RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr Joseph Okotie**

Respondent: **London Borough of Newham**

Heard at: **East London Hearing Centre**

On: **13 & 14 September 2017 and 23 & 24 January 2018**

Before: **Employment Judge Brown**

Members: **Ms J Houzer**
Ms J Owen

Representation

Claimant: In person

Respondent: Ms S King (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The Tribunal does not have jurisdiction to hear the Claimant's ordinary unfair dismissal complaint.**

2. **Even if the Tribunal did have jurisdiction to hear the Claimant's unfair dismissal complaint, the Respondent did not dismiss the Claimant unfairly under *s98 ERA 1996*.**

3. **The Respondent did not dismiss the Claimant automatically unfairly under *s103A ERA 1996.***

4. **The Respondent did not subject the Claimant to any detriment because he made a protected disclosure.**

5. **The Respondent did not fail to pay the Claimant holiday pay.**

REASONS

1 On 15 July 2016 the Claimant presented this claim, number 3200699/2016, against the Respondent, his former employer. The Claimant brought complaints of unfair dismissal, disability discrimination, victimisation and failure to pay wages/holiday pay.

2 A separate claim, claim number 3200336/2016, in which the Claimant brought complaints of unlawful deductions from wages, was heard by Regional Employment Judge Taylor on 22 July 2016. She found that the Respondent had paid all sums lawfully due to the Claimant.

3 At a Preliminary Hearing on 20 February 2017, Employment Judge Russell struck out the Claimant's disability discrimination complaints in this claim, number 3200699/2016, and struck out his victimisation complaint. She refused the Claimant permission to amend his claim to add protected disclosure detriments before August 2015, a race discrimination complaint, and health and safety complaints. Employment Judge Russell recorded the issues which remained to be determined by the Tribunal at the final hearing. They were as follows.

The Issues

Protected Disclosure

5.1 In his grievance dated 7 October 2015, did the Claimant disclose information which in his reasonable belief tended to show that: (i) the Respondent had failed to comply with a legal obligation; and/or (ii) the health and safety of an individual had been put at risk?

5.2 If so, did the Claimant reasonably believe that the disclosure was made in the public interest?

Unfair dismissal claim

5.3 What was the reason for the dismissal on 17 March 2016? The Respondent avers that it was capability, namely the Claimant's ability to discharge his contracted duties. The Claimant avers that it was a protected disclosure made on 7 October 2015 in a written complaint to Human Resources when he alleged bullying, harassment and breach of health and safety.

5.4 If protected disclosure, the dismissal will be automatically unfair and no period of continuous employment is required, s.103A ERA 1996.

5.5 If capability, does the Claimant have the necessary period of continuous employment to present his claim?

5.6 Was the decision to dismiss a fair sanction, that is , was it within the reasonable range of responses for a reasonable employer and fair in all of the circumstances of the case, s.98(4) Employment Rights Act 1996?

5.7 Should there be any adjustments to the basic and/or compensatory awards to reflect:

5.7.1 If procedurally unfair, whether and when the Claimant would have been fairly dismissed in any event.

5.7.2 Contributory fault;

5.7.3 Unreasonable failure to follow the ACAS Code of Practice on Discipline and Grievances.

Protected disclosure detriment, s.47B ERA 1996

5.8 Did the Respondent subject the Claimant to the following detriments because of a protected disclosure:-

5.8.1 Decision in or around 22 November 2015 to place the Claimant on the redeployment register.

5.8.2 Suspension on grounds of alleged misconduct on 20 January 2016.

5.8.3 Relying upon or initiating the sickness absence procedure which ultimately led to the Claimant's dismissal?

Holiday

5.9 How many days of annual leave had the Claimant accrued but not yet taken by the effective date of termination on 17 March 2016? The Respondent's holiday year runs from 1 April to 31 March.

Time/limitation issues

5.10 Were any of the claims presented out of time or did the matters alleged constitute conduct extending over a period which is to be treated as done at the end of the period, here dismissal on 17 March 2016?

5.11 For any complaint presented out of time, was it not reasonably practicable for the Claimant to have presented the complaint in time and was it presented in a reasonable time thereafter?

4 At the final hearing the Tribunal heard evidence from the Claimant. It also heard evidence from Stephen Blackburn, a Passenger Transport Senior Manager who investigated the Claimant's grievances; Khalada Uddin, Senior Human Resources

Adviser for the Respondent; and Jarlath Griffin, Former Head of Delivery and Public Space at the Respondent, who was also the dismissing officer.

5 The Tribunal heard evidence from witnesses for the Claimant, who gave evidence pursuant to Witness Orders. They were Anthony Kett and Saleh Omar (also known as Saleh Ahmed). The Tribunal also made other Witness Orders at the Claimant's request. The Claimant later told the Tribunal that these witnesses were too intimidated by the Respondent to attend the hearing. These witnesses did not contact the Tribunal themselves.

6 There was a Bundle of documents. Page numbers in these Reasons are references to page numbers in that Bundle. The Claimant also produced some additional documents during the hearing.

7 The claim was heard by the Tribunal over 2 days in September 2017 and 2 days in January 2018. The gap in the hearing arose due to a serious family emergency affecting one of the Tribunal Wing Member's families. There was a further delay on the first day of the resumed hearing because the Tribunal administration had mislaid some of the Tribunal bundles.

8 The Claimant made and persisted in a number of misguided applications during the proceedings. On 23 January 2018, the first day of the resumed hearing, he asked that the Respondent disclose an unredacted copy of an apparently irrelevant email. To save time, the Tribunal simply asked the Respondent to produce an unredacted copy of the email (save for a redacted personal mobile telephone number). The Respondent did so. By the end of the evidence in the case, the Claimant had not referred to the particular unredacted email at all. The Claimant asked that his witness, Mr Saleh Omar, give evidence after the Respondent's witness, Mr Griffin. The Tribunal refused the application – the initial burden of proof is on the Claimant in discrimination cases and in cases where the Claimant does not have 2 years' service to bring an unfair dismissal claim.

9 Also on 23 January 2018, the Claimant said that he wanted to further cross examine Mr Blackburn, who had given evidence to the Tribunal on 14 September 2017. In the Tribunal's original timetable, Mr Blackburn had been scheduled to give evidence over 2 days. However, the case had progressed more quickly than the initial timetable had predicted. Mr Blackburn's evidence had been started and completed on 14 September 2017. The Claimant had finished his cross-examination, the Tribunal had asked clarificatory questions and the Respondent had been invited to, but had not, re examined Mr Blackburn. The Judge's and Wing Members' notes all recorded that Mr Blackburn's evidence had been completed and that he had been released. There were no grounds for the Claimant expecting Mr Blackburn to attend at the resumed hearing in January 2018. Nevertheless, the Claimant remained vocally unhappy about Mr Blackburn not giving further evidence at the reconvened hearing.

10 On 23 January the Claimant produced a single copy of the Respondent's Recruitment Policy, saying that he wished to rely on it. He said that the Respondent should have brought copies of it for the Tribunal. The Respondent disagreed and disputed the relevance of the document. The Tribunal doubted that the document was relevant to the issues in the case; but, to save time, the Tribunal allowed Claimant to cross examine Mr Griffin on the single Policy document he had produced. The Tribunal told the Claimant

that, if he wished to rely on the Policy in his closing submissions, the Claimant should bring copies of it for the Tribunal the following day. It was not a long document; copying it would not have taken many minutes. The Claimant also wished to adduce his Claim Form in a High Court action against the Respondent. It, too, appeared irrelevant to the issues in the case. The Tribunal told the Claimant that, if he wished to refer to that document in his submissions, he also should bring copies of it on 24 January 2018.

