



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D. Gil  
**Respondent:** Mandarin Oriental Hyde Park Limited

London Central

18 May 2023

**Employment Judge Goodman**

**Representation:**

**Claimant:** James Carmody, solicitor

**Respondent:** Mark Greaves, counsel

## PRELIMINARY HEARING IN PUBLIC RESERVED JUDGMENT

1. The cases numbered 2210628/22 and 2202588/23 are consolidated under rule 34 .
2. The respondent's time to file a response to 2202588/23 is extended under rule 20 to 3 May 2023
3. All the claims are struck out under rule 37 because they have no reasonable prospect of success.

## REASONS

1. This hearing is to decide applications made by the respondent under rule 37 to strike out both claims as having no reasonable prospect of success. Alternatively, the tribunal is invited to order deposits under rule 39 because the claims have little reasonable prospect of success.
2. I was provided by the respondent with a bundle of 172 pages containing the pleadings, their applications, the claimant's resignation letter, the grievance and the outcome to that, and the text of two disclosures. The claimant supplied a bundle of 42 pages consisting of a written response to the applications, and further documents showing the disclosures and detriments pleaded.
3. During the hearing the respondent added a 10 page clip of emails between the parties are about arrangements for the grievance meeting. There was a

short adjournment for the claimant to give instructions on this.

4. At my request the claimant gave oral and unsworn information about his ability to pay were to consider ordering a deposit.

### **Claims and Issues**

5. The claimant was employed by the respondent as one of five technicians to service the luxury serviced apartments at One Hyde Park, adjacent to their Knightsbridge Hotel. His claims arise from concerns about changes in working arrangements during the coronavirus restrictions of 2021. The first claim is for seven detriments between January 2021 and October 2022, following six public interest disclosures. The second claim is for further or continuing detriment, and constructive unfair dismissal.
6. There was an agreed list of issues, and I allowed the respondent, by way of amendment, to add a remedy point about a covert recording, disclosed in transcript four days ago, that the claimant making it was poor conduct which should reduce the basic and compensatory awards.
7. The full list is appended to this decision. Because of the way the claims were drafted, it replicates the pleading closely, and can stand as a factual summary. The claimant's first claim is in narrative form.

### Factual outline

8. As a factual outline, and based on the pleaded case, supplemented by the documents relied on as disclosure or detriment, the claimant raised concern in January 2021 about whether the technicians should be in one team or two, and about the length of time required for self-isolation (10 days or 5) where there might be contact with infection. The respondent's reply to this in January 2021 is the first detriment.
9. In April 2021 the claimant wrote to Westminster City Council about these concerns, and in June they replied, incorporating in their letter what they had been told by the respondent about furlough. The respondent's reply to the Council is the second detriment.
10. Unless there is a series of acts, any detriment before 8 August 2022 is out of time.
11. In September 2022 the claimant raised concerns with the HR department about his working hours and whether the respondent had claimed flexible furlough payments for him improperly. The respondent replied explaining their approach to calculating working hours; this reply, and a later reply that month are the third and fourth detriments. Detriment five is a further response from the respondent about furlough payments, on 19 October, stating that between December 2020 and September 2021 330 hours has been claimed for his flexible furlough, when in fact he had been working full-time from July 2020.

**Case Nos: 2210628/22 & 2202588/23**

Detriment six on the list is that the claimant went sick with work related stress on 26 October 2022 because of this detriment five letter, and earlier detriments.

12. On the same date, 26 October, he presented a grievance, essentially the same text as his claim form in the first claim. A grievance meeting was arranged for 30 November. Next day, 1 December, he presented the first employment tribunal claim.
13. The respondent then interviewed others and sent a grievance outcome letter on 31 January 2023. The claimant was disappointed by the reply and resigned on 1 February 2023, complaining of “the failure of the Mandarin Oriental to address my grievance in a timely manner” which had caused and perpetuated his period of sickness. He had been “really hoping for the quicker clarification of the ambiguities and issues that have arisen in the last few months, but that has not happened” . He had lost trust and confidence. Delay in dealing with his grievance was the last straw. He did appeal the grievance outcome on 6th February, and there was a grievance appeal meeting on 3 March. He presented the second claim to the tribunal on 15 March 2023.
14. Since leaving he has had three other jobs. Today he is unemployed but he has a job interview tomorrow for a post at £40,000 per annum. The claimant did not give information about his earnings with the respondent on either claim form and did not answer the tribunal question on whether £40,000 was more or less than he was paid by the respondent. As yet there is no schedule of loss.

