THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mr R Thompson	**AND**	**Rail Management Services Ltd t/a RMS Locotec**

REASONS OF THE EMPLOYMENT TRIBUNAL

Held at:	**Middlesbrough**	**On:**	**8-10 February 2017**
Before:	**Employment Judge Wade**	**Members:**	**Ms E Wiles** **Mr S Hunter**

Appearances

For the Claimant: **Ms J Callan of Counsel**
For the Respondent: **Mr Howson, Consultant**

Note: A summary of the written reasons provided below were provided orally in an extempore Judgment delivered on 10 February 2017, the written record of which was sent to the parties on 14 February 2017. A written request for written reasons was received from the respondent on 21 February 2017 and forwarded to me on 1 March. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues… For convenience the terms of the Judgment given on 10 February 2017 are repeated below:

JUDGMENT

1 The claimant's complaint of having been subjected to detriments on grounds of protected disclosures succeeds.

2 The claimant's complaint of unfair dismissal because of the making of protected disclosures succeeds.

3 The claimant's complaint of a failure to pay holiday pay is dismissed.

4 The Tribunal awards, and the Respondent shall pay, the following sums by way of remedy:

Basic Award:	£ 3592.50
Compensatory Award (inclusive of 15% ACAS uplift)	£ 32,439.00
Injury to Feelings	£ 12,000.00

5 The recoupment regulations apply. The prescribed period is 3 May 2016 until 10 February 2017. The Prescribed Amount is £18,443.60. The Grand Total of the Awards is £48,031.50. The amount by which the Grand Total exceeds the prescribed amount is £29,587.90.

6 The respondent shall further reimburse to the claimant a £250 issue fee.

REASONS

Introduction, complaints and issues

1 This is a claim of constructive dismissal and detriment on the grounds of having made protected disclosures. It is also an ordinary unfair dismissal complaint. The claimant had worked for many years in the rail sector, resigning last year. The respondent said this was an ordinary resignation, rather than a dismissal, and denied detriment.

2 The issues were agreed by the parties in preparation for a case management hearing. As it turned out there was considerable reduction in that issue list for a number of reasons: the four asserted disclosures were accepted by the respondent as being protected disclosures within the Employment Rights Act definition, including the "public interest" requirement; the claimant did not pursue his holiday pay complaint; the respondent conceded that if the claimant established a section 95 dismissal, it did not seek to establish reasonable dismissal within Section 98; there were a number of matters (those relating to the van) which the claimant did not pursue.

3 The matters which were said to found breaches of contract or detriments on the grounds of disclosures were therefore:

3.1 Following the three month review on 27th January 2016, the Respondent claiming that the Claimant had failed to meet the standards required;

3.2 The Respondent purporting to extend the Claimant's probationary period by three months;

3.3 [Had the Claimant completed his probationary period by 27th January 2016? If so, did its extension constitute a breach of contract?]

3.4 Did the Respondent undertake to provide training to the Claimant on starting his employment and, if so, did the Respondent fail to provide such training?

3.5 Did the Respondent fail to provide the Claimant with a Vehicle Maintenance Instruction manual?

3.6 Not holding a return to work interview when the Claimant returned to work following a period of sickness absence due to work place stress on 18th February 2016?

3.7 Suspending the Claimant on 26th February 2016?

3.8 Requiring the Claimant to remain on suspension for a protracted period?

3.9 By instituting disciplinary proceedings against the Claimant?

3.10 By giving the Claimant insufficient time to prepare for and attend the scheduled disciplinary hearing on 23rd March 2016?

3.11 Allowing the disciplinary process to be conducted by the Claimant's manager, against whom he had submitted a grievance some 5 weeks earlier?

3.12 By requiring the Claimant to attend a further 'informal investigation meeting' on 8th April 2016 at which he was alleged to have been 'training while suspended' and then imposing a written warning for misconduct?

3.13 By failing to provide the Claimant with a copy of the disciplinary sanction.

3.14 Requiring the Claimant to work in Doncaster on Monday 18th April 2016 and advising him of that fact by voicemail message on Friday 15th April;

3.15 Unilaterally varying his contract in refusing to pay the Claimant for his travel journey from home to work?

3.16 Failing to uphold the Claimant's grievance against his manager?

3.17 Giving the Claimant insufficient notice of his appeal hearings against the disciplinary decision and the grievance decision?

3.18 Failing to give the Claimant a decision on his appeals?

3.19 By refusing the Claimant's subject access request on 12th August 2016

4 The further issues remaining for the Tribunal were: did the respondent breach an express term of the claimant's contract of employment relating to probationary period?

5 Did the respondent engage in conduct calculated or likely, without reasonable and proper cause, to destroy or seriously damage the necessary trust and confidence between the parties?

