EMPLOYMENT TRIBUNALS

Claimant	Respondent
Mr D Moorhouse	v **West Yorkshire Fire and Rescue Authority**

PRELIMINARY HEARING

Heard at: Leeds	**On: 3, 4 , 5 and 6 October 2017**
Before:	**Employment Judge T R Smith**
Members:	**Mr D Wilks**
	Mr J Rhodes
Appearance:	
For the Claimant:	**Mrs Z Moorhouse, lay representative and daughter-in-law of the Claimant.**
For the Respondent:	**Mr Finley of counsel.**

RESERVED JUDGMENT

The unanimous decision of the Tribunal is: -

1. The Claimant's claim under Section 47B of the Employment Rights Act 1996 is not well founded and is dismissed.
2. The Claimant's claim under Section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.
3. The Claimant's claim of constructive unfair dismissal is not well founded and is dismissed.

REASONS

Background.

Issues.

1. We noted that Employment Judge Davies had, at a preliminary hearing held on the 2 May 2017, sought to identify and agree the issues with the parties.

2. For completeness we have set out below the issues agreed with Employment Judge Davies on 2 May 2017 subject to one amendment and one deletion (which we made with both parties' agreement).

   2.1 The amendment appears in square brackets.

   Did the Claimant make a protected disclosure within the meaning of Section 43 (1) (a) and/or (b) of the Employment Rights Act 1996, by informing Emily Dew on 11 January 2016 [and during an investigation on the 25 January 2016] that Mr Atkinson and Mr Mawson were removing hard drives from the Silent Witness CCTV system on the Respondents fire appliances without following the proper process, including by giving particular information about an incident on 13 January 2015?

   2.2 *The Claimant says that in doing so he disclosed information that in his reasonable belief was in the public interest and tended to show that the Data Protection Act 1998 was being breached.*

   2.3 *If so, did the Respondent subject the Claimant to a detriment done on the ground that he had made a protected disclosure by initiating a disciplinary process against him on 24 February 2016 and pursuing it until November 2016?*

   2.4 *Was the Respondent in fundamental breach of the implied term of mutual trust and confidence by: –*

   2.5 *Mr Atkinson subjecting the Claimant to unofficial monitoring in October 2015 by asking two managers, Mr Bleasdale and Mr Milner, to ask their trainees which route they had taken with the Claimant and whether they had had a good time.*

   2.6 *Not upholding the Claimant's complaint about that on 24 February 2016 and/or*

   2.7 *Initiating disciplinary proceedings against the Claimant on 24 February 2016 relating to a matter that had occurred in September 2015 and pursuing those disciplinary proceedings until November 2016.*

   2.8 *If so did the Claimant resign in response without affirming the contract.*

   2.9 *If the Claimant was dismissed, was the reason or principal reason for his dismissal (i.e. for the fundamental breach of contract) that he had made a protected disclosure?*

   2.10 *If not, in the event that the Tribunal finds that there was a fundamental breach of contract, while the Respondent denies that any alleged protected disclosure was the reason for the breach, it does not advance a potentially fair reason for dismissal.*

2.11 *If the Claimant was unfairly dismissed, what is the chance, if any, that he would have been dismissed in any event?*

2.12 *Did the Claimant cause or contribute to his dismissal by culpable or blameworthy conduct and, if so, is it just and equitable to reduce the compensation payable to him?"*

3. Mr Findlay indicated that the Respondent no longer pursued an allegation that the Claimant caused or contributed to his dismissal. We deleted this from the list of issues prepared by Employment Judge Davies which we had to consider.

4. We agreed with the parties we would determine liability and Polkey first and would only hear evidence on remedy if we found for the Claimant wholly or in part.

Evidence.

5. The Tribunal heard evidence from: –

- The Claimant, Mr Daniel Moorhouse
- The Claimant's daughter-in-law, Mrs Zita Moorhouse.
- Mr Christopher Atkinson, Section Head of Training and Watch Manager for the Respondent.
- Mr Ronald Tavener Assistant District Commander for the Respondent.
- Mr Stephen Fealy, Group Manager for the Respondent.
- Mr Jim Butters, Area Manager for the Respondent.

6. The Tribunal had before it a bundle consisting of 496 pages for the Respondent and 78 pages for the Claimant. The bundle had been combined. Where we have referred to a page number prefixed by the letter C, this refers to a document in the Claimant's part of the bundle.

7. We reiterate our comments made at the hearing that the bundle was badly organised, repetitious and difficult to follow. An edited bundle in chronological order would have greatly assisted the Tribunal.

8. Having considered all the evidence, both oral and documentary, the Tribunal made the following findings of fact on the balance of probabilities.

9. These written findings are not intended to cover every point of the evidence given.

10. These findings of a summary of the principal findings that the Tribunal made and from which it drew its conclusions that are relevant to the agreed issues we had to determine.

11. To assist the parties in understanding the framework in which we reached our decision we have set out a summary of the relevant law that we applied.

The Law.

12. Constructive Unfair Dismissal.

12.1 Section 95 (1) of the Employment Rights Act 1996 defines dismissal as follows: –

"(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) …

(c) the employee terminated 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."

12.2 For an employee to succeed in a claim of constructive dismissal the employee must satisfy the following four conditions on the balance of probabilities.

12.3 One, there must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

12.4 Two, that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justifies the employee leaving.

12.5 Three, the employee must leave in response to the breach, that is, it must have played a part in the employee's decision, and not some other unconnected reason.

12.6 Four, the employee must not delay too long in terminating the contract in response to the employer's breach; otherwise the employee may be deemed as waived the breach and agreed to vary the contract.

13. The Court of Appeal in **Western Excavating (ECC) Ltd -v-Sharp 1978 IRLR 27** made it clear that the question of whether there was a constructive dismissal is determined in accordance with the terms of contractual relationship and not in accordance with the test of reasonable conduct by the employer.

14. Reasonableness of an employer's conduct is to be considered under Section 98 (4) of the Employment Rights Act 1996 and not to determine whether there has been a dismissal. That said reasonableness may not be wholly irrelevant and may have some evidential value in a constructive dismissal claim, see **Courtaulds Northern Spinning Limited -v- Sibson 1978 ICR 329.**

15. There is implied into every contract of employment a term of trust and confidence as finally affirmed by the Supreme Court in **Malik -v- Bank of Credit and Commercial International SA 1997 IRLR 62** in which the term was defined as follows: –

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

16. The correct approach to determine whether there has been a breach of the term of trust and confidence according to the Court of Appeal in **Eminence Property Developments Ltd-v-Heaney 2010 EWCA Civ 1168** is as follows: –

"Whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the

contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract"

17. There can be a constructive dismissal if there are a series of events that occur over time which, when considered together, show that there has been a repudiatory breach of contract. In such a case the last action of the employer which leads to the employee resigning need not in itself be a breach of contract. The question the Tribunal must answer is, does the cumulative series of acts taken together amount to a repudiatory breach of the contract, see **Lewis -v- Motorworld Garages Ltd 1986 ICR 157?**

18. This has been further explained by the Court of Appeal in **Omilaju -v- Waltham Forest London Borough Council 2005 ICR 481** where it was held that a relatively minor act may be sufficient to entitle the employee to resign and leave the employment if it is the last straw in a series of incidents.

19. Whether an employee has waived the breach, or what is sometimes described as affirming the contract, is fact sensitive. There is no fixed time within which the employee must make up his or her mind. Factors that may be relevant include the nature of the breach, whether the employee has protested and what steps, if any, the employee has taken after the alleged breach to show an intention still to be bound by the contract.

Polkey Reductions.

20. Under Section 123 (1) of the Employment Rights Act 1996 the Tribunal must consider whether it would be "just and equitable" to make a reduction from any compensatory award.

21. The case of **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** held that a Tribunal must consider whether the unfairly dismissed employee could have been dismissed fairly at a later date.

22. The Polkey principal applies not only to cases where there is a procedural unfairness but also to substantive unfairness, although in the latter case it may be more difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred, see **King -v- Eaton Ltd (2) 1998 IRLR 686.**

23. A Polkey reduction may be on a percentage basis or limited to a specified time period, see **O'Donoghue -v- Redcar and Cleveland Borough Council 2001 IRLR 615**.

24. The mere fact a Polkey reduction may involve a degree of speculation or is difficult does not mean it should not be undertaken, see **Gover -v- Property Care Ltd 2006 ICR1073**

25. The burden on proving that an employee would have been dismissed in any event is on the employer. Provided the employee can put forward an arguable case that he or she would have been retained were it not for the unfair procedure, the evidential burden shifts to the employer to show that the dismissal might have occurred even if a correct procedure had been followed, see **Britool Ltd -v- Roberts 1993 IRLR 481.**

26. The Tribunal looked carefully at the guidance given in **Software 2000 Ltd -v- Andrews 2007 ICR 825** on the application of Polkey.

