EMPLOYMENT TRIBUNALS

Claimant: Mr D Wearn

Respondent: Sainsbury's Supermarkets Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 14, 15, 16 and 17 March 2022

Before: Employment Judge Brewer
Ms R Wills
Mr G Austin

Representation

Claimant: In person
Respondent: Ms L Quigley, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant's claim under section 47B Employment Rights Act 1996 fails and is dismissed;
2. The claimant's claim under section 103A Employment Rights Act 1996 fails and is dismissed;
3. The claimant's claim for constructive unfair dismissal fails and is dismissed;
4. The claimant's claim under section 38 Employment Act 2002 fails and is dismissed;
5. The claimant's claim for unpaid holiday is dismissed on withdrawal.

REASONS

Introduction

1. This case was listed before a full Tribunal to be heard over four days. The claimant represented himself. The respondent was represented by Ms Quigley of Counsel. We heard evidence and had written witness statements from the following: the claimant, Mr Andy Stanbridge, Area Manager for Convenience, Ms Claire Howard, Operations Manager, Ms Emma Colley, Customer and Trading Manager, Online, Mr Matt Bingham, Store Manager and Mr Adam Eteo, Store Manager.

2. The Tribunal was presented with an agreed bundle of documents, and we had written and oral submissions from both parties.

3. At the outset of the hearing the claimant mentioned that he was dyslexic although that was not a matter he had mentioned at the preliminary hearing. He did not say that he required any particular reasonable adjustment. Nevertheless, we gave the claimant an outline of the procedure we would be following at the hearing. We explained to the claimant the purpose of cross examination and we allowed him time to prepare for cross examination as he required during the hearing. We took regular breaks and endeavoured to ensure that the claimant could take a full part in the proceedings.

4. We completed the evidence at the end of day two of the hearing and submissions were completed by lunchtime on day three. The Tribunal retired and reached a judgement which was delivered on the afternoon of day four of the hearing but, notwithstanding that, we decided that given the claimant's dyslexia he would benefit from having the detailed reasons in writing and so these reasons have been produced below.

Issues

5. The claimant brought the following claims:

    a. constructive unfair dismissal;

    b. automatic unfair dismissal (s104A Employment Rights Act 1996 (ERA));

    c. detriment on account of having made a public interest disclosure (s.47B ERA);

    d. unauthorised deductions from wages (unpaid holiday pay); and

    e. failure to provide a s.1 statement (s.38 Employment Act 2002).

6. At the hearing the claimant confirmed that the claim for unauthorised deductions from wages was no longer being pursued.

7. A preliminary hearing for case management was undertaken by Employment Judge Jeram on 30 April 2020 attended by the claimant and a solicitor on behalf of the respondent. At that hearing, as well as identifying the claims set out above, the following issues were identified, each issue standing as straws in the last straw constructive dismissal claim, as detriments in relation to the claim under s.47B ERA and as a reason for the claimant's resignation in relation to the automatic unfair dismissal claim under s.103A ERA:

    a. whilst working at Worksop, once he had reported his colleague for what he believed was tampering of charitable donations, he was called into three phoney investigation meetings where he was made to feel that he himself was being investigated. He was given no notice of those meetings:

        i. the first was on 14 November 2018 which was attended by Suresh (surname not known/recalled); Elliot Billam and later, Rachel Murphy;

        ii. the second was on 16 November which was attended by acting store manager Dave Kemp who said to him "if you think this is the start of the investigation you are very much mistaken". He was then accused of various things and was asked to move out of the petrol station which was described as a toxic environment and into the store, which he was content to do;

        iii. the claimant was spoken to by a senior manager called Andy Robinson, whilst he was on the premises and before Mr Robinson had even left the premises the claimant was called into another meeting with Dave Kemp (on or around 13 December 2018) when he was told that he, Dave Kemp, had a told a colleague to transfer the monies. Dave Kemp was "let go" in March 2019;

    b. in January 2019, the claimant moved to the Mansfield store, which he was content to do. However, whilst there, he was subject to unpleasant treatment by the Online Manager there, Emma Colley. The respondent is content with the details of that alleged treatment as set out in the claim form. The stripping away of duties is a reference to a list of duties attached to the back door; the claimant says that he was stripped of around 95% of those duties. The claimant believes that that treatment was because Ms Colley was aware of what happened at the Worksop store, either because she would have been told by Andy Stanbridge (Regional Manager) or would have been told by Elliot Billam, alternatively Ms Colley may have picked up her own knowledge, she having spent some time undertaking training at the Mansfield store the previous year;

    c. the claimant was off work on sick leave from July 2019 as a result of Ms Colley's actions. He remained off work until he resigned. During this period, the claimant says that Claire Howard, the person carrying out his welfare reviews, failed to take seriously his complaints that he was being bullied by Ms Colley.

8. In relation to the claim in respect of the failure to provide a s.1 ERA statement, the claimant's allegation is not that he was not provided with a full contract of employment, rather that as he changed location and role, he was not given proper notice of those changes in writing as required by s.1 ERA.

9. It was noted at the preliminary hearing that the claims under s.47B were out of time and the preliminary hearing notes specifically state that the claimant "will need to address why he says he could not reasonably have brought a claim sooner than he did in his witness statement". To emphasise the point this wording was underlined.