6 Did the claimant affirm any breaches such that he was no longer entitled to rely upon them?
7 Did the claimant resign at least in part in response to any found breaches?

8 What was the principal reason for the claimant's dismissal (if found)? Was is that he had made protected disclosures?

9 Did the matters above (or any of them) amount to acts to the claimant's detriment on the ground that he had made protected disclosures.

Evidence

10 The Tribunal heard oral evidence from the claimant and from Mr Lark only on behalf the respondent, and had a bundle of relevant documents to assist. We did not hear from Mr Hanson, to whom disclosures were made; he still works for the respondent group and the claimant is very much in touch with him; we did not hear from Mr Clark, executive vice president and involved with the claimant's second grievance, also still employed by the group; we did not hear from Mr Gregory, who heard the first grievance; he is no longer employed by the group; we did not hear from Ms McArthurs who played a part in disciplinary, grievance and administration matters by way of formal or informal HR advice, or Ms Island who supported Mr Lark and others in various ways connected with document and administration.

Findings of Fact

Background and being appointed to a new role

11 The claimant was employed by "Hanson Traction" on 16 November 2009. That was a sister company of the respondent where he worked for many years. He had a long history of working in the railway industry and the role at Hanson was workshop based in the West Midlands.

12 The claimant knew the owner, Mr Hanson, who was also based there. That company was later acquired by a group which also owned the respondent. Mr Hanson became a director in the group but was charged with focussing on his part of the business in the West Midlands.

13 The claimant decided to apply for a role in Doncaster and that had arisen because Mr Lark, who ran the Doncaster operation needed a new fitter. The post was advertised; several candidates were interviewed. There was discussion of the claimant's skill set including him working with "08 locomotives", which he had done in a limited capacity in the past and had included on his CV. He had not done that work whilst working for Hanson.

14 The claimant had not served a conventional fitter apprenticeship. He was largely self taught and a rail enthusiast with skills in specific areas. He had been qualified in the past to carry out service and safety examinations of particular locomotives.

15 There was no discussion of a formal training need or plan at the interview, but Mr Lark was clear that the claimant could work alongside the other fitters as required. Also at the interview there was discussion of the need to work away from home: the work was not a workshop role, it involved being sent on 08 fitting assignments in a van to customers across the country.

16 There was no technical test as part of the interview and technical fitting ability was taken as read. The claimant was prepared to live in Lincoln and work from there during the week (staying with his brother).

The contract of employment and its operation

17 Following e-mails about his successful appointment he was advised that he would be treated as having continuous service (albeit he was issued with a new contract of employment). The contract referred to a staff handbook, but he did not receive a copy of it.

18 Before that employment Mr Lark had contacted Mr Hanson by way of informal referee and been told there had been no issues with the claimant. The claimant had provided other referees also.

19 There was no job description. The appointment was as a Locomotive Mechanical Fitter. The contract referred to a three month probationary period (the advert had also mentioned a 12 week probationary period). The claimant made no objection to that at the start of the employment. The contract provided as follows:

"*You will be expected to travel as part of your employment. Your starting point and main place of work is Rossington and travelling times will only count as paid working hours from Rossington*".

20 In practice however the claimant submitted weekly timesheets which were heavily scrutinised by Mr Lark. He was paid for his hours from 7:30am commencing from Lincoln. He had a fuel card and a van provided for his work.

21 The claimant commenced on 19 October 2016. He asked for a "VMI", akin to a "Hayes" manual for cars as we have had it described, for the 08 locomotive. He was not provided with one to keep in his van whilst out on assignment, despite that request. Mr Lark's objection was on the costs grounds of copying.

22 The three month probationary period expired on 18 January 2016, by which time Mr Lark had developed concerns over some skills gaps. That was as a result of one or two specific incidents. The claimant had also by then developed a very poor impression of Mr Lark, including in relation to his approach to health and safety matters, staff management and the running of the business generally.

The first disclosure

23 On 19 January 2016 the claimant included those concerns in an e-mail to Mr Hanson. There was safety related information which amounted to a protected disclosure. It was clear that there were concerns both for himself but also for others, and including the public at large because the railway sector is a safety critical industry.

24 Mr Hanson's response to that e-mail was instructive to the Tribunal. It was effectively: leave it with me. I can't do anything for the time being because I have to focus on the West Midlands which needs more revenue. Mr Hanson did not forward the claimant's e-mail to Mr Lark at that time.

The performance review meeting

25 On 27 January the claimant met Mr Lark for a three month review at the respondent's Head Office in County Durham. Mr Lark raised concerns about the skills gaps he perceived. He said this:

"*The work you do is satisfactory. The work you can't do is because you don't understand certain key things*".

26 The meeting was structured, followed a template for performance review, resulting in some useful discussion; but it also descended into disagreement which was heated at times.

