EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR COLIN MARTIN	AND	MD INSURANCE SERVICES LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 18TH / 21ST / 22ND / 23RD / 24TH / 25TH / 26TH MAY 2018

EMPLOYMENT JUDGE MR P CADNEY MEMBERS: MRS C MANGLES
MS C WILLIAMS

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MR C MILSOM (COUNSEL)**

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claimant's claim that he was unlawfully subjected to detriment contrary to s47B Employment Rights Act 1996 as a result of having made public interest disclosures is dismissed.

2. The claimant's claim that he was unfairly dismissed pursuant to s103A Employment Rights Act 1996 is dismissed.

Reasons

1. This is the decision of the employment tribunal in the case of Mr Colin Martin v MD Insurance Services Ltd. The claimant was employed by the respondent as a Senior Risk Management Surveyor from 1 June 2009 until his dismissal on 21 March 2017. The respondent provides services in essence to two separate clients simultaneously. It provides surveying services to housebuilders to ensure that their building projects comply with building regulations, other regulatory requirements, and the respondent's own technical standards. In addition it provides the equivalent service to the insurers of those housebuilders who, if there have been breaches and who if claims are made on the insurance, will be liable. It is therefore in the respondent's interests to ensure compliance in order to provide the correct service to both of its professional clients.

2. The tribunal has heard evidence from the claimant himself; and on behalf of the respondent from Paul Banks (Regional Manager- Key Nationals Southern Team); Robert Clay Parker (Managing Director – MD Warranty Support Services Ltd –a subsidiary of the respondent); Robert Burridge (Managing Director of MD Warranty Inspection Services a subsidiary of the respondent);Richard Smith (Deputy Managing Director – MD Warranty Services); Sarah Sheppard (Regional Manager of the respondent); Carolyn Lakin (Regional Manager West Midlands and Wales Team). The tribunal received documents in excess of 1000 pages but in reality few are directly relevant for the issues we have to decide.

3. By this claim the claimant alleges that he made a number of protected disclosures and was subject to forty one separate detriments, and dismissed in consequence of having made those disclosures. He has not brought any claim for "ordinary" unfair dismissal and accordingly if either the disclosures are not protected disclosures within the meaning of the ERA 1996 and/or there is no causal link between any such disclosures and the decision to dismiss and or any alleged detriment then those claims will fail automatically.

4. Before dealing with the disclosures themselves and the alleged detriments we will set out the respondent's case as to the reason for dismissal as that sets out the background and the context of the claim. The claimant was, according to the respondent, dismissed for performance related issues on 21st March 2017. The respondent contends that the dismissal was genuinely as a consequence of the concerns as to his performance and had no relation with any disclosures (whether or not protected disclosures within the meaning of the ERA 1996). In order to understand the context it is necessary to consider events prior to the first alleged disclosure in August 2016, which are relevant to the respondent's case that significant performance concerns were raised before any alleged disclosure had taken place.

5. The first performance related issues occurred in 2012. At that point the claimant's line manager was Carolyn Lakin. In July 2012 there were issues arising out of a complaint by a customer. This resulted in a fact-finding meeting on 24 July 2012 which set a number of performance objectives. Nothing further came of this and it is

therefore of little or no relevance for our purposes which relate to events beginning in 2015.

6. As a result of a reorganisation the claimant became part of what was known as the Southern Team, and at about that time Ms Sarah Sheppard became his manager. In around August 2015 she was contacted by a client asking whether they were due to have a site visit. Ms Sheppard noted that the claimant had issued a Certificate of Approval but had completed a totally blank site inspection report in respect of a site visit that had not yet taken place. She took the view that issuing a Certificate of Approval before carrying out the inspection itself was a breach of the respondent's procedures. Subsequently the claimant admitted issuing the certificate before attending the site and said that he was trying to save time as the system could be slow, and stated that if on inspection the site had been satisfactory the certificate could be issued, but if it were not he could have cancelled it. Ms Sheppard took the view that he could not guarantee that the certificate would not have been issued before he had inspected and had the opportunity to cancel, and that that this was a serious issue and a major breach of the respondent's procedures.

