EMPLOYMENT TRIBUNALS

Claimant: **Mr R.J. Jones**

Respondent: **Cadent Gas Limited (1)**
Mr M. Woolham (2)

Heard at: **Birmingham** **On: 8-12 October 2018**
(Reserved Panel Only – 23 October 2018)
(30 October 2018)

Before: **Employment Judge Butler**
Lay Members, Mr M.J. Bell and Mr D. Faulconbridge

Representation
Claimant: **Mr D. Panesar, Counsel**
Respondent: **Ms. T. Barsam, Counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the Claimant was unfairly dismissed and dismissed in breach of contract by the Respondent and the Respondent is ordered to pay compensation to the Claimant to be assessed at a Remedy Hearing. The majority judgment of the tribunal is that the claim of suffering a detriment as a result of making a protected disclosure is not well founded and is dismissed. The claim against Mr M. Woolham is also dismissed.

REASONS

The Claim

1. By a claim form submitted on 07 December 2017, the Claimant made claims against the Respondents and a further Respondent Mr K. Cain of unfair dismissal, wrongful dismissal, suffering a detriment as a result of making a protected disclosure and for unpaid wages. The claim for unpaid wages and the claim against Mr Cain were subsequently withdrawn.

2. At the commencement of the Hearing, Mr Panesar made an application to amend the claim to include claims for discrimination arising in consequence of a disability contrary to Section 15 of the Equality Act 2010 and a failure to make reasonable adjustments contrary to Section 20 of the Equality Act 2010. The application was opposed by Ms. Barsam on behalf of the Respondent.

3. It was accepted that the Claimant suffers from polycystic kidney disease. Although the Respondent was unaware of this condition, the Claimant did advise it of the detail of the condition during the investigatory and disciplinary stages of his dismissal. One of the symptoms of the disease is fatigue and tiredness.

4. Mr Panesar explained that he had only received the papers for the Hearing of these claims on the Thursday prior to the Hearing commencing. It became apparent to him that there was a disability discrimination claim and he sought instructions as to why these claims had not been brought. He was unable to contact anyone until the evening before the Hearing hence the lateness of the application. He explained that the claim was of particular importance to the Claimant as he had 36 years' service and was in a defined salary pension scheme operated by the first Respondent. Any prejudice to the Respondent in allowing the amendment could be dealt with by way of costs and he accepted that, if granted, the Hearing would have to be postponed. However, balancing the injustice in not allowing the amendment to the Claimant and any hardship to the Respondent, the application should succeed. He submitted this was the view of the approach to be taken as set out in Selkent Bus Co. Limited -v- Moore (1996)ICR836. Mr Panesar submitted that it could be argued the Respondent would have seen this application coming because it was aware of the Claimant's disability. He further accepted that the disability discrimination claim would be out of time and the Tribunal would have to consider whether it was just and equitable to extend the three months' time limited to allow the claim to proceed.

5. For the Respondents, Ms. Barsam submitted that this was an entirely new claim where time limits were relevant and no substantive reason had been given for the delay in making the claim. The Claimant had been represented by his trade union and solicitors throughout and, moreover, his claims had been clearly set out in detail at a Preliminary Hearing on 06 March 2018 where there was "no whisper" of a disability discrimination claim. Indeed, the first the Respondent had heard of a potential disability discrimination claim was on the morning of the Hearing.

6. In relation to the Respondent being adequately compensated for any prejudice by costs, she was concerned at the Claimant's ability to pay those costs. This was a clear case for rejection of the application.

7. Allowed to respond to Ms. Barsam's submissions, Mr Panesar said that the reason for the delay in making the application was that the Claimant had been wrongly advised. Any Costs Order made against him would be borne by his trade union or his solicitors.

8. In considering the application, the Tribunal had regard to the decision in Selkent and also the decision in Wade -v- CT Plus Community Interest Company UK EAT/0510/13/JOJ.

9. We considered those matters set out in Selkent including the nature of the amendment, whether it related to entirely new factual allegations which changed the basis of the initial claim, the applicability of time limits and the timing and manner of the application. We also reviewed the claim form, the further and better particulars provided on behalf of the Claimant and considered in detail the issues agreed by the parties at the Preliminary Hearing. We found no hint of a disability discrimination claim in the claim form or in the Preliminary Hearing. We also considered the potential injustice to the Claimant in refusing the application and the potential prejudice to the Respondent in granting it. We found it difficult to argue there was an injustice to the Claimant when the facts had been known to him and his advisors throughout his disciplinary procedure and subsequently. In relation to any prejudice to the Respondent, the first they heard of a potential disability discrimination claim was the first morning of the Hearing which had been set aside for the Tribunal to read in to the case. We also considered that the prospect of substantial costs being recovered from the Claimant's trade union or his solicitors was pure speculation on Mr Panesar's part.