Law

Section 1 and section 4 ERA

10. In relation to the claim in respect of the s.1 statement the law requires that the employer shall give to the worker a written statement of the particulars set out in s.1 ERA. Under s.4 ERA the employer is required to give to the worker a written statement containing particulars of any changes to the particulars set out in s.1 and must do so not later than one month after the change. S.38, Employment Act 2002 states that in certain proceedings before an employment Tribunal, which includes the claims we are dealing with in this case, if the Tribunal finds that the employer was in breach of its obligations under either s.1 or s.4 ERA, in certain circumstances it must make an award of a minimum amount or uplift an award

Constructive dismissal

11. The claimant claims that he had been constructively dismissed. He resigned following, he says, a series of acts, faults and omissions by the respondent which, he says, amounted to a breach in the implied term of trust and confidence. The relevant law is as follows.

12. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in **Malik v BCCI; Mahmud v BCCI** 1997 1 IRLR 462 where Lord Steyn said that an employer shall not:

> *"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

13. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence — **RDF Media Group plc and anor v Clements** 2008 IRLR 207, QBD. As in that case, this will usually be the employee.

14. In **Hilton v Shiner Ltd — Builders Merchants** 2001 IRLR 727, EAT, for example, Mr Recorder Langstaff QC stated in connection with a submission by counsel as to the proper legal test for establishing a breach of the implied term

in the context of a case where the employer was alleging that the employee's misconduct had destroyed trust and confidence:

> *"When Mr Prichard identified the formulation of the trust and confidence term upon which he relied, he described it as being an obligation to avoid conduct which was likely seriously to damage or destroy a mutual trust and confidence between employer and employee. So to formulate it, however, omits the vital words with which Lord Steyn in his speech in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) (above) qualified the test. The employer must not act without reasonable and proper cause… To take an example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. Yet it could never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause for the suspension, or for taking the disciplinary action."*

15. Section 95(1)(c) ERA states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. That is commonly called constructive dismissal.

16. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

> *'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed'*

17. In order to successfully claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer;

    b. the employer's breach caused the employee to resign;

    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

18. We note that a constructive dismissal is not necessarily an unfair one — **Savoia v Chiltern Herb Farms Ltd 1982** IRLR 166, CA.

19. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — **Lewis v Motorworld Garages Ltd** 1986 ICR 157, CA. However, an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

20. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer — **Logan v Customs and Excise Commissioners** 2004 ICR 1, CA.

21. In **Omilaju v Waltham Forest London Borough Council** 2005 ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. In that context, in **Chadwick v Sainsbury's Supermarkets Ltd** EAT 0052/18 the EAT rejected a Tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

22. Where the act that tips the employee into resigning is entirely innocuous it will be necessary to consider whether any earlier breach has been affirmed. In **Williams v Governing Body of Alderman Davies Church in Wales Primary School** EAT 0108/19 a teacher, W, was suspended for an alleged child protection matter. He was also subject to disciplinary proceedings for alleged breach of the school's data protection policy. He was dissatisfied with the process and resigned after several months, stating that the last straw was learning that a colleague, under investigation for a connected data protection breach, had been instructed not to contact him. The Tribunal found that this instruction was reasonable in the circumstances and entirely innocuous. It held that, following **Omilaju**, this act could not contribute to a breach of the implied duty of trust and confidence and was not a last straw entitling W to treat his employment contract as terminated. On appeal, the EAT held that, where there is conduct by an employer that amounts to a fundamental breach of contract, a constructive dismissal claim can succeed even if there has been more recent conduct by the employer which does not in itself contribute to a breach of the implied term of trust and confidence, but which is what tips the employee into

resigning. Crucially, however, the employee must not have affirmed the earlier fundamental breach and must have resigned at least partly in response to it.

23. In terms of causation, that is the reason for the resignation, a Tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause — **Wright v North Ayrshire Council** 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in **Abbycars (West Horndon) Ltd v Ford** EAT 0472/07,

> *"the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon"*

24. Where an employee has mixed reasons for resigning their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons (see **Meikle v Nottinghamshire County Council** [2004] EWCA Civ 859, [2005] ICR 1).

25. Thus, where an employee leaves a job as a result of a number of actions by the employer, not all of which amounted to a breach of contract, they can nevertheless claim constructive dismissal provided the resignation is partly in response to a fundamental breach.

26. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract resulting in the loss of the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the employee

> *"must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged"*

27. This was emphasised again by the Court of Appeal in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, although Lord Justice Jacob did point out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation. As to any delay in making such a decision, the employee must make up their mind soon after the conduct of which they complain. In the same case it was said that Tribunals must take a '*reasonably robust*' approach to waiver; a wronged employee cannot ordinarily expect to continue with the contract for very long without losing the option of termination.

28. The Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** 2019 ICR 1, CA, held that, in last straw cases, if the last straw incident is part of a

course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

29. If one party commits a repudiatory breach of the contract, the other party can elect to either affirm the contract and insist on its further performance or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If they affirm the contract, even once, they will have waived their right to accept the repudiation.

30. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation. For example, in **Hoch v Thor Atkinson Steel Fabrications Ltd** ET Case No.2411086/18, H resigned nearly three weeks after receiving an email accusing him of not doing his job properly, which was the last straw following several incidents of harassment on the grounds of race and sexual orientation. The Tribunal found that he could not be said to have affirmed his contract by not resigning earlier as he had been on holiday. That said, affirmation can be implied by prolonged delay and/or if the innocent party calls on the guilty party for further performance of the contract by, for example, claiming sick pay.

31. In relation to whether the contract has been affirmed, or the breach waived by the claimant, the Court of Appeal in **Kaur** (above) offered guidance to Tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

    a. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

    b. has he or she affirmed the contract since that act?

    c. if not, was that act (or omission) by itself a repudiatory breach of contract?

    d. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

    e. did the employee resign in response (or partly in response) to that breach?

Automatic unfair dismissal

32. The issue in the claim for automatic unfair dismissal is whether the claimant resigned because he had suffered detriments resulting from having made a public interest disclosure. If so, the dismissal will be unfair.

Public Interest Disclosure and detriment

33. For the claimants' whistleblowing claims the relevant sections of the ERA state:

> **43A Meaning of "protected disclosure":** 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.
>
> **43B Disclosures qualifying for protection:** 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,
>
> **43C Disclosure to employer or other responsible person:** A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —
>
> (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
>
> (i) the conduct of a person other than his employer, or
>
> (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
>
> **47B Protected disclosures:** 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.
>
> **103A Protected disclosure:** An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

34. The leading authority on what is meant by the term "done on the ground that" is **Fecitt and others v NHS Manchester (Public Concern at Work intervening)** [2012] ICR 37. In that case the Court of Appeal stated that:

> *"liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act."*

35. In detriment claims it is for the employer to show the ground on which any act, or deliberate failure to act, was done — s.48(2) ERA.

36. This means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a

protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure. However, if the Tribunal can find no evidence to indicate the ground on which the respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default — **Ibekwe v Sussex Partnership NHS Foundation Trust** EAT 0072/14.

37. In applying these principles it may be appropriate to draw inferences, given that there will often be a dearth of direct evidence as to motivation when a worker has been subject to a detriment. The EAT summarised the proper approach to drawing inferences in a detriment claim in **International Petroleum Ltd and ors v Osipov and ors EAT** 0058/17:

    a. the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made,

    b. by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent) — see **London Borough of Harrow v Knight** 2003 IRLR 140, EAT,

    c. however, as with inferences drawn in a discrimination case, inferences drawn by Tribunals in protected disclosure cases must be justified by the facts as found.

38. The word ‘disclosure’ does not necessarily mean the revelation of information that was formerly unknown or secret. S.43L(3) of the ERA provides that ‘any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention’. Accordingly, protection is not denied simply because the information being communicated was already known to the recipient. This was confirmed by the EAT in **Parsons v Airplus International Ltd** EAT 0111/17.

39. The worker’s reasonable belief must be that the information disclosed tends to show that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure has occurred, is occurring, or is likely to occur. In other words, the worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable — rather, the worker must establish only reasonable belief that the information tended to show the relevant failure.

40. This point was considered by the EAT in **Soh v Imperial College of Science, Technology and Medicine** EAT 0350/14. It was explained that there is a distinction between saying, ‘I believe X is true’ and ‘I believe that this information tends to show X is true’.

41. The EAT has stated that the test of 'belief' in section 43B establishes a low threshold - **Korashi v Abertawe Bro Morgannwg University Local Health Board** 2012 IRLR 4, EAT. However, the reasonableness test clearly requires the belief to be based on some evidence — rumours, unfounded suspicions, uncorroborated allegations and the like will not be enough to establish a reasonable belief.

42. If the claimant reasonably believed that the information tends to show a relevant failure there can be a qualifying disclosure of information even if they were later proved wrong. This was stressed by the EAT in **Darnton v University of Surrey** 2003 ICR 615, EAT. The EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the Tribunal. This case was cited with approval by the Court of Appeal in **Babula v Waltham Forest College** 2007 ICR 1026, CA , when it made clear that a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of any criminal offence or legal obligation on which the disclosure was based. Where the legal position is something of a grey area, a worker might reasonably take the view that there has been a breach.

43. In **Kilraine v London Borough of Wandsworth** 2018 ICR 1850, the Court of Appeal held that 'information' in the context of s.43B is capable of covering statements which might also be characterised as allegations - 'information' and 'allegation' are not mutually exclusive categories of communication. The key principle is that, in order to amount to a disclosure of information for the purposes of s.43B the disclosure must convey facts.

44. There is no requirement that to attract the protection of the statutory scheme, disclosures must be made in good faith. However, s.49(6A) of the ERA, gives the Tribunal the power to reduce compensation in successful claims under s.47B by up to 25 per cent where 'it appears to the Tribunal that the protected disclosure was not made in good faith'. There is a similar provision to reduce compensation in successful claims under s.103A.

45. The leading case on good faith (in a slightly different context under previous whistleblowing legislation) is **Street v Derbyshire Unemployed Workers' Centre** 2005 ICR 97 where the Court of Appeal equated 'good faith' with acting with honest motives. It was held that where the predominant reason that a worker made a disclosure was to advance a grudge, or to advance some other ulterior motive, then he or she would not make the disclosure in good faith.

