



THE EMPLOYMENT TRIBUNALS

Claimant: Mr G Bailey

Respondent: ADM Pressings Limited

Heard at: Newcastle upon Tyne Hearing Centre
On: 4th – 11th December 2020 & 16th – 19th February 2021

Before: Employment Judge Johnson

Members: Mr G Gallagher
Mr G Baines

Representation:

Claimant: In Person
Respondent: Ms H Hogben of Counsel

RESERVED JUDGMENT

The unanimous decision of the employment tribunal is as follows:

1. The claimant's complaints of unlawful disability discrimination are dismissed upon withdrawal by the claimant.
2. The claimant's complaint of automatic unfair constructive dismissal for raising matters related to health and safety, is dismissed upon withdrawal by the claimant.
3. The claimant's complaint of automatic unfair constructive dismissal for making protected disclosures is not well-founded and is dismissed.
4. The claimant's complaint of unfair constructive dismissal is not well-founded and is dismissed.

REASONS

1. The claimant conducted this hearing himself, as he has conducted entire proceedings. The respondent was represented by Ms Hogben of Counsel. The hearing lasted 10 days and was dealt with in 2 separate hearings. The first was over 6 days from 4th to 11th December 2020 and the second over 4 days from 16th to 19th February 2021. The claimant gave evidence himself and called to give evidence Mr Philip David Bowden and Mrs Michelle Bailey (the claimant's wife). The respondent called 11 witnesses as follows:-

Ms Lynsey Carr
Mr Scott Maddison
Ms Paula Noble
Ms Lauren Crozier
Mr Mark Blake
Mr Wayne Farnham
Mr Sean Maunder
Mr Mark McEwan
Mr Gary Miller
Mr Paul Seago and
Mr John Shields

There was an agreed bundle of documents comprising 3 x A4 ring-binders, containing a total of 1,179 pages of documents. Additional documents were added to the bundle during the course of the hearing. The claimant and all witnesses had prepared formal, typed and signed witness statements. Those statements were taken "as read" by the Tribunal, subject to supplemental questions, questions in cross examination and questions from the Employment Tribunal.

2. The claimant was employed by the respondent as a Quality Assurance Engineer from 4th May 2017. The claimant was promoted to the role of Senior Quality Engineer on 17th September 2018. He resigned on 29th May 2019.
3. By claim form presented on 19th August 2019, the claimant brought the following complaints:-
 - (i) unfair constructive dismissal;
 - (ii) automatic unfair constructive dismissal for raising matters related to health and safety;
 - (ii) automatic unfair dismissal for making protected disclosures;
 - (iv) unlawful disability discrimination.

On the morning of the first day of the final hearing, the claimant formally withdrew his complaints of unlawful disability discrimination. On the fifth day of the hearing (the fourth day of the claimant's evidence) on 10th December 2020, the claimant formally withdrew his complaint that he had been automatically unfairly dismissed for raising matters related to health and safety. The remaining claims are therefore of automatic unfair constructive dismissal for making protected disclosures and ordinary unfair constructive dismissal.

4. The claims brought by the claimant have been extensively case-managed by the Tribunal. There have been 3 case management hearings, firstly before Employment Judge Martin on 11th November 2019, then by Employment Judge Johnson on 24th February 2020 and finally by Employment Judge Sweeney on 7th July 2020. The Tribunal has from the outset acknowledged that the claimant is a litigant in person, bringing proceedings against a company with substantial resources and professional representation from experienced solicitors and counsel. In accordance with the Overriding Objective and particularly to try and ensure that parties are on an equal footing, the Tribunal has gone to considerable lengths to explain to the claimant the meaning of the statutory provisions which are engaged by the claims he has presented. At the first preliminary hearing, the claimant was ordered to provide a formal response to the respondent's request for further and better particulars of his allegations. The claimant attempted to do so, but by the time of the hearing on 24th February 2020, the claimant had still not properly identified the factual allegations which formed the subject matter of his claims. It was agreed at that hearing that the Tribunal would set out the statutory provisions which appeared to be engaged by the claims brought by the claimant, together with a brief explanation as to the meaning of those statutory provisions. Detailed and specific case management orders were then made, compliance with which by the claimant would identify the relevant factual allegations. The Tribunal set out from the Employment Rights Act 1996, Section 94 (the right not to be unfairly dismissed), Section 95 (circumstances in which an employee's dismissed) and Section 98 (general unfair dismissal). The Tribunal then set out Section 103A (unfair dismissal for making protected disclosures), followed by Section 43A (meaning of protected disclosures) and Section 43B (disclosures qualifying for protection) and Section 47B (the right not to be subjected to any detriment on the grounds that the worker has made a protected disclosure). The tribunal then set out a paragraph under the heading "CONSTRUCTIVE UNFAIR DISMISSAL", a brief description of what is meant by that phrase, in the following terms:-

"To succeed in a complaint of unfair constructive dismissal, the claimant must establish:-

- (i) a breach of contract by the employer
- (ii) that the breach is fundamental, or a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract
- (iii) the employee resigns in response to the breach
- (iv) before resigning, the claimant had not acted so as to affirm the contract, notwithstanding the breach.

There is implied in the contract of employment a term that the employer will not without reasonable and proper cause conduct themselves calculated or likely to destroy or seriously damage the relationship of confidence and trust which must exist between employer and employee. The Tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its effect, judged reasonably and sensibly, is such that he employee cannot be expected to put up with it. The conduct of the

parties has to be looked at as a whole and its cumulative impact assessed.

As to the “last straw”, its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is utterly trivial.”

The tribunal then set out under the heading “PROTECTED DISCLOSURES”, the following description:-

The first requirement of a qualifying disclosure is that the worker must disclose information and not merely state an opinion or make an allegation. It is accepted that sometimes the provision of information and the making of an allegation are intertwined. However, the tribunal is urged to exercise caution in the application of a rule which differentiates between the provision of information and the making of an allegation. The difference between “information” and “allegation” is not one that is made by the statute itself. The Tribunal should not be easily seduced into asking whether it is one or the other, when reality and experience suggest that very often information and an allegation are intertwined.

In order for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity which is capable of intending to show one of the matters listed in Section 43B (1) of the Employment Rights Act 1996. Whether an identified statement or disclosure in any particular case does or does not meet that standard, will be a matter for an evaluative judgment by the Employment Tribunal in the light of all the facts of the case. It is a question that is likely to be closely aligned with the other requirement set out in Section 43B (1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the five listed matters. This has both a subjective and an objective element. If the worker subjectively believes that what he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.”

5. Having identified the statutory provisions and provided the claimant with that brief explanation, the Tribunal made orders which were designed to enable the claimant to set out in clear, specific and understandable terms exactly what were the alleged qualifying and protected disclosures made by him and what were the acts or omissions by the respondent which the claimant alleged to be a fundamental breach of his contract of employment. The orders made were as follows:-

