EMPLOYMENT TRIBUNALS

Claimant: Mr C Hall

Respondent: M & Y Maintenance and Construction Limited

HELD AT: Liverpool **ON:** 2-5 May 2017

BEFORE: Employment Judge T V Ryan

REPRESENTATION:

Claimant: Mr C Millett, Solicitor
Respondent: Mr S Peacock, Solicitor

JUDGMENT having been sent to the parties on 9 May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. **The Issues**

The issues were agreed at the outset and were included in a document entitled C3. C3 includes details of the respective parties' arguments in respect of some of those issues. For the avoidance of doubt, in agreeing the document at C3 we annotated it to clarify some of the generically stated issues. In consequence of all of that exercise the issues were agreed as follows:

1.1 Did the claimant make a qualifying disclosure within the meaning of section 43B Employment Rights Act 1996 ("ERA")?

1.2 If so, was it made in accordance with sections 43C to 43H ERA?

1.3 The claimant relies on the following disclosures:

1.3.1 3 November 2014 – the respondent accepts that the claimant made a qualifying disclosure but the claimant no longer makes any claim in relation to this disclosure.

1.3.2 2/3 December 2015 – in a telephone conversation with Gillian Kelly.

1.3.3 4 December 2015 – the claimant raised various concerns to Keira Vogle during a meeting on site.

1.3.4 9 December 2015 – the claimant emailed Mr Moses (page 98 of the trial bundle to which all further page references relate unless otherwise stated).

1.3.5 11 December 2015 – the claimant emailed Kate Jolley at page 113. During the course of the hearing Mr Millett conceded for the claimant that the claimant no longer contended that this was a protected disclosure.

1.3.6 15 February 2016 – the claimant had a telephone conversation with Peter Martlew alleging a breach of legal obligation by contract workers untrained to handle asbestos who had been instructed to carry out work with potential exposure to asbestos of which they had not been forewarned.

1.4 Constructive unfair dismissal –

1.4.1 Did the respondent breach an express or implied term of the claimant's contract of employment?

1.4.2 If so, was such a breach fundamental?

1.4.3 If so, did the claimant resign in response to the breach and not for any other reason?

1.4.4 Did the claimant delay too long in resigning and affirm the breach?

1.4.5 Assuming the above had been satisfied, what was the reason for the respondent's conduct i.e. was the sole or principal reason the fact that the claimant had made a protected disclosure?

1.5 The claimant alleges breaches of the implied term of trust and confidence and of providing a safe system of work and safe workplace, and alleges that the following were breaches of these terms –

1.5.1 Suspending him from 7 December 2015 to 22 January 2016 following what the claimant alleges were false allegations of inappropriate behaviour by him towards Keira Vogle, Gillian Kelly and Janine McClymont.

1.5.2 Inviting him to sign a pre-prepared letter of resignation on 15 February 2016.

1.5.3 Failing to address concerns he raised over health and safety.

1.6 Alleged breach of express terms –

1.6.1 Did the respondent breach the claimant's contract by failing to pay him the correct holiday pay due to him inclusive of recognition of bonus entitlement?

1.6.2 If so, was such breach a fundamental breach of contract?

1.7 The parties agreed that the fundamental issues are –

1.7.1 Whether the claimant resigned or was dismissed and if he resigned, was he constructively dismissed, the principal reason being that he made a protected disclosure?

1.7.2 What was the reason that the respondent behaved in the way it did towards the claimant?

1.8 The claimant says he was designated to carry out activities in connection with preventing or reducing risks to health and safety at work. This is in issue.

1.9 Was the claimant an employee at a place where –

1.9.1 There was no health and safety representative or safety committee; or

1.9.2 There was such a representative or safety committee but it was not reasonably practicable for the claimant to raise the matter by those means and he therefore brought to the respondent's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful to health and safety;

1.9.3 In circumstances of danger which the claimant reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, did he leave or propose to leave, or while the danger persisted refused to return to his place of work or any dangerous part of his place of work?

1.9.4 In circumstances of danger which the claimant reasonably believed to be serious and imminent did the claimant take or propose to take appropriate steps to protect himself or other persons from danger?

1.9.5 Assuming the above, what was the sole of principal reason for the respondent's conduct?

1.10 Holiday pay: this claim was settled, withdrawn and dismissed at the outset.

2. **The Facts**

2.1 The respondent is part of the Regenda Group, Regenda Limited, which has over 500 employees. The respondent provides responsive repairs and

maintenance services, both planned and investment work, in respect of rented accommodation. At the material time it dealt with some 13,000 properties, and the respondent had at that time approximately 220 employees.

2.2 The claimant was employed as a window fitter from 22 April 2014 until 22 February 2016 on an extended fixed term contract. Initially the fixed term was to 22 April 2015 but on 18 March it was extended to 31 March 2016.

2.3 The claimant resigned on 15 February 2016 giving one week's notice to 22 February 2016; that was employment for one year and ten months. He did not have protection against "ordinary" unfair dismissal under section 98 Employment Rights Act 1996.

2.4 The claimant was issued with a contract and a job description, pages 72-73 of the trial bundle (all page references are to the trial bundle unless I say otherwise).