27. In summary the guidance directs that the Tribunal must assess how long the employee would be employed but for the dismissal. If the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee (for example an intention to retire). There will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. The Tribunal must have regard to all material reliable evidence even if there are limits to the extent to which it can confidently predict what might have happened. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary namely that the employment would be terminated earlier is so scant that it can effectively be ignored.

Protected Disclosure.

28. Section 43A of the Employment Rights Act 1996 defines a protected disclosure as: –

"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of the sections 43C to 43H"

29. This begs the question what a qualifying disclosure is and the answer is found in section 43B of the Employment Rights Act 1996. To paraphrase: –

"(1) in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –

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

30. Although the act refers to a "worker" the protection applies equally to employees.

31. The Employment Rights Act 1996 then sets out methods of disclosure. Broadly speaking disclosure to a person or body other than the employer requires the worker to satisfy various conditions dependent upon the method of disclosure. If the discloser has made a qualifying disclosure and then discloses in accordance with the Employment Rights Act 1996 that qualifying disclosure is also a protected disclosure.

32. Section 47B of the Employment Rights Act 1996 protects a worker or employee from detriment. The section provides: –

"(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 worker has made a protected disclosure."

33. Protection is also available to an employee from dismissal under Section 103A of the Employment Rights act 1996 which provides: –

"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."

34. In determining whether there has been a qualifying disclosure we remind ourselves that a disclosure requires a disclosure of information and should contain facts, see **Geduld -v- Cavendish Munro Professional Risks Management Ltd 2010 ICR 325.** There may still be a disclosure of information even if that disclosure of information is intertwined with an allegation.

35. In **Blackbay Ventures Ltd -v- Gahir 2014 IRLR 416** helpful and detailed guidance on the approach to be taken by Tribunal was given. The Tribunal should, one, separately identify each alleged disclosure by reference to date and content, two, identify each alleged failure to comply with a legal obligation, three, identify the basis on which it is alleged each disclosure is qualified and protected, four, identify the source of the legal obligation or right by reference to statutes or regulations.

36. A series of communications may in certain circumstances be read together to ascertain whether there has been a disclosure of information although wholly separate communications cannot be aggregated together, see **Barton -v- Royal Borough of Greenwich 2015 UKEAT 18/0041/14**

37. The Tribunal should then go to consider whether the Claimant has the reasonable belief required by Section 43B (1).

38. The enquiry should then move on to whether disclosure was made public interest.

39. The Tribunal must identify the alleged detriment and the date thereof as part of its findings.

40. The phrase "public interest" has been subjected to much recent litigation. The result of that litigation is that the disclosure need not be in the public interest per se but rather the question is whether the disclosing employee had a reasonable belief the disclosure was in the public interest.

41. In answering this question, we noted that factors to consider could include, one, whether the worker/employee subjectively believed at the time that disclosure was in the public interest, two, whether that belief was objectively reasonable, three, there might be more than one reasonable view as to whether a disclosure was in the public interest and the Tribunal should not substitute its own view, four, belief in the public interest need not be dominant motive for making the disclosure.

42. In looking at the issue of reasonable belief, although the test is objective, this must be considered take into account the personal circumstances of the discloser. The question is whether it was reasonable for the discloser to so believe, see **Korashi -v- Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4**.

43. It does not matter that the worker/employee's belief subsequently turns out to be wrong or what was alleged would not amount in law to a relevant failure provided the belief was objectively reasonable.

44. The Tribunal has noted the difference in legal tests to be applied firstly in a detriment and secondly in a dismissal claim where a protected disclosure has been established.

45. In a claim of detriment, the correct test is whether the protected disclosure materially influenced, in the sense of being more than a trivial influence, on the employer's treatment of the whistle-blower, see **NHS Manchester -v- Fecitt 2012 IRLR 64**.

46. The Tribunal in determining whether a detriment is "on the ground" that the worker has made a protected disclosure is required to make an analysis of the conscious or unconscious mental process of the employer acting as it did.

47. If the employee proves that he/she has made a protected disclosure and there has been detrimental treatment then the burden is on the employer to prove the protected disclosure did not materially influence the employee's detrimental treatment.

48. Conversely in a dismissal claim the protected disclosure must be the reason or principal reason for this dismissal. It is not sufficient that the disclosure was a material influence.

49. The Tribunal reminded itself of the authority of **Kuzel -v- Roche Products Ltd 2008 EWCA Civ 380** as to how to apply the burden of proof where the claim was under section 103A.

50. Special considerations apply, as here, when examining causation in constructive dismissal claims. The Tribunal remined itself that it was important to focus on the employer's reasons for its actions, rather than the employee's response.

51. Knowledge of the protected disclosure is normally required by the decision maker. If, however those facts have been manipulated so the decision maker does not know the true facts then the manipulators knowledge may be attributable to the decision maker, see **Royal Mail Group Ltd -v-Jhunti UKEAT /0020/16.**

Findings of Fact.

52. The Claimant, a former fire fighter, was invited by the Respondent, following his retirement, to apply for the vacancy of combined aerial rescue pump instructor/examiner (CARP)at the Respondents driver training centre.

53. The Claimant commenced his new role on 5 October 2009.

54. In March 2012 the post was made permanent.

55. As part of the Claimant's duties he worked as a driving training instructor.

56. The senior manager at the driving training centre was Mr Atkinson who held the title of watch manager. He was assisted by Mr England, also a watch manager, but of a lower grade than Mr Atkinson. They shared an office together.

57. We accepted Mr Atkinson's evidence that within the driver training centre there had been a culture of driving instructors using driving routes to travel outside the county and to shop. For example, there was evidence before us of trips to Sedgefield in County Durham to visit a farm shop, to Hawes in North Yorkshire to visit the cheese and chocolate factory, and trips to Whitby in North Yorkshire.

It was not disputed by the Claimant that in the past goods had been purchased by driving instructors during the day when training a student driver.

58. Whilst Mr Atkinson accepted there might, in some circumstances, be good reason for a driving instructor to take a student on a route out of the county, this would be relatively rare yet it appeared to happen frequently, and there was no excuse, for what he classed, as shopping trips.

59. We should explain that the phrase “student driver’ applies to a variety of drivers. It may include experienced drivers undertaking refresher courses or re-familiarisation of experienced drivers in different localities.

60. At this juncture we found that the driving instructors did not share their driving routes with management. They were not written down. They kept them in their heads.

61. It followed a member of management found it difficult to know what driving instructors had been until they completed the appropriate paperwork and then, in some cases, it was incomplete or vague as to the driving routes.

62. Mr Atkinson, when he came into post in 2012, soon came to the opinion that there was a core of driving instructors, which included the Claimant, who were resistant to change and were resistant to sharing information with management.

63. Mr Atkinson was of the view that change was required, particularly to implement national directives. Conversely the driving instructors believed Mr Atkinson was seeking to micro manage them. Whatever the rights and wrongs of the competing arguments, on the evidence before us, we are satisfied that relations between management and staff within the driving training centre were far from harmonious. The Claimant described the relationship as “poisonous” and we accepted that evidence.

64. On 3 November 2015, when working at the Otley fire station, the Claimant was approached by two separate student drivers who stated they had been approached by members of management and asked what routes and places they had visited during their training the previous week. The approaches were made by Mr Stephen Milner and Martin Bleasdale at the request of Mr Atkinson. We will return to this issue later in our judgement as it was to form a key component of the Claimant’s case that he was constructively unfairly dismissed.

65. The Respondents policy in relation to potential disciplinary matters is that a manager may carry out initial fact-finding before informing a person or persons that they are the subject of an investigation.

66. The Claimant was furious in what he perceived to be unofficial monitoring.

67. It is agreed that the Claimant then approached Mr Atkinson that same day, the 3 November 2015, and an extremely heated discussion took place. Put succinctly the Claimant wanted to know why Mr Atkinson had been making enquiries about the routes he had taken student drivers on and where they had visited. The Claimant expressed himself by his words and actions in the meeting in a manner which he very fairly agreed very soon after the incident was unacceptable and which he sincerely regretted.

68. Disciplinary proceedings ,5 November 2015 to 16 December 2015.

68.1 By a letter dated 5 November 2015 (C5) the Claimant was informed he was under investigation due to his aggressive demeanour, language and threatening manner towards Mr Atkinson on 3 November 2015.

68.2 An investigation ensued.

68.3 By a letter dated 2 December 2015 (C8) the Claimant was summoned to a disciplinary hearing, arranged for 10 December 2015. The Claimant was specifically warned that the hearing would be conducted under stage 3 of the Respondents disciplinary procedure and the allegations, if proven, could result in dismissal.