- 1.1 By not later than 27th March 2020 the claimant shall send to the respondent (and copy to the Employment Tribunal) further information about his alleged protected disclosures. In respect of each of the three disclosures which the claimant alleges to be qualifying and protected, the claimant must set out with precision and clarity:-
- (i) exactly what was said or written (setting out the precise words used);
 - (ii) to whom it was said or written;
 - (iii) when it was said or written;
 - (iv) where it was said or written;
 - (v) who else was present at the time;
 - (vi) if made or subsequently recorded in writing, a copy should be attached;
 - (vii) which of the statutory provisions in Section 43B of the Employment Rights Act 1996 is said to be engaged by that disclosure and how that disclosure is said to have been made in good faith.
- 1.2 By not later than 27th March 2020 the claimant shall send to the respondent (and copy to the Employment Tribunal) further information about his complaints of unfair constructive dismissal. In respect of each separate alleged breach of his contract of employment, the claimant must set out with precision and clarity:-
- (i) exactly what was said or done or omitted to be said or done;
 - (ii) by whom it was said or done or omitted to be said or done;
 - (iii) when it was said or done or omitted to be said or done;
 - (iv) where it was said or done or omitted to be said or done;
 - (v) who else was present;
 - (vi) if made or subsequently recorded in writing a copy should be attached;
 - (vii) which term of the claimant's contract of employment is said to have been breached by that act or omission (ie a specific term in his written contract or a breach of the implied term of trust and confidence);
 - (viii) if there is an allegation of a "last straw" what was it and how did it contribute towards the claimant's decision to resign?
6. The first of those orders referred to the 3 alleged protected disclosures which the claimant had originally referred to in his claim form ET1. However, in response to the orders made on 24th February 2020, the claimant then prepared a "schedule of protected disclosures" which appears at page 101 – 115 in the bundle. That schedule contains 30 separate alleged protected disclosures, the first of which is dated "April – May 2018" and the last of which is dated 28th May 2019. The document is set out in a spreadsheet format, containing 7 columns, bearing the following headings:-
- (i) General description of disclosure made
 - (ii) Date of disclosure
 - (iii) Verbal or in writing?
 - (iv) Where was it said/written?

- (v) Who was present/witnessed the discussion?
 - (vi) Which part of Section 43B of the Employment Rights Act 1996 is engaged?
 - (vii) Exact details of what was said/written
7. Although the number of alleged protected disclosures had increased ten-fold, the respondent was able to set out in its amended response dated 4th August 2020, its defence to each of those allegations.
8. What the claimant did not do in accordance with the Order made on 24th February 2020, was set out each act or omission by the respondent which the claimant alleged amounted to a fundamental breach of his contract of employment. In his evidence and submissions to the Tribunal, the claimant relied upon various replies and responses he alleged he had received from management at the respondent, following those alleged protected disclosures. On a number of occasions throughout the hearing, the Tribunal had to remind the claimant that he had not been dismissed by the respondent and therefore could not have been automatically unfairly dismissed pursuant to Section 103A of the Employment Rights Act 1996, because he had made a protected disclosure. Because he had resigned and was claiming constructive unfair dismissal, the claimant would have to establish that there had been an act or omission by the respondent which amounted to a fundamental breach of his contract of employment and the imposition of that act or omission was because he had made a protected disclosure. Alternatively, the claimant would simply have to establish that he had been treated by the respondent in a way which amounted to a breach of the implied term of trust and confidence and that he had resigned in response to that fundamental breach of his contract of employment. Whilst acknowledging that the law relating to constructive unfair dismissal for protected disclosures can involve difficult concepts, the Tribunal was satisfied that the claimant fully understood what was expected and indeed required of him in the Orders made on 24th February 2020 and from the frequent directions given to him during the final hearing, especially when he was cross-examining the respondent's witnesses.
9. In his claim form, the claimant had originally alleged various breaches of the Equality Act 2010 relating to unlawful disability discrimination. All of those allegations were withdrawn on the morning of the first day of the hearing. The claimant had alleged that he suffered from kidney stones and that this amounted to a disability as defined in Section 6 of the Equality Act 2010. The claimant had set out complaints of unfavourable treatment because of something arising as a consequence of disability and failure to make reasonable adjustments. The claimant accepted that those complaints were unsustainable and they were dismissed upon withdrawal by the claimant.
10. The claimant had also alleged that he was automatically unfairly constructively dismissed for raising matters relating to health and safety, pursuant to Section 100A of the Employment Rights Act 1996. That complaint was based upon an allegation that the claimant, being an employee where there was no safety representative or safety committee, brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety (Section 100 (1) (c)). In simple terms, the claimant alleged that there was no safety representative

or safety committee or, that if there was one, then he was not aware of that. On the 5th day of the hearing, the respondent produced documentation which showed that the claimant had attended an induction course at which the identity of the respondent's safety officer had been made known to the claimant. The claimant had signed a document at the end of that course to confirm that this information had been imparted to him. Upon receipt of that documentation, the claimant withdrew that particular allegation.

11. The evidence heard by the Tribunal therefore related to the allegations that the claimant had made protected disclosures and that, following those disclosures, the claimant had been subjected to treatment by the respondent which treatment amounted to a breach of the implied term of trust and confidence. Alternatively, regardless of whether or not there had been any protected disclosures, the claimant was treated by the respondent in such a way that amounted to a breach of the implied term of trust and confidence.

The issues

12. In preparation for this hearing, the respondent had prepared a list of issues, comprising 216 paragraphs over 19 pages. The claimant had prepared his own list of issues, comprising 23 paragraphs over 8 pages. Following the withdrawal of the allegations of unlawful disability discrimination and automatic unfair constructive dismissal for raising matters relating to health and safety, the remaining issues to be decided by the Tribunal were identified as follows:-

A Protected disclosures

- (i) Exactly what was said or written by the claimant?
- (ii) Did what was said or written by the claimant contain "information"?
- (iii) If so, did that information tend to show one of those matters in Section 43B (1) – if so which one?
- (iv) Was the disclosure made in good faith?
- (v) What was the respondent's behaviour towards the claimant following the making of any protected disclosure?
- (vi) Was that treatment because the claimant had made a protected disclosure?
- (vii) Did the claimant resign because of that behaviour?

B Constructive unfair dismissal

- (i) What was the respondent's behaviour towards the claimant, about which the claimant now complains?
- (ii) Was that behaviour calculated or likely to destroy the mutual relationship of trust and confidence between the claimant and the respondent?
- (iii) Did the claimant resign in response to that behaviour?
- (iv) If there was a "last straw", what was it and how did it contribute towards the claimant's decision to resign?
- (v) In respect of any alleged breach of contract, did the claimant accept the breach and affirm the contract by continuing to work thereafter?

13. The subject matter of what the claimant alleges to have been protected disclosures, may be categorised as follows:-
- (i) a difference in the specification of steel used by the respondent in manufacturing parts for Caterpillar Trucks;
 - (ii) the use of allegedly out of date adhesive in manufacturing parts for Jaguar Land Rover and Aston Martin;
 - (iii) the process used for welding fenders on Jaguar Land Rover vehicles.

The claimant alleges there were detailed drawings and specifications from those customers contained in the contract documentation between those customers and the respondent. The claimant alleged that there could be no departure or variance from those contractual specifications without prior authority in the form of "concessions", which involved internal documentation as part of the respondent's procedures and prior authority from the customer. The claimant's case is that on a number of occasions, he disclosed to the respondent information which showed that a different grade of steel was being used, or that out of date adhesive was being used or that the wrong welding procedure was being followed, all of which involved a departure from the respondent's contractual obligations to observe the specifications and drawings contained in the contracts with the customer. The claimant alleges that following those disclosures, the respondent refused to inform the customer and failed to follow its own internal procedures involving documentation, all of which involved a breach of a contractual obligation which was likely to expose the customer to a health and safety risk.

The respondent's case is that on each of the occasions when the claimant alleges he made a qualifying disclosure, no "information" was disclosed with sufficient specific factual content to amount to a qualifying disclosure. Furthermore, there was no breach of any contractual obligation and no exposure to a risk of health or safety and that no reasonable person would conclude that there was any such breach or exposure to risk.