11 The case was listed for its final day at 10.00 on Wednesday 24 January. The Claimant did not attend at 10.00. He emailed the Tribunal, saying that he was having difficulty obtaining copies of his documents, and would attend at 14.00. The Respondent did attend at 10.00. In fact, it brought copies of the Claimant's High Court Claim Form and copies of an email which the Claimant had asked the Respondent to produce.

12 When the Claimant did not attend but, instead, told the Tribunal that he would attend at 14.00, the Tribunal emailed the Claimant, saying that he should attend the Tribunal immediately. It gave a costs warning to the Claimant. The Respondent produced helpful written submissions. The Tribunal used the some of the 24 January morning to read the Respondent's submissions.

13 At 14.00 on 24 January, the Claimant still did not attend. At 14.10 the Tribunal decided to proceed to hear the Respondent's oral submissions. It considered that it had given the Claimant ample opportunity to attend to make his oral submissions to the Tribunal. It decided that it would be unreasonable to require the Respondent to wait any longer for the Claimant to arrive.

14 It later appeared that the Claimant had emailed written submissions to the Tribunal at 13.49. These were not passed to the Tribunal until after the Respondent had delivered its submissions; there was an inevitable slight administrative delay processing the email to the Tribunal room. Nevertheless, the Tribunal read the Claimant's written submissions before it made its decision in the case. It sent a copy of those submissions to the Respondent. The Respondent did not provide any substantive comment on them.

15 Accordingly, both parties made written submissions. The Tribunal reserved its judgment.

Findings of Fact

16 The Claimant first worked for the Respondent from 1 November 2013, when he commenced a three month work experience placement (page 163 – 164). The Tribunal accepted Jarlath Griffin's evidence that the purpose of such three month, fixed-term contracts was to provide work experience to people who were currently unemployed, to assist them with future applications for permanent employment.

17 On 20 December 2013 the Respondent wrote to the Claimant, to remind him that his last working day for the Respondent would be 31 January 2014 (page 166). The Claimant's contract was not extended after its 3 month term. The Claimant asked his managers at the Respondent for further work. They told him that he should register with the Respondent's agency, "Team Support". The Claimant did so and worked for the Respondent, while employed by that agency, from February 2014 until 22 February 2015.

The Claimant's timesheets for that period record that the supplier of the Claimant was Team Support Limited and that the client was LB Newham (Pages 168 – 218).

18 The Claimant applied for a full-time role as a refuse loader with the Respondent and was employed by the Respondent from 23 February 2015 (page 228). The Claimant's job description as refuse loader required the Claimant to (amongst other things) *"… collect refuse according to the client's specification; particularly replacing lids on bins, returning bins to where they came from, shutting gates and leaving the work area tidy and free of rubbish… to return all bins with lids closed following collection back inside cartilage of property so as they do (not) cause an obstruction or advertise the fact that the property may be unoccupied … it is expected that these duties will entail the lifting of heavy and/or awkward and/or bulky items ranging from bins and bags to freezers, wardrobes etc …"* (pages 236 – 237).

19 Mr Saleh Omar, who gave evidence for the Claimant, continues to be employed by the Respondent as a refuse loader. He confirmed that refuse loaders are required to carry loads of up to 40 kilograms. He also confirmed that job of a refuse loader requires substantial amounts of walking, covering 20 – 25 streets each day, and that each house, on each street, is permitted to have 5 full bin bags collected. Mr Omar also said that refuse loaders can be required to clean the depot if they come back early from their shifts, or when lorries break down.

20 On 27 July 2015 the Claimant had a meeting with David Humphries, the Respondent's Internal Business Lead for Waste Management (page 239). At the meeting, Mr Humphries told the Claimant that it was permissible for refuse loaders to move two bins at a time, so long as the environment permitted it, by using the "push and pull" method. Mr Humphries advised the Claimant that, if in doubt, bins should be moved individually and that bins must be returned to the relevant property; they should not block paths or public footpaths. It appears that the Claimant complained about his fellow employees. Mr Humphries asked the Claimant if he wanted the complaint to be investigated and the Claimant said he did not (page 239).

21 The Respondent provides manual handling training, along with manual handling training handouts, to their employees (pages 294 – 296). One of these manual handling documents tells employees who are moving the bins, *".. If the location environment permits providing good flat surface, consideration given to the weight of the bin, (wheelie bin only) two bins can be moved by means of a "Push Pull" method… if in doubt then the bins are to be handled singularly …"* (page 296).

22 The Claimant was signed off work by his General Practitioner from 2 September 2015 to 15 September 2015 with "low back pain/right knee pain" (page 240). He was signed off again by his GP from 16 September to 29 September 2015 with "low back pain" (page 242). As a result of those absences, Kevin Hills, Recycling Supervisor, the Claimant's line manager, referred the Claimant to Occupational Health.

23 In an Occupational Health report dated 17 September 2015, the Occupational Heath Adviser advised that the Claimant had been off sick from his work as a recycling loader and that the Claimant had said that his symptoms worsened with increasing workloads. The Occupational Health Adviser recorded that the Claimant's problem with his right knee was ongoing and was aggravated by walking for prolonged periods of time and

stairs. The adviser said that the Claimant had had an X-ray on his knee on 1 September 2015 and was currently waiting for the results. The adviser further said that the Claimant could return to work in 2 weeks and to full duties within 4 weeks thereafter. The Occupational Health report stated that, at present, the Claimant's problem was expected to be transient and self limiting. It advised that the Claimant be given a work related stress risk assessment. The OH adviser said that, in their opinion, the Claimant was unlikely to be covered by the Equality Act (page 244 – 246).

24 On 21 September 2015, Mr Hills invited the Claimant to a Stage One Sickness Absence Procedure meeting, scheduled for 30 September 2015. The reason given for the invitation to the meeting was, *"You were sick from 2 September 2015 continuing… As such you have triggered a stage 1 sickness meeting."* Mr Hills enclosed a copy of the Respondent's Sickness Absence Procedure in his letter (page 247).

25 The Respondent's Sickness Absence Procedure (page 516) provides that an employee will hit a trigger level and initiate a Stage One Meeting when, within a rolling 12 month period, they "incur a total of 10 days or more absence; and/or incur 4 spells of sickness, of any length." The procedure says, *"When an employee reaches this trigger level the manager will arrange for a Stage One meeting to be convened under the Council's Sickness Absence policy and procedure"* (page 519).

26 The procedure further states that the outcome of the Stage One Meeting will be a period of monitoring, to be set at 6 months, commencing from the return to work day. The procedure states, "*The manager will monitor the employee's attendance and use the Guidance provided to decide what action should be taken where absence continues to give cause for concern"* (page 520) and that, *"Throughout the 6 months monitoring period the manager must keep the case under review and should consider the employee's attendance record to establish whether or not an improvement has been made and decide whether any further action is required"* (page 520). Within the Stage One 6 month monitoring period, the procedure states that manager may consider three different actions: An extension of the stage on monitoring period for a further three months whereby the employee will remain at Stage One; Progression to Stage Two of the Sickness Absence Procedure *"if attendance has not improved… it is not necessary to wait for the monitoring period to end in order to progress to the next stage where continued and unacceptable level of sickness absence within the monitoring period gives cause to progress the case…"* or; No further action, as attendance has significantly improved (page 520).

27 The Respondent's Guidance to managers regarding progressing to further stages of the procedure says, *"If during any monitoring period an employee's attendance continues to give cause for concern then the manager must consider progressing the case to the next stage of the sickness absence procedure."* The procedure advises that matters which should be taken into account, in considering whether to decide to progress to the next stage, include: Further instances of sickness absence which are a cause for concern, or; A period of long term absence which is over eight weeks and there is no clear indication of a return to work, (page 521).