46. In **Kuzel v Roche Products Ltd** [2008] ICR 799, the Court of Appeal considered the operation of the burden of proof as regards the reason for the dismissal in an unfair dismissal case brought by reference to both section 98 and section 103A. Mummery LJ envisaged that the Tribunal will decide first whether it accepts the reason for the dismissal advanced by the employer before turning, if it does not find that reason to be proved, to consider whether the reason was the making of the protected disclosure.

47. In his judgment Lord Justice Mummery also rejected the contention that the burden of proof was on the claimant to prove that the making of protected disclosures was the reason for dismissal. However, Mummery LJ was in agreement with the EAT that, once a Tribunal has rejected the reason for dismissal advanced by the employer, it is not bound to accept the reason put forward by the claimant. He proposed a three-stage approach to S.103A claims:

    d. first, the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely requiring the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason.

    e. second, having heard the evidence of both sides, it will then be for the employment Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or reasonable inferences.

    f. third and finally, the Tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the Tribunal's satisfaction that it was its asserted reason, then it is open to the Tribunal to find that the reason was as asserted by the employee. However, this is not to say that the Tribunal must accept the employee's reason. That may often be the outcome in practice, but it is not necessarily so.

Time limits

48. The time limit for bringing a claim for detriments caused by having made a public interest disclosure is 3 months from the date of the detriment unless it was not reasonably practicable to bring a claim within that period and the extra time taken was reasonable.

Findings of fact

49. We make the following findings of fact. References below are to pages in the agreed bundle.

50. The claimant commenced employment with the respondent on 15 September 2006. The claimant was based in the Worksop store and was engaged as an online assistant/retail assistant. During the period where the claimant says that he made a protected disclosure, he was working at the petrol station which was part of the Workshop store.

51. The claimant says that when he attended work on 7 November 2018, he noted that a blue charity collection pot, which had previously been full, was empty, and a red charity collection pot set out for the Poppy Appeal that year was full. For reasons which remain unclear the claimant considered that this was

suspicious and that something had happened to the money which was in the blue charity collection pot which the claimant said was for a local charity. The safe was checked but there was no money in that. The claimant spoke to a department manager, Suresh Subramaniam and asserted that, as he says in his witness statement, "someone had put the money from the local charity pot into the Poppy Appeal pot". The claimant says that he left it with Mr Subramaniam to look into it.

52. On 9 November 2018 the claimant says he spoke to the other manager of the department, Rachel Murphy and advised her that about what he had told Mr Subramaniam. Ms Murphy agreed that the security guard, Ian Barnes, should go and check the CCTV to find out what had happened.

53. The claimant also viewed the CCTV footage and created a timeline of events as he saw it. The claimant also burned some of the CCTV footage to a CD and presented the CD and the timeline to Ms Murphy.

54. It transpired that one of the employees had moved money from the blue charity collection box to the red charity collection box set out for the Poppy Appeal. We note at this stage of that the claimant says in his witness statement that he believed that this was a "fraudulent activity" but there is nothing in his statement to say that that is what he said at the time.

55. On 14 November 2018, the claimant had a meeting in a training room with Elliot Billam and Suresh Subramaniam. During the meeting Rachel Murphy was called in. No notes were taken at that meeting.

56. On 16 November 2018 the claimant attended a meeting with Mr David Kemp, deputy store manager, and Mr Subramaniam. The claimant says that at that meeting Mr Kemp said, "if you think this is the start of the investigation then you're very much mistaken". The claimant also says that Mr Kemp said he was "a great worker" and that Mr Kemp wanted him back working in the store rather than working at the petrol station. No notes were taken at that meeting.

57. On 11 December 2018 the claimant sent an email to Mr Andy Robinson, Head of Stores [63/64] the subject of which was "whistleblowing about management" although there is no information in the email about the claimant's concerns.

58. Mr. Robinson and the claimant had a discussion on the telephone on either 11 or 12 December 2018 and it is apparent from an exchange of emails that the claimant was to have a discussion about his concerns with Mr Kemp [63/62]. In the list of issues, the claimant raises a concern about a discussion he had with Mr Kemp on or around 13 December 2018 but from the email chain referred to above it is clear that this meeting took place on 12 December 2018 because in an email from Mr Robinson on 12 December 2018 at 14:26, Mr. Robinson says, "I believe you have chatted things through with Dave". In response at 08:42 on 13 December 2018 the claimant confirms that he had a chat with Mr Kemp as soon as Mr. Robinson had "left the building". The claimant's witness statement also makes it clear that the meeting with Mr Kemp took place on 12 December, not 13 December.

59. At the meeting with Mr Kemp, Mr Kemp confirmed that it was he who told staff to move money from the blue charity box to the red charity box. The claimant seemed dissatisfied with what Mr Kemp had said and decided that the matter required what he referred to as a "full and proper thorough investigation by an independent person" and that he had " lost all faith and trust in most of the managers presently in the Worksop store" [62].

60. The respondent treated the claimant's email as what they call a fair treatment complaint and asked Mr Andy Stanbridge, Area Manager for Convenience, to undertake the investigation. Mr Stanbridge produced a report of his investigation which can be seen from [67]. As part of his investigation, Mr Stanbridge spoke to the claimant, Mr Kemp, Mr Billam, Mr Ken Cottrell, Ms Lynn Wright, Mr Adam Canovan, Mr Subramaniam, Mr Tom Radford, Ms Sammie Marshall, Mr Ryan Fletcher and Ms Murphy.