7. The claimant attended a disciplinary hearing on 22 September 2015, the conclusion of which was that he was given a final written warning. A copy of that decision was sent to the claimant on 24 September 2015, in which Ms Sheppard set out the improvement required of him and prepared an action list of all the areas in which he needed to improve. In addition she took the view that he needed further training, which took place in October 2015, and further performance management. At a meeting on 13 November 2015 the action list was updated and she set out her continuing concerns regarding the claimant failure to complete outstanding tasks.

8. In January 2016 she carried out a desktop sample of three random sites that the claimant had inspected, but he scored poorly. Taking matters shortly, there were further issues in February and March 2016 with the claimant continuing to score poorly. Having heard the evidence of Ms Sheppard we are satisfied that her concerns were entirely genuine, not least because they are supported by the contemporary documentation; and are necessarily not related to any disclosure as none is alleged to have taken place by this point.

9. One of the curiosities in the case is that there are a number of events in the early part of 2016 about which the claimant complains but which he does not rely on as constituting a protected disclosures and/or detriments arising from any disclosure (for the avoidance of doubt and to repeat ourselves the first protected disclosure was alleged to have taken place in 19 August 2016). This is despite the fact that they appear almost indistinguishable from the matters upon which he does rely. It follows that we can deal with these relatively briefly but that as they form part of the sequence of events we need to at least refer to them.

10. As set out in the evidence of Mr Burridge, on 31 January 2016 the claimant emailed the Regional Director and Managing Director of M D Warranty Support Services and Mr Burridge to say that he was having concerns locally and could he meet to discuss them. Mr Burridge subsequently met the claimant and the claimant handed him a

document the main issue of which was a project in the Cardiff waterfront. On 2 February the claimant sent an email in respect of other properties in respect of which he raised complaints in Cardiff, Bridgend, and Tonypandy. Richard Smith carried out detailed investigations into those complaints produced two reports. As the claimant makes no complaint about any of these events, and as they predate any alleged disclosure it is not necessary to do more than set them out as we have done.

11. The claimant in April 2016 raised questions about problems with his manager Ms Sheppard, and it was subsequently agreed that there appeared to have been a breakdown in the relationship between them. In consequence in May 2016 he moved back to the West Midlands team under the management of Carolyn Lakin. Whilst in Ms Lakin's team he was subject to ongoing performance management. She carried out an unaccompanied review on 18 May 2016 at three sites, and in June 2016 carried out desktop sampling. In respect of both she took the view that performance was very disappointing. As a consequence at a meeting on 7 June 2016 she arranged for a performance improvement plan to be instituted for the claimant; and following the meeting she set out a detailed spreadsheet setting out all of the areas that required improvement. On 27 June 2016 she set a training plan for him. On 26 July 2016 she carried out three unaccompanied site reviews, and in August 2016 she provided the claimant with the scores. He did not score well and did not reply to her email. All of the events described above preceded the claimant's first alleged protected disclosure and therefore none of them could be in consequence of it or causally linked to it.

12. We accept the evidence of the respondent's witnesses in respect of those events and it is clear that there is a history of persistent concerns about the claimant's conduct and performance which had existed for a year prior to the first disclosure, which is supported by contemporary documentation. If we accept the respondent's evidence as to these earlier matters, which we do, it follows that the performance issues were entirely genuine and pre-dated any disclosure.

13. At about the end of August 2016 claimant was seconded to the Key Nationals team. This was in part in consequence of the claimant's view that he was struggling because of the number of sites he had. As part of the Key National team it was anticipated that whilst he would have to inspect and visit individual sites more frequently, he would have a smaller number which he would need to visit. The Key Nationals team was set up not to service clients on a geographical basis, but to service specific nationally important clients. Whereas under the old system they would receive a visit at least every 28 days the purpose of the new team was that the surveyor allocated to the project could go every week. This would allow for faster development and the easier and earlier identification of any problems. In consequence an individual surveyor who was part of the Key Nationals team would have a smaller number of clients, a small number of sites which he or she would visit more regularly, but with a potentially larger geographical region to cover.

14. As with many others the claimant joined the Key National team on secondment. This gave the individual surveyor time to decide whether they wanted to be considered for the role permanently, and equally the respondent the time to consider whether a

permanent appointment was appropriate. At that point Mr Banks, who became the claimant's manager on secondment, was not aware of any performance issues. The claimant accepted the offer of secondment and began in this role officially on 5 September 2016.