68.4 The Claimant prepared for the hearing by drafting a detailed note (C9 to C12).

68.5 It is important that we briefly mention two salient points from that document.

68.6 Firstly, following the incident on 3 November 2015, the Claimant had left his identity card with the Respondent intending it to be his resignation. The following morning, the 4 November 2015, when the Claimant came into the office Mr England returned his identity card and told him Mr Atkinson wanted him to have it back. A meeting then took place between the Claimant and Mr Atkinson when Mr Atkinson told the Claimant he did not want him to resign as he was one of the best instructors and wanted to move on. Both parties apparently shook hands. We record this detail as part of the Claimant's case was that Mr Atkinson wanted the Claimant dismissed. The actions of Mr Atkinson on this occasion, and his subsequent actions, which we will highlight in due course, do not support, in our judgement, such an analysis.

68.7 Secondly in the Claimant's detailed note he said the incident of 3 November 2015 had been the "last straw" and there had been an accumulation of events over the last year namely: –

"Silent witness hard drives had been removed from the appliances to listen to conversations and monitor routes.

Belittlement at team meetings in front of colleagues, been told that my hard-earned qualifications aren't worth the paper they are written on."

68.8 We mention this point because it was noted at the subsequent disciplinary hearing by the chair of the meeting and the Claimant was advised if he had concerns about management they could be pursued under the various policies of the Respondent.

68.9 At this point we ought to explain what a silent witness device is. Fire appliances are fitted with a device which records conversations in the appliance and can provide video imagery which would include video imagery outside the appliance. On some vehicles the video imagery provides a 360° view, on others it is just a 180° view. All recorded information is stored on the silent witness's system by means of a hard disc located in a special locked container in the cab of an appliance.

68.10 We accepted the Claimant's evidence that such video recordings capture images of members of the public in the street and car

registration numbers. As a Tribunal we can clearly see the relevance of such equipment, for example to provide evidence if a fire appliance responding to an emergency collided with another vehicle or person. Such images might also be helpful in the detection of crime if, for example, stones were thrown at an appliance. The Respondents had a comprehensive policy in relation to the silent witness device (pages 273 to 289). The policy mentions that the use of the silent witness cameras comes within the scope of the Data Protection Act 1998 but then gives very little detail. The disc cannot be viewed without formal written authorisation.

68.11 There is a further device fitted to some fire appliances which is a tracker and the significance will become clear, later, in our judgement. This allows the route of vehicle to be monitored and to record certain deviations from set parameters such as over revving an engine, G forces or strength of braking application. It does not record conversations or imagery. The Claimant stated, and we accept he honestly held this belief, that while a tracker tracked a vehicle that in turn provided information, in conjunction with a roster as to who the driver was and in his belief, that was personal information protected by the Data Protection Act. He also stated, and the Respondents agreed, that they had no policy in relation to the use of trackers and any safeguards.

68.12 The outcome of the disciplinary hearing, held on 10 December 2015, was that the case was proven; in fairness to the Claimant he did not contest it. He received a final written warning. He was advised any further breach within 18 months could result in the Claimant's dismissal.

68.13 The outcome was confirmed in a letter of 16 December 2015 (C 13) and the Claimant was expressly advised of his right of appeal. He did not appeal.

68.14 On 16 December 2015 the same day the Claimant received his final written warning, the Claimant wrote to Mr Allan Darby, (C17), the Respondents Information Data Manager and raised a query.

68.15 The Claimant asked: –

"As part of a discipline investigation, can you please provide me with documentary evidence of the formal data access request on or about 13 January 2015 from the Silent witness hard drives of vehicles, YJ60 LNY and YJ57 VDX, these vehicles are attached to (sic) driving school. Could you also provide evidence of the reason for the request in accordance with… Data Protection Act 1998…"?

68.16 Mr Darby responded the same day (C17) in the following terms: –

"On checking the audit log, I can confirm that there was a formal request under the CCTV policy and access to images procedure was submitted on 14 January 2015. This was submitted by a group manager and duly authorised by an area manager for silent witness footage relating to 13 January 2015 and the reason quoted for the request was that it was part of a discipline investigation. However, there is no indication of the vehicles that this request relates to so I

cannot confirm if this is the specific request that you refer to. Such a request is in accordance with the Information Commissioner's employment practices code and compliant with the Data Protection Act 1998."

68.17 The Claimant availed himself of the suggestion made at his disciplinary hearing on 10 December 2015 that in relation to any other concerns he had he should pursue them via the appropriate policies of the Respondent. He raised his concerns with the Respondent

69. 7 January 2016.

69.1 A meeting was arranged by the Claimant with Stephen Fealy, Group Manager, for 7 January 2016 to discuss his concerns**.**

69.2 It was not challenged that during the meeting the Claimant alleged the misuse of hard drives from the silent witness was commonplace and that hard drives were removed from fire appliances without following due process and the claimant said this breached the Data Protection Act.

69.3 Due process is set out in the Respondents policy document, which we have already referred to, but put succinctly it involved a written application being made to explain the reason why the hard drive was needed to be viewed. The written application was then considered by senior management. If granted, the hard drive was then supplied to the Respondents technical department who then processed the required information from the drive onto a disc and supplied it to the requisitioner.

69.4 At the meeting on 7 January 2016 the Claimant gave Mr Fealy a specific example. He explained that on 13 January 2015 he had witnessed Mr Atkinson removing hard drives from two fire appliances registration numbers YJ 60 LNY and YJ 57 VDX. The Claimant stated the events of the 13 January 2015 had been witnessed and supplied witness names. Finally, the Claimant confirmed he had made enquiries with Mr Darby and a request had been made on 13 January 2015 to inspect the hard drives in relation to a disciplinary matter, however the Respondents records did not indicate to which vehicles the request related.

69.5 The Claimant produced the email he had already obtained from Mr Darby relating to the incident of the 13 January 2015 (C 17) to Mr Fealy.

69.6 At the meeting the Claimant said he believed the removal of the discs without a clear audit trail to the referenced appliances was a breach of the Data Protection Act 1998. He also referred to other acts of Parliament but these are no longer relied upon. He stated he believed the information he disclosed was in the public interest because data involving the public and registration numbers of cars were recorded and the Respondents own policy was defective.

69.7 The Claimant also stated that some vehicles are fitted with trackers and there was no sign to alert the occupants the tracker was fitted and it was covert monitoring. He complained there was no policy issued by the Respondent's to prevent misuse of trackers. The Claimant stated by having a tracker it was easy by reference to a roster to identify the driver and he believed this was personal information and management could

use trackers to determine which routes driving instructors had taken. The Claimant stated trackers were used for improper purposes namely to fish for information about specific individuals. (We add at this point that in the subsequent investigation commissioned by Mr Fealy, Mr Darby advised that a tracker could not be used by management to fish for information to confirm a suspicion or to single out an individual and their driving habits as this went against the stated purpose for which the trackers were deployed (page 188d)).

69.8 The Claimant also raised specific concerns about the management style of Mr Atkinson which he believed was belittling and undermining and gave an example when at a team meeting he alleged Mr Atkinson had told him his qualifications weren't worth the paper they were printed on.

69.9 Finally, the Claimant alleged that Mr Atkinson had started an unauthorised investigation on the 3 November 2015 by causing other staff to question student drivers on his behalf as to the Claimant's whereabouts that day. We add that under the Respondent's disciplinary procedure an employee must be informed when a disciplinary investigation is commenced against them.

69.10 Mr Fealy summarised the Claimant's concerns into three separate categories namely the incident of 3 November 2015, an allegation of belittling behaviour towards the Claimant by Mr Atkinson and. inappropriate use of the silent witness and tracking equipment.

70. <u>The investigation.</u>

70.1 Mr Fealy took advice from HR that day and on the following day, 8 January 2016 informed the Claimant, by email, that he would consider matters.

70.2 On 11 January 2016 Mr Fealy obtained the Claimant's permission to discuss matters with Emily Dew, the Respondents diversity officer.

70.3 By this stage Mr Fealy had concluded that a review of the whole driver training school, independent of the Claimant's allegations, was desirable. We find it had come to his attention the difficult relationship between staff and management at the driving training centre.

70.4 Ms Dew emailed the Claimant on 11 January 2016 (page 149) to confirm the breadth of the investigation. She made it clear that she would consider any reasonable amendments to the proposed terms of reference. She also recorded and asked for confirmation that the Claimant's concern was to be treated as an informal complaint under the Respondents dignity and respect policy.

70.5 The Respondents dignity and respect policy specifically provides that an employee can make either an informal complaint or a formal complaint, the latter by way of a grievance. (Page 231).