2.5 Clause 5.2 of the contract sets out the claimant's main duties and they are referred to in detail in the job description, although that is not exclusive. The job description defines the overall job purpose as "installing new and replacement windows and doors in accordance with the respondent's health and safety practices to ensure safe and compliant installations". There is then a list of outputs, 1-10, and number 10 is to follow the method statements, risk assessments, health and safety legislation to ensure work is carried out safely in accordance with instructions. That boils down to the claimant being engaged to work safely in general and, initially, not employed in a designated role to prevent or reduce health and safety risks. The claimant was not a health and safety representative for fellow workers. He did not take part in health and safety regulated consultation.

2.6 The respondent has, and had at the material time, a health and safety team which was defined and known to all concerned, comprising Mr Morrell, Mark Barlow, Paula Foster and Janine McClymont.

2.7 On 25 January 2016 the claimant was offered a temporary acting up role as site team leader. That was to take effect on 1 February 2016 (page 158) and he was to operate in that role until 31 March 2016, the end of the fixed term. The document I have mentioned referred to "additional duties as attached" but there was none attached to the document in the trial bundle so I do not know what those additional duties were, if they were ever specified.

2.8 By this time Kevin Moses was the responsible director, Keira Vogle having left in January 2016. Mr Moses wanted the claimant to oversee completion of planned works following the resignation of his site manager. He wanted him to oversee snagging and the fitting of doors by the deadline of 31 March, the end of the contract; for that the claimant was paid an increment of £50 per week. Mr Moses asked the claimant to ensure that operatives wore PPE and that health and safety requirements were followed. Whilst the contracts manager was ultimately responsible for

health and safety, the claimant was at this time designated by Mr Moses to carry out activities in connection with the prevention and the reduction of risks to health and safety at work. That is a material change in the claimant's role with regard to health and safety.

2.9 In October/November 2014 the claimant was concerned about a number of matters, including the size of window frames at two sites, Hopley Court and Broady Court. He found it difficult to manoeuvre them into flats; not necessarily just him but he and his colleagues found it difficult to manoeuvre them into flats, and he was concerned that this amounted to a breach of the Manual Handling Regulations. He wondered whether the use of scaffolding would be more appropriate than man-handling the frames through the buildings. There was also a concern about the training provided in the use of harnesses, protection from falling objects and the risk of people falling from heights, and he raised these matters with the health and safety officer and the contracts manager, Peter Martlew.

2.10 On 3 November 2014 the claimant raised these concerns with his then director, Keira Vogle. The claimant was aware of these health and safety issues and he was vocal about them. He was concerned that he was being seen as a moaner, but the claimant consistently raised health and safety issues from this time on.

2.11 The claimant's fixed term contract was extended after this disclosure. The extension was in March 2015, as I have said, and I note that the claimant makes no claims in respect of the respondent's conduct on the grounds of this disclosure of information.

2.12 The claimant had very definite views on how the business in general ought to be managed. He would contact the Managing Director, Ms Kelly, to discuss his views and he did so frequently, bypassing his line management. Ms Kelly did not discourage this direct approach. Ms Vogle did not appreciate it. Line management at the time was that the claimant reported to Gary Jones, site manager, or whoever the site manager might be from time to time; the site manager would report to the contracts manager, who at this time was Mr Martlew; Mr Martlew reported in to Keira Vogle who in turn reported in to Ms Kelly.

2.13 The claimant was paid £16,000 a year plus bonus and the potential for bonus payments exceeded £16,000 a year. In common with some other employers until late 2015 the respondent did not include in holiday pay any element to reflect potential bonus earnings. This was a bone of contention with the claimant and the claimant was not alone; it was a national issue at the time. The law was not clear and the law has been clarified subsequently.

2.14 The claimant met Keira Vogle and Mr Martlew a few times in the latter part of 2015 about a number of matters, and he remained dissatisfied with the respondent's chosen way of dealing with the holiday pay issue.

2.15 On 2 or 3 December (it matters not and I think the parties agreed on 3 December as the likely date) the claimant telephoned Ms Kelly to complain about the holiday pay issue. The conversation was approximately 20 minutes in length and the claimant got a lot off his chest in that conversation, albeit his emphasis and priority was the payment of holiday pay. More likely than not, the claimant referred to other complaints along the lines of the issues he had over management of health and safety, but I find that his focus at the time was on his personal financial situation rather than raising health and safety issues or disclosing information about them. This is difficult because I had evidence from two credible witnesses, Ms Kelly and the claimant, as to a conversation in which only they were involved without witnesses, and their versions were different.

2.16 In assessing credibility, I found the claimant credible and he was clear and forthright in his evidence. By his nature and from all of the evidence I have heard it is clear that he had concerns over health and safety, and it is entirely consistent that he would have mentioned such issues. Ms Kelly was similarly credible although she has given a different version of the conversation of 3 December. She denied that health and safety was raised in the way that the claimant contends in his written witness statement. She was sure, in fact emphatic, that he did not raise those specific issues as he has detailed them in his statement. I find that she is correct. She says he did not disclose such information but talked about his holiday pay. Again, I find that this is what occurred albeit he also complained in general terms about management.