**Relevant Law – Procedure**

15. Order 37(1) of the Employment Tribunal Rules of Procedure 2013 provides:

At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;

16. Striking out claims at a preliminary stage, before evidence has been heard, is a draconian measure, only to be taken in an obvious case. Where there is a “crucial core of disputed facts”, those should be decided after hearing the evidence, and not at some kind of “impromptu trial” based on pleadings and written statements, save where there is, for example, incontrovertible contradictory evidence in a document. It can be useful to assume that the claimant will establish all the facts set out in his claim on which he relies, subject to incontrovertible documents, and then analyse whether those claims would be established in law.
17. In whistleblowing (public interest disclosure) and Equality Act cases, which are important in a democratic society, over and above the interest of the individual claimant, and particularly fact sensitive, tribunals should be especially careful – **Anyanwu v South Bank University and another UKHL (2001)1; Tayside Public Transport Company Ltd v Reilly (2012) IRLR 755;**

**Ezsias v North Glamorgan NHS Trust (2007) IRLR 603.** That said: “the time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail” (**Anyanwu**), and in **Ahir v British Airways (2017) EWCA Civ 1392**: “Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment”.

18. The alternative to striking out, where there are facts in dispute, could be a deposit order. Rule 39 of the Employment Tribunal Rules of Procedure 2013 states:

Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

19. The amount of the deposit is set having regard to the party’s ability to pay, and must not be so high as to bar access to justice; the real deterrent effect of a deposit order is the risk of paying costs. If at final hearing the claimant loses because of substantially the same weakness in his case as identified in the deposit order he is likely to have to pay the other party’s costs.

20. Applications for deposit orders are decided on the basis of the pleaded case and available documents, without taking oral evidence. The tribunal should consider the prospects of establishing the case on the basis of what is pleaded, and may also take into account the party’s prospects of establishing the facts pleaded – **van Rensburg v Royal Borough of Kingston on Thames UKEAT/0095/07**.

21. A deposit order can have a chilling effect in what is largely a no-costs jurisdiction, and should not be done lightly, or it may in practice bar access to justice. Nevertheless, in **Hemdan v Ishmail (2017) IRLR 228** tribunals were counselled:

“the purpose of the deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit”.

22. In both rule 37 and rule 39 applications, the tribunal must decide first whether there is no reasonable prospect of success and then whether to exercise

discretion to strike out – **Balls v Downham Market High School and College (2011) IRLR 217, Hasan v Tesco Stores Ltd UKEAT/ 0098/16.**

### **Relevant Law -Protected Public Interest Disclosure Detriment and Dismissal**

23. The statutory protection of whistleblowers is set out in the Employment Rights Act 1996. The purpose of the legislation is:

“to protect employees...for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have an early knowledge of them, and protecting the respective interests of employers and employees” – L. J. Mummery in **ALM Medical Services Ltd v Bladon (2002) IRLR 807.**

24. Section 43B of the Employment Rights Act 1996 provides that for a disclosure to qualify for protection, it must disclose “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...(b) that a person.. is likely to fail to comply with any legal obligation to which he is subject...that the health and safety of any individual has been, is being, or is likely to be endangered”, or that information tending to show these is being deliberately concealed.

25. Tribunals must approach the question of whether there was a protected disclosure in structured way. They must consider whether there has been a disclosure of information, not a bare allegation - **Cavendish Munro Professional Risks Management Ltd v Geduld (2010) ICR 325**, although an allegation may accompany information.

26. They must then consider whether the worker held a belief that the information tended to show a class of wrongdoing set out in section 43B (the subjective element), and whether that belief was held on reasonable grounds (the objective element) – which is not to say that belief in wrongdoing must have been correct, as a belief *could* be held on reasonable grounds but still be mistaken - **Babula v Waltham Forest College (2007) ICR 1026, CA**. Then the tribunal must assess whether the claimant believed he was making the disclosure in the public interest, and finally, whether his belief that it was in the public interest was reasonable. The belief in wrongdoing or public interest need not be explicit. As was said by the EAT in **Bolton School v Evans**, “it would have been obvious to all but the concern was the private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to potential legal liability”.