70.6 We interject here to record that in our judgement by the 11 January 2016 Mr Fealy knew that part of the claimant's complaint could be a protected disclosure because he knew of the nature of the allegations,

had taken advice from HR and Ms Dew. He had no reason to take advice if it was a simple informal complaint.

70.7 The Claimant promptly signified his consent by means of an email of 12 January 2016 (page 152) to the terms of reference and that the matter would be dealt with as an informal complaint

70.8 On 12 January 2016 all the driver training team were notified individually (page 151) by Mr Fealy that an informal complaint had been made under the Respondents dignity and respect policy. He also told staff he would be conducting a wider review into demands, expectations and culture within the driver training centre.

70.9 On the same day, 12 January 2016 Mr Fealy told Mr Atkinson that he had been cited in the informal complaint and the allegations related to bullying, intimidating behaviour and misuse of information.

70.10 On the 13 January 2016 Station Manager Taverner was appointed to undertake the investigation into the Claimant's informal complaint under the Respondents dignity and respect policy. He was supplied with a copy of Ms Dew's email to the Claimant dated 11 January 2016.

70.11 There is one aspect of the investigation which we have specifically noted. Mr Tavener interviewed the Claimant on 25 January 2016. The claimant was asked what he meant by the general misuse of surveillance systems. His response was: –

"There is CCTV (silent witness) in training driving school vehicles. There is also tracking data in the form of black boxes on certain vehicles. These are both being misused as it has become normal practice for Chris Atkinson and Andy England to withdraw silent witness hard drives to check on where driver training staff have been and is they have been shopping. Chris Atkinson has been checking up on every member of the driver training staff by accessing tracking data by the fleet controller Glyn Richardson. He is being allowed to access data without making a formal request."

70.12 We accept the Claimant honestly believed the above. While it is right that hard drives were sent to the Respondents technical department so information could be extracted for review, a device which the Claimant believed could be used for viewing drives had been installed by the Respondent's IT department at the driver training centre. On occasions Mr Atkinson would remove hard discs, perfectly properly in accordance with the Respondents policy to prevent them being wiped over. It is likely in our judgement that on occasions the Claimant saw Mr Atkinson carrying hard discs. When this information is pieced together the Claimant could reasonably believe that there was a method whereby Mr Atkinson could view hard drives whilst circumventing the Respondents policy in respect of the same. As it transpired Mr Tavener's investigation revealed that hard discs could not be viewed at the driver training centre and it was permissible for Mr Atkinson to removing hard drives to prevent them being wiped over without the need to complete paperwork. Nevertheless, we find that the Claimant honestly believed that hard disks could be viewed by Mr Atkinson without reference to the Respondents technical department.

70.13 We accept the Claimant had chosen to concentrate on the incident of 13 January 2015 as that had been witnessed and other incidents had not and he felt it was his word against Mr Atkinson.

70.14 Digressing slightly, we noted that it appeared another employee of the Respondent had complained about the use of the silent witness system when it was used the purpose of investigating a disciplinary matters which the employee considered to be a breach of the Data Protection Act 1998. A caseworker at the Information Commissioner's office on 16 March 2017 (pages 299 to 300) advised the Respondents that there had been no breach of the Data Protection Act. However, the caseworker made it clear that he was reversing the decision he had previously given on the subject. We have recorded this evidence placed before us in the bundle because in our judgement it is potentially relevant to the issue of whether the Claimant had a reasonable belief in relation to his alleged protected disclosure. We make the point that even at the Information Commissioner's office there was not complete clarity as to what the silent witness information gathering could be used for and whether it could be used to monitor staff.

70.15 As part of Mr Fealy's review of the whole driver training school, which was out with the investigation by Mr Taverner, Mr Atkinson was interviewed on 27 January 2016.

70.16 During Mr Atkinson's meeting with Mr Fealy on the 27 January 2016 as part of the driver training centre review he produced an email which had been forwarded onto him by Mr England. In addition to the email Mr Atkinson produced evidence of several posters that he removed from notice boards within the driver training centre which he regarded as offensive to others. However, for this judgement we will concentrate on the email that had come to Mr England attention on 4 September 2015 but only forwarded to Mr Atkinson by Mr England on 20 January 2016

70.17 The email produced (pages 265 to 266) was from the Claimant to staff within the driver training centre including Mr England.

70.18 It showed a picture of a cow with a plastic chair trapped round its body. The email read *"he's not the only fat twat with a chair!"*

70.19 At the time the email was sent Mr Atkinson was absent chairing a national conference. The inference is obvious. The Claimant accepted that the email referred to Mr Atkinson.

70.20 Mr Fealy took advice on the email from HR because it breached the Respondents core values but was concerned the Claimant had just received a final written warning and the email predated that warning.

70.21 Mr Fealy met the Claimant as part of the whole driver training school review on 10 February 2016. He came in off leave. He did not mention the email of 4 September 2015 which he had since the 27 January 2016.

71. Investigation outcome.

71.1 Mr Tavener completed his investigation and fed back information to both Mr Fealy and Ms Dew on the 16 February 2016. In addition to the evidence gathered, Mr Taverner supplied a three-page summary of his findings (pages 186 to 188). None of this was supplied to the Claimant.

71.2 The investigation undertaken by Mr Taverner was comprehensive. The Claimant accepted the investigation was thorough. Whilst the Claimant was critical of one aspect of the investigation namely that Mr Taverner did not interview Martin Bleasdale we are satisfied, looking at the totality of the investigation that he could not give any evidence that was not given by other witnesses.

71.3 Mrs Moorhouse, herself a qualified CIPD Human Resources Manager, who as well as undertaking the arduous task of representative for the Claimant also gave evidence on his behalf, was not critical of the investigation and accepted that it was a thorough investigation.

71.4 The Respondents have a written procedure for undertaking an informal complaint under their dignity and respect policy. A copy of that policy can be found at pages 232 to 233. No evidence was placed before us that there was any breach of that policy by the Respondent's.

71.5 Whilst the Claimant's concerns had been classified as an informal complaint in our industrial experience it was clear the Respondents had examined the Claimant's concerns on a reasonably thorough and formal basis as is clear from the documentation (by way of illustration pages 151 to 185)

71.6 Mr Fealy concluded, a conclusion reached with Ms Dew, that the Claimant's complaint should not be dismissed as there was not, no evidence, to support it but there was insufficient evidence to uphold the specific complaints.

71.7 Mr Fealy and Ms Dew identified there were issues about Mr Atkinson's management style having regard to the totality of the information collected. This decision was reached not only based on the investigation by Mr Tavener but also the driving centre review that Mr Fealy himself had conducted.

71.8 A meeting took place between Mr Fealy and Mr Atkinson on 23 February 2016 whereby several actions were to be put in place to assist Mr Atkinson in improving his managerial performance including providing support, a mentor and a 360° feedback exercise.

71.9 Mr Atkinson's management style was to be reviewed again after six months. If no improvement was found formal action was a possibility.

71.10 The following day, 24th of February 2016 a meeting took place between Mr Tavener, Ms Dew, the Claimant and his work representative to provide feedback on the Claimant's informal complaints. The meeting lasted an hour. We find on the evidence before us that the meeting was led by Ms Dew and Mr Tavener was only present to answer any questions or to explain his findings to the Claimant.

71.11 Mr Fealy joined the meeting part way through in line with the Respondent's procedure, as he was required, to serve an outcome letter (page 269). We find the letter was pre-written.

71.12 The Claimant was told of the decision already reached by Mr Fealy and Ms Dew prior to the meeting with the Claimant and that there was insufficient evidence to uphold his complaint. We find that the Claimant was told that steps were to be put in place to address areas for improvement with Mr Atkinson about feedback to Mr Atkinson's but he was not given the details on the grounds of confidentiality.

71.13 We turn to the outcome of the informal complaint made by the Claimant. We remind ourselves that the question that must be asked is not what we may have decided having seen Mr Tavener's evidence gathering but whether the decision by Mr Fealy not to uphold all or any of the Claimant's complaints was a fundamental breach of the Claimant's contract of employment.

71.14 Whilst Mr Tavener found that Mr Atkinson was entitled to know the routes driving instructors took and that there was no investigation that triggered the obligation under the Respondent's disciplinary policy to inform the Claimant of an investigation his final written recommendation found on balance that Mr Atkinson had been engaged in monitoring the Claimant

71.15 Mr Tavener did find some evidence in his investigation that Mr Atkinson's management style impacted on some staff although they there were different views. The specific phrase the Claimant relied upon, "your qualifications are not worth the paper they are printed upon" was raised at a team meeting has to be put in context. Mr Atkinson was explaining that the Respondents were required to introduce new training standards at the request of government agencies. There was some resistance to change from the driving instructors, not just the Claimant and Mr Atkinson was trying to explain why new qualifications and assessments were required and used the phrase complained of. What the driving instructors held by way of qualifications was no longer sufficient. There was also some reference made to the Claimant of the need to obtain a forklift truck certificate. The Claimant, due to current personal reasons, was unable to commit to a two-week course. We are satisfied that Mr Atkinson was required, due to national legislation to require driving instructors to complete evidenced portfolios which would then available for assessment by external inspectors.