The second disclosure

27 The claimant raised a particular safety issue which he had forewarned in his e-mail to Mr Hanson, about a locomotive called the Polar Express and work on its brakes. He raised his lack of a VMI and other matters. Some of the noted comments in the meeting amounted to protected disclosures made orally.

28 The claimant's response to Mr Lark's attempts to discuss his technical ability was to invite more training, but he also disagreed with Mr Lark's assessment.

The letter confirming the outcome of the review

29 The outcome of that meeting was a letter saying that the claimant's probationary period was to be extended to 19 April, that was by three months, and that his employment could be ended at the end of that period. The VMI would be available when he next came to Doncaster, Mr Lark said, but aside from that and being asked to ask colleagues if he had any problems, no structured training plan was proposed or to be put in place.

30 The claimant was then signed unfit for work by his GP due to stress and returned to work only for a few days. He resigned on 3 May 2016.

The claimant's formal grievance

31 On 7 February 2017 the claimant raised a formal grievance to Mr Hanson concerning Mr Lark, including within it further protected disclosures. On 8 February 2017 Mr Hanson forwarded the complaint to the respondent and asked that advice be sought; over the next days it was brought to Mr Lark's attention.

32 There was then no acknowledgement of the grievance; no appointment of someone to investigate it; in fact there was no communication to the claimant about it at all at that time and there was no explanation in respect of that failure. Mr Lark could not help as to the failure to respond. The respondent had HR support via the group structure.

The commencement of disciplinary proceedings against the claimant

33 On Thursday 18 February, after two weeks or so of absence, the claimant was sent to a client in Norwich by Mr Lark, without any return to work interview or discussion about the claimant's health. The claimant signed in at that client using the wrong book; this was raised with him on site, but there was no complaint at that time from the client.

34 On Wednesday 24 February a different client raised routine issues in an email to Mr Lark, including the need for visiting engineers to leave a visit report. That low key mention arose out of the claimant's attendance at the client that day, albeit he was not identified by name. He had been given the wrong number to contact the client, by Mr Lark, but after some confusion had spoken to the client contact.

35 The clients' actions on these two occasions were in stark contrast to the action of a client to an incident involving a colleague of the claimant which occurred the same year. On that occasion the client's reaction was to immediately suspend the colleague

from the site; an investigation followed and the colleague was reinstated after a suspension of three weeks. The Tribunal has inferred from this contrast, and the chronology and content of emails, that where clients have real and serious concerns, their response is immediate and proportionate. The immediate client response to the 18 February matter was very little or nothing other than to mention it to a colleague of the claimant's. The immediate client response to the 24 February matter was also very low key. These proximate client responses were in stark contrast to later lengthier and critical emails.

36 Mr Lark then responded to both clients' by telephone, and, we have inferred, sought from them further information more damming of the claimant. We have inferred the latter from all the circumstances, including those mentioned above.

37 Albeit Mr Lark did not have the later critical client emails, on 26 February 2016 he suspended the claimant, taking possession of the works van in the process, ostensibly in connection with what he characterised as client complaints. During this interaction the claimant referred to Mr Lark as a "devious bastard", such was his upset at being suspended.

38 Mr Lark then telephoned three different contacts in the industry whom he believed may have worked at an organisation where the claimant was said to have worked. Only one contact responded and on Monday 29 February he emailed that contact, attaching the claimant's curriculum vitae and asking for confirmation as to whether the claimant had worked at the organisation present on the CV.

39 On 1 March 2016 the Norwich client provided an account of the claimant's attendance which was critical, and on 2 March, the second client did similar.

40 On 9 March Mr Lark received a response from the contact concerning an organisation where the claimant had said he had worked. That response confirmed no employment records were held for the claimant. In fact that was unsurprising because that contact worked for a different company to the one mentioned on the CV, which had become insolvent, and administrators had sold the business on. In any event the claimant had been mostly a self employed fitter working for the defunct company named on the CV; and was only latterly asked to become an employee, which he undertook for a short spell before resigning.

41 On 18 March the Claimant was sent a letter inviting him to a disciplinary meeting; the letter was posted on a Friday, and he received it the following Monday and was required to attend a hearing at 9.30am that Wednesday. There were four charges put to him; there was no investigation report or details of the investigation and the hearing was due to be conducted by Mr Lark at head office in County Durham.

42 The hearing was postponed until 30 March 2016, and having discussed matters the claimant was told that his suspension would continue because of new allegations which had been made. The claimant was made aware of the response from the contact concerning his CV. Mr Lark had also by then sought information about the claimant's attendance at training for magistrates on a day when the claimant had also attended a hospital appointment and had requested a day's leave to do so.

43 On 1 April the claimant was sent an acknowledgment of his grievance and invited to a grievance meeting to be chaired by a Mr Gregory (pages 94 and 95). The same day the claimant complained to the Information Commissioner (page 96) about the sending of his CV to an external organisation without his consent.