27. **Chesterton Global Ltd v Nurmohamed (2017) IRLR 837** confirms that a claimant’s genuine belief in wrongdoing, the reasonableness of that belief, and his belief in public interest, is to be assessed as at the time he was making it. Public interest need not be the predominant reason for making it. Public interest can be something that is in the “wider interest” than that of the whistleblower - **Ibrahim v HCA International**. The whistleblower may have a different motive for making the disclosure, but the test is whether at

the time he believed there was a wider interest in what he was saying was wrong.

28. Each of these five questions must be answered for each disclosure in order to decide whether it was made and whether it qualified for protection.

29. To be protected, the claimant must make the disclosure to her employer; otherwise it is protected only in restricted circumstances (section 43C). In this claim a tribunal may have to consider whether the claimant's disclosures to Westminster City Council about coronavirus safety were protected by section 43F - did he reasonably believe the information and any allegation was substantially true, was it not made for personal gain, and at the time did he reasonably believe he would be subjected to detriment if he made the disclosure to the respondent, or to a prescribed person under section 43F, or if none, did he receive believe it was likely the evidence would be concealed or destroyed if he made a disclosure to his employer.

30. By section 47B(1)A:

“ 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.

31. Detriment means that “a reasonable worker would take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work” -**De Souza v AA 1986 ICR 514**. It must be the view of a “reasonable” worker - an unjustified sense of grievance cannot amount to detriment  
**Barclays Bank v Kapur no2 1995 IRLR 87**

32. The test of whether any detriment was “on the ground that” the worker had made protected disclosures is whether the detriments were materially influenced by disclosures— **NHS Manchester v Fecitt (2012) ICR 372**. This is less stringent than the sole or principal reason required for claims about dismissal for public interest disclosure in section 103A.

33. This is a case where the employee resigned, and so must establish that in law this amounts to a dismissal. By section 95 of the Employment Rights Act 1996, a dismissal can occur where:

(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.

34. As made clear in **Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27**, it is not enough that the conduct is unreasonable. It must amount to a fundamental breach of the contractual employment terms such that the employee can treat the contract as at an end by reason of the employer's repudiatory conduct. **Woods v WM Cars (Peterborough) Ltd (1981) IRLR 347**, upheld in the Court of Appeal, and approved by the House of Lords in **Malik v BCCI** makes clear there can be:

“implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner

**Case Nos: 2210628/22 & 2202588/23**

calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Industrial tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

35. Where there are a series of actions they can be looked at cumulatively. The precipitating cause may not be weighty of itself but prove to be the last straw – **Omilaju v Waltham Forest (2005) ICR 481**.
36. By section 103A of the Employment Rights Act a dismissal is unfair if a protected disclosure was the sole or (if more than one) principal reason for dismissal. The Tribunal is required to make a careful evaluation of the respondent's reason or reasons for dismissing - or subjecting a worker to other detriment. This is in essence a finding of fact, and inferences to be drawn from facts, as a reason is a set of facts and beliefs known to the respondent - **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA**, and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA**.
37. In assessing reasons, tribunals must be careful to avoid "but for" causation: see for example the discussion in **Chief Constable of Manchester v Bailey (2017) EWCA Civ 425** (a victimisation claim), and **Ahmed v Amnesty International [2009] IRLR 884** . However, it is not necessary to show that the employer acted through conscious motivation – just that a protected disclosure was the reason for the dismissal (or grounds for detriment) that caused the employer to act as he did - **Nagarajan v London Regional Transport (1999) ITLR 574**. These cases concern the Equality Act, but the same considerations apply to analysis of why the employer acted as it did in the context of a protected disclosure.
38. Thus, when deciding whether disclosures were protected, the tribunal focusses on the employee's state of mind at the time, and when deciding what followed from any disclosures being made, the tribunal examines the employer's state of mind.

## **Submissions**

### Respondent

39. The respondent agrees the disclosure 6(2) on 8 September is protected insofar as it tended to show failure to comply with a legal obligation, while denying it tended to show deliberate concealment. The respondent does not accept that other disclosures qualify for protection.
40. It is argued that the disclosure in January 2021 was not about health and safety, and that the contemporary written material shows his concern was efficient operation of the workforce, and a complaint that they were changing the rules.