71.16 Finally, there is issue of the misuse of surveillance equipment. Mr Tavener did consider this matter and took extensive advice from Mr Darby as is evidenced from various emails. Mr Darby's view was that the tracker system tracked vehicles and contained no personal information. In relation to the specific incident of 13 January 2015 paperwork has been completed to obtain hard drives. Mr Atkinson had removed a hard drive on this date but he been requested to do so by an investigating officer into a disciplinary matter. He did not view it but there was not a clear evidential trail that the request related to the two vehicles mentioned by the Claimant.

72. The disciplinary investigation.

72.1 Later that afternoon, 24 February 2016 Mr Fealy, on behalf of Mr Macklam, served a letter on the Claimant. Mr Macklam was, we accept unavailable.

72.2 The Claimant was informed that an investigation would be undertaken concerning an allegation that on 4 September 2015 the Claimant sent an inappropriate email containing offensive language which breached the Respondents dignity and respect, information governance and rules of email usage policies. The letter (page 270) stated that the investigation could lead to a disciplinary hearing.

72.3 Mr Fealy made a note of the discussion he had with the Claimant when serving the letter. Mr Fealy recorded, and we accept the note as reasonably accurate, that the Claimant was upset and wanted to know whether the fact the email was sent prior to his final written warning would have any impact.

72.4 The Claimant alleged that he was only now being served with a letter to try and make him resign. We observe that the Claimant did not suggest that the letter was served as some form of reprisal in response to his protected disclosure. This only came much later.

72.5 The Claimant produced a blue bag to Mr Fealy which contained shopping and wanted to know whether he would be "bollocked" for that. Mr Fealy said he would not take any action on the shopping on this occasion. We observe that if the Respondent's really intended, as the Claimant asserted, to dismiss him or force him to resign for making a protected disclosure here were potential grounds to pursue a possible disciplinary matter which were not taken.

72.6 Mr Findlay for the Respondent urged upon us that if the Claimant was genuinely unhappy with the outcome of his informal complaint he could issue a formal grievance.

72.7 Whilst normally that would be a submission that would have some force, in these particular circumstances, given that within hours of having received the outcome of his informal complaint, he was then served with notice of a disciplinary investigation which could result in him losing his job and given also that he was so distressed that Mr Fealy obtained information for the Claimant of a helpline from occupational health and asked colleagues to keep an eye on the Claimant we prefer the Claimant's evidence that he was in such a mental state that he wasn't thinking rationally.

72.8 As we noted later in our judgement the Claimant was subsequently to be signed off as unfit for work.

72.9 The Respondent's remained concerned as to the Claimant's health and on Friday 26 February 2016 Station Manager Allen was instructed to visit the Claimant at the driving training centre to check on the Claimant and occupational health were requested to appoint a welfare officer to support the Claimant.

72.10 On Tuesday, 1 March 2016 Mr Fealy received a further report expressing concerns about the Claimant's health and arranged for occupational health to visit the Claimant.

72.11 The advice Mr Fealy received from Occupational Health was that the Claimant was fit for work.

73. <u>The Claimant's subsequent sickness.</u>

73.1 On 14 March 2016 the Claimant reported sick. The Claimant said in his evidence that he suffered a mental breakdown. We accepted that evidence which was not disputed.

73.2 Mr Hall had been tasked with investigating the 4 September 2015 e-mail.

73.3 The Claimant was absent due to ill health.

73.4 Mr Hall spoke to other witnesses first and took statements.

73.5 He was unable to see the claimant due to his ill health.

73.6 Having taken advice from Occupational Health that concluding the investigation might assist the Claimant's recovery Mr Hall wrote on 18 July 2016 to Mrs Moorhouse (C22 to C23), who was acting on the Claimant's behalf, enclosing a list of questions, asking Mrs Moorhouse to check the questions and, if suitable to place them before the Claimant for a response. We have examined the questions. They are limited to 8 in total. There is nothing improper about the questions.

73.7 Mr Hall did not receive a response and therefore chased the matter up on 25 July 2016 by email (C24). The tone of the email was measured. Mr Hall emphasised the Claimant's welfare was his main concern and if the Claimant was unable to deal with the questions he didn't want to make matters worse. However, if the Claimant could complete the questions it will enable him to conclude his investigation which might assist the Claimant's overall recovery.

73.8 Mrs Moorhouse responded on 2 August 2016 and stated the Claimant's recovery had been set back because occupational health disclosed to Mr Atkinson its reports. As this was not a ground relied upon to support the Claimant claim of constructive unfair dismissal we will only say that Mr Atkinson, as the claimant's line manager would need to know about the Claimant's health and when he would return. Further the occupational health reports contained a clause confirming that the Claimant consented to the report being disclosed to management.

73.9 Before Mrs Moorhouse indicated that before she discussed the questions with the Claimant she wanted the Claimant to speak with his counsellor and obtain an independent medical report as to whether he was fit enough to answer them. She expressed concern about the way her father-in-law was being dealt with by the Respondent asked for a contact name for someone senior within the Respondent who she could discuss those concerns with.

73.10 Mr Hall responded on 3 August 2016 (C29). He noted Mrs Moorhouse wished to obtain further advice but pointed out the passage of time since the questions had been dispatched and asked for a response to the questions by 19 August. If he did not have answers by the 19 August he would conclude his report but would prefer answers to the questions before he did so. He provided Mrs Moorhouse with details of the Respondent's Area Manager Mr Butters.

73.11 On the 20 August 2016, Mrs Moorhouse emailed Mr Richard Hall to advise him she could not indicate when the Claimant would be able to answer the written questions raised by Mr Hall. Medical advice suggested the Claimant had not improved. She asked that the *"outstanding investigation is put on hold until his health improves."* We observe that she did not ask for the proceedings to be terminated.

73.12 She asked whether the Claimant's contractual sick pay could remain at 100% rather than reducing to 50% as a reduction would cause the Claimant financial difficulties which might be detrimental to his medical condition.

73.13 On 31 August 2016 Occupational Health reported (page 134) that the Claimant might be fit to return to work in three months' time and stated, regarding the disciplinary proceedings: –

"I still believe that it is important for a disciplinary meeting to take place and be concluded as soon as possible, to help Mr Moorhouse's recovery and help him get back to work."

73.14 Mr Butters visited Mrs Moorhouse at her request on 16 September 2016 to discuss with her aspects of her father-in-law's case which it was perceived by the Claimant and Mrs Moorhouse have been mishandled. The reason for delay in arranging the visit were holidays involving both Mr Butters and Mrs Moorhouse. No complaint is made about any delay and nothing turns upon it. Mrs Moorhouse's evidence to us was that she hoped that Mr Butters would drop the disciplinary investigation after the meeting on 16 September 2016 although she did not specifically articulate that to Mr Butters. We accept that may have been her hope but that was not communicated as an issue for Mr Butters to consider.

73.15 Mrs Moorhouse raised the possibility of a settlement agreement but did not mention any figures.

73.16 Mrs Moorhouse did not make any concrete proposals as to steps which might assist the Claimant returning to work as she felt it was not her responsibility. We have some sympathy with that view. The Respondents were the employers of the Claimant and it was for them to manage the situation accordingly. In the circumstances where there is no input from the employee there may be a wider range of perfectly feasible steps that an employee could take which would fall within its management discretion. If specific proposals are put forward by an employee then an employer should explain and justify the reasons why those proposals were rejected.

73.17 Mr Butters was aware from information he received from Ms Dew that the Claimant had raised concerns, amongst other matters, against Mr

Atkinson in relation to monitoring using the silent witness equipment. He therefore had sufficient information to conclude an element of the claimant's concerns related to a protected disclosure.

73.18 We are satisfied Mr Butters did take Mrs Moorhouse's concerns seriously and did seek to obtain additional information to respond to Mrs Moorhouse's request for information. Evidence of the extensive internal enquiries Mr Butters made can be found at pages 115 to 116.

73.19 Mr Butters emailed Mrs Moorhouse on 27 September 2016 (page 47 and 48) dealing with the majority of her queries. He explained that he was satisfied the Claimant disciplinary hearing was properly conducted and that the Claimant did not appeal.

73.20 He was satisfied that the informal complaint was investigated and an extended meeting took place with the Claimant to explain the outcome.