61. As part of the claimant's discussion with Mr Stanbridge he confirmed that the subject of the meeting on 14 November 2018 was the CCTV footage which the claimant had burned onto a CD. The claimant also confirmed that at the meeting on 16 November 2018 there was a concern that the claimant had viewed CCTV footage which he was not authorised to do. The claimant said that Mr Kemp had ranted at him although he did not specify what this amounted to. Mr Stanbridge asked the claimant what he would like to see as a resolution and the claimant confirmed that, other than the investigation, he would like a move from Worksop and said that he would prefer to move to one of Crystal Peaks, Arnold, or Mansfield.

62. Mr Stanbridge concluded his initial investigation on 10 January 2019, and he wrote to the claimant to invite him to a meeting to discuss the outcome [77]. After he had sent that letter, he undertook some further investigation because he picked up a further complaint which the claimant had made on 9 January 2019.

63. The claimant met Mr Stanbridge on 17 January 2019 and Mr Stanbridge fed back the results of his investigation. Notes of that meeting start at [79].

64. Mr Stanbridge rejected claimant's complaint and it was confirmed that the claimant could move to the Mansfield store which he saw as a fair resolution. The claimant did not appeal against Mr Stanbridge's outcome.

65. The claimant moved to the Mansfield store towards the end of January 2019 as a General Assistant in the Online department. His manager was Emma Colley, Customer and Trading Manager in the Online department. The store manager at the time was Matt Bingham.

66. In around April 2019 Ms Colley was told that Rachel Murphy would be transferring from Worksop to Mansfield to take up a post in the bakery department. She mentioned that to the claimant believing, she said, that he would be pleased to welcome a former colleague from Worksop. The claimant alleges that Ms Colley told him about the move knowing that he had had issues with management at Worksop.

67. The claimant went off sick at the end of July 2019.

68. On 12 August 2019 the claimant attended an absence review meeting with Claire Howard who was then Operations Manager at the Mansfield store. Ms Howard made a note of that meeting which appears at [91].

69. A second absence review meeting was undertaken by Mr Bingham on 21 September 2019 and notes of that meeting are at [92 – 94].

70. The claimant resigned confirming that his last day of employment would be Monday 21 October 2019. His resignation letter, which is at [97] is undated and it is unclear when exactly it was sent. The letter refers to the fact that the claimant had a current sick note, would then go on holiday but instead of returning as would have been the case on 22 October, his employment would end, as stated in the letter, on 21 October. The claimant's sick note was to end on 6 October 2019 therefore the claimant resigned sometime between 21 September 2019 and 6 October 2019.

71. The claimant commenced early conciliation on 5 December 2019 and his early conciliation certificate is dated 5 January 2020. The claimant presented his claim to the Tribunal on 4 February 2020.

Discussion and conclusions

Claim under s.47B ERA

72. One difficulty we have noted with this case is that the agreed list of issues as set out at the case management hearing does not refer to the meeting between the claimant and Mr Bingham on 21 September 2019. The last act complained of by the claimant at the preliminary hearing was what he refers to as Ms Howard's failure to take his complaints that he was being bullied by Ms Colley seriously. However, in his claim form the claimant quite clearly states that after the meeting on 21 September 2019 he had "no confidence that the situation would be addressed or improved and felt unable to return to a place where I did not feel safe anymore".

73. A second difficulty we have noted is that at the preliminary hearing the solicitor acting on behalf of the respondent conceded that the claimant had made a public interest disclosure Although what that disclosure was beyond the claimant raising concerns about charitable donations is unclear and in particular there is no reference to the particular sub-sections of s.43B ERA relied upon by the claimant. At the hearing the claimant said that his protected disclosure was that fraud had been committed. He was unclear as to how he reached that conclusion given that all that happened was that money put into a blue charity box, i.e. money donated by the public to, in general, charity, was given to the Poppy Appeal charity rather than to what was referred to as an un-named "local charity".

74. The status and legal effect of a list of issues was explored by the Court of Appeal in **Parekh v London Borough of Brent** 2012 EWCA Civ 1630, CA. There, Lord Justice Mummery made the following points:

a. if the list of issues is agreed, that will, as a general rule, limit the issues at the substantive hearing to those in the list — see **Land Rover v Short EAT 0496/10**;

b. as the employment Tribunal that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence — see **Price v Surrey County Council and anor** EAT 0450/10;

c. as was recognised in **Hart v English Heritage** 2006 ICR 555, EAT, case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances.

75. We shall return to these two issues below, but for now we proceed on the basis of the list of issues agreed at the preliminary hearing.

76. As set out in the list of issues, the last matter the claimant complains of is a failure on the part of Ms Howard to take his complaint of bullying seriously. Given that his only contact with her was at the absence review meeting, we understand him to mean that she did not take his complaint seriously at that meeting. The impact of that is that the last matter which the claimant complains of occurred on 12 August 2019 and therefore all of the detriments complained of are out of time. As we have set out above, the claimant's attention was drawn to the time limit issue at the preliminary hearing, and he was specifically advised to address the matter in his witness evidence.