41. The disclosures made to the employer are accepted as protected if it is shown that they qualified for protection, but it is not admitted that disclosures made to Westminster City Council are protected.
42. As for the detriments, the respondent argues that if the claimant feels any sense of grievance that the respondent did not agree with his concerns, that was not reasonable, and there was no detriment to him thereby. The replies of 29th January 2021 to the claimant, and to Westminster City Council on the 2nd June 2021, are factual and courteous. So, they argue, are the responses of the 8th September, 29th September and 19th October 2022 about whether they were entitled to claim flexible furlough payments if the claimant was working less than full time hours, and about making a calculation whether he was working full time hours by referenced his clocking in times. Next, they submit, even if the failure to agree with the claimant's position is detriment, they deny that the reason for expressing that view was connected in any way with the claimant having made protected disclosures. They point out that the respondent sets out its policy, a policy which was applied to all employees, including the claimant alike. The respondent also disputes that going sick on 26th October is a detriment at all, as it is in fact a consequence of the earlier detriments, so a remedy point. As for the grievance handling, it is asserted that one month to arrange a grievance meeting, and then two months to produce an outcome, was not delay so significant as to fundamentally breach the contract of employment, especially given their communication with him during the process, and the complexity of the issues he raised which they investigated and to which they gave a detailed reply.

#### Claimant

43. The claimant responds that the disclosures were on matters of public interest, and that as government guidance and policy was constantly changing in this period, that requires detailed factual analysis at a full hearing.
44. He adds that the respondent misleading Westminster City Council, was a detriment to him. So was being criticised for not clocking in properly. The claimant says too he was subjected to detriment in that furlough payments appeared in his personal tax statement when the respondent should not have claimed them, and should refund them. The detriment is "potentially financial in terms of tax, injury to feelings and stress".
45. On the reasons for grievance delay, he says the reasons for this must be the subject of detailed probing of the evidence.
46. On the constructive dismissal, the claimant argues that unreasonable delay in dealing with grievance, which had the effect of perpetuating his illness, for which he was only getting statutory sick pay, and claimant's anticipation that his illness would be prolonged if there was delay dealing with the appeal, were repudiatory breaches entitling him to treat the contract as at an end.



47. On detriment 6 (going sick from 27 October) as detriment. the claimant argues this is pleaded “as it extends from the date of the first claim to the date to termination”.

## Discussion

48. PD1, PD2: In respect of the protected disclosures on 28<sup>th</sup> January and the 29<sup>th</sup> January 21, the claimant has disclosed not just the e-mail of the 28<sup>th</sup> January, but a transcription of his covert recording of his meeting about it with his HR manager Mr Vermeire on the 29<sup>th</sup> of January. The e-mail has a complaint that in the first lockdown the technicians were split into two groups to alternate, one working, one on furlough, but now all were asked to work, risking the whole team having to isolate if infected. Then there is a complaint that they would come back to work after isolating five days with a negative test result for COVID-19, while the NHS website said that if tested positive he should stay at home for 10 days. Next day we have the recorded conversation with Mr Vermeire who explained the 10 days was only required if instructed by the NHS, and current government travel guidance was that five days isolation after exposure was adequate if there was a negative test on day five, so self-isolation with a negative test was only five days, not ten. There was in fact no government requirement to self-isolate unless contacted by the NHS test and trace – this was hotel policy, modelled on travel guidance. The claimant explained his concern was that first they were told to self-isolate for 10 days, and now it was only five days. The manager agreed the rules were changing, and gave his explanation. The detriment is said to be Mr Vermeire’s response.

