (a), (b) and (d). It was not controversial that the claimant had brought the previous claim. That was a protected act under section 27(1)(a) EqA – bringing proceedings under EqA.

193. The claimant had, during Mr Walker's B&H investigation, made his own allegations of B&H. We regarded this as a protected act under section 27(1)(d) EqA – making an allegation (whether or not express) that the respondent or another person has contravened EqA.

194. We understood Dr Greasley-Adams to argue that the claimant's COT3 was also a protected act. Dr Gibson disputed this, arguing that signing a COT3 was not something done by reference to EqA. It was something done for the purpose of Tribunal procedure. Dr Gibson referred to ***Kirby v Manpower Services Commission 1980 ICR 420*** and ***Aziz v Trinity Street Taxis Ltd 1988 ICR 534***.

195. A COT3 is the usual way in which the settlement of an Employment Tribunal claim is recorded. Provided an ACAS officer has taken action under section 18C of the Employment Tribunals Act 1996, section 203(2)(e) ERA will operate to preclude further action before the Tribunal – ***Allma Construction Ltd v Bonner 2011 IRLR 204***. We did not agree with Dr Greasley-Adams that entering into a COT3 was a protected act. We did however consider that asserting rights deriving from a COT3 could involve "*doing any other thing for the purposes of or in connection with"*

EqA and/or *"making an allegation (whether express or not)"* of contravention of EqA.

196. Accordingly we found that the claimant's protected acts were (a) the bringing of the previous claim, (b) asserting rights derived from the COT3 agreement and (c) making his own allegations of B&H.

Did the respondent subject the claimant to a detriment because –
(a) the claimant did a protected act, or
(b) the respondent believed that the claimant had done, or might do, a protected act?

197. The detriments said to have been suffered by the claimant because he did a protected act were set out in his Scott Schedule in these terms –

- *C being talked about negatively by R employees, influencing the way management see C. R allowing employees who bear a grudge because of [previous] case to influence C employment opportunities. C being subjected to bully and harassment claims and information from previous claim being permitted to be included in a bullying and harassment case, and used in part to justify upholding complaint against C. All creating a hostile working environment for C.*
- *C's duty has been singled out for removal, with C being made to feel he will be displaced or have his employment going forward made redundant. This because Mr Knox and Mr McEwan disagree with the agreement made during judicial mediation. Detriment in terms of the stress/distress of lack of security over position, magnified because C's disability means that change can cause heightened anxiety. C is now no longer allowed to discuss his agreement with any colleagues (including union representatives) and given that the union have a significant role in deciding who does what role this puts C at a significant disadvantage in the workplace.*

- *C's opportunities for overtime are curtailed through a series of actions of R. C not treated equally in respect of overtime opportunities. R going out of way to prevent C doing duty 1 packets, which are part of COT3 agreement. R not providing opportunities for FT hours on driving; R seeking out others to do overtime in order to prevent that overtime being given to C; when C raised concerns Mr Knox and Mr McEwan raised bullying and harassment cases against C (informed to do so by Mr Aien) with people reporting hearsay provided to them by Mr Knox and Mr McEwan as evidence; R employees subsequently having a role in customer raising a complaint, as a means to limit that being offered as an overtime opportunity to C. Detriment in emotional and financial.*
- *Mr Walker upheld a bullying and harassment case, in part, because C had raised the possibility of taking R to tribunal. C had raised this with Mr McEwan, as the CWU rep, but because Mr McEwan was implicated in the actions of R, he felt personally threatened by this and raised a bullying and harassment case, which was subsequently upheld by R.*
- *Failing to follow employment procedures. Exposing to unnecessary stress by not dealing with issues in a timely fashion (according to timings set out in policies), in the manner set out in policies, and often ignoring concerns all together. When C raised a grievance two bullying and harassment cases were raised, with management advising to do so. The detriment from not following procedure meant C unnecessarily suffered in respect of losing out on overtime, that C was subjected to ongoing harassment including the raising of fictitious bullying and harassment claims/complaints of sexual harassment by a customer. The detriment being not only financial but also emotional in terms of the impact on C's mental health.*

198. We approached this by looking at the alleged detriments with a view to determining whether the claimant had in fact suffered the detriment contended for and, where we found that he had, seeking to determine

whether it was because of a protected act. We reminded ourselves that the threshold for detriment is low – see paragraph 156 above.