10. We also considered the decision in Wade. That was a case involving a driver who was advised by Occupational Health that he could no longer drive. He had a problem with one of his eyes which meant he could not safely drive. This fact was mentioned in his claim form, yet he did not bring a claim for disability discrimination. His subsequent application to amend his claim form was dismissed. Contrasting that case with the instant case, we find no mention of the Claimant's disability in the pleadings or in the Preliminary Hearing issues. We therefore concluded that, in the Claimant's case, the amendment was not a situation where a different label was being attached to the claim, but one where an entirely new claim was being proposed.

11. In all the circumstances, we considered that the application to amend should be dismissed.

The Issues

12. The remaining live issues between the parties may be summarised as follows:

    (i) In relation to ordinary unfair dismissal contrary to Section 98 of the Employment Rights Act 1996 (ERA), what was the principal reason for dismissal and was it a potentially fair reason?

    (ii) Was the dismissal fair or unfair in accordance with Section 98(4) ERA and, in particular, did the Respondent in all respects act within the band of reasonable responses?

    (iii) In relation to the Claimant's protected disclosure (which was accepted by the Respondent prior to the Hearing) was it the principal reason for the Claimant's dismissal?

(iv) If the Claimant was unfairly dismissed and the remedy is compensation, if it was procedurally unfair should the compensatory award be adjusted following Polkey the AE Dayton Services Limited (1987) UKHL8, would it be appropriate to reduce the amount of the basic award pursuant to Section 122(2) ERA or 123(6) ERA and should there be an uplift in compensation if the Respondent is found to have unreasonably failed to comply with the relevant ACAS Code of Practice?

(v) In relation to public interest disclosure contrary to Section 47B ERA, did the Respondents subject the Claimant to any detriments and, if so, is the Claimant entitled to compensation?

(vi) In relation to breach of contract, how much notice was the Claimant entitled to and did he fundamentally breach his contract of employment by committing an act of gross misconduct?

The Law

13. In addition to the statutory provisions referred to above, the Tribunal considered British Home Stores Limited-v-Burchell 1980 ICR303,EAT, Taylor -v- Parsons Peebles NEI Bruce Peebles Limited 1981 IRLR119, EAT, Taylor Woodrow Construction Limited-v-Veale EAT544/76 and Post Office-v-Fennell 1981 IRLR 221,CA.

The Evidence

14. There was an agreed bundle of documents comprising 383 pages and references in this Judgment to page numbers are to page numbers in the bundle.

15. We heard oral evidence from the Claimant and, for the Respondent, from Mr M. Woolham, Operations Network Manager for the first Respondent Northwest Repair Team, Mr K. Cain, Operations Network Manager in the Northwest Repair Team and Mr M. Belmega, Head of Customer Performance.

16. The Tribunal did bear in mind that the Claimant had a kidney transplant in June 2018 as a result of which frequent breaks were given as and when he required them.

17. We found the Claimant's evidence to be mainly given in a straightforward manner without undue prevarication. He was also honest in accepting, for example, that at page 107 he could not draw an inference from Mr Woolham's email to Michael Jennison that he was being targeted as a result of raising the time off in lieu issue. However, we were not convinced by his explanation for the delay between him receiving the relevant call out on 07/08 July 2017 and leaving his house in the first Respondent's company vehicle. He attributed the delay to making tea and toast to help put him in a fit state to drive to the call out address and also to a delay in his computer logging on to the first Respondent's network. Having listened to the conversation between the Claimant and the first

Respondent's dispatch team, where he offers no more than a grunt in response to questions and comments from the dispatch team, we suspected some other unmentioned explanation would be more appropriate. There was also a degree of speculation in the Claimant's evidence in relation to Messrs. Woolham and Cain targeting him as a result of him raising the time off in lieu issues for himself and other engineers. Indeed, at the end of his cross-examination, he said "my thought process was that I was targeted". Other than these matters, we had no reason to question the accuracy of the Claimant's evidence.

