Case Number: 1600419/2016

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR S FRY	**V**	**MR P BOURDILLON**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: **CARDIFF** **ON:** **24 - 27 JANUARY 2017**
31 JANUARY 2017 (IN CHAMBERS)

BEFORE: **EMPLOYMENT JUDGE CK SHARP**
MR L MAPLEY
MR P CHARLES

REPRESENTATION:
FOR THE CLAIMANT: **MR VINES (COUNSEL)**
FOR THE RESPONDENT: **MR LINGARD (CONSULTANT)**

ORDER

1. The Claimant's application to amend his further and better particulars is accepted;

2. Under Rule 43 of the Employment Tribunal Rules of Procedure Mr Lee is excluded from the hearing until he gives oral evidence.

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The Claimant's claims are dismissed on the ground that they have been brought outside the time limits within which a claim must be brought under s48(3) of the Employment Rights Act 1996 and are outside its jurisdiction.

REASONS

1. This is a complaint brought by Mr Stuart Lee, the claimant, against Mr Patrick Bourdillon, the respondent. The claimant asserts that he suffered a number of detriments because of protected disclosures he made. The claimant brings his claims under Part IVA of the Employment Rights Act 1996. The relationship between the parties was until September 2015 a close one and arose from the claimant moving to live in a cottage owned by the respondent in 2001 and located on the estate owned by the respondent known as Llwyn Madoc (and the Tribunal understands now jointly with his wife). The cottage was occupied under an Assured Shorthold Tenancy ("AST") entered into on 1 August 2001; it was agreed the claimant would pay £435 a month rent. In 2008, the claimant started to work on a casual basis on the Llwyn Madoc Estate ("the Estate"). It is accepted by the parties that the claimant was a worker, as opposed to an employee or a self-employed person.

2. The claimant by way of his ET1 filed with the Employment Tribunal on 9 June 2016 a number of claims asserting that he had been subjected to a number of detriments by the respondent. The detriments were broadly described as the withdrawal of work from the claimant by the Estate owned by the respondent on 22 September 2015, and the eviction from his cottage, known as Coed Trefen, in 2016. In the submissions by the claimant's Counsel, the list of detriments alleged suffered by the claimant had been increased to the following:

    (a) the decision not to give the claimant further work as communicated by the postcard from the respondent dated 3 September 2015 and later confirmed in writing by the respondent's agent on 22 September 2015;
    (b) failing to retain the claimant as an approved contractor for the Estate beyond 31 March 2016;
    (c) the decision to withdraw the offer of a new 3 year AST, offered on 21 July 2015, following a request by the claimant to increase the rent;
    (d) the decision to seek possession of Coed Trefen by way of the first set of possession proceedings;
    (e) the decision to seek possession of Coed Trefen by way of the second set of possession proceedings
    (f) the decision to refuse any reprieve in respect of either the withdrawal of work or the eviction on 29 March 2016; and
    (g) the decision to delay until 2016 the repairs to the lane to Coed Trefen to enable the claimant to move out efficiently.

3. The Tribunal noted that this list was the first time that the case had been argued in this way by the claimant and his representatives. The claim was until this submission argued on the basis that the detriments suffered were simply the withdrawal of work from the claimant and his eviction from the cottage. No application to amplify the detriments alleged was made by the claimant's Counsel, despite a successful application to amend the further and better particulars served by the claimant being made earlier at the outset of the hearing. The Tribunal did not consider it fair to consider the new list without such an application being made; it did however note the effective withdrawal of the allegation that the final date of the detriment took place when the claimant moved out of Coed Trefen which was not pursued by his Counsel.

4. This Judgment will go on to deal with the merits of the Claimant's claim, but another issue that it fell to the Tribunal to determine was whether or not the claim had been brought within time under S.48(3) of the Employment Rights Act 1996.

The hearing

5. The Tribunal had the benefit of hearing both Mr Vines and Mr Lingard, Consultant, who appeared on behalf of the respondent. In addition, it heard oral evidence from the claimant, Mr Bourdillon, Mr Timothy Lee and Mrs Miranda Bourdillon.

6. It also received a number of statements obtained in a variety of ways. A Witness Statement prepared for the use of the Employment Tribunal was received from Mr Raymond Gareth Woods which was not supported by a Statement of Truth. Statements from Mr Patrick Bourdillon, Mr Timothy Lee, (Mr Bourdillon's land agent), Mr Jonathan Clive Hussell (manager of the shoot which held sporting rights over Llwyn Madoc), Mr Les Smith (a self-employed earth works contractor), Mr Ben Brown (the shoot tenant), Mr James Smith (gamekeeper employed by Ben Brown), Mr Andrew Morris (a gardener employed by the respondent) and Mrs Miranda Bourdillon (wife of the Respondent). All of these statements were supported with a signed Statement of Truth.

7. Further, within the hearing bundles supplied to the Tribunal, there were copies of Witness Statements given to PC Goulding of South Wales Police currently seconded to Natural Resources Wales as part of his investigation into the damage suffered by a site of special scientific interest ("SSSI") known as Allt y Gest on the Estate. The statements to which the Tribunal was specifically referred during the course of evidence and submissions included a statement from Mr Nicholas

Hudson of Natural Resources Wales, PC Goulding, Les Smith, the claimant and the respondent. It was submitted by Mr Vines that the Tribunal should treat the statements which formed part of the police investigation as statements to this Tribunal and accorded the appropriate weight. The Tribunal's position was that it was a matter for the Tribunal what weight to place on the evidence before it.