73.21 Mr Butters the satisfied the Claimant's welfare had been supported.

73.22 Mr Butters had sought advice whether the Claimant's half pay could be reviewed and indicated the decision made by the Respondent was that the Claimant would remain upon half pay in accordance with his contractual entitlement.

73.23 He considered Mrs Moorhouse as request for a settlement agreement but did not think that an appropriate way to progress and indicated the Respondent needed to progress the outstanding disciplinary investigation.

73.24 He responded to the outstanding queries by email on 11 October 2016 (page 46).

73.25 The Claimant still have not been fit to respond to the questions posed by Mr Hall.

73.26 Mr Butters wrote to the Claimant on 4 November 2016. He indicated the Respondents were keen to assist the Claimant in returning to work. Mr Butters indicated he had reviewed all the evidence about the disciplinary investigation and whilst noting the Claimant had not responded to Mr Hall's questions felt the evidence was reasonably clear. To assist with a return to work he had taken the decision to stop the investigation and that no further action be taken. The reason for this decision was the allegations predated the disciplinary hearing on 10 December 2015. We note that Mr Butters did take soundings in relation to his proposal from Mr Atkinson. Mr Atkinson did not disagree with the proposed approach. This is a further factor that undermines the Claimant's argument that Mr Atkinson and/or the Respondent's wanted him dismissed.

73.27 He informed the Claimant he made an appointment the Claimant to see occupational health on 14 November and once that report was available the Respondents would be better able to consider options for a return to work. The Claimant described this letter as the "final straw". In our judgement the removal of the threat of disciplinary proceedings cannot be a "final straw" in a constructive unfair dismissal claim. In fairness to the Claimant and having ventilated the point with both parties we looked at whether the disciplinary investigation proceedings

should even have been instigated and if so whether they should have been withdrawn at an earlier stage which we have dealt with in our conclusion.

73.28 By an email of 14 November 2016, the Claimant resigned. A copy of the letter of resignation can be found in the bundle (pages 42 to 43). Whilst that letter refers to several issues including an alleged breach of section 100 (1) (D) of the Employment Rights Act 1996 the only matters relied upon are those that were identified by Employment Judge Davies on 2 May 2017, as slightly amended before us and as set out earlier in this judgement.

73.29 The Claimant attended the occupational health appointment on 14 November. The report did not address the Claimant fitness to return to work, given the Claimant had resigned. The occupational health physician noted the Claimant appeared to be improving.

73.30 The Claimant's effective date of termination of 11 December 2016.

73.31 The evidence before us was that in terms of termination on the grounds capability the Respondent's procedure was as follows. In a case of long-term sickness, the Respondent would start to consider that as a possibility of termination between 6 to 12 months absence. Before such a decision would be made occupational health advice would be requested to see if the employee, in the near future, could return to work. The purpose of the appointment made by the Respondent for the Claimant on 14 November was predominantly to enquire; now the disciplinary investigation had been lifted how the Respondent could facilitate the Claimant's return to work. It was not specifically aimed at seeking advice on termination on the grounds of capability.

Submissions.

74. We should begin by thanking both Mrs Moorhouse and Mr Findlay for the professional and measured way they presented their respective cases.

75. Although Mrs Moorhouse is not a qualified lawyer she cross-examined and argued with considerable skill and tenacity and no point that could not be properly argued on behalf the Claimant was not argued.

76. Mr Finley.

76.1 Whilst Mr Finley did not formally concede that the Claimant had not disclosed information within the meaning of section 43B of the Employment Rights Act 1996 he conceded that the disclosures made by the Claimant were capable of amounting to information but it was for the Claimant to satisfy the tribunal on this point.

76.2 Mr Finley indicated he could not concede that the Claimant did not have a reasonable belief that his disclosure tended to show a breach of the Data Protection Act 1998 but did concede that the was no evidence of any form of malice in the disclosure by the Claimant.

76.3 Mr Finley principally concentrated upon whether the disclosure made by the Claimant could be made in the public interest. He argued that looking

at the paper trail, properly analysed, this was a complaint about Mr Atkinson wrapped up with other issues and given that narrow focus there could be no public interest.

76.4 Mr Finley conceded that if there was a qualifying disclosure it was not contended by the Respondent that the method of disclosure was such to take it outside the ambit of a protected disclosure. The disclosure was made internally to the Respondent.

76.5 Turning to the detriment Mr Finley submitted that it was the Claimant to show that the treatment was on the ground of any proven protected disclosure. He addressed two points that potentially favoured the Claimant. One was of timing; on the morning of 24 February the Claimant was told his concerns were not upheld and on the afternoon, he was served with notice of the disciplinary investigation. Whilst Mr Fealy had received the email from Mr Atkinson on the 27 January 2015 his evidence for the delay in serving the notice of a disciplinary investigation was cogent.

76.6 The second was how the email had become a matter of interest for the Respondent. He asked the tribunal to accept that it was given by Mr England to Mr Atkinson to assist Mr Atkinson in resisting the bullying allegations made by the Claimant and to demonstrate there was an upward bullying culture by staff towards managers.

76.7 Turning to the allegations of constructive unfair He contended that the Respondents evidence should be preferred that Mr Atkinson wanted to ensure that the trainee drivers were receiving training appropriate to their new responsibilities. This was not any form of covert monitoring. It was not any form of formal investigation requiring notification to the Claimant under the Respondents policy.

76.8 He next addressed the outcome of the investigation conducted by Mr Taverner. Both the Claimant and Mrs Moorhouse had fairly conceded it was comprehensive. This was not a whitewash. Some evidence potentially favoured Mr Atkinson and some potentially favoured the Claimant. Mr Tavener's report summarised that this was not clear-cut, one way or the other. Mr Fealy was entitled to find that the was some evidence that showed Mr Atkinson could have managed situations in a better manner but that the evidence was not such that the allegations was substantiated. In effect Mr Fealy had adopted the approach of "not proven". He did take the concerns that came to light seriously hence the detailed action plan given to Mr Atkinson.

76.9 It was perfectly proper for Mr Butters to remove the threat of disciplinary proceeding. Occupational health had initially advised that the sooner the proceedings were concluded that better for the Claimant. When it became clear the Claimant wasn't improving and having taken advice from the Respondent HR director and gave Mr Atkinson's views in the attempt to assist with Claimant returning to work those proceedings have been withdrawn. At no stage did the Claimant asked the proceedings to be stopped. Whilst it was arguable the proceedings could have been stopped earlier this was a judgement call and not a fundamental breach of contract. It also was not the last straw.

76.10 Mr Finley said the withdrawal of the disciplinary investigation could not be the last straw and in any event the Claimant delayed too long.

76.11 On Polkey Mr Finley said there was some evidence as to the Claimant's ill-health which may have meant he could be fairly dismissed at a later date and this was a matter of discretion for the Tribunal.

77. Mrs Moorhouse.

77.1 In a persuasive submission Mrs Moorhouse urged us to find that looking at the totality of the communications made by Mr Moorhouse that there was sufficient information given to the Respondents to amount to a disclosure of information.

77.2 She said Mr Moorhouse had not been seriously challenged that he did not have a reasonable belief that information about data control and recording faces, and movements of men's in the street and how that data was kept was a matter of public interest.

77.3 Mrs Moorhouse submitted that there was evidence that Mr Atkinson was, in October 2015, seeking to monitor the Claimant and this was a breach of the Respondent's policy to do so without informing him that he was subject to a formal investigation.

77.4 Mrs Moorhouse stated that on the weight of the evidence obtained by Mr Taverner some or all of the complaint made by the Claimant should have been upheld. She drew to our attention the relatively stringent improvement plan that the Respondent has subsequently imposed upon Mr Atkinson.

77.5 She stressed that Mr Butters could have withdrawn the disciplinary investigation far earlier and indeed given the email, the subject of the proceedings, was dated prior to the Claimant's final written warning it should not have proceeded with it at all.

77.6 She stated Mr Moorhouse had not delay too long, he had acted promptly after Mr Butters withdrew the disciplinary investigation.

77.7 On the Polkey argument she left that to the Tribunal to determine.

77.8 Mrs Moorhouse emphasised the Claimant loved his job and did not want to leave and wanted to work up to retirement.

Conclusion.

78. Protected disclosure

78.1 We start with the issue of whether the Claimant has made a protected disclosure as if we are against the Claimant on this point then the Claimant's claims under section 47B and 103 A of the Employment Rights Act 1996 fall away leaving us to only determine the issues of constructive unfair dismissal and Polkey.

78.2 We are satisfied that the Claimant made a disclosure of information within the meaning set out in **Geduld -v- Cavendish Munro Professional Risks Management Ltd 2010 ICR 325**.