44 The claimant then took part in a further investigation meeting on 8 April 2016 with Mr Lark, regarding the ongoing investigation (concerning his CV and magistrates training) said to be taking place. That meeting was convened with less than twenty four hours' notice and the claimant was told that he did not have the right to be accompanied.

45 On 13 April the claimant took part in a grievance meeting; Mr Gregory then met and interviewed Mr Lark. The same day a letter was sent to the claimant by Mr Lark instructing him to return to work at 7.30am on 18 April 2016, and informing him that he was to be given a warning as a result of the disciplinary hearing, the client complaints and the "devious bastard" comment; no further action was to be taken in relation to the other matters concerning magistrates training. The claimant received that letter on or around 15 April and then emailed Mr Lark to confirm he would not be returning to work. On 18 April he was further certified unfit for work due to stress.

46 On 20 April 2016 a grievance outcome letter was sent to the claimant recording that all the allegations were regarded as unsubstantiated. Mr Gregory said this:

"RMS Locotec cannot substantiate your grievance that Mr Lark "expects [you] to ignore all the rules and safety regulations that [you] have ever been taught during [your] twelve years with the rail industry and himself ignores employment law". We cannot agree with any part of this statement and following our investigation we have found Mr Lark to be professional and to carry out his duties as a manager for the locomotive hire division of RMS Locotec in a satisfactory and safe manner. Mr Lark has adhered to employment law throughout the disciplinary process involving you. We cannot of course comment on which rules and regulations you have been taught during your railway career, however, we note that you referred to Abellio [a client] and Network Rail standards and we would like to point out that Mr Lark is not required to adhere to policies and procedures of companies that are not RMS Locotec. We have no reason to doubt Mr Lark's commitment to safety or UK law."

47 Also on 20 April the claimant appealed against his disciplinary warning and the following day he emailed Mr Lark about his expenses, which had been refused by Mr Lark for the journey to one of the meetings on the basis that the claimant was only entitled to expenses from Doncaster to County Durham, rather than from his home.

48 On 24 April the claimant lodged a second grievance concerning his mileage expenses and on 28 April, Mr Clark the owner of the respondent group, responded to the claimant dismissing that grievance also. The claimant resigned by letter dated 2 May 2016 citing his treatment as the reason for his resignation.

49 <u>Post-Employment</u>

50 On 6 May Mr Clark wrote to the claimant requesting that he retract his resignation; the claimant did not do so but instead submitted an appeal against the

outcome of his first grievance concerning Mr Lark and the disciplinary warning issued to him. Those appeals were acknowledged by the respondent on 19 May 2016. On 8 June a report concerning the brakes issue reported by the claimant concerning the Polar Express locomotive was published, and on 24 June the claimant was invited to hearings to take place on 26 June concerning his appeals.

51 Instead of attendance the claimant provided written submissions for the two appeals and on 7 July he submitted a Subject Access Request to the respondent to receive copies of his personnel papers; when he received no response the claimant wrote to the Information Commissioner and the respondent sought advice in connection with that request. The respondent refused to provide the information on the basis of the advice received that it was not disclosable because the purpose of the request was litigation. Later in November the Information Commissioner wrote to the respondent, resulting in the respondent providing the information on 2 December 2016.

The Law

Unfair constructive dismissal

52 The claimant's right not to be unfairly dismissed is set out at section 94 of the Employment Rights Act 1996 ("the 1996 Act"). Section 95(1)(c) provides that an employee is dismissed if: "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."

53 An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract (**Western Excavating (ECC) Ltd v Sharpe [1978] IRLR 27**). The conduct of the employer must be more than unreasonable, it must amount to a fundamental breach of contract.

54 This claimant is alleging a breach of the implied term of mutual trust and confidence. In **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347**, the EAT said: -

55 *"It is clearly established that there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an 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 Employment Tribunals function is to look at the employer's conduct as a whole and 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 any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."*

56 The House of Lords considered the term in **Malik v BCCI** saying that if conduct, objectively considered, was likely to cause serious damage to the relationship between the employer and the employee, a breach was made out irrespective of the motives of the employer. They emphasised the conduct of the employer must be without "reasonable and proper cause" and that too must be objectively decided see **Bournemouth University-v-Buckland 2009 IRLR 606.**

57 An employer is liable for the acts of its managers towards subordinates done in the course of their employment whether the employer knew or approved of them or not, see **Hilton International v Protopapa**. There are countless examples of the ways in which the term may be breached including the giving of unjustified warnings, see **Walker v Josiah Wedgwood**; and failure to take adequate steps to resolve an employee's claim of harassment, see **Bracebridge Engineering v Darby**.