14. The claimant's allegations of behaviour which amounted to a breach of the implied term of trust and confidence (both because he had made protected disclosures and/or generally) were that he was prevented from contacting the respondent's customers to either report matters to them, discuss matters with them or obtain authority to vary the contractual specifications and that his position as the quality control engineer or senior quality control engineer was thereby undermined to such an extent that he could not continue in that role. The claimant also alleges that he was spoken to in an inappropriate manner following his disclosures and that documents were dishonestly or fraudulently altered to protect the respondent's position. The claimant finally alleged that he was genuinely concerned that he may be made personally liable in criminal or civil court proceedings, should anyone be injured as a result of the respondent's failure to follow the contractual manufacturing specification and refusal to allow him to inform the customer.
15. Of the 30 alleged protected disclosures, 13 were allegedly made verbally to the claimant's colleagues. In each case, those colleagues disputed the claimant's version of what he had actually said. The Tribunal explained to the claimant that

in such circumstances, the Tribunal would consider not just the number of witnesses but the quality of the evidence given by those witnesses and in particular, whether anybody's version was supported by any documents which had been created at the time concerning the disputed conversation. That assessment would of course include any explanation as to why there were no documents which had been created at the time. Where there were no supporting documents and no truly independent witnesses, the Tribunal would be thrown upon the credibility of the claimant or that of the respondent's witnesses. Throughout the hearing, the Tribunal found the claimant to be a less than reliable witness. The claimant frequently accepted that his discussions with his colleagues contained little more than vague references to matters which he now insists amounted to qualifying and protected disclosures. On a number of occasions, the claimant, under cross examination, was forced to accept that he had not disclosed any "information" to his colleagues, or at least none that contained the necessary level of specificity which is now required by the statute. Where there was a direct conflict as to what was exactly said and by whom, the Tribunal preferred the evidence of the respondent's witnesses. The Tribunal found that the respondent's witnesses gave their evidence in a straightforward, matter-of-fact way which described an honest recollection of what had been said or what had happened. Where documents did exist, they tended to support the respondent's witnesses version of events. The claimant's evidence was frequently vague, unsupported by the documents and generally less persuasive. On a number of occasions, the Tribunal attempted to assist the claimant with the direction of his cross-examination of the respondent's witnesses, by inviting him to focus his questions upon the issues which had been identified and agreed at the beginning of the hearing. However, the claimant frequently returned to the same line of questioning in respect of the same matters which the Employment Tribunal had already indicated were less than helpful to his case. By the end of the evidence, the Tribunal concluded that the claimant was convinced that the respondent, through its employees, was behaving improperly and that he no longer wished to be associated with an organisation which conducted itself in that manner. However, that did not explain (nor was any explanation ever given by the claimant for) the claimant's own behaviour in downloading and transferring to his home computer shortly before his resignation, confidential information relating to the respondent's price lists and customer details.

The facts

16. The claimant started work for the respondent as a quality engineer on 4th May 2017. According to his "schedule of protected disclosures" in April – May 2018, he made 5 separate protected disclosures to colleagues about the use of incorrect steel in the manufacture of heavy earthmoving equipment for the respondent's customer, Caterpillar. The claimant noticed that the specification drawings clearly stated that the steel to be used should bear the reference number DCO4, whereas that being used by the respondent showed a reference number DCO6. The part being manufactured was referred to as "Rops and Fops", which are roll-over protection structures and falling object protective structures. The claimant's evidence to the Tribunal was that these were safety requirements from the customer and had to be strictly observed. The claimant's concern was that the DCO6 specification was inferior to the DCO4 specification. The claimant did not

produce any evidence as to the difference between DCO6 and DCO4 and in particular, whether it would make any difference to the safety aspects of the product. The claimant's evidence to the tribunal was that he believed the respondent had formed an agreement with the supplier of the steel (High-Tec Steels) to supply a different steel which "made it easier to draw and form the shaped blank within the press tooling."

17. In terms of what the claimant actually said to Scott Maddison, Lynsey Carr, Lauren Crozier, Paula Noble and Mr R Charlton, the claimant sets out the following:-

"I spoke to commercial/engineering manager Scott Maddison and suggested I'd observed an incorrect material within the customers BOM requirements specific to product already built awaiting JLR (Jaguar Land Rover) buy-off approval, and he would have to apply for SREA approval if he wanted to ship in the first instance. Scott Maddison stated he could obtain a copy of the material certificate that would state the correct material grade via a friend at High-Tech Steels in order to cover for incorrect material being purchased with the wrong grade. I stated it was against the law and didn't feel it was acceptable on behalf of ADM's customers. Quality Manager R Charlton refused to support or escalate the suggestion of fabricated documentation being offered. I said to Lauren Crozier I'd spoken to High-Tech Steels over the telephone. Andy Flatt had suggested that there was an agreement for ADM to accept DCO6 material in place of drawing requirement of DCO4. I suggested he also instructed that they were to supply fake material certificates in place of the required DCO4 material blank. I advised our purchasing manager there was a Rops – Fops statement within the drawing which stated no changes to be made without customer engineering approval. I stated there could be a life-threatening safety issue to consider and that we'd not obtained customer approval to cover bills between 19/7/2016 – 6/7/2018 to date. Lauren Crozier confirmed there was an unofficial agreement in place to her knowledge between ADM and High-Tech Steels. I advised both senior engineers Lloyd Evans and Lauren Crozier we had a potential major safety related issue where ADM were knowingly buying/building product within incorrect DCO6 material composition. Material was against customer drawing requirements and to resource away from High-Tech Steels with immediate effect. I reiterated what A Flatt had recently advised me during our recent telephone call regarding material certification. Both Lauren Crozier and L Evans confirmed material was always incorrect due to pressings issues with DCO4. I requested Paula Noble not to purchase any further M382-2314/5 via High-Tech Steels as a result of not meeting drawing requirements or customer approval. However Paula Noble seemed reluctant to comply with the customer drawing safety requirements and stated its up to Scott Maddison. I spoke to commercial/engineering manager Scott Maddison and suggested ADM were purchasing incorrect material on behalf of their customer which required customer approval as drawings had a Rops and Fops

safety requirement. I advised I had instructed purchase manager to resource away with immediate effect. Scott Maddison simply laughed and dismissed my request as alarmist specific to resourcing away from High-Tech Steels with immediate effect. I reiterated the recent JLR-T5 issues with respect to incorrect material gauge being supplied where JLR had removed a huge amount of business as a result of safety issues etc.”

18. The respondent’s witnesses accepted that the claimant had drawn to their attention the difference between the specification number on the steel which had been supplied by High-Tech Steels and that which appeared on the specification drawing. The respondent’s witnesses denied that the claimant had ever mentioned that this was a safety issue. The respondent’s evidence was that there was in fact no difference between those two particular grades of steel insofar as it related to the performance of the steel in the construction of the relevant parts. The Tribunal found that the claimant had mentioned to his colleagues that there was a difference between the specification numbers and that he genuinely believed that the customers permission should be obtained for the alternative specification to be used. However, the Tribunal was not satisfied that the claimant had informed any of his colleagues that he considered this to be a safety issue. The Tribunal accepted the claimant’s evidence that the difference in the specification number did amount to a technical breach of a legal obligation, namely that the respondent should supply to its customer steel bearing the serial number set out in the specification drawing. Informing the respondent that parts were being manufactured for the customer using steel with a different serial number was information which tended to show a breach of a legal obligation.
19. However, the claimant has not set out any behaviour towards him by the respondent which amounted to any kind of detriment because he had made those protected disclosures. The claimant made reference to Paula Noble telling him that he should “mind his own f***ing business” and that his query about the specification around the steel would involve the respondent having to check hundreds of computer entries and spare parts. The claimant continued to work for the respondent without any complaint relating to the difference in the serial numbers and/or specification of the steel. Indeed, the claimant accepted a promotion in September 2018 to the position of senior quality engineer, with the appropriate increase in responsibility and salary. The next alleged protected disclosure did not take place until April 2019. If there had been any behaviour towards the claimant which he could not reasonably have been expected to put up with, it was accepted by the claimant, because he had accepted the promotion and continued to work without complaint for a further 9 months following the last alleged disclosure in July 2018. By so doing, the claimant had accepted any such breach and affirmed the contract of employment.
20. The next alleged disclosures relate to the manner in which welding was undertaken to effect repairs and/or adjustments to fenders being manufactured for Jaguar Land Rover. The claimant had formed the view that the manner in which these welds were being performed was inappropriate and (again) outside or outwith the specification set out in the technical drawings agreed with the customer. The claimant believed that it was necessary to complete paperwork

known as SREA (Supplier Request for Engineering Authorisation). This effectively meant that the customers permission should be sought and obtained before the welding could be carried out in that particular way.