15. On 9 September 2016 Mr Banks had a conference call with Carolyn Lakin and Sarah Sheppard in which he was brought up to date with the formal performance improvement process, and it was agreed that it should continue whilst the claimant was in the Key Nationals team. Mr Banks evidence was that during the claimant's time with the Key National team he was very disappointed with his level of performance. On 15 September 2016 he carried out unaccompanied site audits which scored poorly, which was similarly the case on unaccompanied site visits on 20 October 2016. Mr Banks evidence in summary is that by 24 October 2016, when he sent an email to this effect to Sarah Rowlands, he did not believe that the claimant had met the standards required by the respondent and felt that he should be dismissed because of his general view that the claimant's performance as a surveyor was inadequate. He took the view that the claimant posed a real risk to the business.

16. In November 2016 the external audit team contacted Mr Banks to understand why the claimant's scores were so low and there was an independent technical services department audit. Irrespective of the rights and wrongs of Mr Banks view (and the claimant does not accept his conclusions), we accept that Mr Banks had genuinely come to the conclusion that the claimant should be dismissed. At this point the only disclosure which is alleged to have been made is that to Mr Smith on 19 August 2016. There is no evidence that Mr Banks was ever aware either specifically of the email or more generally the events at the site earlier in 2016 (which we set out in greater detail below). If it is correct that Mr Banks was unaware of these events, and we accept his evidence that he was, it is in our judgement significant that at least one senior manager had independently come to the view that the claimant's performance was so poor that he should be dismissed.

17. The second disclosure alleged by the claimant is said to have been an oral disclosure made to Mr Burridge on 22nd November 2016. That arose from a complaint made on 10 November 2016. Those complaints included the fact that Mr Banks had extended the performance process by one month from the end of September to the end of October. In addition upon joining the Key National team the claimant became entitled to a monthly £500 disturbance allowance to reflect the greater travelling, together with a £500 monthly bonus which would be paid quarterly in arrears. Neither had by that stage been paid. The claimant alleges that the failure to pay at least the disturbance allowance is a detriment imposed as a consequence of the earlier disclosure. The respondent's evidence, which we accept, as it is once again entirely supported by the contemporary documentation, is that the bonus if payable at all was not yet due, and the disturbance allowance had not been paid as the claimant had failed to supply the correctly completed forms.

18. The alleged disclosure relates to issues with a new starter called Ian Aird. Mr Aird had been recruited to replace the claimant at the end of his secondment and was being trained up by the claimant. The claimant made two allegations about Mr Aird;

firstly he did not feel that he was competent, and specifically in evidence before us pointed to the fact that Mr Aird failed to recognise specific hazards at one of the sites. In addition he contended that Mr Aird was not in possession of a valid Construction Site Skills Certification scheme card which meant that he was not allowed on the construction site, and that the company was breaching health and safety legislation by allowing him to be there. The respondent's evidence, which again we accept is that as Mr Aird did possess the CSSC card, but even if he had not Mr Martin did possess a valid CSSC card, and Mr Aird was allowed to accompany him on site. Accordingly Mr Burridge contends that it was not true that there was any breach of any regulation allowing Mr Aird on site. Although he does not specifically rely on them as protected disclosures the claimant made a number of other allegations in subsequent communications with Mr Burridge.

19. On 5 December 2016 Mr Burridge set out his conclusions as to the matters raised by the claimant and specifically whether they should be regarded as whistleblowing complaints. He concluded that in fact the complaints in truth related to the performance management process. Based on the investigation he did not believe that these events fell within the whistleblowing process. Specifically in respect of the schedule of alleged protected disclosures he contends that as set out above Mr Aird was in possession of the required CSSC card, and that in relation to underpayments it was agreed that outstanding payment be made to him and that the reason for this was that the claimant had not returned the documentation necessary for the disturbance allowance payment to be made. It was agreed that a one-off payment that could be made covering this. He denies having any conversation telling the claimant that he would be protected as a whistleblower as, if his evidence is correct, he had reached the exact opposite conclusion.