77. In the event there is no evidence in the claimant's witness statement, nor did he give any oral evidence as to any impediment which prevented or delayed him bringing his detriment claim in time. That being the case the claim for detriment caused by him making a public interest disclosure must fail.

78. If we were to vary the list of issues and add the claimant's claim in relation to the meeting which took place on 21 September 2019 to the list of issues, the normal time limit for bringing such a claim would have expired on 20 December 2019 and taking account of early conciliation we consider that time was extended to 4 February 2020, the day the claim form was presented.

79. Case management decisions can only be varied if there is a material change in circumstances and we cannot see that in this instance there is a material change in circumstances. The claimant attended the case management hearing, he discussed his complaints, and he received a copy of the case management orders which set out the complaints and the issues in each of the complaints. The case management note states that anyone who is affected by any order may apply for it to be varied, suspended or set aside but no such application was made by the claimant. It is clear from the respondent's case and from Ms Quigley's detailed written submissions that they considered the issues to be those set out in the case management orders. That being the case we remain of the view that the last matter complained of in relation to the

detriment claim is the meeting with Ms Howard on 12 August 2019. However, even if we are wrong about that we are satisfied that the claimant suffered no detriment at or as a result of the meeting with Mr Bingham on 21 September 2019. The notes of that meeting [92 – 94] make it quite clear that it was a very positive meeting, and that the claimant stated that he was "happy with the outcome of the meeting".

80. We pause at this point to make a comment about the claimant's evidence. In general, this is a well-documented case. When it was pointed out during his cross examination, as it was on a number of occasions, that the claimant's evidence or his recollection of meetings did not accord with the contemporaneous documents, the claimant's invariable response was that although he did not agree with what was in the documentation, at the time he saw the notes he was not in a frame of mind which enabled him to take issue with the notes which had been sent to him. We found the claimant to be an intelligent and articulate witness and it was surprising to the Tribunal that his witness statement, which was drafted after he had been sent the agreed bundle, did not raise any concerns he had with the notes of meetings and investigations which were undertaken by the respondent's managers in this case. We stress that at no point in any document or in his witness statement does the claimant take issue with anything set out in any of the respondent's documents. We have accepted those documents at face value. We do not find that the claimant was being in anyway dishonest or even disingenuous when giving his evidence. The Tribunal's experience particularly with litigants in person is that they come to view their case in a particular way and genuinely believe what they say in their evidence even if that does not accord with any other evidence, including in particular, contemporaneous documents. In coming to our conclusions, we have relied heavily on those contemporaneous documents and the absence of any evidence from the claimant prior to this hearing in which he takes issue with anything in those documents.

81. In relation to our second concern, that is the concession made by the respondent that the claimant had made a protected disclosure, we consider that although that concession was made, the evidence we heard about that can amount to a material change of circumstances such that we feel able to ignore that concession and substitute our own finding if we consider that the evidence showed that in fact the claimant had not made a public interest disclosure. Further, such evidence would require us to revisit the concession in order that we are able to determine the case in accordance with the law and the evidence (see **Price** above).

82. We reiterate that the information which the claimant disclosed was simply that money had been moved from one charity box to another - that is to say money which the public had given to charity was in fact still given to charity and we do not see how the claimant could have had a reasonable belief that a crime had been committed let alone the crime of fraud as he asserted at the hearing. The claimant, when asked about this during his evidence, said that he felt that the local charity had been defrauded, but of course the claimant was aware at the time that the blue charity box was not designated to a particular charity even if the respondent had nominated a charity in 2018 to receive its charitable donations. The point is that the public who were putting money into the blue box

did not know which charity they were giving money to because there was no name on the charity box, and the local charity concerned had no expectation of receiving any or any particular sum of money. We consider therefore that there was no reasonable belief on the part of the claimant that a crime had been committed and that therefore he did not make a public interest disclosure within the meaning of the relevant legislation.

83. We would therefore point out that even if the claimant's claim under section 47B ERA had been in time, the claimant's claim would still have failed because there was no public interest disclosure.

84. Furthermore, even if the claimant's claim had been made in time, and he had in fact made a protected disclosure, we find that the claimants claim would have failed because, as we set out below, we find that none of the matters set out by him amounted to a detriment either because what took place was not detrimental or what he said took place did not take place.

85. The claimant's best case is that at the meeting on 14 November 2018 he was made to feel like he was being investigated. The respondent had asked the security guard to view the CCTV footage and undertake the initial investigation. The claimant had undertaken what amounted to his own investigation by viewing CCTV footage that he was not authorised to view. We do not accept the claimant's explanation that he was simply sitting taking notes for the security guard who was viewing the CCTV footage. Data protection laws are to be taken seriously and in the circumstances the respondent had a reasonable and proper cause to investigate what had taken place and as part of that they were entitled to question the claimant about is viewing of the CCTV footage. That is not a detriment in our view.

86. In respect of the meeting on 16 November 2018, even if Mr Kemp did say the claimant was mistaken if he thought that that meeting was the start of an investigation, we cannot see how that amounts to a detriment. The claimant says he was accused of various things, but he has at no point specified what those various things were, and his best case is that in fact he was accused of viewing CCTV footage without authorization, which was in fact the case, and again we do not see how that can amount to a detriment.