21. Again, the claimant was unable to give any specific dates about when his conversations took place with Gary Miller, Graham Bailey and Sean Maunder. In respect of his alleged disclosure number 6 he simply states "April 2019". The claimant's pleaded case is as follows:-

"I advised Gary Miller that JLR require SREA "Supplier Request for Engineering Authorisation" on numerous occasions within our heated debate. Gary Miller advised me that the MD wouldn't allow the fenders to be scrapped off. He stated I was unable to use the documented system into JLR in order to hide the issues, and to instruct departments to weld/metal finish the fenders, I did as instructed, but refused to confirm OK to ship. Regardless of advising Gary Miller of potential safety issues, ADM proceeded to ship regardless of the customer safety/requirements."

22. On 17th May the claimant alleges that he said to Graham Bailey and Sean Maunder:-

"I reminded my manager that I wasn't happy about being forced into welding products and the safety related issues that could potentially occur following this instruction. I also reminded him that I had requested to step down as a result of these safety issues and other related facts."

23. The Tribunal found that the claimant had not disclosed any "information" in respect of this matter. The claimant had simply expressed an opinion that he did not think the manner of undertaking the welding was appropriate and that an SREA could be obtained. The respondent's witnesses evidence was that the manner of welding had been drawn to their attention by the claimant, who had expressed his belief that an SREA should be obtained. The respondent's witnesses disagreed. That effectively was the end of the matter. The claimant has not described any behaviour towards him by the respondent was in any way related to this alleged disclosure. The claimant has simply expressed his displeasure at the respondent's failure or refusal to recognise or accept his personal view that an SREA should be obtained. The claimant had simply not disclosed any information to the respondent which could amount to a qualifying and protected disclosure. The claimant had not been subjected to any detrimental treatment by the respondent because he had made any such protected disclosures, or which behaviour could properly be categorised as such that the claimant could not be expected to put up with it.
24. The next set of alleged disclosures took place between 14th May 2019 and 28th May 2019. They all relate to adhesive being used by the respondent in the manufacture of bonnets to be fitted to Aston Martin vehicles which were to be used for crash-testing purposes. The claimant alleged that the adhesive being

used or to be used in the manufacture of those bonnets was passed its “use by” date. The claimant evidence was that using such adhesive was again a breach of the specifications on the technical drawings supplied by Aston Martin and therefore a breach of the respondent’s contractual obligation towards Aston Martin. The claimant’s evidence to the Tribunal was that he genuinely believed that the use of out of date adhesive was wrong and that the structural integrity of the bonnet would be compromised and that this would represent a serious risk to the health and safety of anyone using or in contact with such vehicles.

25. Having been specifically ordered to set out details of his alleged protected disclosures “with precision and clarity”, the claimant set out in his “schedule of protected disclosures” on pages 105 – 110 the following:-

- (i) 14th May 2019, verbal to M Blake. “I observed 3 metre structural roller hem adhesive being months out of date during build of AML bonnets. I advised M Blake whom was there at the time of the safety aspects of utilising out of date structural adhesive as the two-part resin may not mix and activate correctly. I instructed M Blake himself and engineering would be required to contact the customer asap and obtain approval to ship any product with out of date adhesive being utilised and to complete an internal concession document to record this information.”
- (ii) 15th May 2019, verbal to G Bailey, S Maddison, W Farnham and P Seago. “I spoke to commercial – engineering manager Scott Maddison and reappointed engineering manager Wayne Farnham specific to out of date structural adhesive being built into products relating to Aston Martin bonnets PT1 project work. I suggested that ADM wouldn’t be able to ship products because of this serious undertaking without customer approval in the first instance. I stated that people’s lives could potentially be at risk if product later failed.”
- (iii) 17th May 2019, verbal to G Bailey and S Maunder. “I stated that there was a major safety related issue to potentially consider should the recent Aston Martin bonnets being shipped with out of date structural adhesive being utilised and no testing had been conducted or SREA requests made into customers. I also reminded him I had requested to step down as a result of the safety issues and other related facts.”
- (iv) 17th May 2019, written – verbal – M Nezami, A Martin, S Maunder, M Blake and G Miller. “I instructed the team of the potential safety failure when utilising out of date 3M structural adhesive.”
- (v) e-mail chain 14th May 2019 – 22nd May 2019 to M Blake, J Oliver, J Barber, S Maddison, W Farnham, M Nezami and S Maunder. “Requesting the team provide a counter measure before building Aston Martin product to be built 17th May 2019. I also e-mailed QM on 22nd May 2019 advising I’d receive no response via engineering to confirm SREA (Supplier Request for Engineering Authorisation) approval required (disclosure to the customer specific to out of date adhesive) as product had been shipped.

- (vi) e-mail 22nd May 2019 and attachments 14th May 2019 to 15th May 2019 sent to M Blake, J Oliver, J Barber, S Maddison, W Farnham, M Nezami, S Maunder, M Thomson, S Bolton and M McEwan. "E-mail to M Blake to complete a concession specific to Aston Martin. E-mail to the team regarding concession to the senior department. Requirement to consider an action plan if rejected."
- (vii) Attachments to e-mails 14th May 2019 – 16th May 2019 – 22nd May 2019. E-mails to P Noble, L Crozier, C Davidson, A Martin, M Thomson. "Above information including e-mail to planning department – P Noble, L Crozier and C Davidson identifying where adhesive is utilised into what products? Later e-mail sent via P Noble asking if expiry date 5/5-19 can still be used due to replacement **lead** time."
- (viii) Attachments to e-mails 14th May 2019 – 16th May 2019 and 22nd May 2019. "Copy of e-mails to QM – SM and my previous statement of firming the official line is no we can't utilise the adhesive if out of date to QM SM with an attached listing of all products which use the 3M adhesive. Clearly instructing the business not to use."
- (ix) Attachments to e-mails 14th May 2019 to 15th May 2019 and 22nd May 2019. "Identification where the 3M adhesive is utilised into assemble products."
- (x) 15th May 2019 by e-mail to Doctor Antonio Pagliuca. "GB enquires if out of date 3M structural adhesive is still effective once past the advised use by date? 3M failed to respond to my e-mail."
- (xi) 16th May 2019 e-mail chain from production manager A Martin to P Noble, S Maddison, J Oliver, M Thomson, G Bailey, G Miller. "Production Manager advising he was currently building plan to build at the weekend does this mean I have to stop building? Please advise. GB e-mailed stating the official line via 3M is no we can't utilise the adhesive if out of date 16-5-2019 within the e-mail body. Production Director - GM is also copied into the e-mail chain by a production manager AM when querying if he should build product with out of date adhesive. My disclosure was on a continuing basis due to a failure from the business listen. No concession was visible/issued at the point specific to any product relating to JCB/JLR."
- (xii) 16th May 2019, verbal to M Avery. "I requested to step down from my senior role due to safety related issues."
- (xiii) 16th May 2019, verbal to G Miller. "I requested to step down from my senior role due to safety related issues."
- (xiv) 21st May 2019 – e-mail from J Oliver to Doctor Antonio Pagliuca. (The claimant accepts that this was not a disclosure by him and therefore cannot have been a protected disclosure by him.)