20. Following the concerns raised by Mr Banks the claimant attended a formal performance meeting on 20 December 2016 chaired by Carolyn Lakin, accompanied by Sarah Rowlands. As the claimant's secondment was coming to an end and he was returning to Ms Lakin's management it was decided that the claimant's performance improvement plan would be extended by a further few months, and he would be required to sustain an audit score of 70%. The next formal performance management meeting was on 9 January 2016 and it was decided that his performance would be reviewed for a further six week period he was advised that his audit scores should reach at least 80%.On 30 January Ms Lakin emailed the claimant advising that as he was returning to her team he had been reallocated a number of sites. On 31 January 2017 she held an objectives meeting with the claimant in which she set out the objectives she wished him to obtain in the six week review. It is not necessary for us to set out in detail the evidence as to the claimant's performance during the review period. Ms Lakin has done so in her witness statement and we accept her evidence that the performance targets he was set were not met.

21. On 21 March 2017 at the final performance management meeting took place. Miss Lakin expressed the view that during the six week review period she had not seen any improvement in his performance. She concluded that the claimant was unable to continue to provide the required risk assessment on site commensurate with his role, as he was unwilling to take advice and to improve. He had received the necessary

training but did not seem to take this seriously, and was unable to understand the importance of key risk assessments. In consequence he was advised that he would be dismissed with three months' notice which would be paid in lieu. For the reasons set out above we are not concerned with the fairness of the process or conclusion, but only whether it was causally connected to any disclosure. We accept the evidence of Ms Lakin that the dismissal was genuinely because she held the views summarised above.

22. The claimant appealed and at the appeal that was ultimately heard by Mr Andrew Clay Parker. The appeal hearing took place on 4 May 2017 at following the appeal hearing Mr Parker are set out his decision in a letter of 10 May 2017. He could find no evidence that the claimant had been unsupported by his manager, and no evidence of him raising concerns that were ignored. In respect of the concerns as to his performance he concluded that he had failed to demonstrate any improvement since the management process had begun. Secondly he did not accept that the claimant was the victim of a witchhunt following his allegations of whistleblowing. In conclusion, that he could find no evidence to overturn the original decision and the claimant's dismissal was upheld. Once again we are not concerned with the process or the merits of Mr Cay Parker's decision, only whether there is a causal link with any disclosure; and we accept Mr Clay Parker's evidence that the reasons summarised above were the genuine reasons for dismissing the appeal.

Disclosures

23. The alleged disclosures and detriments have been set out in a Scott schedule. Of the disclosures the last, a freedom of disclosure request is no longer relied upon. In the schedule the claimant sets out three factual allegations of disclosures, but has subdivided them so that five appear in the schedule. There is therefore a degree of duplication and there are in reality three alleged disclosures. The first was made in an email of 19 August 2016 to Mr Richard Smith. The second was the discussion with Mr Burridge on 22 November 2016 The third was in an email to Mr Gary Devaney on 16 February 2017 which the claimant sought assistance following a meeting with Mrs Lakin on disciplinary performance issues.

24. The first disclosure was made on 19 August of 2016. The site in question was in Blackwood and construction took place in January 2016. The issue was whether the basement in the site required waterproofing. The claimant took the view that it did whereas Sarah Sheppard took the view that as it was a party wall it did not. The claimant's case is that when he drew this to Sarah Sheppard's attention she consulted Mr Richard Smith and he was overruled in respect of this. Nothing then happened until August 2016.

25. The respondent's technical manual is reviewed on a regular basis. Its significance is that when the respondent contracts with a housebuilder the builder agrees to

construct in accordance with the manual, and the respondent warrants to the insurer that it has been constructed to those standards. The technical team reviewed the apparent inconsistency between the requirement of the waterproofing of basements but not of subterranean party walls. The respondent's position is that the claimant may have been correct in the sense that its technical manual needed updating and amending. However there was no requirement for the original work to be revisited essentially for two reasons; firstly the work complied with the building regulations and therefore was suitable and secondly, given the contractual position set out above, it was not open to the respondent to change the technical requirements after a contract had been entered into. The only question was whether the technical manual should be amended going forward.