18. We had similar issues with Mr Woolham's evidence. We noted that, at times, he seemed nervous under cross-examination. In particular, referring to page 235a, he attempted to make light of the fact that 17 engineers made claims for time off in lieu at a financial cost to the first Respondent of around £2,000.00 and another unquantified loss in terms of time off in lieu being given to another 13 engineers. His nervous approach to this line of questioning did not instill great confidence in his evidence that he was not concerned about it at all. We also gained the impression that he had rather played down his role, illustrated at page 194, in having a paragraph removed from the Occupational Health Report. His explanation was that he had received a call from John Webster complaining that the particular paragraph in which fatigue is considered showed that the Occupational Health Physician was overstepping her remit. We found it somewhat strange that Mr Woolham seemed to suggest that he was taking instructions from Mr Webster in relation to the report when he was Mr Webster's superior. Further, he rather changed his evidence from having little to do with criticising the report to saying he believed the report overreached the Physician's remit because it could affect every engineer in the Northwest Network. He then said that he did not believe engineers should be able to stop to take tea and toast before responding to a call.

19. We had similar concerns in relation to Mr Cain's evidence. We did not think it likely that, given his position in the first Respondent, he would not have been better acquainted with Mr Woolham than he made out. They were present on conference calls on a weekly basis, attended various meetings at the same time and were friends on Facebook. There was also an element of conjecture in his evidence when he said he believed the Claimant intentionally delayed getting to the call out on time on the 08 July to support his crusade for the first Respondent to put a nightshift in place. He was also somewhat confused in his evidence as to who made the decision to dismiss the Claimant, claiming on the one hand that he made the decision and on the other that it was made jointly with a member of the HR Team. He also stated that the first Respondent operates a zero tolerance in respect of attending without undue delay to call outs but was not able to point to any written policy to support that.

20. Mr Belmega gave his evidence in a clear and concise manner and we largely had no issues with this. We did feel that he had some difficulty in explaining his thought process in reaching his decision to dismiss the Claimant's appeal against dismissal, saying he tried to think of what had been going through the Claimant's mind at the time of the delay, explored why he had not left his house immediately and concluded he had

deliberately delayed leaving but could not explain why he came to that conclusion.

21. In relation to the Respondents' evidence generally, the manner in which they answered questions made us suspect that they may have received some coaching which would explain their nervousness and hesitancy in answering some questions. Our overriding impression was that they were intent upon preserving service level standards at all costs and were very wary of the Claimant being able to set a precedent of delaying leaving home in the middle of the night on a call out in order to have some food and drink.

The Facts

22. Many of the facts in this case were not disputed by the parties, rather it was the interpretation given to those facts which led to the dispute between them.

23. In relation to the issues before us, we find the following facts:

i. The first Respondent is a gas distributor which also manages the National Gas Emergency Service freephone line on behalf of the Gas Industry. It has operational teams in various locations throughout the UK. The Claimant commenced employment with the first Respondent on 10 August 1981 and worked in the North-West Emergency Team. At the time of his dismissal for gross misconduct on 8 September 2017, the Claimant was an emergency lead engineer/first call operative.

ii. The Claimant's employment was subject to the first Respondent's disciplinary policy and procedure and its code of employee conduct. There were also other policies and national agreements governing the time to be taken to arrive at the site of a gas leak, namely, one hour between the first Respondent receiving the call and the engineer attending the site. National agreements also provide that engineers should travel to the site of a gas leak "without delay".

iii. On 7 July 2017, the Claimant had worked a normal daily shift and was to be on call overnight. At approximately 10.15pm on the evening of 7 July, he attended a call out and returned home shortly after midnight. He went to bed and thinks he fell asleep at around 12.30am.

iv. At 3.28am on 8 July 2017, the first Respondent's dispatch team received a call from an operative who telephoned the Claimant at 3.31am but his mobile went to voicemail. When the operative called the Claimant again at 3.34am, he answered and the call out was assigned to him. A further follow-up call was made to the Claimant at 3.56am as he had still not accepted the call out on the first Respondent's system or started to make his way to the call out. The

first Respondent has GPS tracking on all of its vans in order that it can monitor the progress of engineers to call outs.

v. For whatever reason, the Claimant delayed leaving his home until 4.09am some 35 minutes after the dispatch operative had first spoken to him and during which conversation, the Claimant did nothing more than grunt his acknowledgment of what he was being told. He drove very slowly to the call out arriving at the site of the gas leak at 4.27am.