87. We note that at the hearing, when the claimant was cross examining the respondent's witnesses, in particular Mr Stanbridge, he appeared to raise the point that he could not have done anything wrong because he had not been disciplined. The Employment Tribunal is very experienced in dealing with cases involving alleged disciplinary matters and we are aware that it does not follow that just because an employer decides not to discipline an employee misconduct did not occur. Very often minor misconduct is overlooked or dealt with informally and even in more serious cases an employer may decide that no formal proceedings need to be taken.

88. In respect of the meeting on 12 December 2018, even in the claimant's detailed account of that meeting set out in the claimant's email to Mr Robinson of 13 December 2018 is entirely accurate, we cannot see any reference to anything which could amount to a detriment to the claimant.

89. We shall deal with the allegation of bullying in detail below but on the face of the evidence we find that Emma Colley was not aware that the claimant made or believed he had made a public interest disclosure and therefore even if she did bully the claimant she did not do so for that reason and therefore the claimant did not suffer a detriment because he had made a public interest disclosure.

90. Finally in relation to the meeting on 12 August 2018 with Claire Howard, we accept her evidence that she did take the claimant's complaints seriously, that she spoke to Ms Colley and then tried to contact the claimant by email and telephone on a number of occasions, but the claimant failed to respond to her. We point out that Ms Howard's evidence was consistent with the contemporaneous documentation and that at no point during his cross examination of Ms Howard did the claimant take any issue with her evidence on those matters.

91. For the reasons set out above therefore the claim under section 47B ERA fails.

Claim under section 103A ERA

92. It follows from all of the findings above that the claimant's claim for automatic unfair dismissal must fail. If he was dismissed it was not because of or in any way related to a public interest disclosure.

Constructive unfair dismissal

93. We turn then to the claim for constructive unfair dismissal.

94. The claimant relies upon the same issues as discussed above. The claimant says that these, taken together, amount to a breach of the implied term of trust and confidence.

95. The claimant's claim as set out in the list of issues agreed at the preliminary hearing is different to the one set out in his witness statement and in respect of which he gave oral evidence. In the claimant's witness statement, he says at paragraph 23 that in the meeting of 21 September 2019 he "felt intimidated by having two managers present… I was not offered another department… it was determined that the only place for me was the online department - of which Emma Colley was still the manager. it was then that I knew the situation would not be resolved… I knew I just had no alternative but to resign from my 13 year tenure at Sainsbury's…". In his oral evidence the claimant confirmed that the last straw he relies upon was this meeting but, as with the discussion above, that is not what he said at the preliminary hearing and that is not what the agreed list of issues says.

96. That leaves the Tribunal with two possibilities. The first is that at the preliminary hearing the claimant stated that the last straw was his assertion that Ms Howard failed to take his complaints about being bullied seriously but that subsequently he changed his mind and that was not the last straw; the last straw was what happened at the meeting on 21 September 2019. The second is that the claimant simply misunderstood what was going on at the preliminary hearing and his case is really that the last straw was what took place at the meeting on

21 September 2019. The difficulty with the second argument here is that as we have sat out above, the claimant has had plenty of time to consider the list of issues and to correct it had he not been content with how the Employment Judge had set out the issues in this case. Of course, as we set out above, we could take the view that the claimant's evidence amounts to a material change of circumstances such as to enable us to revisit the list of issues and add a new final straw but that would disadvantage the respondent who has taken the list of issues at face value. In any event we do not consider that a claimant giving oral evidence about issues which had not previously been agreed can amount to a material change of circumstances.

97. In our judgement however and for the reasons we set out below, whichever way we view the matter makes no material difference.

98. We remind ourselves that the implied term of trust and confidence is that the employer shall not:

> *"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

99. We can take the matters raised by the claimant fairly shortly.

100. The respondent had reasonable and proper cause to meet the claimant on 14 November 2018 and to raise the matter of him viewing the CCTV footage without authorisation, and the fact that this made the claimant feel that he was being investigated is simply a product of the fact that in a very informal way he was being, but as with the fact of meeting the claimant, the respondent had reasonable and proper cause to discuss the unauthorised viewing of CCTV footage with him. The claimant has not particularised or given any other evidence about anything else which happened at that meeting which could amount to a breach of the implied term of trust and confidence.

101. In relation to the meeting on 16 November 2018, given that this was not the start of an investigation, the respondent had reasonable and proper cause to state that fact. In relation to the claimant's allegation that he was accused of various things, the only thing he refers to is being accused of viewing CCTV footage without authorisation and given that he had done that, the respondent had a reasonable and proper cause to make that accusation.

102. In relation to the meeting on 13 December 2018, as we have pointed out above in our discussion of the detriment claim, there is nothing in the claimant's detailed note of that meeting, nor in any evidence, that anything which happened at that meeting could amount to behaviour which either separately or taken with any other behaviour amount to a breach the implied term of trust and confidence. What occurred at that meeting was principally Mr Kemp's explanation of what he understood to have taken place in relation to the movement of charity money from the blue box to the red box.

103. Turning to the alleged bullying by Emma Colley, the claimant relies on the following matters as amounting to bullying:

a. the stripping away of 95% of his duties;

b. failing to support him in his job role;

c. failing to train him/allow him to perform in his role;

d. taking pleasure in informing him of Rachel Murphy's move to Mansfield.