26. By August 2016 the respondent was in the process of reviewing the technical manual and on 19 August Mr Smith emailed Mr Martin saying *"As you can see there is an action for me to review our current detail in the manual. Can I ask whether you have applied this detail on the site in question*?" That same day claimant replied "*Hi Hope all is good and thanks for everything. Sometime ago I had issues at ISRA stage. I agreed with client to put internal drainage system in as they have concrete on order and were committed. Sarah over the rule overruled this claimant should run it past you at a meeting with you at Birkenhead. I can put proper dates and times together currently returning from Leeds."* There was in fact no further communication from the claimant. The claimant submits that this is a disclosure of the commission of a criminal offence. The second alleged disclosure is in fact that the same email. The claimant contends that it also discloses a breach of civil law.

27. The third disclosure is the oral disclosure (set out in paragraph 17 above) at what is described as a whistleblowing meeting on 22 November of 2016 in Swindon with Mr Robert Burridge.

28. The fourth disclosure was said to be contained in an email of 3 February 2017 (the original disclosure relied on) although in the hearing claimant has relied on email of 16 February 2017 to Mr Gary Devaney. This email related to the Taffs Well site and stated: " *Met with Carolyn and Pete yesterday for a six-week disciplinary performance issues. I need 80% to survive but allocated 40%.The job is LA 702365 Cardiff Rd and the complaint is for my work there 7 – 2 -17. I last called the site August 16 and went to key nationals to now. 7th February 2017 I called to site client complaining bitterly about our service as he has tried relentlessly to arrange inspections and he feels ignored. I apologised on behalf of us. My survey revealed cavities were only 30 mm where we require a minimum 50 mm. I have arranged demolition by 28 February. Client has not complained to HQ. Sarah Rowlands believes that this type of occurrence should attract positivity when marking performance. Also BIS would not allow site to be inspected at this frequency. Can you please assist as Carolyn is to talk to director Keith, but feels rejection as to pre-empt*".The fifth disclosure is the same email which the claimant asserts also alleges breaches of the civil law and contractual obligations.

29. The relevant law is set out in s 43B ERA 1996:-

*"**43B.— Disclosures qualifying for protection.***
(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—
(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed

30. It is convenient at this stage to deal with the respondent's first submission that none of the disclosures amounts to a protected disclosure in law. If this is correct all of the claimant's claims must necessarily fail. In summary in order for a disclosure to be a protected within the meaning of section 43B it must be a disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest, and tends to show (as is relevant for this case) that a criminal offence has been committed, is being committed, or is likely to be committed, or that a person has failed, or is failing, or is likely to fail comply with any legal obligation to which he is subject.

31. As is set out above the claimant contends that his first disclosure discloses the commission of a criminal offence (breach of the Building Act 1984 and the Building Regulations) and also the breach of a legal obligation which is the contractual duties owed by the respondent to, the contractor, and the underwriting company for the Blackwood project. He contends that the second disclosure in the meeting with Mr Burridge on 22 November discloses a contravention of the Health and Safety at Work Act and the Building Act, this being a legal obligation to which the respondent is subject; and thirdly in respect of the disclosure of 3 February 2017 that it was both disclosure of a criminal offence and non-compliance with the civil law.

32. Dealing with the disclosures in turn, in respect of the first disclosure, the information conveyed by the email is essentially threefold. The claimant disclosed that the "detail" had not been applied on the site, and secondly disclosed that he had been informed by Ms Shepherd that she thought it was not necessary to do so, and thirdly that she had been supported in this by Mr Smith. The email self-evidently does not contain any express or explicit allegation that any of those three pieces of information constitutes either a criminal offence or a breach of a legal obligation owed by the respondent to any of its clients. The only information in respect of the earlier work itself is the specific answer question as to whether the detail had been applied the previous site, and an explanation as the claimant understood it as to why it had not.

The claimant's case is that Mr Smith would have understood that to be an allegation of breach of the criminal law and of the legal obligations owed by the respondent to the constructor or the insurer.

33. The respondent submits that firstly the information does not expressly or impliedly disclose a beach of the law or any contractual obligation. There is no allegation made at all. It therefore simply does not fall within s 43B. In our judgment the respondent is correct about this but even if we are wrong we have concluded (for the reasons set out below) that there was no causal link between this email and any of the alleged detriments or dismissal in any event.