2.17 I have taken into account in assessing that conversation that Ms Kelly did not refer any part of the matters raised at that time to the health and safety team, and I am confident from her evidence that she would have if she had genuinely understood that there was a disclosure of information to her of health and safety concerns. I have taken into account that she did refer the personnel management issues to Keira Vogle. I have taken into account that when the claimant wrote to Ms Kelly contemporaneously on 4 December (page 93) he wrote further to that conversation and confirming that conversation; there is no mention of health and safety issues in that letter. It is entirely about the holiday pay issue.

2.18 I accept Mr Hall's evidence that the letter at page 93 is based on a pro forma or a precedent that he may have got from the internet, ACAS, CAB or whoever. It has however been amended to include case specific information; he did not just use a standard letter and it is indicative, I find, of the claimant's priority at the time. His priority was not disclosing information in the public interest; his priority was to complain about holiday pay. He was furthering his personal concern in expressing his dissatisfaction with management more generally, and he felt it could be done better.

2.19 Consistent with Ms Kelly's evidence in that she delegated matters to the responsible people, when she received the letter at page 93 she referred it to Kate Jolley in HR to be dealt with as a grievance.

2.20 In the meantime Ms Kelly, believing that there was a personnel management issue and wary that Ms Vogle did not like being overlooked or bypassed, instructed Ms Vogle to visit the claimant on site about what she considered to be the claimant's complaints about his working conditions, specifically holiday pay.

2.21 On 4 December 2015 Ms Vogle met the claimant on site. She said she happened to be passing, which the claimant did not believe. She said she was coming back from Manchester. The claimant said something like "Do you even know the way to Oldham?" making it sound, or so she thought, like "Hold'em". It was at least a sarcastic remark (being a genuine reference to Oldham) and at worst it had sexual connotations. Either way, the claimant's colleagues certainly interpreted it as a sexual joke at Ms Vogle's expense; they laughed as did the claimant. Ms Vogle reported subsequently that she believed the claimant had also made a gesture as if he was holding breasts as he said it, or that one of his colleagues did. This was a known joke amongst the claimant and his colleagues mispronouncing "Oldham". Ms Vogle felt embarrassed and belittled. She reported the matter to Ms Kelly.

2.22 Ms Kelly took exception to that conduct as alleged. She took exception on Ms Vogle's behalf. She felt that if Mr Hall's alleged conduct was proven it was uncalled for and unacceptable from a male operative to a female director in the context of her managing him and his colleagues. She linked this to two incidents in the past that made her feel uncomfortable. Previously the claimant allegedly mispronounced the name [Mr] Pusey as [Mr] "Pussy" and on another occasion touched Ms Kelly's chest, although very definitely not her breast, to demonstrate that he had cold hands. She had decided to take no further action in respect of either of those incidents at the time and says that she gave the benefit of the doubt to Mr Hall until Ms Vogle's report. She instructed Mr Moses to investigate the claimant's conduct towards women at work because of the report of alleged harassment (that is my word, I do not think anyone has actually used the word "harassment" but if the conduct was as alleged by Ms Vogle then it could amount to harassment). Mr Moses was to investigate that allegation because it chimed with Ms Kelly's own suppressed suspicions about some of Mr Hall's attitude and conduct to female colleagues and people in authority.

2.23 Mr Moses believed that it would assist in his investigation if the claimant was off site during it. I do not mean this in any sense as a criticism of Mr Hall, but he is strong minded and he is vocal. He is determined. It was alleged that he acted inappropriately, not with a peer or even an immediate line manager, the site manager, or his line manager's line manager, but with a director, that is three tiers of management up and very senior. That displays, if the allegations are true, a considerable amount of self confidence. Even on Mr Hall's own admission that he was being sarcastic it probably shows the same, and in that context it is understandable that Mr Moses believed that his enquiries of other female workers who may not have been in such senior positions would be assisted if Mr Hall was not on site. It would reduce any possible risk of any

witnesses feeling intimidated. There is no evidence that Mr Hall did intimidate anyone, but that was the concern of Mr Moses.

2.24 Mr Hall was suspended on 7 December 2015 pending investigation into an allegation of inappropriate behaviour towards female members of staff. Ms Kelly approved the suspension, feeling that she had a duty of care to women employees. Mr Moses' decision was then confirmed in writing (pages 94 and 95).

2.25 Going back to the actual visit on 4 December by Ms Vogle to the site, the respondent concedes that the claimant did make protected disclosures to Ms Vogle tending to show risks to health and safety and the environment and breaches of legal obligations with regard to risks of falling from height, and the need for scaffolding. He made a disclosure about the size of frames which he felt led to breaches of the manual handling regulations, again raising the need potentially for scaffolding. Ms Vogle said that the respondent had no control over the size of the frames, but there were sufficient supervisors on site to deal with the matter. Mr Hall also raised exposure to asbestos, or potential exposure and training with harnesses. Ms Vogle said on 4 December to the claimant that she would meet with Mr Warburton (Site Manager) on 7 December, and that having met with him and discussed these issues she would report back to the claimant. Ms Vogle was going to take up the matters that the claimant had raised.

2.26 At the time that the claimant was suspended by Mr Moses he referred to those points in conversation. It was at the end of the discussion about the disciplinary matter. Until then Mr Moses had been unaware of the claimant's health and safety concerns. Mr Moses asked for the claimant to put those concerns in writing, not for him to deal with but for him to refer on as was appropriate.