28 Where an employee moves to a Stage Two Sickness Absence Meeting, the Respondent's procedure requires that a 9 month formal period of monitoring will be set thereafter, during which the manager will monitor the employee's attendance (page 522). Outcomes of a Stage Two meeting can include referral to the Respondent's OH service

for medical assessment, adjustments to lessen the impact on work performance of short term health problems, and medical redeployment following an OH health assessment and recommendation, page 523.

29 With regard to Stage Three, the procedure provides that, *"Where an employee's attendance continues to give cause for concern and further unacceptable levels of absence have occurred during the Stage Two monitoring period, then the manager must progress the case to Stage Three of the Sickness Absence Procedure"* (page 523).

30 The procedure states that dismissal can be an outcome at a Stage Three hearing, (page 524). Other options include: A period of monitoring of 12 months; Referral to Occupational Health for an up to date medical assessment; Adjustments to lessen the impact on work performance of temporary domestic difficulties or short term health problems; Temporary adjustments to work duties to enable the employee to remain at work; Referral to the Council's Employee Assistance Programme, and/or; Medical Redeployment following an Occupational Health assessment and recommendation (pages 524 – 525).

31 On 30 September 2015 the Claimant attended a Stage One meeting under the Sickness Absence Procedure, (page 247 – 249). Mr Hills conducted the meeting. He explained that the reason the Claimant had been called to the Stage One meeting was that the Claimant had taken 4 weeks, or 20 days, sick leave. The Claimant said that he had been off work with lower back pain and right knee pain and that he was taking painkillers for both. The Claimant said that an X-ray of his knee had shown that he had arthritis in it. Mr Hills told the Claimant that further sickness absences within the next 6 months would lead to a Stage Two meeting. He also said that a Stage Three meeting would be carried out if any further sickness was taken following a Stage Two meeting. Mr Hills advised the Claimant that a Stage Three hearing was to deal with serious attendance problems and that a Stage Three hearing officer could either continue to monitor performance, issue a warning that if attendance did not improve the Claimant may be dismissed, or dismiss the Claimant. Mr Hills said that he would continue to monitor the Claimant's attendance in line with the Council's Sickness Procedure. He asked the Claimant if he was fully fit to carry out his contractual duties and the Claimant replied that he was. The Claimant asked for a phased return to work and Mr Hills agreed to this (page 248 – 249).

32 The Claimant returned to work on 30 September 2015 (page 251).

33 On 6 October 2015 the Claimant was involved in incident with the driver of the refuse lorry on his shift. Mr Hills was called to Kingsland Road, E6, by the driver. Mr Hills made a note, recording what happened when he arrived and a subsequent conversation with the Claimant, on the same day. Mr Hills said that, when he arrived in Kingsland Road, all bins on even side of the road were on the carriageway and a resident complained to Mr Hills about this. Mr Hills said that he told the Claimant to go back and return all bins to the front gardens, away from the paths. Mr Hills recorded that he then followed the crew onto the next road, to make sure the bins were returned with no further problems. Mr Hills stated that, while the Claimant was complaining about the driver pulling forward before he had loaded, when Mr Hills checked, he was happy with the driver's manoeuvring of the vehicle. Mr Hills recorded that, as Mr Hills drove away, he noticed that there were still bins out on the carriageway. Mr Hills said that he had to park

and return the bins to the front gardens himself. Mr Hills recorded that he had told the Claimant that any future recurrence of the issue would lead to formal action (page 252).

34 The Claimant did not return to work after that day. He submitted a grievance on 7 October 2015 (page 253 – 254). In the grievance he said, amongst other things, that the driver of the bin lorry was not happy with the Claimant, as the Claimant was loading one bin at a time, in accordance with health and safety rules. The Claimant said that he was following working practices, but that the driver had said to him, *"I am a Jamaican but not like others. I will physically cross you if you disturb my work"*. The Claimant said that he feared for his life, because he believed that the driver was threatening to kill him. The Claimant said that the driver started to drive more quickly, by moving the vehicle before he had completed loading the bins, which forced the Claimant to walk further than was normally required and to work faster than the Claimant's physical capability. The Claimant said that Mr Hills, supervisor, had come to the scene and that the Claimant had reported the driver's threatening and driving behaviour. However, Mr Hills had encouraged the driver to continue driving in the same manner. The Claimant said that, later, the driver told the Claimant that he was going to take him to the office that the driver refused to stop the vehicle and forcibly took the Claimant back to the depot. The Claimant said that he complained further to Mr Hills, who asked him to leave the office and pushed him out. The Claimant said that this conduct constituted assault and that Mr Hills used physical violence against him again, by pushing the office door against his leg. He said, *"I believe that the behaviour of the named staffs … are both inappropriate and unlawful. I believe they are influenced by senior management decisions to unlawfully victimise me regarding adopting Health and Safety Rules and for another matter which I would like to disclose after seeking legal advice. I fear for my health and safety and so seek urgent intervention of Newham Council to provide me with a conducive and safe working environment"* (page 253 – 254).

35 On 9 October 2015, Stephen Blackburn, Independent Business Lead for Passenger Transport, tried to telephone the Claimant on a number of occasions, about his grievance. He then wrote to the Claimant, saying that he had been unable to contact him by telephone and would like to arrange a meeting to discuss the contents of the grievance (page 257).

36 Also on that day, Mr Humphries, Internal Business Lead Waste Management, wrote to the Claimant. Mr Humphries said that he had telephoned the Claimant and asked why he was not at work. The Claimant had replied, asking if Mr Humphries was aware of the complaint that he had given to Human Resources. The Claimant had said that the driver of his vehicle had threatened to kill him and that he was not coming to work as a result of the threat. Mr Humphries told the Claimant, on the telephone call and in the letter, that his allegations were being investigated by Stephen Blackburn, a manager from another service. Mr Humphries said that the Claimant would be expected to return to work with an alternative crew and duties. In his letter, Mr Humphries wrote, *"You have been offered alternative duties within the recycling collections teams, which you have declined. I would also like to offer you alternative duties on the morning refuse shift away from anyone involved in the incident whilst the investigation takes place. I have also spoken to my colleagues in Street Cleansing and they have advised that they would able to temporarily find you alternative duties during the investigation, again away from anyone involved in the investigation. Please do advise me whether you will be returning to work to undertake the other alternative duties I have offered you… . While the investigation is*

taking place you may wish to contact the Employee Assistance Programme for advice and support …" (page 255 – 256).

37 The Claimant did not return to work on alternative duties. On 14 October 2015 he submitted a sick note for two weeks for, "Work stress related" (page 261).

38 The Claimant attended a meeting with Mr Blackburn on 13 October 2015. After the meeting, Mr Blackburn wrote to the Claimant, asking him to confirm under which of the policies that Mr Blackburn had provided to him the Claimant would like his complaint to be considered, page 258 – 259.

39 On 16 October 2015, Mark Joslin, Refuse Supervisor, wrote to the Claimant, inviting him to a Stage Two Sickness Absence meeting. He said that the meeting had been called because, *"You had a stage one meeting on 30.9.15. You have been absent since 13.10.15 ongoing"* (page 263).

40 On 22 October 2015 Mr Blackburn wrote further to the Claimant, saying that he had been advised that mediation would not be an appropriate course of action in respect of the Claimant's grievance, due to the number of individuals who had been mentioned and the nature of the issues that had been raised by the Claimant. Mr Blackburn confirmed, therefore, that he would deal with the Claimant's issues under the Council's Grievance Resolution Procedure. He invited the Claimant to a meeting on 3 November 2015 (page 264).

41 The Claimant did not attend the Stage Two Sickness Absence meeting. Mr Joslin wrote again to him, inviting him to attend a rearranged meeting on 4 November 2015 (page 265). The Claimant submitted a further sick note covering the period 29 October 2015 to "6 October 2015" for "stress at work" (page 266 – 267). He remained off work.