8. The Tribunal also had the benefit of both written and oral submissions from the representatives of the parties, and was able to explore points with them. The Tribunal will not rehearse the submissions in detail in this Judgement, but will adopt the submissions where it seems most helpful to explain the issues which arose and required determination.

Facts

9. Most of the facts relevant to the issues that the Tribunal needed to determine were agreed by the parties. In 2001, the claimant moved into Coed Trefen on the Estate owned by the respondent. From 2008 onwards, he undertook a series of casual jobs on the Estate, which included but was not limited to stone walling, chopping wood, fencing and related tasks. The claimant also undertook work for others.

10. The claimant began to be unable to pay his rent in cash as it fell due, and over time an arrangement was reached that the work that the claimant undertook for the respondent could be credited against his rent, provided that the claimant sent to Mr Lee an invoice setting out the work done and the cost. Mr Lee wrote on at least two occasions to the claimant reminding him that rent should be paid in cash as opposed to paid using work in lieu, but up until late 2015 the rent continued to be paid mainly through the work undertaken by the claimant for the Estate. The claimant also had the status of Approved Contractor for the Estate, which expired on 31 March 2016.

11. The claimant lived relatively near the respondent and his family, and a friendship developed between them. The Tribunal heard evidence about chickens being cooked by Mrs Bourdillon for the claimant when his oven was broken, suppers together, and driving lessons being given by the claimant to one of the respondent's children. Indeed, the claimant's own evidence was up until the summer of 2015, the relationship between the respondent and himself was "as good as gold".

12. In 2014, the shooting rights over the Estate were leased to Ben Brown of Hardwick Farms in Suffolk. Mr Brown operated a commercial shoot ("the shoot"), whereby individuals could purchase the right to shoot birds, particularly pheasants, on the Estate. The Llwyn Madoc Estate is a large one; the Tribunal was given to understand that it was somewhere in the

region of 2,500 – 3,000 acres in size and contained two SSSI's, one of which at least was next to a river.

13. The shoot was given permission to build pheasant pens on the Estate in 2014 and created the pens and tracks through the woods in the summer of 2014. Unfortunately, it appears that Mr Brown was not informed by either Mr Bourdillon or his agent Mr Lee of the precise boundaries of the two SSSI's on the Estate. Mr Bourdillon's evidence was that he was unaware of the precise boundaries, which had been set in 1972 when his father owned the Estate.

14. The claimant asserted that as early as summer 2014 he informed Mr Les Smith, the earth works contractor undertaking work on behalf of the shoot, and Mr James Smith, the head keeper, that it was not permissible to build the pens and the tracks in their location as it breached the terms of an SSSI. The claimant also said that he made a report to Natural Resources Wales to this effect by calling and leaving a detailed message with a secretary. This is an issue that the Tribunal will return to later as there is a factual dispute on this point between the parties. There is no dispute that the claimant did not tell the respondent in 2014 about the problem.

15. In May 2015, the claimant found a dead buzzard on the Estate and reported its death to the RSPB, who in turn notified Natural Resources Wales. On 9 June 2015, the claimant having returned from abroad discovered that the pheasant pen in the Allt y Gest SSSI had been extended, and a significant extension of the tracks was being carried out by Mr Les Smith. There is a factual dispute about what the claimant told Mr Smith, but there is no dispute that the claimant then immediately went to see Mr James Smith and informed him that the work being done was in breach of the SSSI legislation. There is also no dispute that on the 10 June 2015 the Claimant contacted Natural Resources Wales to pass on the same information and told Mr Andrew Morris, the respondent's gardener of the damage being caused to the SSSI.

16. On 11 June 2015, the claimant informed Mrs Bourdillon that there was a difficulty with the work being carried out by Mr Les Smith at Allt y Gest. There is a dispute between the parties about exactly what the claimant did tell Mrs Bourdillon, but there is no dispute that this conversation triggered a telephone conversation on the 13 June between the claimant and the respondent. There is also no dispute that the claimant told the respondent that considerable damage had been done by the shoot and discussed the SSSI issue.

17. On 15 June 2015, there is no dispute that the claimant spoke to Mr Nicholas Hudson from Natural Resources Wales and explained to him

the situation. There is no dispute that the same day the claimant spoke again on the telephone to Mr Bourdillon and discussed the situation.

18. On 24 June 2015, the claimant complained to the County Planning Officer at Powys County Council, asserting that there was a breach of planning regulations in respect of the construction of the pheasant pens, the building of the tracks and other operations taking place at Allt y Gest.

19. During this period, the claimant asked Mr Lee if he could have a new AST for Coed Trefen with a higher monthly rent. This was to enable him to claim benefits once he reached retirement age. The Estate agreed and a new AST for three years was offered on 21 July 2015 to the claimant.

20. There is no dispute that on the 23 August 2015 the claimant made an entry on his "Welsh Waller" blog on the internet. In that blog, the claimant made a series of references, which he accepted was to Mr and Mrs Bourdillon. They were described by him as "the Laird" and "Milady" of the big house in Beluah, Mid Wales. This would appear to be an appropriate juncture to highlight the key quotations arising out of that blog. They are:

    "*As the mansion is a Grade II listed building it therefore means everything (that has been built) was in the curtillage is also listed and thus must be restored in a manner that recreates the original. I am fairly sure that the local Listing Officer is supposed to be notified and his agreement sought on the methodology of any restoration but the owners of the Estate seemed to consider they are above such menial bureaucracy and would be quite happy for me to use a modern cement. That ain't the way I work I'm afraid but I have compromised on the type of lime mortar."*

    "To add to my problems I drove down to the local builders merchant to get another six bags of mortar, loaded it into the back of my vehicle, went in to sign for it only to discover the account had been suspended for non payment! Not just one month, not just two months, oh no, the local gentry in the big mansion had not paid their March, April, May, June nor July bills! I am more than surprised my sign of for materials for the last three months was not stopped sooner. It's nothing to do with lack of funds, oh no, it's just a total couldn't care less attitude to such matters. At least the local peasants get to have a laugh at their expense!"