2.27 On 9 December 2015 the claimant emailed Mr Moses (pages 97-98), the subject matter of the email being, "on site health and safety" and he gave details of "health and safety problems that I have experienced over the last 12 months". The letter that he attached to that email at page 98 is detailed on the four issues that he raised above and I have referred to as being mentioned to Ms Vogle. As I say, this letter was a response to Mr Moses' request for written details. The claimant referred it to Matthew Culcott, Head of Business Services, and he told the claimant that Mr Culcott would respond. The respondent was taking on the health and safety issues raised by the claimant.

2.28 Mr Moses emailed Matthew Culcott and Mr Morrell, Head of the Health and Safety team, on 9 December asking that they would look into the matter and respond. In the light of that Mr Culcott spoke to the Head of the Health & Safety team, Mr Morrell, and Mr Morrell responded at page 99 to Mr Culcott on 18 December 2015.

2.29 Meanwhile on 16 December 2015 Kate Jolley, HR, had emailed the claimant with an update on the 9 December letter saying that it was being dealt with under the whistle-blowing policy, and she also updated the

claimant with regard to the disciplinary investigation. Ms Jolley's letter is at page 120. Matters were moving on.

2.30 On 22 December 2015 Karen Monk, HR, confirmed to the claimant that she was the facilitator in respect of the claimant's grievance of 4 December; this related to the letter that he had written to Ms Kelly about the holiday pay situation. He was invited to attend a meeting on 7 January 2016 and formal details were set out in that letter at pages 121-122. The grievance was being acted upon.

2.31 On 24 December 2015 Ms Jolley reported to the claimant (the subject matter "whistle-blowing") that initial feedback showed that a full enquiry would be required in the New Year. Some work had been done looking into the issues that he had raised and further work was to be undertaken.

2.32 On the same date, 24 December 2015, Ms Jolley appointed Ian Warren to conduct "a proper investigation" following on from the initial health and safety feedback. Mr Warren probably did not see that email until after the Christmas or New Year break. Mr Warren is the Director of People Services for Regenda, somewhat removed from day-to-day complaints and issues in the respondent company which is part of the Group.

2.33 Mr Warren's priorities at the time were the relocation of 200 employees from Bolton to Liverpool customer service team, restructuring and some resignations amongst staff including notably that of Ms Jolley. During this time, the period of time that I have outlined so far, there were two key figures involved in this episode that had left the respondent's employment, Keira Vogle and Kate Jolley, and their departure appears to have affected the respondent's dealings with the claimant. I have no evidence to suggest that their respective resignations were linked with each other or with the claimant.

2.34 By the time Mr Warren got around to focussing on the claimant's whistle-blowing the claimant had resigned. Mr Warren tried to contact the claimant on 15 February 2016 and again, because that failed, by email on 22 February 2016, but of course Mr Hall had resigned on 15 February 2016 hence he did not reply to Mr Warren's emails.

2.35 Mr Warren had not followed the spirit of the whistle-blowing policy which says at page 111 paragraph 6(4) that "normally the respondent would write to a whistle-blower within ten days of the issue raised with a view to arranging a meeting". This issue was raised on 9 December formally via Mr Moses. The respondent, through Ms Jolley, wrote to the claimant about it to update him and to say that further work was required, but not to arrange a meeting, and there was no real effort to do that throughout the period from 9 December 2015 to 22 February 2016. The reason that there was no such effort were the reasons that I have given above for Mr Warren being otherwise occupied and his prioritisation of matters, exacerbated by the Christmas holiday period.

2.36 Meanwhile, Mr Moses was investigating the disciplinary allegation, and on information received he interviewed Ms McClymont about the claimant. She cited two examples of potentially inappropriate conduct by the claimant that did not trouble her and about which she had not complained and did not wish to complain. Mr Moses concluded that Mr Hall had no case to answer in respect of those matters.

2.37 In his investigation Mr Moses, having interviewed Mr Hall, found Mr Hall to be credible when he explained the "Pusey" mispronunciation and he found no reason in the claimant's evidence to disbelieve his denial of touching Ms Kelly inappropriately. That is not the same as saying that he disbelieved Ms Kelly, but given the lack of detail about the date and time of the allegation, Mr Hall's denial, and his reference to a different occasion involving a male colleague, Mr Moses concluded that he had insufficient evidence to proceed with an allegation of gross or simple misconduct against Mr Hall. Ms Kelly accepted this; she had delayed in reporting the matters and she had no specific information about dates; she was satisfied.

2.38 Mr Moses did, however, recommend disciplinary action against Mr Hall for misconduct, not gross misconduct, and only in respect of the incident on 4 December involving Ms Vogle, which was the issue that started that investigation off. He conveyed this to Ms Jolley on 12 January 2016 and asked that she write to the claimant formally. I do not know the date that Ms Jolley resigned, but she did not write to the claimant as she had been instructed by the date that she left her employment. It was an outstanding matter.

2.39 Notwithstanding that, Mr Moses told the claimant of the disciplinary outcome in detail on 22 January 2016. The claimant was aware from that date at the latest that there was to be no further action in respect of anything said by Ms McClymont or Ms Kelly, and that one allegation would proceed to a formal disciplinary hearing, but not for a dismissible act of gross misconduct.

2.40 Mr Hall remained suspended until 22 January 2016 when the suspension was lifted by Mr Moses. He returned to work on 25 January 2016 on which date Mr Moses offered him the promoted team leader role which the claimant accepted. He commenced that role on 1 February 2016.