49. Evidently the claimant remained dissatisfied that the policy of who was to be on furlough, and the policy of how long they needed to self-isolate after a negative test, had changed. He did not accept the explanation. He therefore took it to Westminster Council. The claimant does not have a copy of what he told them in an online submission, but we have an email from him to the council of 28 April, explaining concern about lack of ventilation in a workshop, lack of risk assessment, and that they were being required to isolate for five days not ten. In a later e-mail he clarified that splitting the team into two reduces the risk of infection. The claimant was dissatisfied with the council’s first reply, and asked Westminster to investigate properly. They asked the respondent their explanation. The respondent’s explanation is given in Westminster’s reply to the claimant at the 2<sup>nd</sup> of June. The workshop was a storeroom, which did not require prolonged occupation. Engineers worked on their own and on different shift patterns and not in large teams, so they were not now being split into groups and furloughed. They had asked the whole team to self isolate after one person was exposed, to take tests beginning of the self isolation and at the end, and five days was judged adequate as NHS test and trace had not contacted them. They had a risk assessment, all staff had had Covid training, the canteen was a large area which followed standard measures such as pre packed meals, no buffet servings, table

separation, floor marking and so on.

50. This response is the second detriment. It is very hard to understand how this was detrimental to the claimant. It was factual. There was no comeback on him for having complained to the council. If the sense of detriment is that the respondent would not accept his contentions, the claimant cannot show that they did not accept his contentions because he had disclosed information to them about lack of health and safety. Even if it were a detriment, he has no reasonable prospect of showing the reason for any detriment in the reply was that he had drawn this to their attention by his disclosures. Of course, if he had not complained to Westminster council, the employer would not have written as they did in answer to their inquiry, but that is "but for" causation. The claimant's having made a disclosure was not the reason why they wrote making assertions he did not agree with. They made these assertions because they believed that was their policy and those were their actions to prevent infection, and these applied to all.
51. The claimant was unhappy with Westminster accepting this information, and took the matter to the local government ombudsman, who informed him on 16th of September that they had decided not to investigate further. The rules had been changing, and there was nothing to suggest that the complainant of contracted COVID or passed it to others.
52. Taking the pleaded case (the claim form includes much narrative) and reading the correspondence, the claimant has no reasonable prospect of establishing that his sense of grievance at responses from Mr Vermeire, and the response of the company to Westminster council, was in any way reasonable. He was concerned that five days of self-isolation was not enough. The respondent said that it was not required by government guidelines at all, but out of caution they took five days if the end result was negative. Even of the sense of grievance at this reply was reasonable, the claimant's case does not show their view of measures to prevent infection (if detrimental to him) was because he had made disclosures. It was just the view of what was required, based on matters they had explained.
53. There is no evidence that the respondent subjected the claimant to any other detriment in any other way throughout 2021 and the first nine months of 2022. He was treated exactly as anyone else, including the rest of his team or the rest of the workforce who had not made disclosures. This would of itself weaken any inference that the respondent's letter to Westminster was because of protected disclosures. If he was viewed as a nuisance and trouble maker, other unpleasant things might have happened. There was uncertainty among the public at the time about the risk of infection, the consequences of infection, and medical opinion and government guidance was changing, so it is understandable that some people were very anxious. It is unlikely however that the claimant will establish that he was subjected to detriment. Even if he could establish that his sense of grievance at the company's response was *reasonable*, he has no reasonable prospect of establishing that the policies

they adopted, which applied to everyone, and had explained to Westminster Council, were because he had made a disclosure.

54. On a separate point, the lack of retribution indicates the claimant will have grave difficulty showing that a disclosure of information to Westminster is protected under section 43 G. Nothing shows that he was in fear of detriment by pursuing the point with his employer. The correspondence tends to suggest that what he wanted to show was that he was right about the measures to adopt.
55. In any case, these disclosures - from January 2021 until the ombudsman's reply in September 2021 - and the first two detriments, are very much out of time. It is improbable that the claimant can show that anything he said or did in January 2021, or even in his correspondence with Westminster Council and the local government ombudsman, caused any of the detriments alleged a year or more later, from September 2022 onward, such that he could establish a series of detriments to bring the earlier matters in time.
56. That brings us to protected disclosures 1.5 and 1.6 on the agreed list of issues. This is an e-mail to the directors on 8th September 2022 and another to Mr Vermeire, same date, that the respondent had improperly claimed furlough pay in his name. He also expressed concern that he had not got tronc payments. The email also shows he was on furlough for some periods in 2021, before the flexible scheme started, and there was no complaint about that earlier furlough. There were other complaints not said to be protected, such as staff not getting a 3% pay rise in line with other hotels. He stated he had become aware of flexible furlough payments in August when he saw his HMRC tax account.
57. Mr Vermeire replied promptly: "when you were working full time, the company has not claimed against those hours for furlough from the government", but the whole workforce had been placed on the flexible furlough scheme so that the company could claim furlough when they were *not* working full time. When the claimant indicated he was still unhappy, the company arranged a meeting with the director of finance, Alan Collier. The claimant then complained (22nd of September) that Mr Collier's explanation that flexible furlough claims were based on the clock in and clock out system was unconvincing. HR staff and the director of finance then looked into the detail. They provided the claimant with a list of the hours that he was clocked in each month from December 2020 to September 2021, so he could understand the hours of flexible furlough payments.
58. On the matter of whether these disclosures of the 8th of September 2022 were protected, they do suggest a belief on the claimants part that there had been some kind of wrongdoing in claiming government money, but it is likely to be doubtful that his belief was reasonable, given the prompt and frank discussion and explanation provided by the respondent of how they operated flexible furlough. He could have checked this against public policy information