34. In respect of the second disclosure (22nd November 2016 meeting) in our judgment neither of the disclosures (Mr Airds alleged incompetence and the absence of a CSF certificate) discloses any information tending to show any breach of any existing legal obligation. At most it could be a disclosure of the claimant's opinion that if in future Mr Aird was allowed to survey alone that it may not be safe to allow him to do so and that if the respondent allowed him to do so without the appropriate certificate it would be in breach of any such obligation. Even on the claimant's case it was not a disclosure of information relating to an existing state of affairs and could not, therefore, by definition disclose information as to any existing breach of any legal or contractual obligation. At most it could amount to an expression of the claimant's opinion as to the likelihood of a future breach if and when Mr Aird were allowed to survey on his own. Of necessity any such breach would only occur if at all at that future point Mr Aird had not been adequately trained and/or did not possess the appropriate CSSC card. In our judgment the information disclosed is not that any such breach is "likely" but simply of the possibility of a breach if these things were not remedied. Accordingly it is not in our judgment a qualifying disclosure within the meaning of s43B. Once again even had we concluded that it was, we accept Mr Burridge's evidence (as set out below) that there is no causal link between it and any detriment or the dismissal.

35. In respect of the third disclosure this was not in fact the disclosure identified in the Scott Schedule but was identified in the hearing. The respondent takes no point about this. However they assert that when read as a whole, the e-mail is complaining to Mr Devaney about what the claimant considers an unfair score as part of his performance improvement plan. The problem he identified should have attracted a good, not a poor mark. There could not therefore be any public interest in the disclosure as it was made purely for the purpose of enlisting Mr Devaney's help in an internal performance dispute. Moreover it is not a disclosure of any breach on the part of the respondent. Indeed in truth it is precisely the opposite. Even if the claimant's assertions are factually correct all he has done is point to the fact that he (and by extension the respondent) has done his (and its) job correctly in identifying a failure to comply with the technical manual by the constructor. There is no information or allegation against the respondent at all other than the failure to score him adequately for his performance, which of necessity cannot be made in the public interest as it relates solely to a private internal dispute. Once again in our judgement these submissions are correct and this necessarily cannot be a disclosure within the meaning of s43B.

Causation

36. As set out above we have gone on to consider the issue of causation in case we are wrong in our conclusions as to any of the disclosures.

37. The respondent submits that there are "four fatal flaws" in the claimant's case. The first of these is that there is no evidence of any causal link between those to whom the disclosures were made and any subsequent detriment or the dismissal. Those to whom the disclosures were made did nothing to the claimant's detriment and those who did act to the claimant's detriment, specifically in relation to his dismissal were unaware of and did not act in consequence of the disclosures. If this analysis is correct the claimant's claims must necessarily fail.

38. In relation to the first disclosure Mr Smith's evidence is that he has no recollection of this email. It was simply a perfectly standard enquiry he made with a perfectly standard response providing the information he had sought, and at this distance in time he simply has no recollection of it whatsoever. It was a perfectly ordinary everyday work email which he did not forward to anybody else, nor disclose the contents to anybody else and nothing came of it save that the answer informed the review of the technical manual. If this is correct, which we accept it is, the sending of this email was not causally linked to any of the events of which the claimant complains.

39. For completeness sake we should record that on the claimant's case this is by far the most significant disclosure. In essence in respect of the later disclosures he alleges that neither Mr Burridge nor Mr Devaney intervened to assist him. However in the case of Mr Smith the claimant's case, as he has confirmed in evidence, rests on a theory that Mr Smith understood the significance of his reply to the email of 19 August and that he was disclosing very serious wrongdoing. In consequence he engineered and was the lynchpin of a conspiracy to ensure the claimant's dismissal involving Mr Banks, Ms Lakin, Ms Sheppard and others in baseless allegations of poor performance. There is, put simply, no evidential support for any such allegation and a wealth to contradict it, not least of which is the fact that the performance concerns pre-date any disclosure by a considerable time.

40. The second disclosure was made to Mr Burridge on 22nd November 2016. The claimant's principal allegation against Mr Burridge is not that he acted to the claimant's detriment or that he participated in the decision to dismiss, but rather that he failed to protect the claimant during the disciplinary/performance process. Even if Mr Burridge had unreasonably failed to intervene in the process that would not of itself be sufficient unless the reason (or part of the reason) was the disclosure itself. We are entirely satisfied that in fact the reason Mr Burridge did not intervene in the process was that he was not involved in the management of the claimant and would have had no reason to become involved. Accordingly once again we are entirely satisfied that there was no link between any disclosure and any of the subsequent events of which the claimant complains.