2.41 During his suspension, on 7 January 2016, the claimant had attended a grievance hearing with Tony Smith who is a director. This was the grievance about holiday pay. The grievance was rejected. The claimant was given the right of appeal to Ms Kelly. He did not appeal. He said he did not appeal because of the ongoing disciplinary suspension in which Ms Kelly was a witness. There are understandable reasons for him not appealing to her, but the claimant did not make any further enquiry as to how he could go ahead with his appeal, neither did he register an appeal with the respondent for it to be dealt with by whomsoever; he just returned to work on 22 January 2016, with the appearance at least of having accepted that his grievance had been rejected.

2.42 So as at 25 January 2016 the claimant's disciplinary proceedings had been dismissed apart from one outstanding allegation, in respect of which he admitted inappropriate sarcasm to a director which was potentially misconduct, but he denied any intentional sexual harassment. Of course "harassment" is not just about intention, it is how it is perceived by the person who is harassed, so he was not completely out of hot water even on his own admission, but he has made some admission, and apologised, for his conduct in respect of what he admitted, which was sarcasm.

2.43 By 25 January 2016 also he knew that the health and safety issues that he had raised were being looked into. By that date he had not challenged or queried the outcome of the grievance or how he could go about appealing if he had a mind to appeal. He was apparently seeing out his contract to 31 March 2016 and when offered a promotion to team leader role he accepted it.

2.44 The claimant worked then as team leader from 1 February 2016 to 15 February 2016. On 11 February 2016 the claimant and his colleagues were told that they were at risk of being made redundant, the contract for windows coming to an end on 31 March 2016. He had always known that he was on a fixed term contract and had known for some time that it was due to end on this date. The contract was due to end and there was no planned window installation in the foreseeable future. If the need arose for a window fitter or repairer then there was no justification for employing a team and the respondent would use subcontractors as and when required. Albeit at risk, the claimant could apply for other jobs with the respondent but there would not be a role for him as a window fitter, and indeed the likelihood was that he would not secure alternative employment with the respondent. The claimant made no such application.

2.45 Also on 11 February 2016 the claimant was given an Asbestos Pack of documents (pages 211-267). This was a pack of documents containing policies and procedures. On reading it over the weekend the claimant was annoyed at what he saw to be the respondent's failures to implement its own policies over a period of time.

2.46 On 15 February 2016 the claimant arrived at a site in Fleetwood and met three subcontractors who said on enquiry that they had not been forewarned of the risk of exposure to asbestos and they had not been trained to deal with asbestos. In his role as team leader Mr Hall did not allow them to work on the site on windows where there was this risk. He telephoned Mr Martlew. Mr Martlew did not insist they work on the windows but said that they should work on doors where there was no risk of exposure to asbestos; they refused for financial reasons as they would be paid less for door work than window work. Mr Hall had a row with Mr Martlew in a second phone call. He felt let down. He was dissatisfied with the respondent's handling of health and safety in general. He informed Mr Martlew that the subcontractors were not told that there was a risk of exposure to asbestos and that they needed asbestos training. That was a disclosure to Mr Martlew of information about breaches of legal obligations

and of health and safety issues made in the public interest and it amounts to a disclosure.

2.47 Mr Hall wanted to discuss everything with Mr Martlew. Whatever words were used in that conversation, which was heated, Mr Martlew believed that the claimant, Mr Wookey and Mr Browse were going to return from Fleetwood to headquarters to resign. Mr Martlew told Mr Moses that this is what they were doing. Mr Moses told someone in HR that this was about to happen and he was provided with a pro forma resignation letter, a precedent document that did not contain names or dates but could be adapted by handwriting as required. HR wanted resignations documented because a number of people were leaving, and in the circumstances of three employees returning to a depot with the understood intention of resigning, it was unlikely they would have any documentation with them; HR wanted the documents signed before they left. That was Mr Moses' understanding.

2.48 Mr Moses spoke to Mr Browse believing that he was about to resign and proffered the letter; Mr Browse signed the letter filling in his name and other details. He also spoke to Mr Wookey in the same vein but Mr Wookey decided not to resign; he remained in the respondent's employment. Mr. Moses also spoke to Mr Hall in the same vein and offered the letter and in response, and this is not a quotation, Mr Hall said that he would be resigning on his own terms and he was not going to sign that letter. He drafted his own resignation, (page 169), citing a breach of contract on the grounds of health and safety, unlawful deduction of wages, unfair treatment. The claimant was confirming in that letter the decision he had made prior to being handed the pro forma precedent letter by Mr Moses.

3. **The Law**

3.1 Constructive unfair dismissal –

3.1.1 Section 94 Employment Rights Act 1996 (ERA) establishes an employee's right not to be unfairly dismissed. Section 95 ERA sets out the circumstances in which an employee is dismissed which includes where an employee terminates the contract of employment (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct (a constructive dismissal).

3.1.2 It is well established that for there to be a constructive dismissal the employer must breach the contract in a fundamental particular, the employee must resign because of that breach (or where that breach is influential in effecting the resignation), and the employee must not delay too long after the breach, where "too long" is not just a matter of strict chronology but where the circumstances of the delay are such that the employee can be said to have waived any right to rely on the respondent's behaviour to base resignation and a claim of dismissal.