vi. Mr Woolham undertakes daily conference calls with the dispatch team to monitor the performance of the team to ensure standards of service are maintained and to ensure that Ofgem's target standards of service (1-hour time limit to attend gas leaks) were satisfied. As part of these daily reviews, the Claimant's conduct on 8 July 2017, including his grunting interaction with the dispatch team and the time it took him to attend an emergency call out were examined. Having considered the behaviour log at page 118, Mr Woolham decided to listen to the telephone conversation the Claimant had with the dispatch operative and asked Mr Webster to speak to the Claimant to find out what had happened. Mr Webster made notes of his meeting with the Claimant at page 120 and recounted the key points of the interview he had undertaken with the Claimant. The gas leak in question was known as a P1 Carbon Monoxide Escape which is the most serious gas leak tended to by the first Respondent. Mr Woolham considered that the Claimant had not attended the call out without delay and seemed focused more on using the incident to support his opinion that the first Respondent should introduce a nightshift rather than using standby cover.

vii. Mr Woolham decided that the matter should be investigated and Mr Webster conducted a preliminary investigation which commenced on 7 August 2017 after the Claimant's return from holiday. The Claimant was interviewed in the presence of his trade union representative.

viii. Mr Woolham considered the conclusion of the preliminary investigation and decided that the matter should proceed to a formal investigation as potentially an act of gross misconduct. He was not happy with the length of time it had taken the Claimant to leave home and he should not have stopped to have tea and toast before leaving home, which was one of the explanations the Claimant had given for not leaving home immediately he received the call out.

ix. Joanna Griffiths, a performance management specialist with the first Respondent was appointed to carry out the investigation. During the course of that investigation, the Claimant advised for the first time that he was suffering from

polycystic kidney disease, a degenerative and congenital condition which might lead to him having to have a kidney transplant. (Indeed, the Claimant did have a kidney transplant in June 2018). Mr Webster requested an Occupational Health Report which is at page 187. He telephoned Mr Woolham to say that in his opinion, with which Mr Woolham concurred, the Occupational Health Advisor had overreached her remit in relation to one paragraph of the report which said "Regarding Robert's alleged failure to respond quickly enough to the second call out of the night, please be aware it can be difficult to wake suddenly from a deep sleep after being disturbed once already, and it is normal for any employee to need a drink and/or food prior to leaving home in the middle of the night as they are unsure of how long they are going to be out or when they will be able to eat or drink again in the coming hours. These notions should be seen as reasonable given the circumstances". Mr Woolham phoned Jane Raby in the Respondent's HR Team to discuss this particular paragraph and it seems the matter was escalated to the Head of HR who prevailed upon Ms. Andrews, the Occupational Health Advisor, to resubmit the report with that paragraph omitted, which she did.

x. The Claimant was then invited to a disciplinary meeting on 8 September to consider the allegation that he had committed an act of gross misconduct on 7 & 8 July 2017 by failing to attend the gas escape without delay. Mr Cain chaired the disciplinary meeting. He found the allegation to be proved and wrote to the Claimant by letter of 18 September 2017 (page 229) which explained that Mr Cain was of the view that the Claimant had deliberately taken his time in getting to the emergency escape in question. Mr Cain did not consider that the Claimant's medical condition or his long service with the first Respondent were significant enough to mitigate the sanction of summary dismissal.

xi. The Claimant was given the right of appeal against this decision which he took up and his appeal was heard by Mr Belmega on 27 October 2017. Mr Belmega dismissed the Claimant's appeal and confirmed his decision by letter of 15 December 2017 (page 354) and he, too, did not consider the Claimant's medical condition and long service were of sufficient weight to override the sanction of summary dismissal.

xii. In his Appeal Hearing, the Claimant had raised as an issue his view that he had been targeted for disciplinary action and dismissal as a result of his activities in pursuing the first Respondent for time off in lieu claims for himself and other engineers. This issue had first been raised in writing by the Claimant in May 2017 and it ultimately resulted in the Claimant receiving the payment for his time off in lieu days in December 2017 with one other engineer also receiving a payment and 13 other engineers receiving time off in lieu. In the

Appeal Hearing it was considered there was no evidence to support the Claimant's view that he had been targeted as alleged.