58 A breach of the term may result from a number of actions extending over a period of time as explained in **Lewis v Motorworld Garages [1985] IRLR 465**. This so called "last straw doctrine" was further explored in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35**. The last straw does not in itself have to be a breach of contract or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts, it amounts to a breach of the term. It must contribute something to that breach, although what it adds may be relatively insignificant. An entirely innocuous act cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of her trust and confidence in the employer.

59 In short then, the Tribunal will ask whether the behaviour of the employer objectively judged was, without reasonable and proper cause, sufficiently serious to breach the term of mutual trust and confidence and, if so, whether it was an effective cause of the resignation, see **Jones v F.Sirl Furnishing Ltd** as qualified in **Wright-v-Ayrshire Council**.

60 The principle of contractual affirmation can be shortly put: if an innocent party affirms the contract, his right to accept any repudiatory breach is at an end. If there is a fundamental breach of an employment contract an employee can bring that contract to an end as a remedy - she cannot rely on those fundamental breaches indefinitely. If she continues on with the contract she will be taken to have "affirmed". Acts consistent with affirmation include remaining at work, accepting pay and benefits, and so on, unless an employee makes it clear that such acts are not to be taken as affirmation by saying "I'm working under protest" or words to that effect.

61 The principles of affirmation were examined in **Cockram v Air Products** EAT 0038/14/LA and were helpfully summarised. Mrs Justice Silber said this (paragraph 25): "The question whether a party has affirmed the contract is fact sensitive and context dependent. It does not generally lend itself to bright lines or rigid rules." At paragraph 15 she says: "It is undoubtedly the case that an employee faced with an employer's repudiatory breach is in a very difficult position, as the courts have repeatedly recognised. Most recently, Jacob LJ described the difficulties in these circumstances in **Bournemouth University Corporation v Buckland** [2011] QB 323 at para. 54 as follows:

"..there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."

62 The relationship of affirmation to the last straw doctrine is not straightforward. In Dr I Gibson and Partners v Mrs SA Hughes UKEAT 0371/06 His Honour Judge McMullen QC said this at paragraphs 19 and 20:
63 "First this is not a last straw case. The difficultly in using metaphors, as Lord Hoffmann warned recently in **Lawson v Serco** [2006] ICR 250 para 19, is there is a great danger in spending too long on a metaphor and a striking metaphor may lead to distraction. The last straw indicates that a very substantial weight be placed upon the back of a camel which it will bear with fortitude. But there comes a stage when any addition to the load will cause the camel's back to be broken, even if the addition is of something as trivial as a straw. That is the language used throughout the cases from **Lewis v Motorworld** to **Omilaju**. What is plain is that for this doctrine to be engaged there must be more than one event. True it is that none of them needs to be serious and none needs to be a breach of contract, provided cumulatively they amount to a fundamental breach. …..In this case a line was drawn under the events of June 2004 by the Claimant's affirmation of her contract and so none of the events, including a disputed matter of 4 June which occurred before her affirmation, can contribute to the load placed upon the camel's back."

Protected disclosures: "whistleblowing"

64 Section 103A of the 1996 Act provides that "an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or), if more than one, the principal reason for the dismissal is that the employee made a protected disclosure. Sections 43A, B and C set out the provisions defining protected disclosures and to whom they must be made, but these matters were conceded by the respondent.

65 A finding of the principal reason for dismissal is a matter of fact for the Tribunal to find on the basis of all the evidence presented (see Kuzel). Drawing inferences from primary findings of fact is not a tick box exercise. It is necessary in each case to consider whether in the particular circumstances of that case, the failure in question is capable of constituting evidence supporting the inference being sought; the question is: in the light of any explanation supplied does the equivocation, delay or other matter, in fact, justify that inference.There will be many cases where it should be clear from the start or soon becomes evident, that any eventual failure.. however reprehensible, can have no bearing on the reasons why the respondents did the act complained of…..". (Lord Justice Underhill paragraph 38 **Mr C DeSilva v NAFTHE UK EAT/0384/07/LA).**

66 Section 47B of the 1996 Act provides as follows:

47B Protected disclosures

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

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

(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

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

67 Fecitt v NHS Manchester [2012] IRLR 64 at para 45 confirms that a protected disclosure must "materially influence" an employer's treatment: that is the degree of causation required by "on the ground that"; but that an omission or failure to act must be a deliberate failure.

Submission, discussions, further findings and conclusions

68 The Tribunal had the benefit of written submissions developed orally; they are not reproduced here for reasons of expediency, but the Tribunal was grateful for the assistance of the advocates in the efficient disposal of the hearing. The Tribunal's conclusions in relation to the nineteen matters relied upon are as follows.

Mr Lark's assertion following the review that the claimant had not reached the standards required

69 We have concluded Mr Lark's judgment was made with reasonable and proper cause: it was Mr Lark's assessment of some aspects of the claimant's technical capacity. It did not cross the **Malik** threshold and it was not on grounds of the claimant having made a protected disclosure on our findings. At the stage Mr Lark reached this conclusion he had no knowledge of the first disclosure, and had genuine concerns about technical performance arising from one or two matters.