3.1.3 The breach relied upon by an employee may be of a fundamental express term or the implied term of trust and confidence and any such breach must be repudiatory; a breach of the implied term will be repudiatory meaning that the behaviour complained of seriously damaged or destroyed the essential relationship of trust and confidence. Objective consideration of the employer's intention in behaving as it did cannot be avoided but motive is not the determinative consideration. Whether or not there has been a repudiatory breach of contract by the employer is a question of facts for the tribunal. The test is contractual and not one importing principles of reasonableness; a breach cannot be cured and it is a matter for the employee whether to accept the breach as one leading to termination of the contract or to waive it and to work on freely (that is not under genuine protest or in a position that merely and genuinely reserves the employee's position pro temps).

3.1.4 As to whether a claimant has resigned as a result of a breach of contract it is established that where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, rather than attempting to determine which one of the potential reasons is the effective cause of the resignation.

3.1.5 Even if an employee establishes that there has been a dismissal the fairness or otherwise of that dismissal still falls to be determined, subject to the principles of section 98 ERA. That said it will only be in exceptional circumstances that a constructive dismissal based on a repudiatory breach of the implied term will ever be considered fair.

3.2 "Whistle-blowing" –

3.2.1 Section 103A ERA provides that an employee who is dismissed shall be regarded as being unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure. This is therefore an automatically unfair dismissal.

3.2.2 Section 43A ERA defines a "protected disclosure" as being a qualifying disclosure as defined by section 43B which is made by a worker in accordance with any of the sections 43C-43H.

3.2.3 Section 43B ERA lists disclosures that qualify for protection and provides that a qualifying disclosure is a disclosure of information which in the reasonable belief of the worker making the disclosure tends to show one or more of the following, namely:

"(a) That a criminal offence has been committed, is being committed or is likely to be committed;

(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) That a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) That the health or safety of any individual has been, is being or is likely to be endangered;

(e) That the environment has been, is being or is likely to be damaged; or

(f) That information tending to show any matter falling within any of the preceding paragraphs has been or is likely to be deliberately concealed."

3.2.4 A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

3.2.5 Sections 43C-43H provide the prescribed methods of making the disclosure which must be to an employer or other responsible person, legal adviser, minister of the Crown, a prescribed person as defined in sections 43C-43F.

3.2.6 Sections 43G and 43H ERA provide for disclosure in other cases and where there is "disclosure of exceptionally serious failure".

3.2.7 Section 47B provides a worker with a 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.

3.2.8 In cases of dismissal and/or detriment related to protected disclosures the key is to ascertain the reason for the employer's/respondent's actions, and if they are materially influenced by the disclosure then the claimant/worker may have protection subject to the Tribunal's findings of fact and application of the above law to those facts.

3.3 Health and safety –

3.3.1 Section 100 ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one the principal reason for the dismissal) is that having been designated to carry out specified activities relating to health and safety or being a representative on such matters, or where there is no such representative or committee he has taken protective action in defined circumstances set out in section 100.

3.3.2 In those circumstances, once again provided the Tribunal finds that the reason for the employer's/respondent's actions were as alleged, the dismissal will be automatically unfair.

3.3.3 Again, this is a fact sensitive matter.

3.4 An employee does not have to have been employed for a qualifying period before having protection against dismissal for "whistle-blowing" or in respect of health and safety cases as defined above.

3.5 Otherwise, and in respect of "ordinary" unfair dismissal an employee must be employed for two years before having protection and the right not to be unfairly dismissed under section 94 ERA. The exclusion of that right by virtue of the qualifying period of employment is set out at section 108 ERA.

3.6 Case law to which the parties referred the Tribunal –

3.6.1 **Salisbury NHS Foundation Trust v Wyeth UKEAT/0061/15/JOJ**: a Tribunal must conduct a critical analysis of the respondent's reasons for its conduct.

3.6.2 **Crawford and another v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138**: this was relied upon for the principle at paragraph 71 to the effect that even whilst there is evidence supporting an investigation, suspension is not automatically justified and a "kneejerk reaction" would be a breach of duty of trust and confidence. Suspension may be belittling and demoralising and therefore damaging to a worker.

3.6.3 **Kuzel v Roche Products Limited UKEAT/0516/06/CEA**: this was relied upon in respect of paragraph 27 which confirmed that as to cases where the section 103 reason is raised by the employee, if he has less than one year's continuous service, and thus is ineligible for "ordinary" unfair dismissal protection, he must establish that his protected disclosure was the employer's reason (or principal reason) for dismissal in order, in the first instance, to found the Tribunal's jurisdiction to entertain his complaint.

4. **Application of Law to Facts**

1.1 There was no disagreement on the applicable law between Mr Millett and Mr Peacock. There was no argument between them as to any interpretation of the law except for section 100 of the Employment Rights Act 1996, Health and Safety Cases, when it talks about a person being "designated by an employer to carry out activities in connection with preventing or reducing risks". In respect of that I favoured Mr Peacock's interpretation that "designation" has to be more than an expectation that employees will comply with a duty to look after themselves at work and to look after their colleagues. "Designation" must mean more than that. Initially the claimant was not "designated", by my definition, but he became "designated" upon becoming a team leader.