on the government website

59. The claimant's next detriments are that he was criticised (29 September) for not clocking in properly (the claimant had said clocking records would understate his actual working time), and that the respondent failed to repay (19 October) flexible furlough money to HMRC.
60. It is very hard to understand how either if these was a detriment. He, not they, had suggested the clocking records were not accurate, and their response gives no suggestion of disciplinary action, just asking how they should count his working hours if they were not accurate.
61. It is even harder to understand the claimant being subjected to detriment if the respondent *had* made a false furlough claim and not repaid the money. The claimant makes no complaint that *he* was not paid full time salary at any point after he came off the first furlough scheme. The repayment would be between his employer and HMRC, who made payments by credit against the employer's liability to account for tax and national insurance. No refund would have been required from the claimant. The claimant has no reasonable prospect of showing this was detriment. Even if he could show he worried about it, the respondent seems to have taken trouble to explain and reassure. The fact that his worry caused him to take time off work does make the worry reasonable (that is, based on real, rather than fanciful, risk).
62. Thus the tribunal finds that the claimant has no reasonable prospect of establishing any claim on the first claim form. Should they be struck out? The tribunal considers that there is disadvantage in time and costs in defending a claim with no prospect of success, and a multi-day hearing would be required which will take up hard pressed tribunal resources. They are struck out under rule 37.
63. Turning to the second claim, it is that the respondent unreasonably delayed the grievance process because he had made protected disclosures.
64. The emails that have been disclosed show that after a delay of a few days after the grievance was submitted on 27th of October, caused by Mr Vermeire's absence from work, his staff contacted the claimant about arranging a meeting, but were cautious doing so given that the claimant was off work with stress, and so they asked if his GP could confirm that he was well enough for a meeting. Following the dates through in the emails shows that there is no untoward delay arranging a meeting for the 30th November (which is in fact the date of expiry of his first sick note). So for a claim submitted on the 1st of December to the employment tribunal, the claimant has no reasonable prospect of success in showing that there was (at that stage) undue delay.
65. As for delay giving the outcome after the meeting, the grievance letter was nine pages long and covered many different issues which are the subject of

this claim. After the meeting on 30 November the respondent's grievance manager arranged to interview Mr Collier, Alan Rushbrook, a line manager - Alex Zlatkov (twice) and Robin Vermeire of HR. Another member of staff had spoken to the Mr Wren who had written to Westminster. Given the number of inquiries that had to be made, and the intervention of the Christmas period, leading to an 8 page response which addresses in detail the facts of the matters complained of, it cannot be said that this delay was unreasonable. Grievances should be dealt with promptly, but how prompt, and how long that takes, depends on their complexity. A query about underpayment in a month's wages may be sorted out in two or three days. A complaint about a large number of different issues over a period of time, particularly when policies will have varied over the period because of changes in government guidance, can reasonably take longer. It is hard to conceive any employment tribunal finding this a long, let alone an unreasonably long, delay.

66. That the resignation was prompted by delay is even harder to understand. It is more readily understood as acute disappointment that his contentions were still not accepted as correct. The alternative, that the disappointment was the last straw after a sequence of detriments cannot found a dismissal, because it could not be shown any of the earlier detriments complained of were in fact detrimental to him. Far from breaching trust and confidence, the respondent had always addressed his concerns promptly and in detail, even if he did not accept what they said.