42 The Claimant did not attend the grievance meeting, but submitted two further statements in relation to his grievance (page 269 – 271 and 272 – 281). In the Claimant's second statement, he repeated the allegations against the driver of the bin lorry and Mr Hills. The Claimant also said that he believed that the staff, individually and collectively, had colluded to carry out inappropriate behaviour towards him. He said that he considered his that current workplace was unhealthy, unsafe and not suitable for him to carry out his employment duties. The Claimant said he wanted the Respondent to provide safeguards and a safe working environment for him and to prevent the driver from carrying out his threats of unlawful violence; to provide safeguards to prevent refuse management supervisors and other staff from assaulting, intimidating and harassing the Claimant; to implement health and safety rules and provide all loaders and drivers with leaflets regarding safe working practices. He also asked that written information should be given to drivers and loaders about rights, including places where they could take rest breaks and use toilet facilities.

43 In his third statement of complaint, the Claimant again repeated the allegations he had made against Mr Hills and the driver. He also said that, in March 2015, one of the recycling loaders called Reece had verbally assaulted him and that Tony Kett had stopped the Claimant leaving a room, putting his hand on the door. The Claimant asserted that, in March 2015, Kevin Hills had told the Claimant that he would be dismissed if he did not follow a working practice for loaders to convey and load two recycling bins at the same

time, irrespective of danger to health, and that the Claimant could not use one bin at a time. The Claimant said that all recycling loaders, including the Claimant, were constantly bullied, harassed and threatened that notes would be put on their files if they did not complete new daily assignments, which were impossible to complete. He said that workers had started limping and working with pain in their wrists, knees joints, shoulders and legs, to avoid the consequences of taking time off to treat injuries. The Claimant stated that loaders were urinating on public roads, caused by fear of being accused of wasting time and that this created psychological problems for refuse employees, including himself. The Claimant said that he had progressively developed lower back pain and knee pain and suffered mentally from stress. He said that he had been advised that excessive workload was the probable cause of his injuries. The Claimant asserted that Mr Tony Kett had colluded with others in an attempt to constructively dismiss the Claimant and that the Respondents had victimised him for reporting discrimination and for whistleblowing.

44 The Claimant asked that the Respondent cancel the absence meetings and disregard them, since his absences were as a result of injuries unlawfully caused by the Respondent. The Claimant said that the lorry driver in question was associated with gangs and had a history of violence and that there was a substantial risk that the Claimant could be attacked by gangs while working in cleansing or refuse bins.

45 The Claimant went on state that his disability of knee arthritis also meant that he would experience substantial difficulties in doing loading and cleaning jobs to the frequency required. He asserted that he needed breaks when walking distances, pulling and pushing loads and climbing or descending steps and kerbs. He asked for reasonable adjustments. The Claimant said that the Respondent should redeploy him.

46 The Claimant did not attend the rescheduled Stage Two Absence meeting either. The meeting was conducted by Mark Joslin in the Claimant's absence (page 283 – 284).

47 On 5 November 2015 Mr Joslin wrote to the Claimant, confirming the outcome of the meeting. Mr Joslin said that he had found that the Claimant had had a Stage One meeting on 30 September 2015 and that the Claimant had submitted two doctor's certificates since that date. Mr Joslin said that, as advised in the letter sent on 9 October 2015, the offer of working alternative duties on the morning shift, or temporary working within the cleansing service, was still available to the Claimant. Mr Joslin invited the Claimant to telephone David Humphries if he wished to take up the offer of either. Mr Joslin said that, as the Claimant had triggered a Stage Two Sickness meeting, the Claimant would be referred to Occupational Health. He said that Occupational Health would be asked to provide an assessment of the Claimant's medical situation in relation to his absence from work and his stress. Mr Joslin said, *"Please note: any further absences within the next 9 month period could lead to a stage 3 hearing…" .* Mr Joslin said that one of the outcomes of the stage three hearing could be dismissal. Mr Joslin told the Claimant that the Respondent would continue to monitor the Claimant's attendance record, in line with its Sickness Absence Procedures (page 285 – 286).

48 The Claimant submitted a further sick note, covering the period 6 November 2015 to 22 November 2015. The reason for his absence, given on the note, was, "Stress related to work with anxiety." (page 287).

49 The Claimant attended an Occupational Health review on 18 November 2015. The Occupational Health adviser wrote to the Mr Joslin on 23 November 2015. The adviser said that the Claimant had been off sick since 14 October 2015 with stress related symptoms, as a result of work issues. The adviser also said that the Claimant had been on long term absence due to lower back and right knee pain, just prior to the current sickness absence and that the Claimant told the adviser that the pain and discomfort in his right knee was ongoing, as the Claimant had osteoarthritis. The adviser said that, in their opinion, the Claimant was fit to work with adjustments. The adviser said that the Claimant should have a phased return to work over 4 weeks.

50 In answer to specific questions, the adviser said that the Claimant was fit to attend meetings and to attend sickness absence meetings. In answer to the question, *"Would he be suitable for redeployment,"* the adviser responded, *"He would be suitable for redeployment to a role which does not require him to be on his feet for long periods of time and minimal heavy manual handling due to the chronic condition in his knee. Prolonged periods of standing and manual handling of heavy loads aggravate the symptoms. He also finds stairs troublesome."* (page 299 – 300).

51 On 24 November 2015 Mr Blackburn wrote to the Claimant, saying that he had not upheld the Claimant's grievance. Mr Blackburn said that he had met with the Claimant and had also met and interviewed David Humphries, Waste Collections Manager; Anthony Kett, Assistant Waste Collections Manager; Micky Neale, Waste Collections Supervisor; Kevin Hills, Waste Collections Supervisor; Milton Brydson, Refuse Driver; Bradley Pickett refuse Loader; and Larry Little, Health and Safety Adviser. Mr Blackburn said that Mr Brydson had denied threatening to kill the Claimant and that the only witness did not recall any such thing being said. Mr Blackburn said that Mr Brydson had not falsely imprisoned or kidnapped the Claimant, but had carried out a reasonable management instruction, during the Claimant's contractual working hours, to return to the depot with the Claimant. Mr Blackburn said that he had not been able to find any evidence that there was any conspiracy to target the Claimant, or victimise him in any way, nor any evidence of Mr Kett or Mr Humphries abusing their power, or any evidence of racism. He said that he did not agree with the claim that the Claimant had been assaulted. In relation to the alleged incident, he said that Mr Hills had placed his hand on the Claimant's arm, attempting to usher him from a room, due to the Claimant's behaviour, and the witnesses did not agree with the suggestion that Mr Hills had slammed the door shut against the Claimant's leg. Mr Blackburn advised the Claimant of his right to appeal to the Strategic HR Business Manager (page 302 – 304).

52 The Claimant notified Khalada Uddin of his appeal against the grievance outcome, by email on 25 November 2015. He referred to the Occupational Health report and said that it was imperative that his safety concerns were considered in his redeployment. Khalada Uddin replied the following day, telling the Claimant to email his grounds of appeal to the Strategic HR Business Manager. Ms Uddin also advised the Claimant that he would required to obtain a return to work medical certificate, as he had been off for a long period of time. Ms Uddin advised the Claimant that, if redeployment had been recommended by the Occupational Health Service, then the Claimant's line manager would discuss, with the Claimant, how the process worked and would place the Claimant on the corporate redeployment register (page 318).

53 The Claimant further replied to Ms Uddin, saying that wanted his appeal to be

heard by a Divisional Director, or Executive Director. He asked for the contact details of such a person. He also said that Ms Uddin's advice to return to work was unreasonable and dangerous (page 317).

54 On the same day, Mark Joslin emailed the Respondent's Occupational Health providers, asking further questions in relation to the Claimant's redeployment. He asked if Occupational Health could advise whether redeployment should be permanent, or temporary, and, if permanent, the type of jobs or duties for which the Claimant could be considered.