The extension to the probationary period

70 For the same reasons, this had nothing to do with the disclosure to Mr Hanson and cannot therefore amount to detriment on those grounds. As to contributing to a breach of trust and confidence, the claimant had completed his probationary period, as set out in his contract of employment, by 27 January. We consider that holding a meeting and extending a period which had already been completed was conduct which was without reasonable and proper cause, not because there were not legitimate concerns about performance, but because the period had already ended and there was no contractual provision to impose a new probationary period, with the threat of dismissal at the end. In these circumstances that conduct was without reasonable and proper cause, and likely to contribute to a **Malik** breach; it was not likely objectively to destroy or seriously damage trust and confidence on its own, but it is a matter was likely to contribute to such destruction or damage. The respondent's approach to this matter, when it had HR support, was indicative of an approach which road roughshod over fair procedures.

Did the respondent undertake to provide training and fail to do so and did the respondent fail to provide a VMI?

71 These were both matters about which the claimant either expressly or implicitly criticised Mr Lark in the claimant's initial e-mail to Mr Hanson: they were very real concerns which he raised in making that disclosure. They were not therefore detriments on grounds of that disclosure; they occurred both before and after it was made; they were not related to it at all or to later disclosures.

72 As to trust and confidence, there was no formal arrangement as to training at the beginning of the employment: competence was taken as read. We do consider that holding a meeting in which a training need is identified, and at which the claimant was willing and able to undertake such training, and then not arranging it, or dealing with it by saying, '*We'll provide that in after a further period of three months probation*", which was Mr Lark's position, was conduct likely to objectively damage trust and confidence; that is to contribute to its serious damage or destruction. It was indicative of Mr Lark's expectation (and perhaps wish) that the claimant would fail. Similarly to have failed to provide the VMI copy for the van in the period in which the claimant's technical skills were criticised was **Malik** threshold conduct in these circumstances.

The failure to hold a return to work interview after the initial stress absence

73 We consider this was simply not thought about by Mr Lark. We consider it broadly reflective of the criticisms that the claimant made of Mr Lark in his very first communication to Mr Hanson. The claimant considered this a significant omission in a safety critical sector, and that the respondent should have assured itself that he was well enough and able to work alone, returning from a spell of poor mental health.

74 This omission was not on grounds of the second disclosure (about which Mr Lark did by then have knowledge); it was simply a matter which did not enter his mind. It was not deliberate.

75 Omissions and mistakes may contribute to **Malik** breaches. Did he have reasonable and proper grounds for his lack of thought? The respondent had HR support and the effects of poor mental health in safety critical industries is well documented; Mr Lark cannot be said to have reasonable and proper cause for this omission; it is objectively likely that it would contribute to damaged trust and confidence on the part of the claimant with a long history in this sector.

The suspension of the claimant and the length of that suspension

76 In broad terms we have concluded that the suspension of the claimant was entirely a retaliatory measure for the claimant's criticisms of Mr Lark and the disclosures he had made. The circumstances were that a client had sent a routine e-mail, having already had a conversation with the claimant. The routine email was sent at lunchtime on the day that the claimant had left the premises.

77 Quite properly Mr Lark might have wanted to pick up or acknowledge that client communication, but there is no rational explanation for the zealotry with which he seized upon subsequent evidence gathering against the claimant, nor the difference between the initial innocuous client communication, and the following much inflated accounts secured by Mr Lark. Mr Lark's conduct wholly failed to acknowledge his own error in providing the wrong telephone number for the client in the first place, or that the first matter occurred in a week when the claimant had just returned to work from ill health. He sought to gather evidence to blame the claimant in a wholly disproportionate way.

78 Despite Mr Lark's evidence to the contrary, which we rejected, the order in which these events unfold is compelling as to what was in his mind when he sought to investigate and implicate the claimant; the later events compound the conclusion we reached. We have also inferred from all the circumstances that the matters raised by the clients were, in reality at the time, minor matters, later sought to be inflated by Mr Lark. The suspension was to the claimant's detriment; it was wholly disproportionate and it was materially influenced by the disclosures and complaints about Mr Lark which the claimant made.

79 The maintenance of the suspension for such a lengthy period (some eight or nine weeks) over matters which had barely been raised by the clients at the time, and because Mr Lark was seeking to gather other damming evidence about the claimant's CV (without foundation), was undoubtedly influenced by the disclosures he had made, including in his grievance, to which there was no acknowledgment or reply for some weeks. There was a clear lack of good faith by Mr Lark.

80 It follows that the suspension and its maintenance were without reasonable and proper cause and were likely of themselves to destroy or seriously damage trust and confidence in these circumstances.