41. The third disclosure was made in an email to Mr Gary Devaney. He has not been called to give evidence. There is therefore no specific evidence from Mr Devaney himself. Again the complaint is that the claimant having informed Mr Devaney of his concerns, that Mr Devaney did not intervene to assist him. There is however no evidence at all before us to allow us to conclude that the reason (or part of the reason) was the sending of the email, as opposed to the fact that Mr Devaney was not part of the process. In the absence of any evidence that would be at best speculation. On the evidence before us there is again, therefore no causal link between this email and either the dismissal or any of the other alleged detriments.

Dismissal

42. The test we must apply is as set out in Kuzel v Roche [2007] IRLR 309:-

*Reverting to the **Maund** test, applicable to s103A dismissals, we would formulate the approach to be applied on the findings made by the Tribunal in this case as follows:*

> *(1) Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent, some other substantial reason, was not the true reason? Has she raised some doubt as to that reason by advancing the s103A reason?*
>
> *(2) If so, has the employer proved his reason for dismissal?*
>
> *(3) If not, has the employer disproved the s103A reason advanced by the Claimant?*
>
> *(4) If not, dismissal is for the s103A reason.*

43. For the reasons set out below we are entirely satisfied that the sole reason for dismissal was the performance concerns set out above. We have set out the events above leading to the dismissal and make the following findings. The concerns about the claimant's performance predated by a considerable period any disclosure that he may have made. Mr Banks knew nothing of any disclosure and had reached the conclusion that he should be dismissed entirely independently of them. It is not alleged that any disclosure that was actually made to Ms Lakin and there is no evidence that she was aware of any. Similarly although parts of the grounds of appeal were that the true reason for his dismissal was protected disclosures it has not been alleged, and nor do we find that Mr Clay Parker was in any way motivated by any disclosures which were drawn to his attention by the claimant. It follows that in our judgement even had we found that any of the disclosures were protected disclosures that there is no causal link between those disclosures and the claimant's dismissal. In terms of the test set out above it follows either that there is no issue as to the reason or alternatively that we are entirely satisfied that the respondent has proved that the true reason was the performance issues.

Detriments

44. In the light of our earlier findings as to the disclosures it is not strictly necessary to deal with the detriments. However in broad terms we are satisfied that there is also no causal link between any of the alleged detriments and the alleged disclosures. The claimant's case in essence is that the detriments he has listed are all examples of him being treated unfairly or unfavourably after his disclosures. Insofar as there is a specific link between the detriments and the disclosures it rests on his theory that the matters he disclosed to Mr Smith were so significant that he hatched and managed the subsequent conspiracy against the claimant of which the detriments are in the main examples. As set out above we accept Mr Smith's evidence that he did not communicate the email or its contents to anyone else, and nor did he act on it, save to use it as one of the sources of information for the technical manual. It follows automatically that it cannot be causally linked to any detriment. If that allegation is not true, which for the reasons set out above we accept that it is not, then the essential link between the disclosure and the vast majority of the detriments falls away.

45. The detriments not specifically linked to the alleged conspiracy in the main concern Mr Burridge and Mr Devaney. As set out above the central complaint against Mr Burridge and Mr Devaney is that they did not involve themselves in the performance management process despite being the recipients of public interest disclosures. Once again as set out above, in our judgement the reason for the failure to involve themselves is the more basic one that there was no reason for them to do so as they were not part of or involved in the process.

46. One of the allegations of detriment relate to Mr Clay Parker's conduct of the appeal. As set out above one of Mr Clay Parker's tasks was to investigate whether the original decision to dismiss was causally linked to any disclosure. He found that it was not and that the decision was justified so dismissed the appeal. That process did not require him to investigate the underlying disclosures but only any link between them and the dismissal.

47. It follows that without dealing with them individually, for the reasons set out above we are satisfied that here is no causal link between any disclosure and any detriment and that these claims must also be dismissed.

EMPLOYMENT JUDGE Cadney

Dated: 2 October 18

Judgment entered into Register
And copies sent to the parties on

.....2 October 2018.....

.....
for Secretary of the Tribunals