55 An Occupational Health adviser replied on 30 November 2015 saying, *"The redeployment would be permanent as the condition is chronic and ongoing. He would be suitable for a role which does not require him to be on his feet for long periods of time and minimal heavy manual handling due to the chronic condition in his knee. Prolonged periods of standing and manual handling of heavy loads aggravate his symptoms. He also finds stairs troublesome. Otherwise he would be capable of all of the elements of any job which matched his skill set and experience or for which suitable training would be given"* (pages 322 – 323).

56 The same day, 30 November 2015, Khalada Uddin emailed the Claimant, attaching the Respondent's corporate redeployment form. She said that the Claimant should complete this and email it back, so that Ms Uddin could register the Claimant on the redeployment register. Ms Uddin said that the Respondent had confirmed that they could not offer the Claimant temporary alternative work as a sweeper within the cleansing service, as according to the Occupational Health report, the Claimant was not able to undertake a role which required the Claimant to be on his feet for long periods of time and had also advised that heavy manual handling had to be minimal due to the chronic condition of the Claimant's knee. Ms Uddin said that the Head of Service, Norman Steed, Interim Head of Service Delivery and Public Space, would hear the Claimant's appeal (page 324).

57 The Claimant completed the redeployment form on 3 December 2015 (page 325 - 332). He applied for a job as a Town Planner (page 396) a Children's Commissioning Support Officer (page 402) a Bailiff Operations Manager (page 408) and a Revenues Bailiff Officer (page 414). Candidates were short listed for the post of Planner if they had a recognised Planning degree or similar Planning qualification and experience of a range of Planning work and knowledge. The Claimant did not demonstrate that he met either of the short listing criteria and was not short listed (page 491).

58 The Claimant was not short listed for the post of Children's Commissioning Support Officer because he did not give evidence as to how he met the criteria for the job. The recruiters did not detect any research by the Claimant into working to improve the lives of children, or into commissioning. They also considered that the Claimant had no relevant work experience (page 492).

59 The Respondent provided the Claimant with interview skills training on 16 December 2015.

60 The Claimant's applications were all contained in the Tribunal bundle. His applications for each of the roles of Town Planner, Children's Commissioning Support

officer, Bailiff Operations Manager, and Revenues Bailiff Officer were worded in precisely the same terms. The applications referred only to the Claimant's experience as a Refuse Loader and Banks Man, directing heavy vehicles on building sites.

61 Khalada Uddin wrote further to the Claimant on 13 January 2016, saying that, as the Claimant was still off sick and unable to undertake his substantive role, the Respondent had decided to convene a Stage Three sickness hearing. She said that, as a result, the Respondent required an up to date Occupational Health report before proceeding further. Ms Uddin said that the Respondent had asked Occupational Health to confirm if the Claimant was fit to attend a Stage Three sickness hearing and whether any adjustments needed to be made to the hearing. She commented that the Occupational Health review was in line with the Respondent Council's Sickness Absence Procedure (page 428).

62 On 15 January 2016 the Claimant attended the Respondent's Housing Office at Bridge House. The Bridge House housing service operates on an "appointment only" basis. The Claimant was told by security officers at the door to call the Respondent's Housing Needs Service Duty Line, to provide information to support his homelessness application.

63 There was dispute of fact between the parties about whether the Claimant tried to force his way into the building that day. The Tribunal viewed CCTV evidence of the incident. It was quite plain to all of the members of the Tribunal that the Claimant had lunged violently forward, trying to push past the security officers. From the CCTV footage, the Claimant's actions appeared aggressive. The Claimant later left the building.

64 On 15 January 2016 Donna Morley, Head of Leasehold Services and Client Relations, emailed Jarlath Griffin, stating that two security guards had been attacked at Bridge House by Joseph Okotie, a homeless applicant. Ms Morley said that HR had confirmed that Mr Okotie was a member of staff in Refuse. She said that an incident report had been completed and that the housing service had requested that the Claimant be banned from all council buildings before they became aware that the Claimant was an employee (page 429c).

65 Witness statements were taken from the two security guards. One said the Claimant was frustrated and became aggressive towards the guards, trying to barge his way past them as they stood in the door entrance. The security guard said that the Claimant had had grabbed hold of him on the neck, attempting to force his way into the building (page 429d). The other security guard said that the Claimant had become aggressive and tried to barge his way past, grabbing the security guards. He said that he had stopped the Claimant from entering the building, but realised later that his right hand was bleeding following the incident (page 429e). There were photographs, in the Tribunal Bundle, of the injury to the security guard's palm (page 429kn).

66 Mr Griffin gave evidence to the Tribunal about the Claimant's subsequent suspension from work. Mr Griffin said that it was standard practice for an employee, who is suspected of acting in a manner which brings the Council into disrepute, or who carries out an act of physical violence, to be suspended from work, pending an investigation into their actions. Mr Griffin said that, on reviewing the evidence, and consulting with HR, a decision to suspend the Claimant had been made by the Director of Environment, Gary

Alderson. Mr Alderson then delegated, to Mr Griffin, the task of informing the Claimant.

67 The Tribunal accepted Mr Griffin's evidence about Mr Alderson taking the decision to suspend and then delegating responsibility, for informing the Claimant of this, to Mr Griffin.

68 On 20 January 2016 Mr Griffin wrote to the Claimant, suspending him from 20 January, pending an investigation. Mr Griffin said that the allegation against the Claimant was that, on 15 January 2016, while accessing Council services, the Claimant had become aggressive and had tried to force his way into the building and, in the process, two security officers had become involved and one had been harmed. Mr Griffin said this was a serious allegation which, if substantiated, constituted an act of gross misconduct under the terms of the Council's Employee Code of Conduct Section 9. Mr Griffin quoted that Code of Conduct:

> *"Gross Misconduct*
>
> *Gross misconduct includes any conduct which amounts to a fundamental breach of the contract of employment and which destroys the trust and confidence the council has in the employee and makes any further working relationship impossible. If substantiated following an investigation and disciplinary hearing the employee would normally be summarily dismissed from the council's service…*
>
> *[The Code gave examples of gross misconduct which included] …*
>
> *c) Intentionally or recklessly or without reasonable cause, acts in a manner which damages or is likely to damage the reputation of the Council; …*
>
> *j) physical violence."*

69 Mr Griffin said that David Humphries had been appointed as investigating officer (page 434 – 436).

70 On 26 January 2016 Occupational Health told the Respondent that the Claimant had withdrawn consent for any Occupational Health reports to be sent to his employer (page 437).

71 On 2 February 2016 the Claimant wrote to the Mayor of the London Borough of Newham, saying that he had only been paid a statutory sick pay and that he had been underpaid. He said that he had been placed on a redeployment register and had not been on sick leave and, in those circumstances, he would expect to receive his full salary (page 440).

72 On 5 February 2016 David Humphries wrote to the Claimant, inviting him to a Stage Three sickness hearing, to be held on 23 February 2016. Mr Humphries said that Jarlath Griffin, Head of Delivery and Public Space, would be the hearing officer. He said that Third Stage sickness hearing had been called because of unacceptable levels of sickness since the Claimant's Stage Two sickness meeting on 4 November 2015. He advised the Claimant one of the outcomes of the meeting could be dismissal. Other

outcomes could be a further monitoring period of 12 months, temporary adjustments, referral to Occupational Health service, suitable adjustments in accordance with the requirements of relevant legislation, or medical redeployment (page 441 – 442).

73 The Claimant was provided with a copy of a Stage Three report (page 459 – 464). The report set out the chronology of previous sickness absence meetings and Occupational Health report outcomes, as well as the Claimant's placement on the redeployment register.