21. There was no serious challenge to the respondent's evidence that this blog entry was not seen by him until it was drawn to his attention by one of his children during the weekend of the August Bank Holiday, on or

around Monday 31 August 2015. The respondent said that his wife and children were particularly distressed by the blog, not least by its unpleasant tone, and regarded it as offensive and a betrayal of the friendly relationship that existed between the claimant and the respondent and his family. The respondent's evidence was that he and his family felt strongly at that point the claimant should no longer work or live on the estate, but wanted to reflect on the decision.

22. On 2 September 2015, the claimant's birthday, there was a short friendly discussion in passing between the claimant, the respondent and the claimant's assistant about the claimant's plans for his birthday, the respondent's tax bill and general inconsequential matters.

23. On 3 September 2015, following Mrs Bourdillon's return from a short trip away from home, Mr Bourdillon delivered a "postcard" (which was more akin to a handwritten note) to the delivery post box for the claimant; this was located about half a mile from Coed Trefen. The postcard said that in light of reading the contents of the blog, the Bourdillon family no longer wished for the claimant to remain in the cottage and to be employed by the Estate. This postcard was not seen by the claimant for some weeks due to it slipping within the liner of the post box.

24. On 22 September 2015, Mr Lee confirmed formally by way of a letter the decision of the Bourdillon family as explained in the postcard, namely that the claimant was being given formal notice under the original AST to leave, but the precise date of departure could be agreed by the parties, but that no further work would be available for him from the Estate. This prompted the claimant to examine closely his post box and find the postcard.

25. The claimant then submitted his invoices for the work done to date which had the effect of largely paying the rent due up until the end of 2015 (albeit that the respondent believed that the claimant was in arrears with his rent). Possession proceedings were issued at the County Court at Merthyr Tydfil but withdrawn on 7 March 2016 by the respondent as there had been a failure to comply with the requirements of the Tenancy Deposit Scheme. This failure meant that the Court would not grant a possession order and would be obliged to dismiss the respondent's claim for possession in any event. In that letter the respondent said:

"rather than waste the Court's time by going ahead with the hearing next Monday, I intend to ask my agents to formally provide the Defendant with the TDS Notice and all the prescribed information which they omitted to do previously and also to sent the tenant his deposit sum of £435 back before restarting the process".

26. On the 29 March 2016, the claimant emailed Mr Lee asking if the Respondent would grant a reprieve and not evict him from his property. Mr Lee's response the same day was that "*the Estate wants vacant possession of Coed Trefen, there is no hope of a reprieve".* A second set of possession proceedings were then issued, and the track to the Coed Trefen (which was described as being in a bad state and caused significant difficulty to the claimant in removing his property) was repaired in April 2016 by the Estate.

27. There is a dispute about precisely when the claimant vacated Coed Trefen. The claimant says that he left on 31 May 2016 which was when the Section 21 Notice expired. The respondent says that as the claimant had left some of his property behind and did not return the key, in fact he did not vacate the premises until July 2016.

Time Bar

28. Under Section 48(3) of the Employment Rights Act 1996 an Employment Tribunal shall not consider a complaint unless it is presented before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them. It can also consider claims brought within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months.

29. The parties went through the mandatory ACAS early conciliation period between 31 March 2016 and 5 April 2016. The ET1 was issued on 9 June 2016.

30. The parties in their submissions and at the outset of the hearing when the Tribunal was agreeing with the parties the issues to be determined gave the Tribunal a choice of 3 dates. The first date was 3 September 2015, where the respondent's case was that the respondent, following consultation with his family, crystallised and finalised the decision to withdraw all work from the claimant and evict him from Coed Trefen on that date, as demonstrated by the contents of his postcard of the same date. In the alternative, the respondent submitted 22 September 2015 was the date of the act of detriment as that was when Mr Lee confirmed in writing the settled determination of the respondent to withdraw work from the claimant and evict him from the cottage.

31. Mr Vines submitted that the latest date of the act or series of acts was 29 March 2016 (not 31 May 2016 as asserted in the ET1) as that was the date when the decision to evict the claimant was made afresh by the

respondent following the claimant's request for a reprieve by way of an email to Mr Lee.

32. The Tribunal reminded itself of the words of Section 47B which is that "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done on the ground that the worker has made a protected disclosure." This poses the question of what is the "act" which subjected the claimant to the alleged detriment. Section 48(4)(b) states a deliberate failure to act should be treated as done when it was decided on, but there is no similar definition of "act". The Tribunal for different purposes was referred to by Mr Vines the cases of *Stolt Offshore Limited –v- Miklaszewicz* [2002] IRLR 344 and *The Met Office –v- Edgar* [2001] UK EAT 1448-00-1406. Whilst the *Stolt* case is a Scottish case and therefore is not binding upon this Tribunal, it is a very helpful case when dealing with public interest disclosure cases. In paragraph 18, the Court in summarising the submissions of Counsel (and which Mr Vines highlighted in the copy handed up to the Tribunal) said:

"the important point at time was at which the employer took the decision to dismiss the worker. Indeed if one takes cases where an employee loses their employment on a discriminatory basis due to a protected characteristic it is clear that subjecting someone to an act occurs when a decision is made."