67. Apart from the meeting with Mr Collier, the finance director, and the missing complaint made to Westminster, whose subject matter can be deduced from the response, all disclosures and documents complained of are set out in writing. It is hard to see how a final hearing would improve the claimant's prospects of establishing detriment, or if there was detriment, that it was because of making protected disclosures. Examining whether any policy did breach a government guideline at any particular point would not assist, as the claimant does not have to be right, provided his belief in breach of legal obligation, or of health and safety, was reasonable. Even if the belief in every disclosure was reasonable, he has no reasonable prospect of success in showing he was subjected to detriment because of them.

68. They should be struck out because there is no merit in taking up tribunal resources hearing claims with no prospect of success, or putting the respondent to the costs of defending them.

### **Deposit Orders**

69. If these claims had not been struck out, the tribunal would have made a deposit order on the basis that they have little reasonable prospect of success, for the reasons already given.

70. As for ability to pay, the claimant may not be in work at present, but he has useful and marketable skills in a tight labour market, and it can be expected

**Case Nos: 2210628/22 & 2202588/23**

that he will find remunerative work soon. There is no information about his savings, though he mentioned some credit card debts without giving detail. He pays both rent and mortgage on a property in a shared ownership scheme - £600 per month rent from £200 per month mortgage, the property having been valued in 2013 for £35,000 pounds. He has no dependents. The tribunal would have ordered payment of £300 for the claims for detriments 1 and 2, £500 for remaining detriments on the first claim, and £500 in respect of the constructive unfair dismissal.

Employment Judge Goodman  
Dated 19 May 2023

JUDGMENT AND REASONS SENT to the PARTIES ON

.19/05/2023

FOR THE TRIBUNAL OFFICE

**APPENDIX  
LIST OF ISSUES AS OF 18 MAY 2023**

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**Claim 2210628/2022**

Protected Disclosures:

1. Did the following acts constitute Protected Disclosures under s43B ERA96?
  - 1.1 One: 28 January 2021: By email to HR concerning reducing self-isolation time, from 10 to 5 days: Protected Disclosure s43B(1)(d) ERA96 – health and safety).
  - 1.2 Two: 29 January 2021: By telephone conversation with Mr Vermeire at 3pm about cutting self-isolation from 10 to 5 days. (s43B(1)(d) ERA96)
  - 1.3 Three: April 2021: By submitting a report to Westminster County Council re Covid and Health and safety at the Respondent (s43B(1)(d) ERA96)
  - 1.4 Five: June / July 2021: By submitting an appeal to Westminster Council / complaint to ombudsman (s43B(1)(d) ERA96)
  - 1.5 Six(1): 8 September 2022: By emailing the Directors that the Respondent had improperly claimed furlough pay in his name. (s43B(1)(d) ERA96)
  - 1.6 Six(2): 8 September 2022: Six: By emailing Mr Vermeire (Protected Disclosure – s43B(1)(b) – failure to comply with a legal obligation (R accepts this was a

**Case Nos: 2210628/22 & 2202588/23**

Protected Disclosure – GoR 61) and/or, s43B(1)(f) – deliberate concealment) (R denies this showed or tended to show deliberate concealment). (s43B(1)(d) ERA96)

2. In particular:

2.1 Were they disclosures of information?

2.2 If so, did the Claimant reasonably believe that the alleged disclosures were made in the public interest?

2.3 If so, did the Claimant reasonably believe that the information tended to show one of the relevant failures in s43B(1), ERA96?

2.4 If the alleged disclosures One, Two, Six(1) and Six(2) above were qualifying disclosures, it is agreed that they were protected disclosures in that they were made to the First Respondent, the Claimant's employer, pursuant to s43C(1)(a), ERA 1996 (GoR, para. 66). In respect of the alleged disclosures Three and Five, were they protected disclosures, pursuant to s43G(1), ERA 1996, in that the following four conditions are satisfied:

2.4.1 The Claimant reasonably believed that the information disclosed, and any allegation contained in it, was substantially true;