74 The Claimant did not attend the Stage Three sickness hearing on 23 February 2016. The Respondent wrote to him, reconvening the stage three sickness hearing on Tuesday 1 March 2016 (page 456).

75 On 29 February 2016 Jan Douglas, Deputy Director of Human Resources, replied to the Claimant's letter about his pay. She said that, due to the Claimant's length of service, his entitlement to sick pay was 26 days' full pay and 52 days' half pay. Ms Douglas said that the Claimant's half pay entitlement had expired on 14 December 2015 and that the Council's records indicated that the Claimant was on sick leave (page 458).

76 The Claimant also failed to attend the Stage Three hearing on 1 March 2016. Mr Jarlath Griffin chaired the hearing. Khalada Uddin attended the hearing and told Mr Griffin that Occupational Health had confirmed, on 30 November 2015, that the Claimant should be permanently redeployed. Mr Griffin asked when the Claimant had gone on the redeployment register; Daniel O'Connor, presenting officer, said that the Claimant had gone on redeployment on 3 December 2015 and had applied for 4 vacancies. Mr O'Connor said that the Claimant had attended interview training sessions on 16 December 2015. Mr O'Connor confirmed that, up to the date of the Stage Three meeting, the Claimant had not secured employment through the redeployment register. Mr O'Connor said that the Claimant remained absent from work, without any clear indication of an expected return to work date (page 465 – 467).

77 On 10 March 2016 Mr Griffin wrote to the Claimant, dismissing him with effect from 17 March 2016. In the letter, Mr Griffin said that the Claimant had been on sickness absence on 2 – 29 September 2015 and that his current period of absence had commenced on 7 October 2015. Mr Griffin said that the Claimant had advised management, on 7 October 2015, that he was unable to attend work due to an incident at work. Mr Griffin said that, in order to assist the Claimant's return and performance of his duties, the Claimant had been offered alternative duties on a different shift, or temporary duties with the cleaning service. Mr Griffin said that the Claimant had declined to take up either offer and had remained absent from work. Mr Griffin recorded that a Second Stage sickness review meeting had been held on 4 November 2015, the outcome of which was that the Claimant would be referred to Occupation Health and monitored for a further 9 months. Mr Griffin noted that the Claimant had been told that, if his attendance did not improve, this could lead to a Stage Three sickness meeting. Mr Griffin recorded that the Occupational Health report of 23 November 2015 confirmed that the Claimant was fit to return to work with adjustments, but had also said that, due to the chronic nature of the Claimant's knee, he would be suitable for redeployment to a role not requiring long periods of standing or substantial heavy manual handling. Mr Griffin said that, based on that information, the Council had offered the Claimant the opportunity to be redeployed and the Claimant had completed a redeployment matching form on 3 December 2015. Mr

Griffin said that the Claimant had applied for 4 posts, but had not been shortlisted for those roles. Mr Griffin said that, in accordance with the Council's sickness absence procedure, as a redeployee, the Claimant remained absent due to sickness throughout this period. Mr Griffin said that the Council had received no further sickness certificates after 22 November 2015, despite numerous requests that the Claimant provide them. Throughout the following period, the Claimant had remained absent from work and had continued to receive sick pay as a redeployee. Mr Griffin said that, as the Claimant had been a redeployee since November 2015 and remained absent, the Claimant had again been referred to Occupational Health. He recorded that the Claimant had withdrawn his consent for Occupational Health to release the report to his line manager.

78 Mr Griffin said that he had taken into account the fact that the Claimant had been off for two periods; 2 - 29 September 2015 and 7 October 2015 – March 2016 and that the Claimant had failed to attend his Stage Two meeting, reconvened Stage Two meeting and both scheduled Stage Three meetings. The Claimant had failed to submit sick certificates covering the period 23 November to 1 March, despite management requests to do so. Mr Griffin said he had also taken into account the fact that the Council had explored redeployment since November 2015, but that no suitable roles had been identified. He said he had taken into account the impact of the Claimant's absence on service delivery and on his colleagues and managers, which had been significant, both in management time and cover and resource management. He had also taken into account the fact that the Claimant had been advised that his employment would be at risk if his attendance continued to be a cause for concern. Mr Griffin said that, taking into account all that information, and that there was no foreseeable return to work date, Mr Griffin had made the decision to dismiss the Claimant.

79 Mr Griffin said that the Claimant would be paid for outstanding annual leave of 27.5 days (page 468 – 470). Mr Griffin advised the Claimant of his right to appeal against the decision within ten working days. The Claimant did not appeal against the decision to dismiss until 12 April 2016. On account of the fact that the appeal was submitted significantly beyond the ten day period, the Respondent did not accept the appeal (page 471).

80 The Claimant cross-examined Mr Griffin about redeployment and why the Respondent had not given the Claimant alternative work. Mr Griffin told the Tribunal that all employees, who require to be redeployed, are put on the council's redeployment register. He explained that, before any vacancy is advertised, employees on the redeployment register are given an opportunity to apply for the vacant role. Mr Griffin said that redeployees still had to go through competitive interviews, because there may be a number of employees who are seeking redeployment at the relevant time. It would not fair to favour one above another. He also told the Tribunal that redeployees need to have the relevant skills for the job for which they apply.

81 The Claimant told the Tribunal that he could have been given alternative duties within the Refuse department, including delivering wheelie bins, or orange bags, or carrying out special collections for mixed domestic bins, white goods collections, missed bins collections and trade collections.

82 Mr Griffin told the Tribunal that the delivery of orange bags is not a role in itself; orange bags are delivered once every 6 months, to particular properties. The properties

are given 6 months' supply of the orange bags and the delivery takes two weeks every 6 months. In the following 6 months, if those properties run out of orange bags, they can obtain further supplies from libraries or council offices. Alternatively, occasionally, refuse collectors will drop off orange bags while they are doing their other refuse collecting rounds.

83 Mr Griffin told the Tribunal that delivery of wheelie bins is carried out by a particular employee, who has a licence to drive a 7.5 tonne truck. Generally, the driver of this truck carries out the work on his own, although, occasionally, a refuse loader will accompany him.

84 Mr Griffin said that employees are employed to carry out special collections for mixed domestic bins, white goods, missed bins and trade collections, but that all these roles require walking and climbing stairs and most require bending and heavy lifting.

85 Mr Saleh Omar gave evidence that cleaning of the depot is undertaken by refuse collectors who return early to the depot, or whose bin lorry is not working.

86 The Employment Tribunal accepted Mr Griffin's evidence on all of these matters. In a number of respects, it was corroborated by Mr Omar. Mr Omar said that he had once undertaken orange bag delivery and he had done it over a two week period. Mr Omar also confirmed that collection of bins required lifting weights of over 40 kilograms.

87 It was clear to the Tribunal that missed bin collections and special collections from mixed domestic bins, white goods collections and trade collections would require heavy manual lifting of weights of up to 40 kilograms, so the Claimant could not have undertaken those roles - in the same way as he was unable to undertake his normal role.

88 Mr Griffin told the Tribunal that there were no vacancies within the Refuse department at the time the Claimant was dismissed. The Tribunal accepted Mr Griffin's evidence. Mr Griffin was an excellent witness. He was calm and dispassionate and he explained in detail all the processes that existed in the Refuse department. He also explained the Respondent's redeployment process with clarity. The Tribunal accepted his evidence that employees are required to go through competitive interviews for any roles for which they apply and need to have requisite skills for those roles. The Tribunal accepted that it would not be fair, simply to slot in one person into a job, above others, on the redeployment register. Furthermore, the Tribunal considered that it would clearly be inappropriate to give a role to a person for which the person was not qualified.