199. We considered whether the claimant had been talked about negatively by employees of the respondent. We believed that this had occurred (a) prior to the B&H investigation and (b) during that investigation.

200. In respect of the period prior to the investigation, we refer to paragraph 81 above. There were conversations amongst the claimant's work colleagues about behaviours displayed by the claimant which were linked to his AS. However, apart from Mr Kerr's email, we had no evidence about what was said, when and by/to whom. Without more, we were not able to find that any derogatory comments were made because of a protected act done by the claimant.

201. In respect of the period during the investigation, we found that there were negative comments about the claimant – see paragraph 77 above. We believed that these were made not because the claimant had done a protected act but because of the behaviours of the claimant which led Mr McEwan and Mr Knox to submit their B&H complaints. Without those complaints the opportunity for negative comments about the claimant to be made to Mr Walker would not have arisen.

202. We next looked at the alleged detriment of allowing employees who bore a grudge because of the previous case to influence the claimant's employment opportunities. This was in essence that Mr McEwan and Mr Knox were influencing management to prevent the claimant from getting overtime and full-time driving opportunities. Our view of this was that (a) Mr Knox was not in a position to influence management in relation to the claimant's driving opportunities and (b) Mr McEwan was involved in resourcing discussions with management but we did not believe that he had exercised any influence, and certainly not to the claimant's prejudice.

203. It seemed to us that the claimant believed that the Professional Drivers Agreement was not being adhered to, particularly in the context of driving duties carried out by Mr Knox as an OPG. That was what he complained

about to Mr Aien in his email of 1 August 2019. He also believed that Mr Robertson had been given Saturday duties to reduce his own opportunities for that work. We found no link between these matters and the claimant's protected acts.

5

204. The claimant alleged that being subjected to the B&H complaints was a detriment. We agreed. However those complaints were not submitted because the claimant had done a protected act but because of the effect his behaviours had on Mr McEwan and Mr Knox.

10

205. The claimant said that permitting information from the previous claim to be included in, and used in part to justify upholding, the B&H complaints was a detriment. We did not believe that information from the previous claim had been *"included"* in Mr Walker's investigation in the sense contended for by the claimant. Mr Walker had allowed Mr McEwan to speak about the previous case during his interview but he (Mr Walker) was clear in his evidence to us that his focus was on the events in the three months leading up to the B&H complaints. What Mr McEwan said about the previous case did not feature in his decision to uphold the complaints.

15

20

206. We found no merit in the claimant's assertion that his duty had been *"singled out"* for removal. Our views on this are set out at paragraph 167 above. This had nothing to do with whether Mr McEwan and Mr Knox disagreed with the agreement made during the judicial mediation.

25

207. The claimant's assertion that he was no longer allowed to discuss his agreement with any colleagues (including union representatives) was disingenuous. The COT3 which the claimant signed clearly set out at clauses 14 and 15 (see paragraph 42 above) what the claimant could and could not say about that agreement. The claimant could have sought to include wording specifically allowing him to seek union advice, but arguably clause 15 was in any event wide enough to cover this. We considered it unfortunate that the claimant appeared to have paid scant regard to the obligation of confidentiality as to the "*fact"* (ie the existence) of the agreement in clause 14.

30

35

208. We next addressed the claimant's assertion that he had suffered the detriment of his opportunities for overtime being curtailed through a series of actions of the respondent. He referred to the respondent going *"out of way to prevent [the claimant] doing duty 1 packets", "not providing opportunities for [full-time] hours on driving"* and the respondent "*seeking out others to do overtime in order to prevent that overtime being given to [the claimant]".*

209. In relation to duty 1 packets, our view was that two factors had contributed to the claimant's perception that his entitlement to be given first refusal on duty 1 overtime was not being honoured. The first was Mr Aien's quest for greater efficiency when he became Stirling DOM. We believed that this probably led to Mr Robertson doing duty 1 work which might otherwise have been allocated to the claimant as overtime. However, Mr Robertson did this during his standard working hours and this did not breach the claimant's COT3 agreement. This was not linked to any protected act by the claimant.

210. The second factor was Mr Aien's lack of awareness of the COT3 agreement until June 2019. We considered that this probably led to duty 1 packets being given once or twice to whoever was doing the Saturday shift. We understood that this was classed as scheduled attendance rather than overtime. However, it attracted a higher than standard rate of pay and so it was akin to overtime. This was arguably a breach of the claimant's COT3 but it was again not linked to any protected act.