- (xv) E-mail chain multiple – 14th May 2019 to 23rd May 2019 from G Bailey to P Noble and S Maunder. “E-mail advising the response via 3M 22nd May 2019 and copy correspondence between ADM and 3M including information querying why MP and L had utilised out of date adhesive when previously placed into quarantine and later released via PN without any approval via QA.
- (xvi) 23rd May 2019, verbal/e-mail to S Maunder. “I asked my manager if he’d seen a concession relating to the issue of out of date structural adhesive specific to JLR – JCB products. I stated I felt there was a major safety issue developing that could affect people’s lives. SM responded he hadn’t seen anything to date. I also e-mailed SM to confirm this in writing as I felt there was a miscarriage of justice occurring through the use of dangerous structural adhesive which was being concealed. My manager e-mailed GB stating no to signing a concession.”
- (xvii) 23rd May 2019, verbal to M McEwan. “Advised senior manager that ADM were acting with complete disregard specific to safety related issues with out of date 3M structural adhesive. I stated I was going to whistle blow due to the undermining of my position and the deceit of senior management with respect of knowingly shipping product into JLR – AML and JCB when they all knew the structural adhesive was out of its use by date.”
- (xviii) 24th May 2019, verbal to S Maunder. “Advised SM of issues relating to the use of out of date adhesive and not being guaranteed via 3M. Requirement to submit SREA into customers was paramount in order to allow the customer to complete engineering analysis based on rejecting or accepting their products with out of date adhesive.”
- (xix) 25th May 2019, writing e-mail to S Maunder. “GB advised SM the recent concession supplied via SCM wasn’t confirming if we were to obtain customer concession approval. GM to SM confirming – I’m not to submit any further onward concession specific to the out of date 3M adhesive requesting approval. SM responded – that is the business decision, correct.
- (xx) 27th May 2019, phone call from GB to GM (Miller). “Contacted GM to discuss the issues relating to disclosing issues to customers specific to out of date structural adhesive due to an ongoing failure where GB felt a blind eye was being turned. GB advising of contact in the customers as there was a potential serious issue and GM was aware as he had signed the concessions etc. I even stated he would possibly cause people to end up in prison as a result of these safety issues.”
- (xxi) 28th May 2019, verbal between GB and GM. “Discussion with Gary Miller about the structural adhesive and the need to inform the customer because the product being a safety issue which had been shipped into their location. I advised I was resigning for constructive dismissal

(undermining the authority of my role) failing to protect the customer and placing public safety at potential safety risk.

(xxii) 28th May 2019 – meeting between GB and GM/PS. “Discussion with GM and PS. I advised again about the issues at hand and the need to inform the customers about the adhesive issues. PS didn’t want to inform their customers as he felt there would be a very difficult discussion should this happen. I requested to speak to the owner. However he refused this option. I was requested to take time to think about everything.”

26. Those details provided by the claimant in his schedule of protected disclosures do not provide the level of detail and clarity which he was ordered to provide. In particular, the claimant does not set out precisely which words were used on each occasion. Where alleged disclosures were made in writing, none of them referred to the use of out of date adhesive as being a safety related issue. An example is the e-mail dated 23rd May 2019 which appears at page 775 in the bundle. In his schedule the claimant states, “I stated I felt there was a major safety issue developing that could affect people’s lives. I also e-mailed SM to confirm this in writing as I felt there was a miscarriage of justice occurring for the use of dangerous structural adhesive which was being concealed.” The e-mail itself simply states, “Have you signed a concession ref the below?” The “below” refers to an e-mail from the previous day addressed to Paula Noble, in which the claimant states, “I’m assuming you have obtained authorisation to utilise adhesive dated 5/5/2019, we have a stock adjustment in our quarantine area where adhesive has been moved back into production and I just need to ensure you have adjusted as adhesive out of quarantine specific to products within your below e-mail?” Clearly, there is no mention in the e-mail of anything to do with health and safety. No mention is made of any potential risk to any particular person. The claimant was unable to give an explanation to the Tribunal as to why e-mails sent shortly after he had made allegedly verbal disclosures to his colleagues, did not confirm what he now says was included in those verbal discussions. The claimant accepted that, as a quality assurance manager, he was well-versed in the procedural aspects of his role. The claimant clearly had an in-depth knowledge of the technical drawings and specifications and the requirements to issue an SREA if there was to be any variation from those drawings or specifications. The claimant was unable to provide any meaningful explanation as to why his contemporaneous e-mails make no mention of those matters he now says were disclosed to his colleagues. The Tribunal found that, had the claimant specifically said that he considered these to be matters relating to health and safety, then he would have specifically referred to those in his e-mails.
27. The respondent’s witnesses evidence to the Tribunal was that, whilst the 3M adhesive did have a “use by” date on its packaging, this did not mean that the adhesive could not be used beyond that date. The respondent’s witnesses evidence was that there was a well-recognised “grace period” of one month after that “use by” date, during which the adhesive could be used. The claimant denied that there was any such grace period and further denied that he was aware of any such grace period at the relevant time. However, the claimant’s own evidence was contradicted by what he said in e-mails to his colleagues. An example

appears at page 709 in an e-mail from the claimant to Mark Blake which states as follows:-

I have checked use by dates reference material currently held within our storage area. Material held within first use and second use is up to 4 months out of date, after grace period of 1 month from use by date. Material third use and fourth use is approaching one month out of date, after grace period of one month from use by date. Could you urgently advise me on counter measure relating to out of date bonded adhesive prior our next planned build on 17th May 2019.”

That clearly shows that the claimant was aware of and understood the “grace period” of one month. At page 762 is an e-mail from the claimant to Paula Noble stating as follows, “I’m assuming you have obtained authorisation to utilise adhesive dated 5th May 2019, we have a stock adjustment in our quarantine area where adhesive has been moved back into production and I just need to ensure you have adjusted adhesive out of quarantine specific to product within your below e-mail? Have you been supplied with a concession, many thanks.” Later that day the claimant sent an e-mail to Antonio Pagliuca at 3M (page 709) in which the claimant states, “Please elaborate and specify on the process of material relief specific to out of date adhesive material, I need to fully understand your process/requirements in order to validate any out of date material, many thanks.” Mr Pagliuca replied stating, “3M would actually prefer not to do relief of its structural adhesive products. These are often used to bond safety-critical components and as such would need to be used within their shelf life to maintain performance. However, under exceptional circumstances with products just outside (within one month) of the shelf life, 3M can perform a series of performance tests, the results of which would then be compared to normal expected values and if in range the shelf life would be extended by one month from the date of the retest. 3M would not offer a guarantee of performance – just the date that suggests performance appears within the normal range.”

28. The Tribunal found there was a general practice within the respondent of continuing to use adhesive which was within one month of its “use by” date. That was known as the “grace period”. The claimant was at all times aware of that grace period. The claimant did not challenge the existence of the grace period, nor did he ever allege that using adhesive during the grace period amounted to a risk to the health and safety of those using vehicles with components which had been glued with out of date adhesive.
29. Evidence was given by some of the respondent’s witnesses to the effect that the claimant resented the attitude of some of the respondent’s younger, graduate employees. The claimant considered that graduates acted as if they had more knowledge than the claimant, whereas the claimant believed their lack of experience meant that they were of less value to the respondent than he was. Nevertheless, the respondent’s witnesses described the claimant as a capable and competent quality assurance manager, whose services they wished to retain. Those witnesses could not understand why the claimant had resigned. None would accept that the claimant’s position had in any way been undermined. The respondent’s witnesses perception was that the claimant had formed the view that

an SREA should have been obtained in respect of the difference in the grade of steel for the Caterpillar trucks, for the manner in which the welding was performed on the Jaguar Land Rover fenders and for the use of adhesive that was beyond its use by date on the packaging. The respondent's witnesses described how, when the claimant raised concerns about the lack of appropriate documentation, they attempted to discuss the matter with him and to satisfy him that, in those circumstances, there was no requirement for an SREA and that his concerns about those matters were unfounded.