2.4.2 The Claimant did not make the disclosure for the purposes of personal gain;

2.4.3 One of the conditions in s43G(2), ERA 1996 is satisfied, namely:

2.4.3.1 At the time he made the disclosure, the Claimant reasonably believed that he would be subjected to a detriment by the Respondent if he made a disclosure to it or to a prescribed person in accordance with s43F, ERA 1996;

2.4.3.2 There was no prescribed person for the purposes of s43F, ERA 1996 in relation to the relevant failure and the Claimant reasonably believed that it was likely that evidence relating to the relevant failure would be concealed or destroyed if he made a disclosure to his employer; or

2.4.3.3 The Claimant had previously made a disclosure of substantially the same information to the Respondent.

2.4.3.4 In all the circumstances of the case, it was reasonable for the Claimant to make the disclosure.

S47B Detriments:

3. Was the Claimant subjected to the following detriments and, if so, was this on the ground that he made (a) Protected Disclosure(s):

**Case Nos: 2210628/22 & 2202588/23**

- i. 29 January 2021: By the response of Mr Vermeire (detriment causing injury to feelings) (R says response was in line with guidance and was reasonable)
- ii. 2 June 2021: By receiving copy of Respondent's misleading reply to LB Westminster (detriment – injury to feelings, stress) (R says this was genuine)
- iii. 8 September 2022: By the reply of Mr Vermeire wrongly claiming that furlough had not been claimed (detriment – injury to feelings, stress)
- iv. 29 September 2022: By being unreasonably criticised by Mr Vermeire for not clocking in (despite the Claimant working full time hours) (detriment – injury to feelings, stress)
- v. 19 October 2022: By failing to repay the furlough money claimed from HMRC, meaning that the Claimant's HMRC Personal Tax Account is inaccurate (Detriment – potentially financial in terms of tax, injury to feelings, stress)
- vi. 26 October 2022: by causing the Claimant the Claimant to become sick with stress and consequently getting singed off sick. Consequent loss of pay (detriment – injury to feelings, stress, loss of normal pay during sickness)
- vii. 27 October 2022: By failing to address Claimant's grievance of 27 October 2021 in a timely manner (detriment – injury to feelings, stress. Financial insofar as that failure caused the sick leave and causing it to then be extended, and consequent loss of earning during that period)

Jurisdiction:

4. In respect of any alleged detriment which is *prima facie* out of time in that it occurred prior to 8 August 2022, did the detriment(s) complained of form part of a continuing act extending up to or after 8 August 2022 (s48(4)(a) ERA96)?
5. If not, was it not reasonably practicable for the claim to be presented in time?

Breach of Contract:

6. Breach of contract: C does not pursue a separate breach of contract claim.

**Claim 220588/2023**

SS94 and 98, ERA 1996: Constructive Unfair Dismissal

7. Was C constructively unfairly dismissed on 1 February 2023 (s.95(1)(c) & ERA 1996 s.136(1)(c)? In particular:

7.1 Did R commit (a) repudiatory breach(es) of the Claimant's contract? C relies on the following alleged repudiatory breaches:

7.1.1 Unreasonable delay in dealing with grievance

7.1.2 Perpetuating C's illness by that delay, and occasioning loss of income



7.1.3 Anticipated delay in dealing with appeal and likely further perpetuation of illness pending outcome.

7.2 If so, did the repudiatory breach(es) cause the Claimant's summary resignation on 1 February 2023?

8. If the Claimant was constructively dismissed, was the dismissal unfair in all the circumstances?

S47B, ERA 1996: Unlawful "whistleblowing" detriments

9. Did the alleged detriment of causing C's sickness from 26 October 2022 (above) continue up to and including 1 February 2023? (ERA 96 s43A)

**Remedies:**

10. If the Tribunal find in C's favour, what declaration and remedies should it make?

11. What award should it make for PIDA detriments and constructive dismissal? In particular, if the Claimant succeeds in his claim for constructive dismissal:

11.1 Is it just and equitable to make any basic award in light of the Claimant's conduct in making a covert recording of the call with Mr Vermeire on 29 January 2021, and concealing this at the grievance hearing meeting on 30 November 2022?

11.2 Should a Polkey deduction be made to reflect the likelihood that the Claimant would have been dismissed in any event for gross misconduct as a result of his covert recording and dishonesty about doing so, as set out above?