211. In relation to not providing opportunities for full-time hours on driving, we considered this stemmed from the respondent's understanding of the Professional Drivers Agreement differing from the claimant's. That was confirmed by Mr Aien's (somewhat belated) response on 24 January 2020 to the claimant's email of 1 August 2019 (see paragraph 109 above). Irrespective of which interpretation was correct, this had no connection with the claimant's protected acts.

212. We referred to the allegation of *"seeking out others to do overtime"* at paragraph 72 above. We found that this was an operational matter and

that there was no collusion against the claimant. Consistent with this, we found no link between the claimant's protected acts and the alleged detriment.

213. We did not agree with the claimant's assertion that when he raised concerns, Mr Knox and Mr McEwan raised B&H cases against him. We did not believe that Mr Knox and Mr McEwan were aware of the claimant's email of 1 August 2019 to Mr Aien when they submitted their B&H complaints. We did not believe that they had been informed to do so by Mr Aien. We believed that Mr Walker had reviewed and assessed the evidence gathered during his investigation and we were not persuaded that he had unquestioningly accepted hearsay evidence.

214. With regard to the assertion that employees of the respondent had a role in the Mr Fix It complaint, Mr Aien had undertaken an investigation, had considered the possibility that Mr Kerr was involved and had come to the conclusion that he was not. Having spoken twice with the complainer, Mr Aien was well placed to reach that view. We found no reason to disagree.

215. The claimant's next assertion was that Mr Walker had upheld the B&H complaints, in part, because the claimant had raised the possibility of taking the respondent to Tribunal. This flowed from Mr Walker's finding that "*it was reasonable for Mr McEwan to think that the legal action referred to by Mr Greasley Adams might include action against Mr McEwan personally".*

216. A threat of legal action against Mr McEwan personally was not necessarily the same as raising the possibility of taking the respondent to Tribunal. Our view of this was that Mr Walker found that the claimant caused Mr McEwan increased levels of stress and anxiety. We did not regard that as perverse. It was a conclusion that Mr Walker was entitled to reach based on the evidence available to him. We did not believe that Mr Walker came to that conclusion because the claimant had done a protected act, but rather because it was a conclusion supported by the evidence.

217. The claimant's next assertion was that the respondent had failed to follow its employment policies, had not dealt with issues in a timely fashion and had often ignored concerns altogether. The evidence before us indicated that the Christmas period was the respondent's busiest time of year. It was therefore unfortunate that the Mr Fix It complaint was made in early December 2019. Notwithstanding that, Mr Aien visited the complainer twice during December 2019. However matters were then delayed due to Mr Aien being on annual leave until 13 January 2020.

218. Upon his return Mr Aien met with the claimant on 21 January 2020 and with Mr Kerr on 29 January 2020. He reached his decision that there was no case to answer on or around 3 February 2020. The respondent's Conduct Policy (394-400) states that *"cases will be handled as speedily as possible".* Our view was that there had not been unreasonable delay and that the claimant had not, in all the circumstances, been exposed to unnecessary stress.

219. We understood the allegation of ignoring concerns altogether related to the claimant's belief that there had been a conspiracy behind the Mr Fix It complaint. We found that Mr Aien did not ignore this. He considered the possibility (see paragraph 118 above) but came to the view that Mr Kerr was not involved. There was in our view no detriment here and certainly no link to any protected act.

220. We considered the claimant's assertion that when he raised a grievance, two B&H cases were raised, with management advising to do so. We identified a number of difficulties with this as an alleged detriment. Firstly, we did not agree that the claimant had raised a grievance prior to the B&H complaints being submitted – see paragraph 76 above. Secondly, we were not persuaded that Mr McEwan and Mr Knox knew about the claimant's email of 1 August 2019 when they submitted their complaints – see paragraph 123 above. Thirdly, we believed that Mr Aien had told Mr McEwan and Mr Knox that they could submit a grievance or a B&H complaint but that he had not actively encouraged them to do so – see paragraph 124 above. We found no detriment here nor any link to a protected act.

221. The detriment said to have been suffered by the claimant as a result of the respondent not following procedure was (a) losing out on overtime and (b) being subjected to ongoing harassment including (i) fictitious B&H claims and (ii) fictitious complaints of sexual harassment by a customer. We believed that *"losing out on overtime"* and "*fictitious complaints of sexual harassment"* were connected and we deal with these together.