The disciplinary matters and corollary events

81 Instituting disciplinary proceedings, giving insufficient time to prepare for and attend the scheduled hearing on 23 March, allowing it to be conducted by Mr Lark in these circumstances, requiring the Claimant to attend a further 'informal investigation meeting' on 8th April 2016 at which he was alleged to have been 'training while suspended' and then imposing a written warning for misconduct?

82 We have also concluded that the institution of disciplinary proceedings were similarly materially influenced by the disclosures made by the claimant. The short notice communications when looked at in the round, together with arranging for Mr Lark to deal with these matters notwithstanding the grievance submitted by the claimant on 7 February, was an oppressive, targeted and bad faith use of disciplinary procedures to the detriment of somebody who had raised very specific concerns amounting to protected disclosures. There was no independent oversight or investigation of the client complaint issues, which had arisen almost immediately after the claimant presented his grievance, and there had been no similar ssues raised during the probationary review. These matters were clearly to the claimant's detriment and caused him a great deal of strain. They are the paradigm of protected disclosure detriment.

Failing to provide a written outcome of the disciplinary sanction and requiring his attendance at work

83 The first matter fell by the wayside because it became apparent that the claimant was provided with a disciplinary sanction outcome posted to him on 13 April albeit it would not have received that until perhaps Friday the 15th or the Thursday the 14th.

84 The requirement to attend work, the suspension having been lifted in the disciplinary outcome letter, is not, notwithstanding our findings concerning the disciplinary proceedings, a matter we considered to be a detriment, nor was it materially influenced by the disclosures. Quite the reverse, Mr Lark was in all likelihood told he must bring the claimant back to work. It was simply the lifting of, the coming to an end of the suspension. We do not consider it to be conduct which objectively would be likely to contribute a **Malik** breach. By this stage, trust and confidence was, in fact destroyed as between the claimant and the respondent by reason of the events described above.

Unilaterally varying his contract in refusing to pay the claimant for his travel journey from home to work

85 We consider this matter was polluted by and materially influenced by the disclosure. On our findings Mr Lark did regularly scrutinise hours and the like on timesheets. On our findings the claimant was paid for his time to travel from Lincoln, notwithstanding his contract provided otherwise and had not been applied by Mr Lark.

86 Suddenly, following the events of the suspension and so on it became Mr Lark's mission to apply the contract to the letter, as instructed by accounts, when he had not seen fit to do that up until this point.

87 Mr Lark's cause for his decision was both accounts instruction and the contract itself; in ordinary circumstances of course that would be reasonable and proper cause; but these were not ordinary circumstances: Mr Lark had been doing otherwise for the first three months of the contract, and his change in approach was materially influcenced by the claimant's disclosures. In these circumstances refusing to pay the claimant for his travel time from home to a meeting was conduct contributing to a **Malik** breach (not a breach of an express term) and a public interest disclosure detriment.

Failing to uphold the Claimant's grievance against his manager and resignation

88 The claimant presented two grievances. Both of them, considering their content and that of the outcomes, were on our findings best described as a wholesale vindication of Mr Lark's actions. In light of the circumstances we have found, their failure to get to grips with the merits and to undertake any reasonable investigation of the complaints are both materially influenced by the fact of the claimant having made disclosures, and unsurprisingly **Malik** breaches. Again, this was the classic suppression effectively of legitimately raised concerns, fairly (and unusually) described as a whitewash on both occasions on our findings.

89 The second grievance outcome, in relation to the expenses issue, immediately preceded the claimant's resignation and it is convenient to address whether the claimant has made out a dismissal within Section 95 and established its reason within Section 103A. Affirmation was not pursued by the respondent. The claimant's conduct was not consistent with his affirmation of this contract of employment, or his waiver of a series of breaches, in this case, and the resignation was very proximate in time to the disciplinary and grievance outcomes which we have found to be influenced by disclosures.

90 On our findings it is very clear that the claimant's resignation was wholly, not simply partly, in response to these events, it was for no other reason at all. Looking at the balance of the reasons for his resignation and the chain of events, this is properly described as circumstances in which the principal reason for the dismissal is the making of protected disclosures. The destruction of trust and confidence (which we have subjected to the objective **Woods** test) is in large part due to the suspension and disciplinary events, and grievance outcomes, which we have found to be substantially and largely caused by the disclosures. He has made out that the principal reason for his (constructive) dismissal was his making of disclosures. The claimant's protected disclosure dismissal complaint succeeds.

Giving the Claimant insufficient notice of his appeal hearings against the disciplinary decision and the grievance decision; failing to give the Claimant a decision on his appeals; refusing the Claimant's subject access request on 12th August 2016.

91 As to the post employment detriment complaints, the last of those, the subject access request and refusal to deliver the required or requested documents, was in our judgment clearly by reason of advice concerning a perception of the use to which the

documents were to be put (namely litigation). It was not materially influenced by the original protected disclosures.