104. The Tribunal found Ms Colley to be a truthful witness. She accepted that the role being undertaken by the claimant when he moved to Mansfield was limited. She explained that the general assistant role is wide ranging and not every general assistant does every aspect of the general assistant duties. For example, her unchallenged evidence was that in Mansfield not every general assistant works on the computer. Her perspective was that notwithstanding the claimant's long service, when he began working for her, she noted some performance concerns. She also reviewed the claimant's training record and noted that he did not have what she referred to as sufficient training to cover all aspects of his role. He was, she felt, able to carry out what she called the general day to day tasks of the general assistant role which included lifting, stacking and moving trolleys and loading delivery vehicles. Ms Colley noted after a reasonably short period that the claimant was not particularly proactive in his role, and he needed prompting to complete tasks. Her unchallenged evidence was that on more than one occasion she spotted him sitting in a home delivery vehicle using his mobile phone and on one occasion he failed to deal appropriately with a call from a customer who had a declined payment. We note that when the claimant cross examined Ms Colley he did not dispute that these matters had taken place, he merely did not like how he says he was dealt with but without specifying what exactly he did not like.

105. The concerns the claimant raised in relation to failure to support him and train him are in fact part of the same issue. What the claimant seems to have been complaining about is the fact that his role was limited and indeed Ms Colley agreed with that. She said that she wanted to make sure that the claimant was proficient in the basics of the role before being trained in other aspects of it and given that there were the concerns set out above that seems to the Tribunal to be a reasonable approach for her to have taken and falls very far short of bullying.

106. The final matter relates to Rachel Murphy's transfer from Worksop to Mansfield. In his witness statement the claimant says that he was told of the move by Ms Colley in a sarcastic way, and he states that "she said it as if she knew I would not be pleased about it". The claimant says that Ms Colley knew that Ms Murphy "Was one of the managers involved in dealing with my complaint about what I regarded as the charity pot theft". The Tribunal accepts Ms Colley's evidence that she did not know that. Furthermore, it remains entirely unclear to the Tribunal why the claimant asserts that there was any issue between him and Ms Murphy and it remains unclear why he would have been unhappy that she was coming to work in Mansfield. Her sole involvement

in the charity pot issue appears to be that she asked the security guard to view the CCTV footage. The claimant does not suggest that she authorised him to view the CCTV footage and it is therefore difficult to see why he had an issue with Ms Murphy at all, but even if he had, the Tribunal is clear that Ms Colley had no knowledge of that.

107. We note that in his witness evidence the claimant also relies on an incident where he asked to leave work early, but Ms Colley insisted that he worked his full shift. Ms Colley explained the circumstances (essentially that there was work to be completed) and her evidence was not challenged. We do not see how an employer insisting that a worker work their contracted hours in the circumstances set out by Ms Colley can amount to bullying.

108. The claimant also raised in his evidence the fact that he was denied holiday for a house move. The claimant's evidence about this was that he had given the respondent a number of possible dates that he may need off, but the position kept changing and ultimately, he asked for time off giving two weeks' notice. The clear evidence is that although Ms Colley said she could not accommodate him taking the time off work as holiday, she was prepared to, and did alter his times of work so that he could be at home when the house move took place and that is in fact what happened. Again, the Tribunal does not find this amounted to an act of bullying.

109. The final issue relied on by the claimant is what he refers to as Ms Howard's failure to take his complaints about Ms Colley seriously. As we have set out above, Ms Howard's unchallenged evidence was that she met with the claimant on 12 August 2019, they discussed what the claimant believed was causing him stress, they went on to discuss how his stress could be alleviated and the claimant suggested that he would like better communication from Ms Colley and more training. Ms Howard said that she would speak to Mrs Colley about that matter and there was also a discussion about the claimant moving to working two days a week and also about looking for vacancies in other departments in Mansfield as well as the possibility of transferring to another store.

110. After the meeting Ms Howard did speak to Ms Colley and the matters raised by the claimant were discussed. Ms Howard then attempted to give feedback to the claimant on a number of occasions after their meeting, but the claimant did not respond either to emails or telephone calls. Subsequently of course as we know Mr Bingham conducted a second absence review meeting and therefore Ms Howard had no further involvement.

111. The Tribunal's judgement is that none of the matters raised by the claimant, whether taken separately or together, amounted to behaviour calculated or likely to destroy or seriously damaged the implied term of trust and confidence. We find that was either because there was reasonable and proper cause for the behaviours or in the case of Ms Colley and Ms Howard, we prefer the evidence of the respondent.

112. For the sake of completeness, we add that even if we were considering what took place at the meeting of 21 September 2019, for the detailed reasons

we have given above, nothing which happened at that meeting was anything other than positive therefore could not give rise to a breach of the implied term of trust and confidence.

113. For all of those reasons the claim for constructive unfair dismissal fails.

Failure to provide a note of changes to the information required by s.1 ERA

114. This claim is parasitic upon some other successful claim and therefore must fail because all of the claimant's claims have failed. In any event we note the evidence of Mr Eteo, which was unchallenged by the claimant, to the effect that every employee has access to a portal known as Kronos which includes access to their contract of employment which is updated every time details change and therefore if we were required to decide the matter, we would have decided it in favour of the respondent given this unchallenged evidence.

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Employment Judge Brewer

Date: 17 March 2022