30. Having described what he considers to be qualifying and protected disclosures, the claimant was asked to describe the treatment to which he had been subjected after those disclosures were made. The claimant was asked to describe the connection between the making of the disclosures and the way he had subsequently been treated. The claimant was also asked to describe how that treatment amounted to behaviour by the respondent calculated or likely to destroy the mutual relationship of trust and confidence which must exist between employer and employee. The claimant's response was that the use of the wrong grade of steel, the improper welding of the fenders and the use of out of date adhesive each individually and collectively amounted to a serious risk to the health and safety of anybody subsequently using those vehicles. The claimant sought to persuade the Tribunal that he genuinely believed he could be made personally liable in civil or criminal proceedings, should an accident occur which was caused by any of those three matters. It was put to the claimant that he could never have been made personally liable in any of those circumstances, particularly if as he now says he had specifically drawn his employer's attention to those matters. The Tribunal was not satisfied that the claimant genuinely believed that he could be made personally liable. The Tribunal was satisfied that no reasonable person would conclude that the claimant could be made personally liable in those circumstances.
31. At paragraph 32 of his witness statement, the claimant describes an incident which he alleges took place on Friday 24th May 2019. The claimant states, "Gary Miller walked from his office with another manager from the west side paint plant and this manager started to engage in a non-related bizarre conversation in order to distract me, whilst I observed Gary Miller from the corner of my right eye hand Sean Maunder what I believed to be a back-dated internal concession request document from behind his back. The west side manager stopped talking once the document had been exchanged from Gary to Sean. Sean Maunder miraculously at this time stated he had just found the second adhesive concession document within his paper tray." What the claimant told the Tribunal was that Mr Miller and Mr Maunder had forged or fabricated or improperly altered this concession sheet and were going through this "bizarre" procedure to try and persuade the claimant that the appropriate documentation had been completed but had been misplaced. There was no meaningful explanation as to why Mr Miller and/or Mr Maunder should behave in this way. All they had to do was to produce the document and confirm that it had indeed been misplaced. Both Mr Miller and Mr Maunder denied that this "bizarre" process had ever taken place. The Tribunal preferred the evidence of Mr Miller and Mr Maunder in this regard and found that there had been no deliberate attempt to forge or fabricate any paperwork or to deliberately conceal it from the claimant.

32. The claimant decided on Friday 24th May that he intended to resign. He says at the end of paragraph 32 in his statement:-

“My role was deliberately undermined in terms of unwanted management bullying, customers SREA requirements. I feel I have proved up to this point in time I was attempting to do my job, customer/safety being paramount, encouraging the business to act accordingly and protect the ongoing relationship between ADM and their customers so as not to damage it.”

33. That weekend was in fact the spring bank holiday weekend. The claimant decided to go into work on Saturday 25th May and at 8:41am (page 805) he sent the following e-mail to Mr Maunder:-

“This is the concession relating to adhesive used within built product and was expired – out of shelf life from 5th May 2019. We haven’t ticked customer approval required, please confirm if we are utilising the concession for internal use only, or customer concession required in addition. I required a response today, or I will be duty-bound to contact our customers. Many thanks.”

Mr Maunder replied 5 minutes later, stating:-

“The business has determined that this concession is for internal use. I would like to know when the replacement adhesive is due in please.”

In his witness statement at paragraph 34, the claimant says, “I felt disgusted about possibly compromising innocent people’s product safety. I couldn’t have this on my conscience if a member of the public was to suffer as a consequence. I tried to sleep however my heart was racing at night. I considered my options on the next day (Sunday) and on knowing the product had been shipped I felt the senior management had disregarded potential safety related issues with supplied products into their customers location. On 27th May (Sunday) I contacted Gary Miller via my landline. I had previously prepared information to discuss during this call. I advised I was going to resign my employment due to health and safety related reasons and preventing the customers from being informed etc. I advised Gary Miller it was due to the neglect of customer product integrity and I felt the senior managers were knowingly aware of these issues. I advised I was making a public disclosure and was also informing the customers in order to prevent the product being further distributed into circulation. I mentioned about all issues and that their incompetence was going to get us taken to court via their customers and in big trouble.”

34. On 28th May, the claimant attended work and had a meeting with Gary Miller, at which the claimant stated he was leaving because of the effects everything was having on his health and the undermining of his position. He said he didn’t want to be associated with products failing where loss of life could be the potential outcome. The claimant began to clear his desk. Mr Miller asked the claimant to accompany him to see the managing director Mr Paul Seago. The claimant

reluctantly agreed and asked Mr Seago to contact the owner of the business so that the claimant could speak to her directly. That was refused. The claimant says "I left this meeting feeling very unwell at this time. I felt a lack of trust and confidence in the business senior management." On the morning of Tuesday 29th May, the claimant contacted Mr Miller and confirmed to him that he was "still resigning, due to their bullying regime, immensely undermining my position and integrity."

35. The claimant's letter of resignation appears at page 810 in the bundle and is dated 29th May 2019. The relevant parts of the letter state as follows:-

"Please accept this letter as notice of my resignation from the position of senior quality engineer at ADM Pressings (constructive dismissal). I have enjoyed being a part of the team and am thankful for the opportunities you have given me during my time here. However unfortunately I have no choice but to leave the business due to failings at the senior level of the business. I am a senior quality engineer being restricted from contacting our customers JLR/AML and JCB. My duties require I alert customers where a potential issue may arise with respect to their product. 3M structural adhesive is an important product being applied to large volumes of ADM assemblies and as such we must make correct provision to advise our customers of potential risk in order to allow our customer to make a quantified decision whether they are happy to accept the build of assemblies that could cause ADM senior management team to have denied me the right to execute my role with respect to alerting our customer and even on occasion deliberately not responded to escalated e-mails requesting acknowledgement to inform our customer where mixed date adhesives had been utilised. I believe ADM could have seriously compromised product assemblies within PT1 – OEM build supplied into customer Aston Martin. ADM have proceeded to ship product regardless of this "risk" possibly damaging our customers critical test data they would obtain under crash impact conditions, once assemblies are received and fitted to vehicles at Aston Martin. I later witnessed an appalling misuse of internal concession documentation backdated to 16th May 2019. It is my duty to protect the business, customer and public. ADM Pressings have left me no choice but to resign under grounds of constructive dismissal failing to allow me to perform my role and best serve its customers."

36. On 30th and 31st May 2019, a number of the respondent's customers contacted the respondent to state that they had received information from a former employee (the claimant) suggesting that the respondent had deviated from standard agreed manufacturing specifications.
37. Following the claimant's departure, his computer records were forensically examined, which examination showed that on Saturday 25th May the claimant had entered the respondent's premises, copied a number of documents onto a USB drive and sent a number of documents to his personal e-mail address. That was a clear breach of the claimant's contract of employment, as those documents

included matters relating to concessions, timings, pricings and customer lists. When challenged about this in cross-examination, the claimant stated that the documents had been sent to his home because he frequently worked from home and that these documents were required for him to do so. That was clearly untrue. By the time the documents were sent to the claimant's home e-mail address, he had already decided to resign. The Tribunal accepted that the documents that the claimant sent to his home e-mail address were in any event not necessary for him to have undertaken his role as a senior quality engineer.