Submissions

24. For the Respondent, Ms. Barsam submitted that the first Respondent had to have trust and confidence in its employees. It provided an emergency service where lives might be at risk and call outs should be attended without undue delay. The Claimant could have stood himself down if he was too tired, but had not done so. As at the date of the alleged act of gross misconduct, there was no medical evidence that the Claimant was unfit to work or that he required more time to get ready. The Claimant had been unable to identify any evidence that either Mr Cain or Mr Belmega were influenced by the time off in lieu issues pursued by the Claimant. She further noted that the Claimant had indicated he would have left earlier if the call out had been further away from his home and he had also argued the case for a nightshift to be put in place by the first Respondent with Mr Webster.

25. She further submitted that the amendment to the Occupational Health Report was of no consequence in assisting the Claimant.

26. For the Claimant, Mr Panesar relied initially on his written submissions which we do not repeat here. There had been reference to the Respondent considering the floodgates would open in respect of further time off in lieu claims which he said illustrated that the first Respondent had the Claimants part in these claims in mind in deciding to discipline and then dismiss him. Further he submitted that being an emergency service did not excuse the first Respondent's apparent lack of concern for the safety of its employees when trying to maintain its standards.

27. In relation to the time off in lieu claims, this was a matter of importance for the first Respondent and, given the friendship between Mr Woolham and Mr Cain, this must have been discussed at meetings at which they were both present.

Conclusions

28. We consider firstly the conclusions of the majority of the panel members.

29. Dismissal for gross misconduct is a potentially fair reason for dismissal pursuant to Section 94 ERA. Following the decision in Burchell, we remind ourselves that an employer must have a reasonable belief in the conduct alleged, carry out a reasonable investigation and the decision to dismiss must then fall within the range of responses of a reasonable employer. We also bear in mind the decision in Taylor in relation to the influence of an employee's long service on an employer's decision making. In that case, the EAT said "the proper test is not what the policy of the ……. employers was, but what the reaction of a reasonable

employer would have been in the circumstances. That reaction would have taken into account the longer period of service and good conduct which the appellant was in a position to claim".

30. In this case, the Claimant had 36 years' service. During that time, he had been given one final written warning in 2011 which had long since expired. He had never before been criticised or disciplined for attending a call-out with undue delay.

31. The manner in which the first Respondent's witnesses gave their evidence, and their constant references to the one-hour standard for attending call outs, led us to believe that meeting this standard was the first Respondent's sole aim and was important to avoid very considerable fines which could be imposed in failing to meet the standard. But in this case, the standard was met by the Claimant albeit by one minute. There could be no fine or recriminations for the first Respondent from the Regulators.

32. We also have some considerable concerns over the issue of the amended Occupational Health Report. It says little for the Respondent's responsibilities towards it employees that it would seek to have the relevant paragraph omitted to avoid its engineers on call out daring to have something to eat and drink before leaving home in the middle of the night. As an aside, we consider the fact that the Occupational Health supplier succumbed to pressure from the first Respondent and removed the relevant paragraph suggests it provides its service without any degree of integrity.

33. Having said that, we are of the firm view that the relevant paragraph was not specifically aimed at the Claimant as an individual, but was generic in nature, merely pointing out that any employee called out for the second time in one night would be very tired and it would be entirely reasonable for them to have something to eat and drink before leaving home. The Respondent's view was clearly that this could affect the standards being missed on occasions.

34. Had the Claimant missed the one-hour standard, we might have had more sympathy for the view of Mr Cain and Mr Belmega that the Claimant's delay in attending the site of the gas leak was an act of misconduct. However, put simply, this is a case where an engineer attending a call out for the second time in one night maintained the first Respondent's standards even though his explanations for some of the delay attending, might not have been entirely reasonable. We remind ourselves that we should not consider the first Respondent's decision to summarily dismiss in the light of what we would have done in the same circumstances. The standard is that of the reasonable employer. Would a reasonable employer have dismissed an employee with 36 years' service, a clean disciplinary record and who had met the first Respondent's standards? Our view and, indeed, the unanimous view of the Tribunal was that summary dismissal in these circumstances is not within the range of responses of a reasonable employer. On this basis, therefore, the test in Burchell is not met. Therefore, we were unconvinced by the evidence of Mr Cain and Mr Belmega that the Claimant's long service was not a sufficiently mitigating factor to avoid summary dismissal.

Further, in Taylor Woodrow, the EAT suggested that it might be a more reasonable approach to request that the employee gives an undertaking as to his future conduct.