The well known cases of *Burton –v- De* Vere Hotels Ltd [1996] IRLR 596 and *Abertawe Bro Morganwg University Health Board –v- Ferguson* [2013] UK EAT/0044/13 review the use of the phrase "subjected to" in similar terms. The submissions of the parties themselves only make sense if the date that the decision was made is the date that the "act" took place. That is no doubt why for example Mr Vines moved away from the position outlined in the ET1 that the date of the eviction was the date the last of the series of acts of detriment took place.

33. On that basis, the Tribunal took the view that it was the date that the decision was made to withdraw work from the claimant and evict him from the property by the respondent that is the date of the "act" that should apply for time purposes, and also for the determination of other issues in relation to the date of detriment.

34. The Tribunal heard oral evidence from Mr Bourdillon, Mr Lee and Mrs Bourdillon on this point. It was satisfied that all three witnesses to a greater or lesser extent were very clear that the decision to withdraw work from the claimant and evict him was made over the course of the Bank Holiday weekend. The decision was notified to Mr Lee on the telephone on the first working day following the bank holiday by the

respondent, but notification to the claimant was delayed until Mrs Bourdillon had returned from her trip and was able to review the postcard drafted by the respondent. That postcard was dated 3 September 2015 and was delivered to the claimant's post box on that date.

35. The Tribunal considered whether there was a fresh reconsideration of the decision to evict the claimant and withdraw work on 29 March 2016. There was no such reconsideration in relation to the decision to withdraw work. In relation to the decision to continue with the possession proceedings, the Tribunal took the view in light of the oral evidence that it heard and the letter of 7 March 2016, where the respondent made it abundantly clear to the Court that he intended to restart the possession proceedings as soon as he could, after 3 September 2015 everything that occurred was simply taking steps to give effect to that decision. The Tribunal also noted that even when under cross examination Mrs Bourdillon suggested that the decision had been made afresh, she corrected herself and said it was effectively a continuation of the decision made over the Bank Holiday weekend in August 2015 and crystallised on the 3 September 2015.

36. The Tribunal finds that the date of the "act" of which the claimant complains is 3 September 2015. It then went on to consider whether the proceedings had been brought within such further period the Tribunal considers reasonable if it was not reasonably practicable for the claimant to issue the claim earlier. It considered that until the claimant was aware of the decision to stop him working and to evict him, it was not reasonable practicable for him to bring the claim. The letter of Mr Lee dated 22 September 2015, which was likely to have been received on or around 24 or 25 September 2015, caused the claimant to check his post box and look for the postcard that had been posted within it on 3 September 2015. The Tribunal considered that a 22-day extension of the time limit would be reasonable in the circumstances.

37. The Tribunal noted that proceedings were not issued until 9 June 2016. ACAS early conciliation did not stop time running in the claimant's case as time by this point had already expired. According to the claimant's own evidence, in late 2015 he sought legal advice in relation to the eviction, and sought advice from a specialist employment tribunal lawyer in March 2016. Notwithstanding this, a further period of 3 months elapsed before the current proceedings were issued. The Tribunal considered that it was reasonably practicable for the Claimant to have issued the claim within the three-month period following 3 September 2015, or indeed within a three-month period running from 25 September 2015. The claimant gave no evidence that it was not reasonably practicable for him within that period of time. He gave evidence he had a

low mental state in December 2015 and January 2016, and suggested that his blog written in February 2016 was an indicator of his low mental state. However, the Tribunal took the view that as the claimant was clearly able to write further blog entries and take legal advice, it was reasonably practicable for him to have brought the claim by 24 December 2015.

38. It therefore concludes that the claimant's complaint in its entirety is outside of the Tribunal's jurisdiction and must therefore fail.

Protected Disclosures

39. Notwithstanding the previous decision by the Tribunal that the claim is outside its jurisdiction, given that it had the benefit of hearing four days of oral evidence and submissions, combined with the documents set out in the hearing bundle, the supplemental bundle and various exhibits supplied by each party, it would be appropriate for it to go on to consider whether or not the claimant had been subjected to a detriment on the grounds that he had made one or more protected disclosures.

40. As specified to the representatives at the start of the hearing, the Tribunal would proceed on the basis of an amended further and better particulars dated 24 January 2017 as the list of protected disclosures. The Tribunal also indicated to the representatives that it was for them to supply authority confirming that the various parties involved were prescribed persons noted that it appeared devolved matters under the Government of Wales Act were involved.

41. The Tribunal made the following findings regarding the list of protected disclosures provided by the claimant:

Disclosure 1 — The Tribunal carefully considered the evidence of the claimant in this regard. It bore in mind that the claimant gave evidence under oath and was subjected to cross examination. However, it also noted the Witness Statement of Mr Les Smith to the Tribunal (which was not tested under cross examination) and the statement made by him to PC Golding on 3 September 2015 and which can be found at pages 88-92 of the supplementary bundle. In those statements, Mr Smith denies absolutely having a discussion with the claimant in the summer of 2014 about the trackways he was creating through the woods. The Tribunal also bore in mind that Mr Smith's statement was made to the police which gave it a great weight, though it noted the claimant had also

given a statement to the police saying he had spoken to Mr Smith.