222. As mentioned at paragraph 115 above, the email from Mr Gardner making the complaint (645) included – "*I request that you organise with Stirling that he no longer comes to collect my mail"* ("*he"* being the claimant). Mr Aien told us the Mr Fix It was a significant customer of the respondent. When Mr Aien investigated the complaint, he decided that there was no case to answer. His decision, recorded on 3 February 2020 (758B), did not refer to the complaint being fictitious. Our view of this was that (a) the complaint was not fictitious (although it may have been spurious) and (b) in view of the customer's request, it would have been untenable for the claimant to have continued to make collections from the customer. We understood that the claimant would regard this as a detriment but it was not linked to any protected act.

223. We did not agree with the claimant's contention that the B&H complaints of Mr McEwan and Mr Knox were fictitious (in the sense of being spurious). Following his investigation, there was material before Mr Walker on the basis of which he was able to conclude that harassment had occurred. For the complaints to be fictitious, there would need to have been some sort of conspiracy amongst the eleven witnesses (excluding the claimant) interviewed by Mr Walker. Eight of those witnesses gave evidence to us. We found no trace of any conspiracy. The complaints were not fictitious.

224. We were satisfied that the claimant did not suffer any detriment because he did a protected act or acts. Although not necessary in light of our determination of the substantive issues, we moved on to consider time bar.

Did the claimant present his whistleblowing detriment claim (or part of it) 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 to act is part of a series of similar acts or failures, the last of them?

225. When we considered the claimant's complaint that he had suffered detriment on the ground that he had made protected disclosures, we focussed on the elements of section 43B(1) ERA and came to the view that the statutory test (in particular the public interest element) was not met. In contrast with the harassment and victimisation complaints, we considered that this was the appropriate approach rather than working through the claimant's Scott Schedule. However, to deal with the time bar issue, we will refer to the Scott Schedule which was provided on or around 1 September 2020.

226. Within his Scott Schedule (at page 188) the claimant provided the following information about his alleged protected disclosures –

> "*At multiple, unspecified dates between April/May 2019 and July 2019, C advised management (principally Mr Fowler, Ms Williamson and Mr Aien, and on occasion Ms Simmons) that driving regulations had been breached….or were about to be breached with the planned resourcing….On at least one unspecified date between April/May 2019 and July 2019 C advised Mr Aien that he believed there were falsifying records….C advised management (Mr Fowler and Mr Aien) that he would report to VOSA if the breaches were permitted to continue.*"

227. The claimant provided the following information about the detriment said to have been suffered –

> "*C was exposed to a hostile working environment where he was singled out, subjected to people speaking about him behind his back, being reported to management and being exposed to undue stress and concerns through being singled out in bullying and harassment*

complaint (and fearing he would be disciplined/lose his job). All, in part, because he had disclosed to management about the infringements. After disclosure management (Mr Fowler and Mr Aien), told CWU reps (Mr Knox and Mr McEwan) and possibly others (Mr Kerr and Mr Thompson) that C had made the disclosures. Subsequently contributing to C being singled out by Mr Knox, Mr McEwan, Mr Kerr, Mr Robertson, Ms Bennet and Mr Thompson who would make frequent comment to each other and management (Mr Fowler, Mr Aien and Mr Aitchison) about C. Mr Knox subsequently raising a bullying and harassment case against C because of the disclosures being made. Mr Knox singled out C for this action despite others discussing his infringements and he tried to blame C for a previous occasion when he had been removed from driving because of infringements despite C not being involved in that decision at all. Mr McEwan at the same time raised a separate bullying and harassment case against C (also citing C having raised concerns about infringements). The detriment being magnified and having a permanent impact when the claimant's reputation and record were tarnished by the upholding of the bullying and harassment case against C."

228. Under the heading "*Date of the act which gave rise to the detriment"* the claimant stated as follows –

"*Hostile environment/gossiping between April/May 2019 to present – no action taken by R to prevent this and so believed to be ongoing. Raising of bullying and harassment cases against C on or around 5th and 7th August 2019. Investigation between then and 18th September 2019, when complaint upheld. Permanent detriment to employment record/reputation."*

229. Section 48 ERA provides, so far as relevant, as follows –

"*(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B….*

(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…."