38. Subsequent investigations carried out by the respondent following concerns expressed by their customers as a result of the claimant's disclosures, showed that the grade of metal used on the Caterpillar product was equivalent to that specified on the drawings and that, whilst there had been a technical departure from specification, Caterpillar were not concerned. Aston Martin accepted the respondent's explanation about the adhesive being used in the "grace period". JCB were also satisfied with the respondent's explanation about the performance of the 3M adhesive following tests which were carried out by 3M. Mr Seago's evidence to the Tribunal was that the claimant had not addressed these problems in the right way. At no stage did the claimant raise a formal grievance about his issues, nor about the way he was allegedly treated by the respondent. At no stage did the claimant seek to utilise the respondent's whistle blowing policy, which is clearly set out in the company handbook. The Tribunal did not accept the claimant's explanation that he was unaware of these procedures because he had never received a copy of the handbook. The handbook was readily available on the respondent's intranet. The claimant was clearly well acquainted with the respondent's IT systems, particularly in an industry which is so well regulated and in which technical specifications and drawings are fully computerised.
39. Following the claimant's departure and the concerns raised by its customers following the claimant's disclosures, the respondent appointed Mr John Shields (Chief Operating Officer of the GCH Corporation) to undertake an independent investigation into those matters which had been reported by the claimant to the respondent's customers. Mr Shields concluded that tests on the adhesive showed that it all performed within its expected parameters. Aston Martin and JCB had confirmed that, in their opinion, there was no safety risk and also that Jaguar Land Rover had not raised any safety concerns. Mr Shields concluded that there was no need to request SREA approval in respect of any of the matters raised by the claimant. Mr Shields concluded that the claimant's concerns had arisen from a lack of understanding in relation to the concession process and that management was entitled to reach a decision that the adhesive could be utilised within the one-month grace period. Mr Shields concluded that, had the claimant checked properly, he would have accepted that the difference between DCO4 and DCO6 steel was insignificant.
40. The claimant presented his claim form to the employment tribunal on 17th September 2019, having entered into early conciliation via ACAS on 4th July 2019.

The law

41. The remaining claims by the claimant are raised under the provisions of the Employment Rights Act 1996.

Unfair constructive dismissal

Section 94 The right

- (1) An employee has the right not to be unfairly dismissed by his employer.
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 95 Circumstances in which an employee is dismissed

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)--
 - (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
 - (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
- (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if--
 - (a) the employer gives notice to the employee to terminate his contract of employment, and
 - (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

Section 98 General

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--
 - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

- (2) A reason falls within this subsection if it--
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c) is that the employee was redundant, or
 - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (3) In subsection (2)(a)--
- (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
 - (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.

Protected disclosures

Section 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.

Section 43B Disclosures qualifying for protection

- (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, 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.
- (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
- (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
- (4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
- (5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

Section 47B Protected Disclosures

- (1) A worker has the right not 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 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 other worker's employment, or
 - (b) by an agent of W's employer with the employer's authority, 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 purpose 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

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subject W to detriment if –

- (a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
- (b) it is reasonable for the worker or agent to rely on the statement

But this does not prevent the employer from being liable by reason of subsection (1B)

(2) This section does not apply where –

- (a) the worker is an employee, and
- (b) the detriment in question amounts to a dismissal (within the meaning of Part X)

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

Section 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.

42. Turning first to the claims related to protected disclosures. Any alleged disclosure must be a "qualifying disclosure", as defined in Section 43B. A qualifying disclosure is a disclosure of information which, in the reasonable belief of the disclosing employee, is made in the public interest and tends to show one or more of the six categories set out in Section 43B. The claimant alleges that his disclosures to the respondent engage sub-paragraphs (b) and (d), namely that the respondent has failed to comply with the legal obligation and that as a result the health and safety of individuals is being or is likely to be endangered.

43. In **Geduld v Cavendish Munroe Professional Risks Management Limited [2010 ICR 235]** the Employment Appeal Tribunal considered what was required for a disclosure of "information". The EAT held that there was a distinction between communicating "information" (which is protected) and making an

“allegation” which does not convey facts (and which is not protected). The example given in that case related to the state of a hospital. It was held that to say, “Health and safety requirements are not being complied with,” was an unprotected allegation. To say, “The wards of the hospital have not been cleaned for two weeks and sharps were left lying around” is conveying “information” and was therefore protected. In **Kilraine v London Borough of Wandsworth [2016 IRLR 422]** the President of the EAT urged that tribunals should be careful in applying the principle of “information” versus “allegations”, as those two concepts are often tied together. That approach was subsequently approved by the Court of Appeal. The concept of “information” can cover statements which might be categorised as “allegations”. The Court of Appeal pointed out that there is no rigid dichotomy between the two concepts and one should not be introduced into the consideration of Section 43B (1). For a statement to be a qualifying disclosure, there must be sufficient factual content and specificity to show that one of the matters listed in Section 43B (1) is engaged. The context of the statement is relevant to the enquiry as to whether it is sufficient to be a qualifying disclosure. In **Blackbay Ventures v Gahir [2014 IRLR 416]** the EAT suggested the following guidance to be used by the employment tribunals in such cases:-

- (i) separately identify each alleged disclosure by reference to date in content;
- (ii) identify each alleged failure to comply with a legal obligation or health and safety matter (as the case maybe);
- (iii) identify the basis on which it is alleged each disclosure is qualifying and protected;
- (iv) identify the source of the legal obligation relied upon by reference to statute or regulations (**except** in obvious cases).

Without undertaking that exercise, it will be difficult for the Tribunal to know whether a particular disclosure is said to have resulted in a particular detriment, nor the relevant date of the alleged detriment. The Tribunal should then go on to consider whether the claimant had the reasonable belief required under Section 43B (1). The enquiry should then move to whether the disclosure was made in the public interest. The Tribunal must identify the alleged detriment and the date thereof as part of its findings.

44. In **Chesterton Global Limited v Numohamed [2015 IRLR614]** the EAT considered the “public interest” requirement. It was made clear that the disclosure need not be in the public interest per se – rather the question was whether the disclosing employee had a reasonable belief the disclosure was in the public interest. The EAT specifically observed that the statutory objective of the public interest requirement was to prevent a worker from relying upon a complaint of a breach of his own contract of employment as a protected disclosure, where that breach involves no wider public interest implications.
45. The Court of Appeal considered the public interest requirement on further appeal in **Chesterton Global v Numohamed**. The fact that a disclosure which is in the private interest of a worker making it does not become in the public interest merely because it serves the private interests of a number of other workers as well. The test is not one of merely numerical analysis, but depends upon the character of the interests served. Factors will include the numbers whose

interests are served by the disclosure, the nature of the interest affected and its importance, whether the matter complained of was deliberate and the identity of the alleged wrongdoer.

46. There is no absolute requirement that the legal obligation in fact exists – the objective reasonableness of the employee’s belief is what is in issue. What amounts to “reasonable belief” is objective but must be considered taking into account the personal circumstances of the person making the disclosure. The question is whether it was reasonable for him to believe it. Where an employee relies on multiple alleged protected disclosures, reasonable belief must be made out in relation to each of the disclosures and a general belief in the broad gist of the content of the disclosures is not enough.
47. If the Tribunal is satisfied that the employee has made a qualifying and protected disclosure, it must then go on to consider whether the making of that disclosure was the principle reason why the employee was dismissed. Alternatively, it must consider whether the making of the disclosures had a material influence on the imposition of a detriment other than dismissal.
48. Turning now to the complaint of unfair constructive dismissal, the claimant must establish the following elements:-
 - (i) a repudiatory breach by the employer, which may come from a series of acts;
 - (ii) the employee must elect to accept that breach and treat the contract as at an end;
 - (iii) the employee must resign in response to the breach;
 - (iv) the employee must not delay too long, as otherwise he will be regarded as having accepted that breach and waved the same.
49. The alleged breach must be significant and either go the root of the contract or show that the employer no longer intends to be bound by one of more of the essential terms of the contract. That term may be an express term, or an implied term of the contract. It is now trite law that there is implied into every contract of employment, a term that the employer will not without reasonable and proper cause, conduct itself in a manner which is calculated or likely to undermine the relationship of trust and confidence which ought to exist between the employer and employee. It may be difficult to point to a single event which leads to the employee’s resignation. The employee may appoint to a series of breaches of contract or a course of conduct by the employer which, taking cumulatively, amounts to a breach of the implied term of trust and confidence. **[Kaur v Leeds Teaching Hospitals NHS Trust – 2018 EWCA-CIV-978].**
50. Where an employee seeks to rely upon the last straw in a series of incidents, that final straw must contribute something, even if it relatively insignificant to the breach. It must not be utterly trivial and does not have to be of the same character as earlier acts, as long as it not entirely innocuous. The test of whether the employee’s trust and confidence has been undermined is objective.