78.3 The drafting of the issues was somewhat unfortunate as the Claimant did not speak to Ms Dew on 11 January 2016 but had spoken to Mr Fealy a few days earlier on 7 January 2016. We do not repeat our findings of fact as to what the claimant said at that meeting other than to note it was very clearly information. Mr Fealy had then discussed those concerns with Ms Dew who had then summarised them in writing. It is arguable therefore that there was no disclosure by the Claimant on 11 of January 2016 although to Mr Finley's credit he did not take the point. In our judgement we are entitled to examine what was said to Mr Fealy on 7 January 2016 when determining whether there was a disclosure of information. In summary on 7 January 2016 the Claimant had clearly told Mr Fealy that he believed there was a misuse of the silent witness system by Mr Atkinson, that proper records were not been kept by the Respondent and that the tracker system was used for unauthorised purpose. He believed there was a breach of the Data Protection Act That is sufficient to be a disclosure of information.

78.4 If we are wrong then we find that on 25 January 2016 there was a disclosure of information to the Respondent when the Claimant said, during the investigation being conducted by Mr Taverner that: –

"There is CCTV (silent witness) in *training driving school vehicles. There is also tracking data in the form of black boxes on certain vehicles. These are both being misused as it has become normal practice for Chris Atkinson and Andy England to withdraw silent witness hard drives to check on where driver training staff have been and is they have been shopping. Chris Atkinson has been checking up on every member of the driver training staff by accessing tracking data by the fleet controller Glyn Richardson. He is being allowed to access data without making a formal request."*

78.5 The Claimant amplified upon the above at his interview with Mr Taverner. in our judgement the above was sufficient to amount to a disclosure of information.

78.6 We then turned to the issue of reasonable belief. It is important we emphasise that all the Claimant must show is that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The Claimant had made it clear that he believed there were breaches of the Data Protection Act. We emphasise that it is not necessary in law for there to be an actual breach. An honest but mistaken belief will suffice.

78.7 We are satisfied the Claimant genuinely believed that managers and the Respondent were breaching the Data Protection Act. While Mr Finley did not expressly concede the point the Claimant that was not challenged that he did not have a reasonable belief. We are not convinced that the Claimant was right in law that there were breaches, for example trackers record personal data. However, that is not the question that needs to be asked. The question is, did this Claimant reasonably believe there were breaches of the Data Protection Act. We found the Claimant to be a truthful man who honestly told us his recollection of events from his perspective. On occasions we do not necessarily accept his perspective but do accept that he was truthful.

The Claimant had a genuine belief. We have noted in our findings of fact the document found at page 299 to 300 which related to correspondence from the Information Commissioner's office about a completely different matter but relating to the silent witness equipment. The caseworker at the Information Commissioner's office changed his opinion as to whether how silent witness had been used was or was not a breach of the Data Protection Act. If the regulator found the matter far from clear, taking everything together, we are perfectly satisfied the Claimant's belief was genuine and he held a reasonable belief and that the belief was objectively reasonable in all the circumstances.

78.8 We now turn to the issue of public interest. It was on this ground that Mr Finley argued that there was no public interest. In essence he said that as the Claimant proceeded with an informal complaint under the Respondents dignity and respect policy the complaint was focused upon Mr Atkinson and this was a matter to which the public would have an interest.

78.9 With respect to Mr Finley we reject that submission. The facts were that the Claimant made his complaint which included a potential protected disclosure. It was the Respondents who decided to deal with the matter under its dignity and respect policy. This classification was made by Ms Dew, the equality and diversity officer for the Respondent. It is true the Claimant agreed to proceed as suggested by Ms Dew but we are not satisfied that any attempt was made to explain to the Claimant the various avenues of redress that could be sought such as under the Respondent's "Whistleblowing" policy. In fact, we are not satisfied at that stage the Respondents even addressed their mind to the fact that a substantial strand of the Claimant's complaint could be a protected disclosure. All the Claimant wanted was his complaint to be investigated and addressed. He went along with what was suggested. He was not trained in HR and did not know the range of policies available. We did consider whether placing the Claimant's complaint under the dignity and respect policy was an attempt to divert the Claimant from Whistleblowing. We rejected that having seen and heard from the witnesses. The Respondents were not that sophisticated.

78.10 As we have already indicated the phrase "made in the public interest" does not mean the public per se. Here we had a large public authority funded by the taxpayer. The public would have an interest in knowing whether it complied with the Data Protection Act The Claimant's allegation included that there was no evidential trail to show when hard drives were processed from which appliance they came. The lack of a clear evidence trail would be potentially in the public interest

78.11 The Claimant alleged that members of the public would been filmed when they should not have been filmed and information such as car registration numbers were being recorded when they should not have been recorded. These were allegations which in our judgement were capable of and did have a potential public interest and that the Claimant genuinely believed on reasonable grounds that they had a public interest.

78.12 Whilst we accept that the Claimant also wished to call Mr Atkinson to account the case law is clear that the public interest need not be the only motivation for the disclosure though it must pay a part. Here it did play a part for the reasons set out above.

78.13 We are satisfied that the Claimant made a qualifying disclosure and given the manner that disclosure was made that the disclosure was protected. Indeed, Mr Finley conceded there was a qualifying disclosure it was protected.

79. Detriment.

79.1 We now turn to the issue of the alleged detriment namely serving upon the Claimant notice of a disciplinary investigation on 24 February 2016 within hours of not upholding his informal complaint.

79.2 To establish a detriment the disclosure must be a material, that is more than a trivial influence on the Respondent.

79.3 We found this a difficult and troubling issue.

79.4 Not unnaturally Mrs Moorhouse emphasised to us the timing of the service of this letter, within hours of the Claimant's informal complaint, which it was alleged included a protected disclosure not being upheld. We could see force in this submission and was scrupulous therefore to examine how the email of the 4 September 2015 came into Mr Atkinson's possession, why it came into his possession and the reason for the delay in raising this matter with the Claimant.

79.5 We start with how the email of 4 September 2015 came into Mr Atkinson's possession. The evidence is clear; he was emailed a copy by Mr England on 20 January 2016 (page 265 to 266).

79.6 This gives rise to the question as to why Mr England gave Mr Atkinson a copy of the email. Mr England was not called to give evidence and we were therefore reliant upon Mr Atkinson's evidence.

79.7 Mr Atkinson and Mr England shared an office. Mr Atkinson knew he had been cited by the Claimant because Mr Fealy had told him so on the 12 January 2016.The previous day, 19 January 2016 Mr Atkinson had been interviewed by Mr Tavener about the Claimant's informal complaint so would have known by then the detail of it.

79.8 Mr Atkinson was adamant he had not discussed the Claimant's allegations against him with Mr England.

79.9 There are three possibilities as to how Mr England knew of the Claimant's complaint.

79.10 One, Mr England was told by Mr Atkinson. This is certainly possible as Mr Atkinson would be upset about the allegations made by the Claimant and would be likely to seek support from other management colleagues.

79.11 Two as we have noted Mr Fealy had spoken to all the driver training centre team to inform them there was an informal complaint under the dignity and respect policy within the driver training centre team and he

then realised what that related too. We did not have evidence what Mr Fealy told the driver training centre team so give this little weight.

79.12 Three there was an active rumour mill within the driver training centre team and Mr England learnt that the Claimant had made a complaint of bullying against Mr Atkinson. We think this possible, given our findings of the unhappy state of relation between staff and management is perfectly credible.

79.13 We had no evidence before us that Mr England had any knowledge of any protected disclosure being made by the Claimant.

79.14 We have concluded, on the balance of probabilities, that the email was given by Mr England to Mr Atkinson as a document to defend himself from bullying allegations whether he knew of them from Mr Atkinson or from the rumour mill. It was given to Mr Atkinson in relation to the bullying as in our judgement that would have been the matter the caused Mr Atkinson the greatest concern.

79.15 We have concluded that the email was simply one of the number of documents that Mr Atkinson then passed to Mr Fealy to demonstrate what he regarded as "upward bullying" by some members of staff towards management. The reason Mr England gave the e-mail of the 4 September 2015 to Mr Atkinson on the 20 January 2016 is what had changed was there was a bullying allegation against Mr Atkinson.

79.16 We now turn to the delay in Mr Fealy raising the email of the 4 September 2015 with the Claimant.

79.17 The evidence before us, and it was not seriously challenged, for the delay in Mr Fealy receiving the email from Mr Atkinson and conveying the same on the Claimant was in our judgement credible. The Claimant had been absent due to the death of his mother, the Claimant had been absent due to sick leave, Mr Fealy had been on leave and an investigating officer had to be appointed to deal with the email issue. We accepted Mr Fealy's explanation that he wanted to personally discuss matters with the Claimant because he knew he would take it badly and felt this was more appropriate than simply posting a letter at an earlier stage. He wished to keep the driving training centre review separate.