89 The Claimant also cross-examined Mr Griffin by putting to him that employees in the Refuse department had, in other circumstances, been slotted into jobs in other departments. Mr Griffin denied that this was the case. He said that Stephen King, who had originally been employed in the Refuse department, had applied through a competitive interview process for a job in another department. Mr Griffin said that Mr King could not have been given a job in another department without going through such a process. He said that the Respondent's Human Resources Department would require all appointments to be supported with evidence that the appointment had been advertised and that a competitive process had been properly undertaken.

90 The Claimant cross-examined Mr Griffin about the fact that the Claimant had been offered temporary alternative duties, working on another refuse shift or in the cleaning department. Mr Griffin said that the Claimant had been offered temporary alternative duties while his grievance was investigated. Mr Griffin said that, if there had been a permanent role available, it would have to have been advertised and available on the redeployment register: the role that the Claimant was offered was only ever temporary and was not a substantive role. Again, the Tribunal accepted that evidence. The terms of the offer of alterative work, which was made to the Claimant, made clear that the offer was of a temporary alternative post, for the duration of the investigation into his grievance. In any event, the Tribunal noted that that alternative work was offered to the Claimant before Occupational Health advice that the Claimant should not undertake roles which required long period of standing, or heavy lifting. Clearly, alternative shifts on refuse trucks and street cleaning operations would both require long periods of standing and lifting.

91 Mr Griffin told the Tribunal that he did not take into account any of the Claimant's alleged protected disclosures when he decided to dismiss the Claimant. He said that he had been aware of, but did not know the detail of the Claimant's grievances. Mr Griffin told the Tribunal that the fact that the Claimant had raised grievances played no part in his decision making.

The Relevant Law

92 An employee who makes a "protected disclosure" is given protection against his employer subjecting him to a detriment, or dismissing him, by reason of having made such a protected disclosure.

93 The meaning of "protected disclosure" is defined in section 43A of the ERA 1996:

"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 sections 43C to 43H."

94 "Qualifying disclosures" are defined by section 43B. This provides:

"43B Disclosures qualifying for protection
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—
(a) that a criminal offence has been committed, is bring 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…

(d) that the health and safety of any individual has been, is being, or is likely to be endangered, ..

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

95 Before 25 June 2013, s43G ERA 1996 provided that a qualifying disclosure was made in accordance with s43 if "..the worker makes a disclosure in good faith". That provision was repealed from 25 June 2013.

96 The disclosure must be a disclosure of information, of facts, rather than opinion or allegation (although it may disclose both information and opinions/allegations), *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR [24] – [25]; *Kilraine v LB Wandsworth* [2016] IRLR 422. The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non compliance, *Fincham v HM Prison Service* EAT 19 December 2002, unrep; *Western Union Payment Services UK Limited v Anastasiou* EAT 21 February 2014, unrep.

97 Protection from being subjected to a detriment is afforded by *s47B ERA 1996*, which provides: "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

98 A "whistleblower" who has been subjected to a detriment by reason of having made protected disclosures may apply for compensation to an Employment Tribunal under *s48 ERA 1996*.

99 The term 'detriment has been explained by Lord Hope in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at 34:“ .. [the] tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. ……. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment."

100 In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, “the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower." Per Elias J at para [45].

101 The making of a protected disclosure cannot shield an employee from disciplinary action, including dismissal, which is taken for reasons other than the fact that the employee has made a protected disclosure, *Bolton School v Evans* [2007] ICR 641.

Unfair Dismissal

102 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

103 *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*.

104 Incapability is a potentially fair reason for dismissal. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under

s98(4) Employment Rights Act 1996. In doing so, the Employment Tribunal applies a neutral burden of proof.

105 The Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439.

106 Factors which may be relevant in considering whether a dismissal for incapability was fair include the nature of the illness, the employer's need for the employee, the impact of the absences and the extent to which the employee was made aware of the position, *Lynock v Cereal Packaging Limited* [1988] ICR 760.

107 In order to bring a claim for ordinary unfair dismissal, an employee must have been continuously employed for not less than 2 years ending with the effective date of termination, *s108 ERA 1996*.

108 In *James v London Borough of Greenwich* [2008] EWCA Civ. 35 the Court of Appeal considered a case of an agency worker employed by an agency and supplied to an end user. The Court of Appeal considered the question of whether a contract could be implied between the agency worker and the end user. It decided that the question was to be decided by applying the test of whether it was necessary to imply a contract. At paragraph 23 of that judgment the Court of Appeal said this:

> "… in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end user, the test being that laid down by Bingham LJ in **The Aramis** [1989] 1 Lloyd's Report 213 at 224
>
> " … necessary … in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."

109 In *James v LB Greenwich,* at paragraphs 41 and 42, the Court of Appeal decided that it was not necessary to imply a third contract between Ms James (the worker) and the Council (the end user). The Court of Appeal said that what Ms James did and what the Council did were fully explained in the case by the express contracts into which she and the Council had entered with an employment agency. The Court of Appeal decided that Ms James was not an employee of the Council because there was no express or implied contractual relationship between her and the Council. Her only express contractual relationship was with the employment agency. The provision of work by the Council, its payments to the employment agency and the performance of work by Ms James were all explained by their respective express contracts with the employment agency, so that it was not necessary to imply the existence of another contract in order to give business reality to the relationship between the parties.

Automatically Unfair Dismissal

110 A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed (see section 103A):

"103A Protected disclosure

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."

111 In order for an employee to have been automatically unfairly dismissed under *s103A ERA*, the reason or principal reason for dismissal must be that the Claimant had made one or more protected disclosures.

Discussion and Decision

Protected Disclosure Detriment s43B Employment Rights Act 1996

112 The Claimant contended that the Respondent subjected him to the following detriments because he had made protected disclosures:

112.1 Relying on or initiating the sickness absence procedure which ultimately led to the Claimant's dismissal.

112.2 Deciding in or around 22 November 2015 to place the Claimant on the redeployment register.

112.3 Suspending the Claimant on grounds of alleged misconduct on 20 January 2016.

113 It was clear that the Claimant did write to the Respondent on at least three occasions, alleging that he had been threatened by colleagues and that he had been required to work in a way which he said was unsafe by pushing and pulling two bins at a time, rather than moving a single bin. He made a number of other allegations about assaults on him by Mr Hills and about unsafe working practices. In one of his complaints, he said that inadequate toilet facilities were provided to refuse collectors which led to them to urinate in public places to relieve themselves. The Claimant said that he had suffered physical injury and also anxiety and stress due to the unsafe working practices at the Respondent. His allegations related, not just to himself, but to other employees.

114 The Tribunal concluded that the Claimant made a number of protected disclosures in his three statements of complaint. However, the Tribunal found that none of the detriments upon which the Claimant relied were done because the Claimant had made any of the protected disclosure.

115 The Tribunal found that the Claimant was subjected to the Respondent's Sickness Absence Procedure, which ultimately led to his dismissal, because he was off work, sick, for prolonged periods of time, triggering the application of the Procedure. The Claimant's absences were so lengthy that he triggered each of the three stages of the Sickness Absence meeting procedure. The Tribunal found that the Claimant had been off work for 20 days before he attended the Stage One absence meeting. He was then put on a 6 months monitoring period, in accordance with the Respondent's procedure. During that 6 month monitoring period, he went off sick, again, with stress, and he was invited to a Stage Two sickness absence meeting. This was entirely in line with the guidance set out in the Respondent's Sickness Absence Procedure. The Claimant was then put on a

further 9 month monitoring period. He remained off work thereafter and never returned to work.

116 While the Claimant submitted grievances containing protected disclosures, the Tribunal concluded that the Claimant's protected disclosures were appropriately investigated by Mr Blackburn. He gave the Claimant a detailed outcome, responding to his complaints and allegations. That grievance procedure was investigated separately from the Sickness Absence process, so that the decision makers in each were different.