1.2 Turning to the issues document at C3, my findings are these:

1.2.1 On 3 November 2014 the claimant made a qualifying disclosure but he makes no claim of any consequence flowing from that so that is a neutral matter.

1.2.2 On 2 or 3 December 2015 the claimant did not make a qualifying disclosure to Gillian Kelly on the telephone. He complained about his holiday pay and management generally. He did not disclose information. His comments related to his disgruntlement and were not in the public interest. This was a personal matter.

1.2.3 On 4 December 2015, as conceded, the claimant made a qualifying disclosure to Keira Vogle at a site meeting. He gave her information relating to breaches of legal obligation and endangerment to health and safety. His disclosures were made in the public interest.

1.2.4 On 9 December 2015, and again as conceded by the respondent, the claimant made a protected disclosure in an email to Mr Moses (page 98). The claimant had contended that he made a disclosure on 16 December but was that then changed to 11 December; Mr Millett has clarified that the claimant is no longer contending that the correspondence with Kate Jolley at that time was a disclosure.

1.2.5 The claimant made a protected disclosure on 15 February 2016 to Peter Martlew on the telephone. He made a disclosure in the public interest that there was a breach of legal obligation by the commissioning of subcontractors/workers who were untrained to handle asbestos to work on jobs with the potential for exposure of which they had not been forewarned; that was a protected disclosure.

1.3 At page 2 of the Issues at section B it sets out the test for breaches of contract, but the material part is at paragraph 7 where the claimant alleges a breach of the implied term of trust and confidence and cites three examples: suspension, pre-prepared letter of resignation and failing to address the concerns he had over health and safety:

<u>Suspension</u>

1.3.1 With regard to the suspension, on allegations of inappropriate behaviour towards Keira Vogle, Gillian Kelly and Janine McClymont, the respondent was entitled to, and under a duty to, investigate the complaint made by Ms Vogle; it was entitled to give further consideration to the afterthought of Ms Kelly, and in the course of that ought properly to consider the matters raised by Ms McClymont.

1.3.2 Given the circumstances that I have described, the respondent was entitled to suspend the claimant pending the outcome of the investigation. It was contractually entitled to suspend. He was kept informed; there was an ongoing investigation that was potentially

sensitive. Suspension was within a band of reasonable responses of a reasonable employer (although I understand that reasonableness is not the test as to whether there has been a breach of contract); it was not out of the way or egregious and it was done because of the nature of the investigation; it was not done because of the raising or making of disclosures and it was not a detriment. I am saying it was not a breach of contract to suspend, but even if it had been the claimant affirmed the contract subsequently when he returned to work, post grievance and he worked on in a promoted role. He was willing to confirm the relationship and he positively affirmed his contract of employment. The claimant was not working on under protest. He accepted that he had been promoted until the expiration of his fixed term of employment and accepted the terms and conditions, duties and responsibilities of that role.

Pre-prepared letter of resignation

1.3.3 Innocently inviting the claimant to sign a pre-prepared letter of resignation on 15 February if he wanted to do so was not a breach of contract; this was a matter of administrative convenience in a situation where the claimant had said that he was resigning. The respondent's managers held a genuine belief that the claimant was about to resign. The claimant, whatever he had said to Mr Martlew, gave that impression, and not just about himself but also about Mr Wookey and Mr Browse. Mr Browse did in fact go through with his resignation as did the claimant. Faced with the same situation Mr Wookey did not sign the letter or resign; he said he wanted to work on and the respondent had no issue with his apparent change of heart.

1.3.4 The respondent wanted a letter for administrative convenience. It had not initiated the discussion about resignation; there was no evidence that management was angling for it or pressuring the claimant, or that Mr Martlew had initially suggested it, or that Mr Moses was applying any pressure. The claimant was not being encouraged to resign. The claimant for his own reasons, which again it is not for me to criticise and I do not, confirmed he was going to resign; he was not intimidated by the letter; he was not prepared to use the respondent's draft letter but he was going to resign for his own reasons stated in his own words. This was not a breach of contract by the respondent.

Breach of implied term of trust and confidence regarding health and safety

1.3.5 Was there a breach of the implied term of trust and confidence by failure to provide a safe system of work and a failure to address the concerns that Mr Hall raised over health and safety? The alleged failure here is by way of delay. There was a delay in arranging a meeting by 19 December, the ten days that the respondent's own policy says is normal for a meeting. However

there was some considerable and substantive activity by the respondent in response to the matters raised by the claimant. There was, however, a considerable delay and period of inactivity further from 24 December 2015 when an officer was appointed to oversee the investigation (or at least from the first week of January 2016 after the Christmas break) to 22 February 2016 when concrete steps were taken to arrange a meeting with the claimant as was his due.

1.3.6 The last that the claimant knew of any progress with regard to his health and safety issues and concerns was 24 December. Mr Warren did not deal with the matter, and that is it. Mr Warren had not dealt with it by 15 February by which time the claimant had resigned; Mr Warren ought to have dealt with the matter by that date. In view of everything else, this was a serious delay over an issue that everybody knew was of concern to the claimant. He had issues about his pay, but he raised genuine, conscientious and sincere issues over health and safety. He raised the matters appropriately, not aggressively or in a demanding way.