230. Our view of this was that the last act complained of as a detriment was the upholding by Mr Walker of the B&H complaints made by Mr McEwan and Mr Knox (the "last act"). That occurred on 18 September 2019. The date of the claimant's EC notification was 9 December 2019. This meant that a complaint about any alleged detriment said to occur on or before 9 September 2019 was out of time unless the last act was the last of a series of similar acts or failures.

231. The other allegations of detriment were said to have occurred between April/May 2019 and July 2019. If we give the claimant the benefit of the doubt, that means the last detriment, apart from the upholding of the B&H complaints, occurred no later than 31 July 2019.

232. We found that the last act was not part of a series of similar acts or failures. The upholding of the B&H complaints brought by Mr McEwan and Mr Knox was not similar to other detriments described at paragraph 227 above. It followed that the claim that the claimant had suffered detriment on the ground of having made a protected disclosure in terms of section 47B ERA was out of time except in so far as it related to the upholding of the B&H complaints on 18 September 2019.

If not, was the complaint brought within such further period as the Tribunal considers reasonable if it was satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months?

5

233. The meaning of *"reasonably practicable"* is akin to reasonably feasible (per ***Palmer and another v Southend-on-Sea Borough Council 1984 ICR 372***). In ***Porter v Bandridge Ltd 1978 ICR 943*** the Court of Appeal in England ruled that the correct test is not whether the claimant knew of
10 his or her rights but whether he or she ought to have known of them. In ***Asda Stores Ltd v Kauser EAT/0165/07*** the Employment Appeal Tribunal said –

> "*….the relevant test is not simply a matter of looking at what was*
15 *possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."*

234. We took into account that –

20 (a) the claimant had brought the previous claim and so had some knowledge and experience of the Employment Tribunal process,

(b) at paragraph 35 of his details of claim in his ET1, the claimant had stated "*This claim has been lodged with the employment tribunal, whilst internal procedures continue, to ensure that it does not become*
25 *time barred",* and

(c) while not legally represented, the claimant had the benefit of representation by Dr Greasley-Adams who, in the course of presenting the claimant's case, demonstrated an impressive degree of understanding of the law applicable in this case.

30

235. To the extent that it was brought out of time, we decided that it had been reasonably practicable for the claimant to present his complaint within the statutory time limit. The reference in his ET1 to time bar demonstrated an awareness of time limits. In our view, it had been possible for the claim to
35 be presented timeously and it was reasonable to expect that to have been

done. The claim under section 47B ERA was, except as above, time barred.

Did the claimant present his section 26 EqA (Harassment) and/or section 27 EqA (Victimisation) complaints (or part of them) –

(a) at or before the end of the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Tribunal thinks just and equitable?

236. Section 123 EqA provides, so far as relevant, as follows –

> "*(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of –*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable….*
>
> *(3) For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period…."*

237. The Tribunal's discretion to extend time under section 123(1)(b) is broader than the discretion to allow a late claim where it was not reasonably practicable to present it in time. However, extending time is the exception, not the rule – ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434***. In broad terms, the Tribunal has to consider all the relevant circumstances and the prejudice which each party would suffer if the discretion to extend time is exercised, or not.

238. Guidance on what amounts to conduct extending over a period was given by the Court of Appeal in England in ***Hendricks v Commissioner of Police of the Metropolis [2003] ICR 530***, as follows –

> "*….the focus should be on the substance of the complaints that the* [respondent] *was responsible for an ongoing situation or a continuing state of affairs….The question is whether that is "an act extending over*

a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date on which each specific act was committed."

5 239. Dealing firstly with the harassment claim, we have detailed the alleged *"unwanted conduct"* at paragraph 163 above. Looking at the claimant's Scott Schedule and following the same order as the bullet points in paragraph 163, the dates on which that conduct is said to have occurred are stated as follows –

10

- *At unspecified dates between October 2018 and present. C believes this is ongoing. Despite C requesting R intervene, R has done nothing to stop or limit this behaviour.*
- *At unspecified dates between April 2019 and present. C believes* 15 *this is ongoing because R has done nothing to intervene or prevent further discussions of this nature between other members of staff. This despite C requesting that R stepped in and acted when evidence of rumour spreading came to light.*
- *Between or around June/July 2019 and 18th September 2019. R* 20 *(has) doing nothing to prevent these discussions going on.*
- *At an unknown date in 2019 there were conversations between R and customer about C. R failed to respond to concerns raised from August/September 2019. At start of December 2019 C raised a grievance that nothing had been done about this.*