It noted the surrounding evidence, including the Witness Statement of Mr James Smith where he also denied having a related conversation with the claimant in the summer of 2014. The Tribunal noted the fact that the claimant alleged to have made a report to Natural Resources Wales at the same time, but Natural Resources Wales had no record of such a complaint and the claimant had been unable to provide any objective evidence such as telephone bills demonstrating that he had made the call. The Tribunal noted that in relation to the reports made by the claimant in 2015 to both Natural Resources Wales and Powys County Council, he chased those organisations for an update and signs of progress. The claimant's evidence was because the trackway work ceased within a week of him making the report to Natural Resources Wales, he believed that action had been taken. However, it is apparent that the trackway work must have been completed in 2014 as work would not have stopped otherwise; Natural Resources Wales in fact did not prevent the work in 2014. The Tribunal considered it was likely to have been obvious to the claimant as a conservationist and a highly experienced worker in this area that the work had completed and that was why it had stopped. It concluded on the balance of probabilities that it was more likely than not that the claimant had not discussed the tracks with Les Smith in the summer of 2014. It finds therefore that there was no qualifying disclosure.

There is also an issue as to whether information was given to Mr Les Smith. The claimant in his own witness statement does not say he told Mr Smith he was working in a SSSI. Given the finding above, the Tribunal did not need to determine this point.

Disclosure 2

The Tribunal adopted the same findings it made in relation to disclosure 1 for this disclosure. It preferred the evidence of James Smith that the claimant had not raised the issue with the pens or the tracks within a SSSI with him in the summer of 2014. It noted the

evidence surrounding the disclosure made in the summer of 2015. The Tribunal also bore in mind the denial of Mr Hassall that any issue was raised by the claimant in 2014. The Tribunal found on the balance of probabilities that the claimant did not make a qualified disclosure as asserted in disclosure 2.

Disclosure 3 — The Tribunal relies on its findings in relation to Disclosure 1 and 2 and found there was no qualifying disclosure.

Disclosure 4 — The claimant's evidence was that he gave a detailed report to a secretary at Natural Resources Wales in the summer of 2014 about environmental damage to the Allt y Gest SSSI. However Natural Resources Wales appears to have no record of such a report. The Tribunal viewed that it was more likely than not, particularly given what happened in June 2015, that had Natural Resources Wales received such a report it would have taken action. The Tribunal found that it was more likely than not that the claimant had not contacted Natural Resources Wales. The Tribunal also noted that the claimant chose not to tell the respondent, despite having what he described as a friendly relationship with him, about the damage to the SSSI. This was difficult to understand if the claimant had notified third parties of the damage being done to the SSSI; the respondent was legally responsible for protecting the land and the SSSI.

Disclosure 5 — The Tribunal found in light of the evidence from the claimant, together with the surrounding evidence from Natural Resources Wales, that the claimant did report a dead buzzard found on the Estate in early May 2015 to the RSPB. The Tribunal was satisfied that this met the test set out in S.43B in that there was a disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest, and tends to show that a criminal offence had been committed, is being committed or likely to be committed, and that the environment has been, is being, or is likely to be damaged. The evidence of the claimant is that he was concerned

that the buzzard had been unlawfully killed and possibly a Larsen trap had been involved.

However, the Tribunal did not consider that the requirements of S.43C had been complied with. The claimant did not make the disclosure to the respondent or to the person that he reasonably believed was legally responsible for the death of the buzzard. The Tribunal did not accept that the RSPB or Natural Resources Wales had legal responsibility in terms of being accountable for the events surrounding the death of the buzzard. S.43C deals with disclosures to "*those who are in law accountable for the conduct and practice in question*" (Hansard 19 June 1998, Lord Borrie). The claimant's own evidence was that he did not believe either the RSPB or Natural Resources Wales had killed the buzzard; he believed such suspicious deaths should be reported to the RSPB as that was what he believed to be the correct procedure.

The Tribunal considered that this was not a disclosure to a prescribed person as there is no evidence before it that the RSPB was a prescribed person. Natural Resources Wales did not become a prescribed person until 1 February 2016 by way of the Public Interest Disclosure (Prescribed Persons) (Amendment) (No. 2) Order 2015; this statutory instrument amended a Welsh Government statutory instrument known as the Natural Resources Body for Wales (Establishment) Order 2012. The Tribunal accepted as a matter of law Mr Vines' submission on behalf of the claimant that the cases of *Stoltz* and *Edgar* confirmed that it was the date of the detriment that was key to deciding whether or not the body was a prescribed person for the purposes of the act. Had the detriment identified by the Tribunal been from 1 February 2016 onwards, the Tribunal may have found that this disclosure had been to a prescribed person, notwithstanding that the initial disclosure was to the RSPB who passed the information on to Natural Resources Wales under the standard procedure.

However, as the date of detriment identified by the Tribunal is 3 September 2015, the Tribunal is unable to make this finding. The Tribunal was unable to find

that the claimant had complied with Section 43G; while it accepted that the claimant reasonably believed that the information disclosed in any allegation contained within it were substantially true, and accepted that he did not make the disclosure for the purposes of personal gain, it was not satisfied that Mr Fry reasonably believed that he would be subjected to a detriment by his employer if he made the disclosure to Mr Bourdillon or in accordance with Section 43F. The Welsh Ministers were the prescribed person in respect of environmental matters and Mr Bourdillon did not make a disclosure to that person. The claimant accepted that he had not told Mr Bourdillon about the buzzard, and gave no evidence at all as to why he believed he would have been subjected to a detriment by Mr Bourdillon had he told him about the dead buzzard. The Tribunal judged the claimant did not believe the respondent would have subjected him to a detriment if the death had been reported by him; it thought it was more likely than not the claimant did not think to tell Mr Bourdillon.