35. We were also given during the Hearing, letters in relation to other engineers who had been disciplined by the first Respondent albeit that they were working in different regions. In Post Office -v- Fennell, the Court of Appeal endorsed the view that when an employee is treated differently for a similar offence, dismissal may well be unfair particularly where the employer had exaggerated the alleged offence. This has similarities with this case since there was an element of exaggeration by the first Respondent and Mr Woolham in particular in dismissing the Claimant when the operating standards had been met.

36. Accordingly, we find that the Claimant's dismissal was unfair. In relation to contribution, we cannot find that the Claimant contributed to his dismissal. It is accepted that there was a delay. The Claimant said this was caused by a slow computer and stopping to make tea and toast to ensure he could drive safely. The Respondent submits there was an ulterior motive to the Claimant's deliberate "go slow". It is not for this Tribunal to speculate as to the reason for the delays, but we have to acknowledge that there was no breach of the relevant standard and the Claimant had never before been criticised or disciplined for a slow reaction to a call out in the middle of the night.

37. It follows that we do not accept that the Claimant committed a fundamental breach of the terms of his contract of employment. Accordingly, he was wrongfully dismissed.

38. We now consider the issue of the alleged protected disclosure. Section 47B(1)ERA 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". In this case, the Respondent accepts that the Claimant made a protected disclosure on 17 May 2018 (page 109). The Claimant alleges that he was subjected to the detriment of being subjected to a disciplinary investigation and procedure as a result of his protected disclosure. This is a matter of some consequence to the Claimant in relation to the level of compensation he could reasonably expect if we find was subjected to such detriment.

39. The view of the majority is that he was not subjected to a detriment as a result of his protected disclosure. This conclusion is based on the following facts:

i. The Claimant was unable to point to any evidence of substance which suggested that Mr Woolham had in mind his protected disclosure and its cost to the first Respondent. Submission by Mr Panesar that Mr Woolham and Mr Cain were friends and attended the same meetings, hence would have discussed the time off in lieu issues raised by the Claimant is, in our view, nothing more than conjecture. Only in one respect is there any written evidence which might suggest that a contrary view could be formed and that is at (page 102) where Mr M. Jennison, Network Supervisor made reference to the Claimant's disclosure as potentially "opening the floodgates" as it happened in previous years when

the Claimant had been involved in obtaining further payment for Bank Holidays worked. We accept the evidence of Mr Woolham in this regard that these were the remarks of a supervisor with only six months' experience of working for the first Respondent. In any event, the allegation is that the detriment was put into operation by Mr Woolham.

ii. We have considered the amended Occupational Health Report and are firmly of the view that this does not single out the Claimant, but merely seeks to make general comments about employees called out twice in one night and that they would be particularly tired when receiving a call out for the second time.

iii. The Claimant himself was unable to point to any evidence of Mr Woolham or the first Respondent deliberately targeting him saying quite specifically in his own evidence that this was his view. Considering the Court of Appeal's judgment in NHS Manchester v Fecitt & others [2011] EWCA Civ 1190, the tribunal questioned whether the Claimant's protected disclosure was the sole or principal reason for him being taken through the disciplinary process. The conclusion was that there was no causal link between the disclosure and the alleged detriment.

iv. For these reasons, we conclude that the Claimant was not subjected to any detriment as a result of making a protected disclosure. Accordingly, this element of the claim should be dismissed against both the first Respondent and Mr Woolham.

v. The minority view of one of the Members of the Tribunal is that the Claimant was subjected to a detriment in the form of being disciplined at the behest of Mr Woolham as result of making his protected disclosure. Contrary to the majority view, his view is that the report by the Occupational Health Advisor, which was then doctored by the removal of the paragraph previously referred to, involved the making of a comment which was specific to the Claimant and not generic in referring to the first Respondent's employees in general.

vi. Further, his view was that Mr Woolham was a "directing mind" in relation to the Claimant. Mr Woolham had been aware of the Claimant's protected disclosure, was instrumental in seeking to have the Occupational Health Report amended and had a closer relationship with Mr Cain than was suggested in his evidence. It was therefore possible to infer that the Claimant was indeed targeted for disciplinary investigation and action as a result of making a protected disclosure in respect of time off in lieu issues. For this reason, the minority view is that claims against the first Respondent and Mr Woolham are both well founded.

Employment Judge Butler

20 December 2018