92 As to the first two post employment detriments, the pattern of communications in this case was that the claimant complied with the time limits in the respondent's disciplinary and grievance procedures, as he was advised by the correspondence, and the respondent then takes weeks to reply and to invite him to a meeting, typically at very short notice.

93 We have inferred, in the absence of evidence from HR or those directly involved in the grievance and appeals, that these matters can only be explained by the respondent being influenced by the original disclosures; and a wish to make matters as difficult as possible for the claimant. Applying the burden of proof framework concerning the appeal outcome, the claimant has asserted that the failure to give him a decision on his appeal was because he made the original disclosures. The factual matrix certainly indicates that is an arguable assertion. The respondent has not adduced any evidence or explanation at all. The claimant succeeds on his case and evidence; we consider his shabby treatment to the last to have been influenced by those disclosures. It appears inexplicable given the arrangements that were made to determine the appeals, that the respondent did not respond to those.

94 In summary two out of the three post employment detriments complaints succeed, on our findings.

95 Finally the claimant's claim in respect of accrued untaken holidays is dismissed for not having been pursued.

Remedy Reasons

96 The parties were able to reach substantial agreement as to remedy. The representatives agreed the Basic Award (£3592.50), the lost statutory rights component of a Compensatory Award (£375), the pension loss component (£216.34), and lost earnings to the date of this hearing (£18, 443.60). It was acknowledged that the recoupment provisions would apply to the Tribunal's award. The parties were agreed that it was just and equitable that some award for future lost earnings should be made as the claimant had yet to replace his earnings, and that an award for Injury to Feelings should also be made in the Vento middle band, and that some uplift for the respondent's failures to comply with the ACAS Code on Disciplinary and Grievance Procedures should also be made.

97 The issues between the parties were:

the respondent said this was a lower end of the mid band case; the claimant contended for £12,500;

the respondent contended for a 10% uplift only; the claimant for the maximum 25%;

the claimant sought six months' future lost earnings; the respondent contended for three months.

98 The Tribunal made the following further findings of fact having heard from the claimant.

99 As a result of his suspension, the claimant felt humiliated with family, was frequently upset and tearful and later became fearful of texts and letters from the respondent. He was embarrassed amongst friends and contacts; his relationship

suffered; his upset was recognised by his GP as amounting to depression for which he was offered medication. He considered his life was “on hold” for much of 2016. He was unable to buy gifts for loved ones.

100 He initially circulated contacts to seek further work; he wanted to avoid claiming benefits, but had to do so being unsuccessful in that job search. He had to complete 30 hours of job seeking activity in order to receive universal credit. He continues to seek work and has made every effort to do so.

Conclusions: applying the law to the facts

101 The Tribunal considers that the claimant has been actively seeking work and will continue to do so. With the resolution these proceedings will bring, his feelings will recover. That is likely to be reflected in time in securing work: it is February and in our Judgment it is likely that the claimant will replace his previous earnings after a further twenty weeks and that produces further lost earnings sum of £9221.80 in addition to the 18,443.60 some agreed by the representatives.

102 As to the respondent’s unreasonable failures to comply with the ACAS code, they include overarching fairness in having Mr Lark investigate and pursue disciplinary measures, delay and failures to deliver appeal outcomes, and a lack of good faith. Those are fundamental, rather than technical failures to comply. Nevertheless the application of any uplift is a matter for the Tribunal’s discretion, and discretion must be exercised in the interests of justice and judicially. The claimant contended for a 20% uplift; we do consider this to be a case where that would ordinarily by the just level given the character of the failures. However, there is one matter where the claimant’s actions did justifiably raise Mr Lark’s concern and that is in seeking a full day off for a hospital appointment, and also that day attending magistrates training without being transparent about that. In those circumstances we exercise our discretion to uplift the award by 15%. Taking into account the agreed and determined elements, the total compensatory award is £32, 439.

103 In making injury to feelings awards, the Tribunal’s task is to compensate the claimant and not to punish the respondent. The fact of both detriment and dismissal as a result of making protected disclosures in reality meant that the claimant’s feelings were injured over a substantial period of time (from February onwards); the failure to provide a grievance or appeal outcome has meant he has struggled to have a resolution on these matters to enable his feelings to recover, until this Tribunal. In these circumstances, and recognising the value of money to him, including such matters as being without a car for this period and his inability to buy gifts, we consider a just award to be £12, 000.

104 The claimant is also entitled to his issue fee of £250. He received remission in respect of the hearing fee.

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EMPLOYMENT JUDGE WADE

REASONS SIGNED BY EMPLOYMENT
JUDGE ON 17 March 2017
....
REASONS SENT TO THE PARTIES ON

22 March 2017

FOR THE TRIBUNAL

G Palmer