1.3.7 There was nothing wrong in the way the claimant advanced his concerns about health and safety to the respondent, but the respondent failed to act appropriately from 24 December 2015 to 22 February 2016; it carried on with business regardless of very serious concerns; this was a breach of the implied term of trust and confidence and was a fundamental breach of the claimant's contract; it seriously damaged the relationship of trust and confidence. This was emphasised on 15 February when the claimant reacted angrily having raised a matter with Mr Martlew that Mr Martlew did not resolve to the claimant's satisfaction. Mr. Martlew's response in instructing that the contractors should not work in an area where they were at risk of contact with asbestos was appropriate and did not breach the claimant's contract.

1.3.8 Insofar as there was a breach of contract by Mr Warren's failures, I find that that was a fundamental breach. There was a failure from 24th December 2015 to address the claimant's health and safety concerns in a timely and appropriate manner.

1.4 As to the allegation at C3 paragraph 9, a breach of an express term by failing to pay wages and not paying the correct wages, and in this respect I find that there was a breach of contract but it is not a fundamental breach of contract. Whilst there was no intention on the part of the respondent to seriously damage or destroy the relationship between the claimant and the respondent, it did not have that effect anyway, and that is the point. The conduct should either set out to or have the effect of seriously damaging or destroying the relationship of trust and confidence. It created strain in the relationship for sure, but the whole argument over holiday pay and whether it included bonuses and commissions was an issue at large, and it was generally settled through litigation, the law was clarified, and then the situation was rectified. Failing to account for lost bonus payments and the

like was found to be unlawful. Until that time it was a bone of contention with the claimant but he affirmed the contract when he carried on working in a promoted position without appealing against the rejection of his grievance.

1.5 The situation would have been different if despite the clarification the respondent had persisted in underpaying the claimant but it did not so. Non-payment of monies due must be a breach of contract, but the respondent could not reasonably have known that the monies were due until the outcome of the litigation. In any event, the claimant continued working, did not resign in response, and he delayed too long in resigning and he affirmed the contract by accepting promotion and working on until February when his resignation was due to health and safety matters not the pay issue.

1.6 Regarding C3 paragraph 15, I have found that the claimant was constructively dismissed due to the failure on the part of the respondent to address health and safety issues. The question then to be resolved is: did they fail to address health and safety issues because he made protected disclosures, or on the ground that he made protected disclosures? What was the reason for the failure?

1.7 I have found that there was a failure on Mr Warren's part. I find that whilst there was a dismissal the reason was not the fact of Mr Hall having made a protected disclosure ("blown the whistle"); the reason for the failure to properly address conscientious, genuine and worrying health and safety issues was poor management, slow response, and an administrative failure to follow timing according to the respondent's policy. This was an error. The matter ought to have been dealt with by or shortly after 24 December 2015. It slipped through the net with staff changes, other priorities, bad management, a failure to take seriously enough matters of potential grave concern, of potential risk, but it was not by reason of the claimant having made disclosures that there was a breach of a legal obligation or that he had disclosed endangerment to the health and safety of others.

1.8 Mr Warren either failed to see emails or on seeing them failed to recognise their importance. He failed to manage the situation as he ought properly to have done, when it was a matter of great significance to the claimant. That might sound harsh on Mr Warren whose involvement was late in the day, and he has mitigating circumstances to take into account, but he does not have a defence to the allegation that he has failed the claimant; it is up to the respondent and himself to consider whether he failed the respondent, because issues of health and safety were not peculiar to Mr Hall or individual to him.

1.9 This was a constructive dismissal, but it is not an automatically unfair dismissal under s.103A ERA, because the reason, or principal reason, for the respondent's breach of the implied term was not that the claimant made a protected disclosure.

1.10 In respect of the s 100 ERA claim, as I have said, the claimant was designated in respect of health and safety activities from his promotion on 1 February 2016 to team leader, but he was not before that.

1.11 Was the claimant an employee at a place where there was no representative or safety committee? No, he was not.

1.12 Was there was a representative but it was not reasonably practicable for the claimant to raise issues? The claimant did raise issues of health and safety so it was reasonably practicable. He raised them quite properly and, as I have said before, conscientiously. He did bring matters to the attention of the respondent.

1.13 The claimant had been trained as regards asbestos and he was aware of the risk. It was not so much his refusal to return to work that was an issue, but he did take appropriate steps to protect himself and others from dangers on 15 February. The key question in respect of the health safety case is: what was the reason for the respondent's conduct? The conduct is delay in dealing with health and safety concerns, and I have already found that the reason for the delay was poor management. The reason for the delay was not related to the claimant's designated role or to him taking appropriate steps to protect himself and others on 15 February 2016. He acted properly on that occasion but that cannot have influenced in any respect Mr Warren's mismanagement of the health and safety issues raised by the claimant on that date.

1.14 In short the respondent acted as it did for reasons other than any disclosures by, or the health and safety activities of, the claimant. The claimant resigned for his own reasons. He was not dismissed. Whereas the claimant may have succeeded in a claim of "ordinary" constructive unfair dismissal he does not qualify for protection from the right not to be unfairly dismissed under s.98 ERA because he lacked qualifying employment as at the date of termination of his employment.

Employment Judge T V Ryan

Date: 02.06.17

JUDGMENT AND REASONS SENT TO THE PARTIES ON

7 June 2017

FOR THE TRIBUNAL OFFICE