Finally, the Tribunal was not satisfied that the requirements of 43H were met on this occasion. While it accepted that Mr Fry reasonably believed that the information disclosed and any allegation contained within it were substantially true and he did not make the disclosure for purposes of personal gain, it was not satisfied that the relevant failure was of an exceptionally serious nature.

The Tribunal gave careful consideration to the definition of “exceptionally serious failure”. This term is not defined within the Act. It had consideration to the passages of Hansard when S.43H was debated by Parliament, which stated that exceptionally serious failures would only exist in “very rare cases”. It noted a commentary from the IDS book on Whistleblowing at Work printed November 2013 which says that only in cases of “extreme public concern” would the threshold of exceptionally serious failure be met. The Tribunal considered examples where this issue had been considered by other Tribunals. In the case of *Collins –v- The National Trust* (ET case 25507244/05) contamination of land with asbestos was regarded as being of an exceptionally serious nature. In the case

of *Bolkavac –v- DymCorp Aerospace Operations (UK) Limited* (ET case 3102729/2001). disclosures about the trafficking of women and girls for prostitution by organized criminal gangs was regarded as exceptionally serious. In the case of *Holbrook –v- Queen Mary's Sidcup NHS Trust* (ET case 1101904/06) a report of drink driving by a police officer in uniform was not regarded as an exceptionally serious failure. The Tribunal when considering the death of a single buzzard judged that this was not an exceptionally serious failure and therefore not protected under Section 43H.

Disclosure 6

The Tribunal had to resolve a factual dispute in relation to this disclosure. There was no dispute that the claimant spoke to Les Smith on 9 June 2015. There was no dispute that something was said suggesting that the claimant was surprised by the activities of Mr Les Smith within the SSSI. There was no dispute that following this conversation the claimant went straight to see James Smith, the gamekeeper. The dispute is whether or not the claimant told Mr Les Smith to stop what he was doing and told him that he was working within an SSSI. The claimant's own evidence does not say that he told Mr Les Smith that it was an SSSI. Mr Les Smith's evidence to both the Tribunal and the police is that he had never heard of the term "SSSI" and that the claimant did not tell him to stop. Mr Les Smith went on to make the point that had the claimant told him to stop he would not have done so as he was not working for the claimant. The Tribunal on the balance of probabilities preferred the evidence of Mr Les Smith and found that the claimant had not instructed him to stop work and had not told him that the site was an SSSI. It considered whether being surprised by the work being undertaken constituted a disclosure which includes information, as is required as highlighted in the case of *Cavendish Munro Professional Risks Management Ltd –v- Geduld* [2010] IRLR 38, and found that it was not. The key information, namely that work should be stopped as damage to an SSSI was taking place was not communicated to Mr Les Smith on 9 June 2015 by the claimant and therefore was not a qualifying disclosure.

Disclosure 7

In contrast, there is little dispute about what occurred on 9 June between the claimant and Mr James Smith. The claimant did tell Mr James Smith that the work being done by the shoot was in breach of an SSSI. The Tribunal had no difficulty in finding that this disclosure was in the public interest and tended to show that (a) a criminal offence has been committed, is being committed or 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, and (e) that the environment has been, is being or is likely to be damaged. It was also satisfied that this was a protected disclosure under Section 43C(1)(b)(i) as it was reported to the person who was employed by the entity who the claimant reasonably believed was accountable for the relevant failure; in other words, an employee of Mr Ben Brown of Hardwick Farms, the shoot tenant.

Disclosure 8

The Tribunal was satisfied that this was a qualifying disclosure; the information given by the claimant to Natural Resources Wales was a disclosure of information which in the reasonable belief of the worker making disclosure, is made in the public interest and tends to show (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, and (e) that the environment has been, is being or is likely to be damaged.

The Tribunal was not satisfied that the comments of the claimant to the gardener Mr Morris constituted a qualifying disclosure. While it accepted that Mr Morris was told that the work that Mr Les Smith was undertaking was in breach of an SSSI, Mr Morris was the respondent's gardener. He was not in any position to do anything about the matter whatsoever and there was no evidence from the claimant that he reasonably believed the contrary. The Tribunal was satisfied that the disclosure to Mr Morris could not be a disclosure under Section 43G as it was not reasonable for the claimant to make a disclosure to a gardener.

In any event the Tribunal did not accept that Mr Fry reasonably believed that he would be subjected to a detriment by Mr Bourdillon if he told the respondent about the issue. The Tribunal noted that the claimant went on to make the disclosure to the respondent and there was no evidence adduced that Mr Fry was concerned that he would be subjected to a detriment at this time. In relation to the disclosure to Natural Resources Wales, the Tribunal for the same reasons outlined under the section dealing with Disclosure 5 was not satisfied that this met the requirements of Section 43C, 43F, 43G or 43H.

The Tribunal in relation to Section 43H noted that damage being done to the SSSI was significant. It carefully considered the evidence in the supplementary bundle, particularly the statement by Mr Nicholas Hudson. The Tribunal also noted the evidence of PC Golding that about 1.5% of the area of the SSSI was affected, and that ultimately the investigation was concluded by the respondent accepting a caution for the damage done to the SSSI by the shoot. The Tribunal considered that damage to the extent described in the evidence before it and which resulted in a caution could not be judged as being an exceptionally serious failure.