51. It is accepted in the claimant's case that he was not dismissed by the respondent, but chose to resign. The claimant's case is that he resigned in response to a fundamental breach of his contract of employment. That fundamental breach relates to a breach of the implied term of trust and confidence. The claimant's case is that he brought to his employer's attention matters relating to its manufacturing process which the claimant considered to be proper and which ought to be reported to the respondent's customers. The claimant alleges that he was prevented from reporting those matters to the respondent's customers. The claimant complained that his position as senior quality control manager was seriously undermined to the extent that he could no longer be expected to perform that role.
52. The claimant further alleges that he was automatically unfairly dismissed **contrary** to the provisions of **Section 103A of the Employment Rights Act 1996**, in that the principle reason for his dismissal was because he had made qualifying and protected disclosures. Because the claimant was not actually dismissed but chose to resign, the claimant would have to establish that following the making of qualifying and protected disclosures, his treatment at the hands of the respondent because he had made those disclosures, itself amounted to a fundamental breach of the implied term of trust and confidence. **Section 95 (1) (c)** refers to the employee terminating the contract in circumstances in which he is entitled to terminate it without notice, **by reason of the employer's conduct**.
53. With regard to the alleged disclosures in April – July 2018, the Tribunal found that there had not been a disclosure of information with sufficient factual content and specificity. The claimant had brought to his employer's attention a difference in the stock number on the steel obtained from the respondent's supplier. There was no evidence produced by the claimant to show that the difference in stock number meant there was a difference in the grade of steel. The claimant did not take any steps to investigate that. The claimant's position was simply that, because the technical drawings had a specific stock number on them, then any departure from that meant that the claimant should obtain an SREA and prior authority from the customer. The Tribunal was not satisfied that the use of steel with a different stock number amounted to a breach of a legal obligation. No reasonable person would conclude that it amounted to a breach of a legal obligation. All the claimant had was a suspicion that it might be, in circumstances where he could easily have checked. Furthermore, the claimant has not alleged any treatment towards him by the respondent as a result of him making those alleged disclosures. Certainly, there was no treatment or behaviour towards him which could reasonably be described as such that the claimant could not be expected to put up with it. The claimant could not reasonably allege that his position was undermined by the way the respondent reacted to him notifying him that a different stock number meant a different grade of steel may have been supplied. The claimant did not resign in response to any such treatment. In fact, he accepted a promotion in September 2018 and continued working in 2019. With regard to those alleged disclosures, the Tribunal found that no protected disclosures had been made by the claimant. There was no subsequent treatment towards the claimant which was in any way linked to the making of those alleged disclosures and which could reasonably be described as a fundamental breach of the claimant's contract of employment. Even if there had been, the claimant

accepted any such breach when he accepted the promotion and continued working thereafter.

54 With regard to the alleged disclosures relating to the welding of the fenders, again the Tribunal found that the claimant had not disclosed information with sufficient factual content and specificity which could possibly show that there was a breach of a legal obligation, or that it related to matters of health and safety. Again, the claimant's approach was simply that he believed there should be an SREA in place before the fenders were welded in that manner and further that the customers prior approval was required. Management took the view that an SREA was not required and that the customer's prior approval was not required. The Tribunal found that any belief which the claimant may have had in that regard was not reasonable in all the circumstances. Accordingly, the claimant had not made a qualifying and protected disclosure in respect of the welding of the fenders. Furthermore, once again the claimant had not established any detrimental treatment towards him by the respondent which could in any way be connected to the issues he had raised about the fenders. Management's refusal to accept the claimant's interpretation of the documents to the effect that an SREA was required and/or the customers prior approval, could not fairly or reasonably be described as detrimental treatment. The Tribunal found that no reasonable person would conclude that the claimant's position in that regard had been undermined by the respondent's refusal to accept the claimant's version of events. That refusal could not and did not amount to a breach of the implied term of trust and confidence. There was nothing which could reasonably be described as behaviour which the claimant could not be expected to put up with.

55 The Tribunal addressed the alleged disclosures relating to the out of date adhesive. At first sight, an allegation that out of date adhesive was being used to manufacture bonnets and other components for prestigious customers who have an international reputation, may well be a matter of public interest. However, the claimant would have to genuinely believe that the use of the adhesive amounted to a breach of a legal obligation and/or a threat to health and safety. Even if the belief was genuine, it would have to be reasonable in the circumstances. The Tribunal did not accept the claimant's evidence in this regard. The Tribunal preferred the evidence of the respondent's witnesses, to the effect that the claimant had never raised these issues as being a breach of the legal obligation or a risk to health and safety. The claimant's assertions that he made such verbal representations to a number of colleagues were all denied by those colleagues. None of the claimant's allegations were supported by any contemporaneous documents. Once again, the claimant insisted that a variation in the paperwork meant that respondent's procedures required production of an SREA and/or the prior authority of the customer. The Tribunal found the claimant's insistence on those matters to be a matter of internal procedure. The Tribunal found that the claimant became increasingly irritated and frustrated at the respondent's refusal and/or failure to accept his interpretation of those procedures as meaning that additional documentation was required and/or permission from the customers. The Tribunal was satisfied that the claimant informing the respondent that glue was being used beyond its use by date was information which contained sufficient factual specificity. However, the Tribunal was not satisfied that the claimant

genuinely believed that the use of the adhesive amounted to a breach of a legal obligation or a risk to health and safety. The Tribunal found that no reasonable person would conclude that the use of that adhesive was either of those. The claimant's credibility in this regard was somewhat undermined by his insistence that he was unaware of any "grace period". That assertion was shown to be wrong when the e-mails produced by the claimant himself specifically referred to that grace period. The claimant did not produce any evidence to show that, following on from any disclosures, he had been subjected to any specific detriment by the respondent. The only thing which the claimant didn't like was the respondent's flat refusal to produce additional SREA documentation and/or to contact the customers. The Tribunal did not accept that this amounted to any kind of detrimental treatment. It was certainly not undermining the claimant's position to the extent that any reasonable person would conclude that it was behaviour that the claimant could not be expected to put up with. The claimant's evidence to the Tribunal that he at the time considered that he may be made personally liable in a civil or criminal court for any accident which may happen as a result of the out of date adhesive, was entirely fanciful.

54. The Tribunal found that there had been no qualifying and protected disclosures made by the claimant. The Tribunal found that there had been no detrimental treatment towards the claimant following on from those disclosures. The Tribunal found that there had been no behaviour towards the claimant which could be reasonably described as likely to destroy or seriously damage the relationship of trust and confidence.
55. For those reasons the claimant's complaints of unfair constructive dismissal and automatic unfair constructive dismissal for making protected disclosures are not well-founded and are dismissed.

EMPLOYMENT JUDGE JOHNSON

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 13 April 2021**

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