25 *At a later date at the start of December 2019, R had further conversations with customer and customer raised complaint against C. Investigation completed Feb 2020 (no case to answer) but R singling out C in preventing C going to customer.*

R continues to not address C concerns raised in Sep 2019, and Dec 30 *2019, and subsequently during investigations into complaint in Dec 2019. Unwanted conduct of allowing this behaviour to go without comment or action of R ongoing and behaviours likely to be ongoing as R has failed to intervene.*

240. Despite the claimant's references to "*ongoing*" we did not believe that the evidence supported the view that there had been an ongoing situation or continuing state of affairs. The evidence about when there had allegedly been discussion amongst his work colleagues about the claimant's disability was vague. The other matters we found to be "*unwanted conduct*" were (a) Mr McEwan's allegation about the claimant in relation to his sickness records and (b) discussion about the incident involving Ms Williamson. These were unconnected and isolated specific acts rather than a continuing state of affairs.

241. We believed that the matters set out at paragraph 234 above were also relevant to the issue of whether it was just and equitable to extend time in respect of the claimant's harassment complaints. Accordingly we took account of these.

242. We considered the balance of prejudice. We regarded this as finely balanced. The contrast was between (a) the claimant losing the ability to pursue claims where he believed there had been harassment and (b) the respondent having to face those claims despite their being brought out of time.

243. Taking the foregoing into account and looking at matters in the round, we decided that it would not be just and equitable to extend time in relation to the harassment claim. That meant that the claim of harassment, insofar as it related to any act done on or before 9 September 2019, was time barred.

244. Turning to the victimisation claim, we have detailed the detriments said to have been suffered by the claimant at paragraph 197 above. Looking again at the claimant's Scott Schedule and following the same order as the bullet points in paragraph 196, the dates on which the detriments are said to have been suffered are stated as follows –

- *Unspecified dates between March 2019 and present (R has done nothing to intervene and so conduct likely to continue).*

- *At unspecified and numerous dates between August 2018 and present – revision ongoing and C duty still to be removed.*
- *March 2019 to present (R has done nothing to intervene and so unwanted behaviour and conduct continues).*
- *18th September 2019 – the detriment ongoing as there is no right to appeal that decision.*
- *Unspecified between July 2019 and present – the grievance process remains uncomplete.*

245. We believed that a picture emerged of the claimant alleging he had been victimised whenever something happened about which he was unhappy. Looking back at paragraphs 199-223 above, we observed that we found on at least twelve occasions that the alleged detriment was not because of a protected act (we refer there to the absence of any *"connection"* or "*link"*).

246. Taking that into account, and also taking account of the matters we have referred to at paragraphs 242 and 243 above, we came to same conclusion in respect of the victimisation claim as we did in respect of the harassment claim. It would not be just and equitable to extend time and the claim of victimisation, insofar as it related to any alleged detriment suffered on or before 9 September 2019, was time barred.

247. For the sake of completeness we should add that in addressing the time bar issues, we have taken account of the provisions relating to the extension of time limits to facilitate conciliation before institution of proceedings in section 207B ERA and 140B EqA. We say nothing about remedy as we have not found in the claimant's favour.

Disposal

248. For the reasons set out above, we decided that the claimant's claims of (a) detriment on the ground of having made a protected disclosure, (b) harassment and (c) victimisation did not succeed and required to be dismissed.

249. We offer some final comments. With the wisdom of hindsight, we observe that it might have been helpful if the COT3 recording the agreed terms of settlement of the previous claim had included some provision for training of the claimant's work colleagues, including managers, in relation to autism, and AS in particular. We understood that some training has been provided, although not until after the present claim had been lodged, and we regarded that as positive.

250. We heard some evidence which suggested that relations between the claimant and Mr McEwan/Mr Knox had improved. If the claimant's work colleagues, including managers, are aware that the claimant may display some behaviours which are linked to his AS, they should be better able to accept those behaviours. Any further steps the respondent might be minded to take in this regard should include consultation with the claimant as to the nature and timing of those steps.

Employment Judge: **W A Meiklejohn**
Date of Judgment: **27 August 2021**
Date sent to parties: **27 August 2021**