117 The Claimant was later suspended from duty, following an incident at the Respondent's Bridge House premises. Once more, this was going to be investigated separately from the Sickness Absence procedure.

118 The Tribunal decided, on all the evidence, that the Respondent followed each of its appropriate processes with care and diligence. The Tribunal found that the only reason that the Claimant was taken through the stages of the Sickness Absence Procedure was that he was off work for a very considerable period of time and he hit the sickness absence meeting triggers at each stage.

119 The Tribunal accepted the Respondent's evidence that the Claimant was invited to each Sickness Absence meeting for the reasons set out in the relevant letters inviting him to the meetings. These reasons related solely to the Claimant's ongoing absence from work. The Tribunal also noted that the Claimant failed to attend the Stage Two and Stage Three Sickness Absence meetings, even when they were rescheduled because of his non attendance. He failed to give the Respondent any reassurance that he would attend work, or that his absence would improve.

120 The Tribunal found that the Respondent placed the Claimant on its redeployment register because its Occupational Health advisers had advised that the Claimant should be permanently redeployed, because of his knee injury. Furthermore, the Claimant agreed to be placed on the redeployment register. The Claimant's alleged protected disclosures had nothing to do with the decision to place the Claimant on the redeployment register. He was placed on the register wholly because he had become incapable of doing the job he was employed to do. The Claimant wanted to be redeployed and did not accept offers of temporary alternative work, when this was offered to him, either in the refuse department, or in street cleansing.

121 The Tribunal also found that the Claimant was suspended on the grounds of alleged misconduct in January 2016 because the Respondent received evidence, including witness statements from security guards, that the Claimant had been involved in an incident at Bridge House when he had become aggressive and tried to force his way into the building, during which one of the security guards present was injured.

122 At the Tribunal the Claimant denied that he had acted in this way. The Tribunal saw the CCTV evidence and found that the Claimant had tried to barge his way through the door, suddenly and aggressively. The Tribunal accepted Mr Griffin's evidence that the Respondent's standard practice is to suspend employees who are suspected of having committed offences of gross misconduct, including acts of violence. In the Tribunal's experience, it would be entirely normal to suspend employees in such circumstances, while an investigation into the allegations was being undertaken. The Tribunal found that

the Claimant suspension had absolutely nothing to do with the Claimant's alleged protected disclosures. He was suspended only when he violently attempted to enter the Respondent's premises. His protected disclosures had been made months before his suspension. They had been investigated and a conclusion notified to the Claimant, well before the Claimant's suspension. He was not suspended at a time proximate to his making protected disclosures.

Ordinary Unfair Dismissal

123 The Tribunal found that the Claimant did not have the 2 years' requisite continuous service in order to bring a claim for ordinary unfair dismissal, *s108 ERA 1996*.

124 The Claimant was initially engaged by the Respondent under a three month limited term contract from 1 November 2013 until 31 January 2014. The Claimant's fixed term contract was not extended beyond that date. The Claimant sought further work for the Respondent through an agency called Team Support Limited. It is clear from the documents in the bundle that, from February 2014 until February 2015, the Claimant was supplied to the Respondent by Team Support Limited, an agency. The Respondent did not employ the Claimant during that period.

125 The Claimant contended that the Respondent ought to have given him further work, pursuant to its Redundancy Procedure, on expiry of his fixed term contract. He contended that the Employment Tribunal should imply a contract of employment during his work for the Respondent through the agency Team Support Limited.

126 The Tribunal did not accept that the Respondent ought to have provided the Claimant with additional work following his 3 month fixed term contract. The Tribunal accepted that the purpose of 3 month fixed term contracts was to help unemployed people to gain work experience, to assist them with future job applications. Its purpose was not to provide permanent employment thenceforth.

127 The Tribunal found that it was not necessary to imply a contract of employment between the Claimant and the Respondent, as end user, in the period February 2014 to February 2015. The Claimant was employed by the agency and supplied to the Respondent as an agency worker during that period. There was no express or implied contractual relationship between the Claimant and the Respondent. His only express contractual relationship was with the employment agency. As was the case in *James v LB Greenwich*, the provision of work by the Respondent Council, its payments to the employment agency and the performance of work by the Claimant, were all explained by their respective express contracts with the employment agency. The Tribunal found that it was not necessary to imply the existence of another contract in order to give business reality to the relationship between the Claimant and the Respondent.

128 The Claimant was then employed again by the Respondent from 23 February 2015 and was dismissed on 17 March 2016. At the time of his dismissal, he had been continuously employed by the Respondent for a period of just over one year. He did not have the requisite service in order to bring a complaint of ordinary unfair dismissal. The Tribunal did not have jurisdiction to hear his claim.

129 However, even if the Tribunal was wrong in that, it found, applying *s98(4) Employment Rights Act 1996,* that the Respondent acted reasonably in dismissing the Claimant for incapability. The Claimant had been absent, long term, from October 2015 until the date of his dismissal on 17 March 2016. There was no indication that he was likely to return to work. The Respondent had gone through the three stages of its Sickness Absence Procedure. It had placed the Claimant on a redeployment register and provided him with interview skills training.

130 The Tribunal concluded that the dismissing officer, Mr Griffin, took into account all relevant matters, as set out in his letter of dismissal, before dismissing the Claimant.

131 While the Claimant wanted to be slotted into a job through the redeployment process, the Tribunal concluded that the Respondent acted reasonably in operating a redeployment process which allowed all redeployees priority to apply for jobs and be appointed if they succeeded at a competitive interview process and had relevant skills.

132 The Tribunal found that the Claimant applied for jobs through redeployment process for which he had no relevant experience or qualifications. He did not meet the criteria to be interview short listed for the Planning or children's Commissioning posts. His applications were not tailored to any of the posts for which he was applying. It was entirely reasonable for the Respondent not to slot the Claimant into vacant roles for which he did not have skills or experience; and where other redeployee employees were entitled to apply for those jobs on a priority basis.

133 The Tribunal found that there were no alternative jobs available in the Refuse Department which the Claimant could undertake. It accepted Mr Griffin's evidence that: orange bag delivery was not a job in itself; that another employee, who held a 7.5 ton lorry licence delivered wheelie bins; and that roles undertaking special collections for mixed domestic bins, white goods, missed bins and trade collections all required walking and climbing stairs, which the Claimant could not do.

134 It was within the broad band of reasonable responses for the Respondent to dismiss the Claimant in all these circumstances and when there was no sign of any return to work.

Automatic Unfair Dismissal

135 The Tribunal found that the only reason for the Claimant's dismissal was the Claimant's continued absence from work, as set out in the letter of dismissal. The Tribunal accepted that Mr Griffin's letter of dismissal set out all the considerations that Mr Griffin had taken into account in deciding to dismiss the Claimant. It accepted Mr Griffin's evidence that he did not take into account any of the Claimant's alleged protected disclosures. It accepted Mr Griffin's evidence that he had been aware of, but did not know the detail of the Claimant's grievances.

136 Mr Griffin was a credible witness, who gave detailed answers and justified each of his responses in evidence.

137 The Tribunal found that Mr Griffin genuinely believed that the Claimant was

incapable of doing his job, that there were no jobs available through the redeployment register for him and that the Claimant had no likely date of return. It concluded that the fact that the Claimant had raised grievances played no part in Mr Griffin's decision making.

Holiday Pay Claim

138 The Respondent's holiday year began on 1 April each year. The Claimant was dismissed with effect from 17 March 2016, 352 days into the holiday year. The Claimant was entitled to 28 days leave per leave year under the *Working Time Regulations*. The Claimant had accrued 27 days leave by the date of his dismissal. The Claimant was paid for 27.5 days' holiday, on termination of his employment. The Claimant was therefore paid for at least much accrued holiday pay as he was entitled to.

139 All the Claimant's claims failed.

Employment Judge Brown

21 February 2018