Disclosure 9

The Tribunal considered it was required to make findings of fact in relation to what happened when the claimant spoke to Mrs Bourdillon on 12 June 2015. Mrs Bourdillon's oral evidence was that she could not fully remember the conversation but she denied the phrase "SSSI" being said by the claimant. Her evidence was that initially the claimant was unwilling to tell her what the difficulty was and that he wanted to speak to Mr Bourdillon. The Tribunal accepted this evidence and found that Mrs Bourdillon was a credible witness. It is not unusual for witnesses not to remember the entirety of a conversation. Weighing the evidence of both Mr Fry and Mrs Bourdillon, the Tribunal found that it was more likely not that Mr Fry did not say that the work being undertaken by Les Smith was in breach of the SSSI. It thought it was more likely than not that he wanted to tell the respondent direct this information. It found that he did tell Mrs Bourdillon that the problem was occurring

where Les Smith was working, that a film crew was recording the damage, and that there was an issue with the tracks and pheasant pens in Allt y Gest. The Tribunal did not accept that Mrs Bourdillon had made the remark "*people around here make me sick, why don't they mind their business, it can't be seen from the road and there's no public access there*" as it preferred the evidence of Mrs Bourdillon. It thought it was more likely than not if Mrs Bourdillon had said this, the claimant would have said so in his blog, and it found Mrs Bourdillon's oral denial on this point credible and persuasive. The Tribunal was not persuaded by the claimant's evidence on this issue.

The Tribunal took the view that telling Mrs Bourdillon that there was an issue with the tracks and pens where Les Smith was working was not a disclosure of information which constituted a qualifying disclosure.

Disclosure 10

There is little factual dispute about this disclosure, both parties accepting that the claimant told Mr Bourdillon about the environmental damage and that there was an SSSI in place at the site. This is clearly a qualifying disclosure under Section 43B, the Tribunal being satisfied it was made in the public interest and was made in compliance with Section 43C to the claimant's employer, the respondent, on 13 June 2015. The Tribunal had no difficulty in finding that this was a protected disclosure.

Disclosure 11

For the reasons already given under Disclosures 5 and 8, while there is no factual dispute about what the claimant told Mr Hudson from Natural Resources Wales on 15 June 2015 and it clearly is a qualified disclosure, in the judgment of the Tribunal this alleged disclosure is not a protected disclosure under either Section 43C, Section 43F or Section 43H.

When considering Section 43G, the Tribunal found that Mr Fry reasonably believed that the information disclosed and any allegation contained within it was substantially true and he did not make the disclosure for the purposes of personal gain. As by this point the respondent had received the same information from the claimant, the conditions set out in Section 43G(1)(d) were met and the Tribunal considered that

it was reasonable for the claimant to make the further disclosures to Mr Hudson. The damage to the SSSI was being investigated by him following the earlier disclosure to Natural Resources Wales, and it was reasonable for Mr Fry to cooperate with that investigation. The Tribunal noted that it appeared that the disclosure made to Mr Hudson on 15 June 2015 largely appeared to be the same disclosure made previously by the claimant to Natural Resources Wales on 10 June 2015. The Tribunal considered that disclosure fell under Section 43G (4) as it was a subsequent disclosure of substantially the same information as previously disclosed both to the respondent and to Natural Resources Wales. It was satisfied that Disclosure 11 was a protected disclosure.

Disclosure 12 — There is no factual dispute between the parties about what happened in the telephone conversation between Mr Bourdillon and Mr Fry in the evening of 15 June 2015. However, in the judgment of the Tribunal, this conversation was simply a discussion between the parties about the damage that had been caused and the next steps. There was no disclosure of information within this conversation. It therefore does not constitute a qualifying disclosure in the judgment of the Tribunal.

Disclosure 13 — There is little factual dispute that on 24 June 2015 the claimant contacted the County Planning Officer about operations by the shoot, including the construction of pheasant pens, the quarrying of stone, issues regarding the footpaths, and the number of days of shooting taking place. The Tribunal was satisfied that this was a disclosure of information which in the reasonable belief of the worker (the claimant) making the disclosure, was made in the public interest and tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, namely planning law. The claimant's evidence was that he believed this to be the case and it was not seriously challenged under cross-examination. The fact that it appears that there was been no actual breach of planning permission is irrelevant as the claimant reasonably believed that

there were breaches of planning as set out in his email to Powys County Council.

However, the Tribunal is not satisfied that this was a breach of Section 43C because the Council was not legally liable or accountant for breaches of planning permission by the shoot or the respondent. No evidence was adduced showing that Powys County Council is a prescribed person under Section 43F. The alleged breaches of planning permission were not an exceptionally serious failure as defined by Section 43H in the judgment of the Tribunal; it refers the parties to its previous discussion about the threshold to be met for Section 43H.

In relation to Section 43G, the Tribunal was satisfied that Mr Fry reasonably believed that the information disclosed and any allegation contained within it was substantially true and that he did not make the disclosure for the purposes of personal gain but that there was no evidence that Mr Fry reasonably believed that it was likely that he would be subjected to a detriment by the respondent if he told Mr Bourdillon about his concerns about planning permission.

Disclosure 14

The allegation within the Welsh Waller blog on 23 August 2015 written by the claimant was that the respondent had failed to comply with the law regarding repairs to listed buildings, particularly in the reference to the use of lime mortar, as opposed to modern cement. Again, the Tribunal found that this was an exceptionally serious failure as required under Section 43H. It also judged that this was not a disclosure under Section 43G as there was no evidence that Mr Fry reasonably believed that he would be subjected to a detriment by his employer had he told Mr Bourdillon of his concerns regarding the use of modern cement. The Tribunal was satisfied that as the claimant was the specialist employed to repair the wall, it was his choice whether or not to use lime mortar and his role to ensure that he complied with the relevant regulations concerning repairs to listed buildings or tell the Estate why lime mortar was required. The claimant was an approved contractor for these purposes according to the evidence the

Tribunal heard, and it was noteworthy that in fact the claimant did use lime mortar to complete the wall.