79.18 The Claimant's case, and it is very easy to understand, was that he was served with the notice of the disciplinary investigation as, in effect, a tit for tat reprisal for bringing a protected disclosure. We reject that contention. Mr Fealy knew by 10 February 2016 the nature of the Claimant's complaint. If he wished to dissuade the Claimant from pursuing matters he could have served notice of the disciplinary investigation on 10 February 2016.

79.19 We have carefully considered that had the Claimant not raised a complaint about Mr Atkinson which included a protected disclosure then Mr England would not have given Mr Atkinson the email of 4 September 2015 which was passed to Mr Fealy who then decided, after passage of time, to commence a disciplinary investigation.

79.20 We have concluded that the protected disclosure made by the Claimant did not materially influence Mr Fealy in deciding to serve notice of the disciplinary investigation upon the Claimant. It was a serious allegation. Mr Atkinson was being investigated for bullying and had produced cogent evidence that the Claimant had acted inappropriately. It could not be ignored in fairness to Mr Atkinson. The Claimant himself accepted that the email was a matter that management could reasonably want to investigate. For the reasons set out above both the production of and the serving of the notice of disciplinary investigation was not motivated materially, that is more than trivially, by Mr Fealy's knowledge that the Claimant had made a protected disclosure.

80. Constructive dismissal.

80.1 We now turn to whether the Claimant was constructively unfairly dismissed. Only if we find that there was a constructively unfair dismissal do we then need to consider section 103A of the Employment Rights Act 1996.

80.2 The Claimant relied upon three acts or omissions identified by Employment Judge Davies.

80.3 We do not intend to repeat our findings of fact.

80.4 On the unofficial monitoring this complaint was not upheld. What was not know to the Claimant prior to his resignation was that Mr Taverner had prepared a report which he had supplied to management, but not to the Claimant, summarising his investigation. On this allegation Mr Tavener found that on balance Mr Atkinson had carried out unofficial monitoring. The fact that he found, on balance, means that it must have been more likely than not that there was unofficial monitoring. It follows therefore that this element of the Claimant's complaint should have been upheld. It was not. This potentially could amount to a fundamental breach of the duty of trust and confidence as Mr Fealy offered no explanation before us as to why he did not accept recommendation. However, as we emphasise we need to look at what was in the Claimant's mind and knowledge when he resigned. He was unaware of this evidence and therefore it cannot have influenced his resignation.

80.5 The second element relates to not upholding the Claimant's complaint.

80.6 This already incorporated the alleged unofficial monitoring in October 2015.

80.7 The other elements related to Mr Atkinson's bullying and intimidating manner and misuse of silent witness and tracking devices. As we have already summarised on our findings of fact we are satisfied that the judgement reached by Mr Fealy on the basis of Mr Tavener's report was a judgement he was entitled to reach. Whilst there was a comment by Mr Atkinson as to the worth of the Claimant's qualifications, in the context of the comment being made it cannot be said to be a fundamental breach of the duty of trust and confidence to not uphold

that as being bullying. The other, more tangential matters, on the evidence, placed before Mr Fealy justified the decision he reached.

80.8 Finally dealing with the issue of silent witness/tracker monitoring the specific incident relied upon by Claimant was examined by Mr Taverner and considered by Mr Fealy.

80.9 Mr Atkinson did remove hard drives on the 13 January 2015 but this was at the request of senior management and the purpose of the disciplinary investigation which was duly authorised and recorded. Mr Atkinson did not access (i.e. read) the hard drives but simply bagged and tagged the drives. Whilst it is true that the Respondents did not have a system of recording which vehicles the drives were removed from that was not the fault of Mr Atkinson but a system failure of the Respondent.

80.10 Mr Tavener enquired as to misuse of trackers and there was no evidence that was such as to lead him to find they were being misused by Mr Atkinson or Mr England and therefore it cannot be said that on the evidence placed before Mr Fealy that his decision not to uphold this element of the Claimant's complaint was a fundamental breach of the duty of trust and confidence.

80.11 We now turn to the discontinuance of the disciplinary investigation by Mr Butters. Our starting point is that the removal of a disciplinary investigation cannot be a final straw within the meaning of **Omilaju -v- Waltham Forest London Borough Council 2005 ICR 481**. The stronger point made by Mrs Moorhouse was that it either the disciplinary investigation should not have been commenced or should have been lifted earlier. Given the content and tone of the email of the 4 September 2015, the fact it referred to the Claimant's line manager and that the Claimant himself accepted in cross examination that it was an issue that the Respondent could properly investigate we do not find that it was a fundamental breach of the duty of trust and confidence to start such an investigation.

80.12 In a report from occupational health dated 31 August 2016 it was recommended that the investigation was concluded speedily as it would benefit the Claimant's health. The investigating officer had been attempting to do so whilst making allowances the Claimant's illness; he sent questions to the Claimant. It wasn't a fundamental breach of the duty of trust and confidence for the investigation to continue certainly up to 31 August 2016.

80.13 We accept the evidence of Mr Butters that what changed was the passage of time. The Respondents genuinely wanted the Claimant to return to work and believed the disciplinary investigation was an obstacle to return to work and therefore as a gesture to build bridges the investigation was ended.

80.14 Between Mr Butters seeing Mrs Moorhouse on 16 September 2016 and his decision on the 4 November 2016 Mr Butters had to address and collate information to deal with request for information made by Mrs Moorhouse on behalf of her father-in-law. We find he genuinely did review matters. Whilst it could be argued that Mr Butters could have

withdrawn the disciplinary investigation at an earlier stage that is a matter that falls within a broad band a managerial discretion. We cannot say that Mr Butters, exercising that discretion to withdraw the disciplinary investigation when he did, or by not doing it sooner fundamentally breached the Claimant's contract of employment.

80.15 For completeness we should say that we accept that each incident need not in itself be a fundamental breach of the duty of trust and confidence. Although we have addressed each incident individually we have then stood back and looked at matters in their totality to determine whether there has been a fundamental breach. There has not.

80.16 Further if we are wrong then we find the Claimant has affirmed the contract. The withdrawal of the disciplinary investigation was not a "final straw" and the Claimant had affirmed the contract by continuing to regard himself as bound by it evidenced by Mrs Moorhouse's request on the 16 September 2016 for the Respondent to extend contractual sick pay, the passage of time coupled, with the lack of action from the Claimant to show he no longer regarded himself bound by the contract.

80.17 It follows the claim of constructive unfair dismissal must be dismissed.

81. <u>Polkey.</u>

81.1 Finally, we deal with the issue of Polkey if we are wrong and the Claimant was constructively unfairly dismissed.

81.2 We remind ourselves that the burden is on the Respondent and that even though our task may be difficult and involved a degree of speculation if there is some evidence we must embark upon that exercise.

81.3 We know the Claimant was signed off work in March 2016.

81.4 On 31 August 2016 occupational health, at that stage, was anticipating a return within approximately three months. In other words, if the Claimant progressed a return to work was being considered was the end of November 2016.

81.5 Occupational health when they saw the Claimant on 14 November 2016 did not address whether the Claimant was fit for work although did note he was much improved.

81.6 The evidence from the Respondent's was that termination on the grounds of capability would normally be considered after 6 to 12 months sickness.

81.7 In our judgement the Claimant would have returned to work prior to the conclusion of any capability proceedings by the Respondent.

81.8 The Claimant would be returning to work still managed by Mr Atkinson and we have the benefit of observing both witnesses. In our judgement stresses and strains, despite no doubt both parties' best efforts, would soon arise. The Claimant had from March 2016 suffered a mental health breakdown and we have concluded that there is a risk that the

Claimant would fall sick again at some stage and there was a risk that he would then be fairly dismissed based on ill-health capability by this Respondent.

81.9 However, before any return to work the Respondent's might have changed the claimant's line manager or Mr Atkinson may have not managed the Claimant until retirement.

81.10 Doing the best we can on all the information which we have, which is scant, we cannot say there is no risk the claimant would not have been fairly dismissed on capability grounds, but the risk is relatively low.

81.11 Doing the best, we can on the information we assess a 10% Polkey risk. We were not asked to assess a Polkey risk based on the Claimant being fairly dismissed for misconduct given he had a final written warning.

82. Post script.

We observe that it was regrettable that this case came before us where the Respondent's recognised the Claimant was a very competent instructor and wanted him back to work and the Claimant has lost a job he loved and wished to undertake until retirement. Magnanimous gestures on both sides may have saved what appears to be a lose, lose situation for both parties.

Employment Judge T R Smith

Date: 19 October 2017