The Tribunal found that the entry in the blog was not a protected disclosure, though it was satisfied that it would constitute a qualifying disclosure as it accepted that Mr Fry reasonably believed that the information showed that a person had failed or is failing or is likely to fail to comply with any legal obligations and was made in the public interest, listing existing in order to preserve buildings for the public. The disclosure was not protected for the reasons given above.

Disclosure 15 — The Tribunal accepted that this was a qualifying disclosure and that the claimant had a reasonable belief in making the disclosure and that it was made in the public interest, and that it tended to show that (a) 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, and (e) that the environment has been, is being or is likely to be damaged.

For the reasons previously stated, the Tribunal judged that this was not protected by Section 43C, 43H or 43F, but was satisfied it was a protected disclosure under Section 43G. It accepted that the claimant reasonably believed that the information disclosed and any allegation contained within it was substantially true and that he did not make the disclosure for the purposes of personal gain and that he previously disclosed substantially the same information to the respondent. The Tribunal was satisfied in all the circumstances of the case that it was reasonable for the Claimant to give a formal statement to PC Golding and Mr Hudson regarding the damage to the SSSI and to cooperate with the investigation.

42. The Tribunal therefore finds that the following disclosures were protected: -

Disclosure 7, Disclosure 10, Disclosure 11 and Disclosure 15.

Subjected to detriment on the ground that the worker made a protected disclosure

43. The Tribunal then went on to consider whether the claimant had been subjected to any detriment by any act by the respondent on the ground that the claimant made protected disclosures. The Tribunal accepted that the withdrawal of work and eviction from Coed Trefen constituted detriments. The Tribunal found that the loss of work and his home was to the disadvantage of the claimant and constituted a detriment.

44. The question that the Tribunal needed to determine was whether these detriments occurred because of the protected disclosures made by the claimant or for some other reason. The Tribunal found that the claimant was subjected to the detriments because the contents of his blog of 23 August 2015. It was not persuaded that the issue of possible rent arrears was the reason why the respondent decided to withdraw work and evict the claimant. The Tribunal was wholly persuaded by the evidence of Mr Bourdillon, Mr Lee and Mrs Bourdillon about the reason why on 3 September 2015 the respondent withdrew work and decided to evict the claimant. Their evidence was that the blog was offensive and upsetting to the Bourdillon family, and was seen as a "betrayal" by the claimant of their friendship. Mrs Bourdillon in particularly felt that the claimant had been hypocritical as he failed to pay the rent in cash due to his financial difficulties, but complained when the Bourdillons did not have money available as a result.

45. The Tribunal regarded the contents of the blog of 23 August 2015 as undoubtedly offensive and appeared objectively to be an attempt in some way to shame the Bourdillon family. The tone was unpleasant. Indeed, Mr Fry himself accepted under cross-examination that when he repeated the same comments in February 2016 in his blog, albeit in a more extreme manner, he intended to be offensive. Describing the Bourdillons' as being above "menial bureaucracy", making public their financial difficulties and asserting it was because they did not care, was in the judgment of the Tribunal grounds on which the respondent could reasonably take action against the claimant. While this point is not determinative, having a good reason to take action is more likely to persuade a tribunal that this was why the detriment occurred than when no such reason exists.

46. It is noteworthy that the respondent believed that the claimant had been involved in June 2015 and the disclosure to Natural Resources Wales as shown by his emails to third parties. The Tribunal was persuaded by the evidence that the respondent was grateful to the claimant and only wished he had been told earlier to stop the damage becoming more significant. The claimant did not give any satisfactory answer as to why

he had not told the respondent any earlier about the damage to the SSSI, notwithstanding the fact that it was the respondent who was criminally liable for any damage caused. It was noteworthy that even after the involvement of Natural Resources Wales and the disclosure to Mr Bourdillon on 13 June 2015, there was no difficulty in the respondent acceding to the claimant's request for a new AST in July 2015. This in the judgment of the Tribunal showed the relationship between the claimant and the respondent remained good after the protected disclosures had been made to various parties, including to the respondent himself.

47. The Tribunal asked itself what changed between July 2015 and 3 September 2015? What changed was that the Bourdillon family read the claimant's blog of 23 August 2015. As Mr Bourdillon's postcard of 3 September 2015 makes clear, the offence caused by the blog to the family was the reason why the respondent as no longer prepared to allow the claimant to work for the Estate any longer or live nearby in a property owned by the Estate. The Tribunal, having heard from Mr Bourdillon directly, was not persuaded by Mr Vines' contention that the respondent had cleverly crafted a postcard and become an expert on protected disclosures (an area in which he appeared to have no prior knowledge; it is worth noting the respondent practices as a private client solicitor, not in employment law) in order to be able to get rid of the claimant under the guise of being offended by his blog.

48. The Tribunal finds that the reason that the claimant was subjected to the detriments of which he complains was entirely due to the contents of his blog on 23 August 2015. The contents of this blog were not a protected disclosure and therefore the claimant's claim would have failed on its merits, had it not been outside the Tribunal's jurisdiction due to a failure to bring the claims in time.

Employment Judge C Sharp
Dated 15 February 2017

REASONS SENT TO THE PARTIES ON

21 February 2017

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS