# EMPLOYMENT TRIBUNALS

| **Claimant:** | | **Respondent:** |
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| Mr D Hawkins | **v** | FCC Environment (UK) Ltd |

**Heard at:** Reading **On:** 20, 21, 22, 23 and 24 August 2018

**Before:** Employment Judge Gumbiti-Zimuto
Members: Mrs CM Baggs and Mrs A Gibson

**Appearances**
**For the Claimant:** Mr O Isaacs of Counsel
**For the Respondent:** Ms J Ferrario of Counsel

# RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Claimant's complaint about automatic unfair dismissal pursuant to section 103A Employment Rights Act 1996 is not well founded and is dismissed.

3. The Claimant's complaint that he was subjected to detriment because he made protected disclosures is not well founded and is dismissed.

4. The Claimant's complaint of breach of contract and unpaid wages succeeds. The Respondent is ordered to pay to the Claimant the sum of £587.80.

5. A hearing to decide the remedy the Claimant is entitled to shall take place on **14 December 2018** at the Reading Employment Tribunal.

# REASONS

1. In a claim form presented on 16 August 2017, the Claimant made complaints of breach of contract, unlawful deduction from wages, being subjected to detriment on the grounds that he made a protected disclosure, automatic unfair dismissal because he made a protected disclosure, and unfair dismissal pursuant to sections 94 and 98 of the

Employment Rights Act 1996. In a response dated 22 September 2017, the Respondent denied the Claimant's complaints.

2. The Tribunal heard evidence from Mrs Nicola Towell, Mr Paul Smith and Mr Steven Longdon in support of the Respondent's case. The Claimant gave evidence in support of his own case and also relied on the evidence of Mr Graham Francis. All the witnesses produced written statements which were taken as their evidence in chief. The evidence given by Mr Graham Francis was not challenged by the Respondent. The Tribunal was provided with a witness statement from Mr Paul Stokes. There was no challenge made by the Respondent to the evidence which was given by Mr Paul Stokes and he was not required to give live evidence.

3. The Tribunal was provided with a trial bundle containing in excess of 650 pages of documents. The Claimant's Counsel provided the Tribunal with an opening note and written closing submissions. The Respondent's Counsel provided the Tribunal with written closing submissions in writing. Counsel for both parties added to these written documents further oral submissions.

4. From all these various sources referred to above, we made the following findings of fact in this case.

5. The Respondent is a waste and energy recovery management company. It employs around 2,500 people in the United Kingdom. It has a dedicated HR department.

6. The Claimant was originally employed by the Respondent at its Bletchley Material Recycling Facility (MRF) as a Site Business Manager. The Claimant's employment commenced with effect from 27 April 2015. The Claimant reported to the Area Manager South East, Mrs Towell. The South East Region, as well as including the Bletchley site, included Sutton Courtenay Material Recycling Facility.

7. The Claimant and Mrs Towell had known each other for over 40 years. They attended social functions together and Mrs Towell had been a guest at the Claimant's wedding.

8. During the course of the Claimant's probation period, the Claimant was asked to expand his role so that he would cover both the Bletchley site and the Sutton Courtenay site. In the first three months of his employment with the Respondent, the Claimant had been able to focus on and achieve improved production at the Bletchley site. It was hoped that he would be able to achieve a similar effect at the Sutton Courtenay site which was, like the Bletchley site before the Claimant arrived, not performing as the Respondent would have expected it to.

9. At the point that the Claimant was asked to expand his role to take on the Sutton Courtenay site Mrs Towell said she had no performance concerns about the Claimant's work. When the Claimant consented to take on the

Sutton Courtenay site he said that he could not be expected to perform to the same standard because he would be stretched between the two sites.

10. Although the Respondent produced a contract of employment dated 22 July 2015 which purported to amend and update the Claimant's contract of employment, this document was never provided to the Claimant. The Claimant was given a salary increase from £43,000 to £49,500 to reflect the expansion of his duties.

11. Mrs Towell conducted the Claimant's appraisal in 2015 and in 2016. The Claimant was assessed as overall achieving.

12. The Respondent operates a bonus scheme. The bonus scheme provides that the overall individual performance of the employee for the year will be assessed by the line manager in order to calculate the employee's bonus entitlement. The bonus scheme contains five levels. Level 1 is low and level 5 is very high. An employee on level 1 is an employee who does not perform his or her job to an acceptable level and an immediate improvement is required. Level 5 is very high and the employee at this level exceeds what is expected for his or her job. Where an employee is operating at level 1, he receives no bonus payment, where he performs at level 5, he receives 100% bonus payment. Levels 2, 3 and 4 provide for a bonus payment respectively of 10%, 50% and 80%.

13. In April 2016, a review of the sites at Sutton Courtenay and Bletchley was undertaken. The Sutton Courtenay site resulted in good feedback on the Claimant from the site staff. The feedback on the Claimant from the staff at the Bletchley site was negative. The feedback obtained was shared with the Claimant.

14. The Claimant put the less positive feedback from Bletchley down to his being based at Sutton Courtenay and spending less time at Bletchley. This meant he was not able to be as engaged as he had previously been with the employees at Bletchley. In the Claimant's view the employees at Bletchley were more 'politically motivated' than at Sutton Courtenay. The Claimant considers this contributed to the nature of the feedback that he received.

15. During 2016, the Respondent was considering what to do about the poor performance of the Sutton Courtenay site. In about May of 2016 the Claimant made a presentation that formed part of the considerations. In about August 2016, the Claimant made an announcement about a proposal to cease the night shift cleaning and make cleaners redundant at the Sutton Courtenay site (p114L). Following that announcement, the Claimant had no further involvement in discussions relating to plans for the Sutton Courtenay site.

16. There is a dispute between the Claimant and the Respondent as to whether during 2016, there were issues regarding the Claimant's

performance brought to his attention and discussed with him by Mrs Towell.

17. In support of her contention, Mrs Towell refers to the negative feedback which was received in respect of the Claimant. The Claimant's answer is that he accepted the negative feedback and that he worked on ways to address the issues that had arisen.

18. Legal compliance audits had been carried out at the Bletchley and Sutton Courtenay sites. The Claimant and Mrs Towell reviewed the results. Mrs Towell says that she discussed a number of items with the Claimant relating to unsatisfactory results which included safety-critical issues relating to employee wellbeing and safety whilst at work and how the Claimant would address the points. The Claimant says the audit was not raising any performance issue about the Claimant. While there were concerns over the operation of the plant, these were not considered to be the Claimant's performance issues.

19. Mrs Towell says that on 26 October 2016, she had a conversation with the Claimant regarding his performance. She says the Claimant had not improved his performance. Mrs Towell states that it was in October 2016 that she took advice from Human Resources and commenced formal performance management of the Claimant. In her witness statement, Mrs Towell states: "I took guidance from Human resources… and commenced formal performance management with the Claimant." Then later in her statement: "I went on to discuss with the Claimant his poor performance and I advised him that I would be arranging a meeting with him next week to discuss performance and an improvement plan. The Claimant queried with me if it was performance management and I advised him on two occasions that it was." Mrs Towell then makes reference to documents which appear in the trial bundle at pages 136A-136E.

20. These documents were put to the Claimant and in answer to questions about them the Claimant said that he was not under a performance management plan and that Mrs Towell would have sent him a work plan if he was. He denied that the documents produced were a work plan. He stated that Mrs Towell said it was a jobs list. The Claimant stated that the list was a list of tasks. He did not agree that Mrs Towell was monitoring his performance in respect of that list.

21. The Claimant denied that he was ever subject to any formal or informal performance management. The Claimant says that there were discussions between himself and Mrs Towell about the performance of the sites that he was responsible for. He denies that he was told by her that there was concern about his performance or that he was performing below expectation or that he was under performance management.

22. The Tribunal, on this dispute broadly accept the Claimant's evidence that he was not subject to performance management in the period up to October 2016. In coming to this conclusion, we take into account the fact

the Claimant was awarded a bonus for 2016. The bonus was awarded in respect of the objectives set for 2016. It was conceded that the Claimant had in fact achieved the objectives as defined in the bonus scheme. The Claimant would not have got a bonus if there was significant concern about his performance.

23. However, we are also satisfied that there were discussions with the Claimant about the performance of the sites that he was responsible for. We accept that it was not expressed to the Claimant in terms that he was under performing to the extent that he was to be subject to performance management.

24. We note that in her email to Clare Ewens (HR) Mrs Towell stated: "We discussed that I would be arranging a meeting with him next week to discuss performance and an improvement plan – he queries with me if it was performance management and I advised that it was." We note that the Claimant disputed this in his evidence, but in our view if correct it shows that the issue of performance management was to be discussed and that no plan had been established. In her evidence we understood Mrs Towell to accept that she never started formal performance management of the Claimant and was only dealing with the Claimant's performance issues informally (which the claimant in any event denied).

25. It is clear from correspondence that as at 2 November 2016, the Claimant had not been placed on a formal performance management process. The Claimant was never placed on a formal performance management procedure after that date. Mrs Towell is wrong to say, as she does in her witness statement, that she commenced formal performance management with the Claimant. Any process that she carried out relating to performance management with the Claimant, if any, was an informal process. Mrs Towell accepted she discussed matters with the Claimant informally.

26. In about June 2016, the Claimant had initially raised with Mrs Towell the possibility of standing down from managing the Bletchley site and continuing as site business manager at Sutton Courtenay site only.

27. If the Claimant's was to be reduce to one site he would have to take a commensurate reduction in salary which would mean going back to his original salary level (with any pay rise that had been awarded in the interim).

28. In August 2016, the Claimant was married. In October 2016, the Claimant had a period of time off work due to illness. At his return to work meeting on 26 October 2016 the Claimant again raised the question of relinquishing responsibility for one of the two sites he managed.

29. The Claimant was asked to put his request in writing stating that he wished to step down from the position at Bletchley. It was made clear to the Claimant that until a replacement had been found to take over the management of the Bletchley site, the Claimant would have to continue to

manage both the Sutton Courtenay and the Bletchley sites. The Claimant agreed that because of the reduction in responsibility to one site, his salary would decrease but that decrease would only take place from the point at which he was no longer responsible for the Bletchley MRF site and not before he had handed over responsibility to the incoming manager.

30. On 3 November 2016, the Claimant wrote to Mrs Towell stating that he would like to stand down from his role as Business Manager at the Bletchley MRF site. Mrs Towell asked the Claimant to provide some clarification, to confirm the request was to stand down from the role of Business Manager for Bletchley and Sutton Courtenay for a role with the responsibility for one site only with the preference being Sutton Courtenay.

31. The Claimant retained responsibility for both the Bletchley and Sutton Courtenay sites until the end of February 2017 when a new manager for the Bletchley site was to commence work.

32. The future of the Sutton Courtenay site was under consideration in 2016. The Respondent's case is that the final decision on the future of the Sutton Courtenay site was not made until 6 February 2017, up until that date, the future of the Sutton Courtenay site was a matter for discussion. There was a proposal matching the decision, but the decision was not made before 6 February 2017. The Tribunal rejects that evidence given by the Respondent's witnesses.

33. The Tribunal considers that such a conclusion flies in the face of the documentation which is produced. There is a complete absence of any reference to any other proposal in any of the documentation provided to us. In the period from October 2016 onwards, there is only reference to the proposal which was eventually implemented. The December Monthly report appears to record a decision not a proposal. The notes made at the meeting on 9 November 2016 by Mr Longdon suggest a decision has been taken and records steps to implement.

34. The meeting on 9 November 2016 was a meeting with the Chief Operating Officer. Mr Longdon's notes at that meeting include a reference to "Sutton Courtenay Transfer Station only" and "RDF plant at S/C (i.e. Sutton Courtenay) to be mothballed". The notes also include the following: "to Approvals tomorrow programme to deliver change by end of 2016 start 1 January 2017". This is a reference to the matter being brought before an internal governance committee within the Respondent.

35. A consideration of Mr Longdon's notes lead the Tribunal to conclude that a decision was made on 9 November 2016 to mothball the plant at Sutton Courtenay and to operate it as a transfer station only. This is in fact what happened.

36. Mr Longdon prepares a monthly report for the executive directors of the Respondent. The December 2016 monthly report includes a passage which reads: "An RDF redistribution strategy will be implemented in

January 2017 and this will result in the suspension of RDF activities at Sutton Courtenay."

37. On its face, this passage reports a decision that has been made to be implemented in January 2017. However, the evidence from Mr Longdon was that he prepares this report a month in arrears for the executive directors and this document was written in January 2016. In his oral evidence, he was able to specify the date on which this document was written as 24 January 2016. He states that was the date that he circulated it by email to those who receive a copy of the report. No email was produced to verify this.

38. The date on which the decision relating to the Sutton Courtenay site was made is a matter which is very much in dispute between the parties. There have been requests for disclosure made by the Claimant in respect of board discussions relating to this decision. The Respondent's position is that full disclosure has been made. The conclusion of the Tribunal therefore is that the email referred to by Mr Longdon, if it ever existed, no longer exists.

39. Mr Longdon also gave evidence that the decision to close the Sutton Courtenay site was made by him. He stated that his decision was subject to ratification by the executive directors. There is no evidence of his decision being ratified by the board before or after 6 February 2017. On the face of the December 2016 monthly report Mr Longdon's evidence that he made the decision on 6 February 2017 cannot be correct. The monthly report of December 2016 refers to a decision that has been made and indicates when it is to be implemented. So even if the evidence about the report being sent on the 24 January 2017 is correct the decision was still made before the 6 February 2017. For the reasons stated earlier we consider the decision was made on 9 November 2016.

40. The Claimant announced the decision about the Sutton Courtney site on 6 February 2017. The 6 February 2017 was when the Claimant became aware of the decision that had been taken to suspend RDF activities at the Sutton Courtenay site.

41. The recruitment for the manager of the Bletchley site commenced in December 2016. By this time, the Respondent was aware of the future of the Sutton Courtenay site; no mention of the decision relating to the Sutton Courtenay site was made to the Claimant at this time. The manager to take over at the Bletchley site was appointed on 19 January 2017. He was an external candidate. He accepted the role to commence employment on 27 February 2017.

42. On 8 and 9 December 2016, the Claimant attended an IOSH management safety course. During that course, the Claimant made a protected disclosure relating to the Respondent failing to comply with RIDDOR reporting requirements. The Claimant made a further protected disclosure about non-compliance with RIDDOR reporting requirements to Mrs Towell.

43. On 29 December 2016, Mrs Towell took steps which resulted in a reduction in the Claimant's salary. She reduced his pay to the original salary (subject to pay rises). The Claimant received reduced pay for January 2017. The Claimant had not agreed to this change. It had been agreed between the Claimant and Mrs Towell that the Claimant would continue to be paid at his salary at the higher rate until he relinquished responsibility for the Bletchley site to the new manager.

44. Mrs Towell states that the Claimant was not performing his duties in relation to Bletchley therefore she reduced the Claimant's pay. The Claimant disputes this, saying that he retained responsibility for the Bletchley site until the end of February 2017 and that although he did not visit the Bletchley site as often he was entitled to continue to be paid until the end of February because he retained responsibility.

45. The Tribunal accepts the Claimant's evidence in relation to what was agreed in respect of pay. It was agreed that the Claimant would retain responsibility for Bletchley until the new manager took place and started and it was then that his pay would be reduced.

46. On 7 February 2017, the Claimant was placed at risk of redundancy and a collective redundancy consultation process began.

47. On 10 February 2017 the Claimant's request to stand down from his role as MRF manager at Bletchley and Sutton Courtenay into the role of manager at Sutton Courtenay was confirmed in writing by providing the Claimant with a new contract of employment.

48. The new manager commenced the role at Bletchley on 27 February and on 3 March 2017, the Claimant handed over his duties as manager of the MRF site at Bletchley to the new manager.

49. Collective consultation meetings took place on 9 and 21 March 2017. The Claimant's first individual consultation meeting with Mrs Towell took place on 4 April 2017. There was a further consultation meeting on 6 April 2017.

50. The Respondent created a new role, Contract Operations Manager covering Sutton Courtenay Transfer Station, Sutton Courtenay Compost Pad and Dix Pit Household Waste Recycling site transfer station. On 7 April 2017 the Claimant applied for the position of Contract Operations Manager.

51. The Respondent contends that the responsibilities for this role were significantly different to the role that the Claimant's role as Manager of the Bletchley and Sutton Courtenay sites. Mrs Towell states that this new role was complex and carried with it a great deal of responsibility.

52. The Claimant was interviewed on 18 April 2017. The Claimant was not successful. The Claimant requested feedback on his application for the role.

53. The Claimant was provided with written feedback in a letter dated 15 March 2017. The Claimant complains that the feedback was unfair and unjustified. It contained observations concerning the Claimant's past performance which must have emanated from Mrs Towell. The Claimant states that it was unfair for the matters relating to his past performance to be brought into the assessment for the new manager's role at Sutton Courtenay. In answer to this criticism, Mrs Towell states that the matters referred to were general knowledge and the Claimant would have been aware of them at the time and that the successful candidate was also an existing employee for whom there would have been similar considerations taken.

54. The Claimant's case is that because of making the protected disclosures, he was subjected to a number of detriments.

55. In January 2017 the Claimant alleges that he was shouted at by Mrs Towell. In a general discussion and update on his site the Claimant raised the fact he considered it unfair that the cost of an employee (DC) was being attributed to his site resulting his site being over budget. The Claimant says that Mrs Towell shouted at him throughout the discussion and he says that he found her behaviour towards him extremely aggressive. The Claimant says that it left him shaken, and her reaction was "over the top". The Claimant attributes this to the fact that he made protected disclosures. Mrs Towell denies the Claimant's description of the meeting however she states that "the Claimant was raising his voice; I had to raise my voice to match his".

56. The Claimant says that the decision to downgrade the Sutton Courtenay site should have led to a halt in the recruitment of a new manager for the Bletchley site and the Claimant offered the opportunity to fill that position. In email correspondence taking place between Mrs Towell and Mr Longdon at the beginning of January there is reference to "the new world" in a discussion about the roles. There are discussions (4 January 2017) and email correspondence (6 January 2017) between Clare Ewens (HR) and Mrs Towell in which they discuss the procedure to be followed when making 20 or more employees redundant. Referring to the email of the 6 January 2017 Mrs Towell stated in answer to questions from the Claimant that "there is nothing that says it is to do with a particular site". This evidence is patently incorrect as the email specifically refers to "a spreadsheet showing all the employees at Sutton Courtenay" and then goes to ask, "let me know as soon as possible how many roles are going to be made redundant". It was clear that redundancies, including the Claimant's role, would be made at Sutton Courtenay. By early January 2017 the redundancy in the Claimant's role was being considered with other redundancies at Sutton Courtenay. That was a time when the

recruitment for the role of the Manager for the Bletchley site taking place. The Claimant was not considered for it.

57. The Claimant criticises the Respondent for the failure to create a pool including the new manager for the Bletchley site and the Claimant as the manager of the Sutton Courtenay site. The claimant says this was a detriment.

58. At a meeting which took place on 27 April 2017, the Claimant met with Mrs Towell in her office. The Claimant wanted to speak about his application for the Contracts Manager position. The Claimant asked if he could have an off the record conversation with Mrs Towell. Mrs Towell then approached the Claimant and without warning ran her hands down over his chest, torso and legs as if she was searching him. The claimant asked her what she was doing, and Mrs Towell responded that she was checking to see if he was recording their conversation. The Claimant says that he left soon after feeling humiliated and demeaned.

59. Mrs Towell accepts that the incident occurred. She disputes the way it is said to have occurred. Her version of the incident is that after a friendly conversation about what the Claimant had been doing at the weekend the Claimant asked about the Contracts Manager position and it was then in a joking manner, understood as such and accepted as such by the Claimant, that she carried out the actions that the Claimant describes.

60. The Tribunal prefer the Claimant's account of this incident. By the time that this incident took place the relationship between the Claimant and Mrs Towell was such that they did not trust each other. We do not consider likely that the friendly banter of the type described by Mrs Towell would have been taking place between the Claimant and Mrs Towell by this stage.

61. Following that encounter, there is alleged by the Claimant to have been threats made to him by Mrs Towell on 3 May 2017. At the second consultation meeting the Claimant asked if Mrs Towell had any answers to the questions he had asked at the first consultation meeting. In the exchange which followed Mrs Towell referred to the Claimant as smug. The Claimant and Mrs Towell also discussed the events which had occurred on the 27 April 2017. The following day the Claimant received a telephone call from Mrs Towell in which she stated that if things that had happened or been said between her and the Claimant came out that would be the end of her personal relationship with the Claimant and there would be no point in speaking to her in social setting.

62. During the first individual consultation meeting, the Claimant asked Mrs Towell why he had not been given the opportunity to keep the role of Site Business at Bletchley. The Claimant was told that he had all the information he was entitled to and that the role had been offered to GP. At the second consultation meeting the Claimant had asked Mrs Towell why

the Contracts Manager role could not be ringfenced for him and he was told that it was because it was a different role.

63. The Claimant was informed on 11 May 2017 that his employment was going to be brought to an end as a result of redundancy. The Claimant was told that his employment would end on 16 May 2017.

64. The Claimant appealed the decision to dismiss him. The Claimant attended an appeal meeting on 30 May 2017 conducted by Mr Smith. At the appeal the Claimant was accompanied by a colleague, Sarah Hillier. At the end of the appeal meeting, Mr Smith said that he needed to carry out some further investigations.

65. On 2 June, the Claimant received the outcome of his dismissal appeal and was informed that his appeal had not been upheld.

66. The Claimant had raised a grievance. The Claimant contends that in making the grievance he made protected disclosure. The respondent accepts that the grievance contained a protected disclosure.

67. Mr Smith considered the Claimant's grievance on the occasion that he considered the Claimant's appeal against dismissal on 30 May 2017. The Claimant complains that during the course of the grievance investigation, Mr Smith made an allegation that the Claimant was undergoing performance management. The Claimant contends this amounted to a detriment.

68. The Claimant received the outcome of his grievance on 7 June. The Claimant complains that the dismissal of his grievance was a detriment.

69. The Claimant appealed the grievance outcome. His grievance appeal hearing was conducted by Mr Longdon on 4 July 2017. The Claimant contends that the grievance appeal contained a protected disclosure. At the grievance appeal meeting, there were fresh allegations of poor performance made by Mr Longdon the Claimant complains that this constituted a further detriment.

70. Mr Longdon carried out some further investigations following the grievance. The Claimant received his grievance outcome on 12 August 2017 he was informed that his grievance appeal had not been upheld. The Claimant contends that this too amounted to a detriment.

71. The Respondent's witnesses, Mr Smith and Mr Longdon, gave evidence which explained their actions in respect of the matters arising from the appeal against dismissal, the grievance and grievance appeal. They denied that any of the actions taken were because of the Claimant having made the protected disclosures. The Respondent concedes that the Claimant made protected disclosures.

Statutory Provisions

72. Section 94 of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed. Section 98 of the Employment Rights Act 1996 provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Redundancy is a reason within subsection (2).

73. In this case it is accepted that there was a redundancy situation.

74. Where the employer has shown a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and is to be determined in accordance with equity and the substantial merits of the case.

75. Section 103A of the Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

76. When an employee positively asserts that there is an inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. It is for the Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

77. The Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserted it was. An employer who dismisses an employee has a reason for doing so. The employer knows what it is. The employer must prove what it was.

78. The meaning of a protected disclosure is to be found in sections 43A to 43H of the Employment Rights Act 1996. In this case it is accepted that the claimant made protected disclosures.

79. 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. On such a complaint it is for the

employer to show the ground on which any act, or deliberate failure to act, was done.

## CONCLUSIONS

80. In the list of issues, we are asked to consider whether there has been a qualifying disclosure within the meaning of section 43B of the Employment Rights Act 1996. The Respondent concedes that the Claimant made protected disclosures.

81. The Respondent concedes that on the final day of the IOSH course, the Claimant made a protected disclosure relating to the way that the Respondent reported the incidents under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR).

82. The Respondent concedes that on or about 19 December 2016, the Claimant repeated his disclosure to Mrs Towell.

83. The Respondent concedes that on or about 12 January 2017, the Claimant again told Mrs Towell that he believed the Respondent was failing to comply with the legal requirements for reporting of RIDDOR incidents.

84. The Respondent concedes that in the grievance statement made on 30 May 2017, the Claimant made a protected disclosure.

Reason for Dismissal

85. We must determine what the reason or the principal reason for the Claimant's dismissal was. The Claimant contends that it was because he made protected disclosures. The Respondent denies this and says that the reason for the Claimant's dismissal was redundancy.

86. In coming to our conclusions as to what were the reasons for the Claimant's dismissal, we have considered all the evidence that has been put before us. We have considered the credibility of the witnesses and having assessed their credibility, we found the Claimant to be a credible witness.

87. The evidence of the Respondent's witness's in parts was difficult to reconcile with the apparent record of events emerging from documents. This applied to a crucial part of the evidence relating to the timing of the decision relating to Sutton Courtenay. The notes taken by Mr Longdon at the Chief Operating Officer's meeting on 9 November 2016 do not appear to support the account that he gives that the decision relating to Sutton Courtenay at that time was no more than a proposal. The suggestion that the decision in relation to the Sutton Courtenay site was not made until 6 February 2017 is difficult to reconcile with the documentation.

88. That the Respondent's witnesses maintained a narrative that did not match the documentation provided by the parties affected their credibility.

89. The Tribunal's conclusion is that the decision in relation to the Sutton Courtenay site was made on 9 November 2016, the notes taken by Mr Longdon bear that out. We note that Mr Longdon said that the decision on Sutton Courtenay was his decision to make and that it was to be subject to ratification by the board. The monthly report for December 2016 prepared by Mr Longdon refers to "the strategy will be implemented in January 2017". It is not recording a proposal; it is setting out a decision that has already been made.

90. Mrs Towell relied on the contention that Claimant was subject to formal performance management by November 2016, this was not correct. Mrs Towell may have had concerns about the Claimant's performance in November 2016, but there is no evidence of performance issues being a concern before that except to the extent that they are referred to in staff survey feedback and discussion about site performance.

91. The Claimant's decision to stand down from the Bletchley role was little more than a week before the decision in relation to the future of the Sutton Courtenay site was taken. The Bletchley Manager role and the Sutton Courtenay Manager roles were similar, and the Claimant could have stood down from one role or the other. Mrs Towell confirmed during her evidence that the Claimant could have changed his decision from Sutton Courtenay to Bletchley so long as he did so in a timely manner which she agreed was any time before the appointment is made to the Bletchley Manager role. The decision on Sutton Courtenay site was taken a month before the recruitment for the Bletchley Manager commenced. The decision to cease RDF activities at Sutton Courtenay was going to result in redundancies including the Claimant's role.

92. It is unexplained why the Respondent commenced the recruitment for the Bletchley Manager role without informing the Claimant that a decision had been taken in relation to the Sutton Courtenay site which may result in the Sutton Courtenay Manager role being redundant.

93. The Claimant made his first protected disclosures at the IOSH course on 9 December 2016. There is no connection between the Claimant making a protected disclosure and the decision to commence the recruitment for the Bletchley Manager role.

94. The Respondent's reaction to the Claimant's protected disclosures was indifference. Mrs Towell treated it as an operational issue about which different employees may adopt different views.

95. Mrs Towell was dismissive of the Claimant's disclosures, she was disinterested in them, considering them of little significance or importance. We cannot accept the Claimant's suggestion that the disclosures that the Claimant made had an impact on the decision Mrs Towell made about pay.

96. The Tribunal has not been able to accept the Claimant's contention that the reason for his dismissal was because he made a protected interest disclosure. Considering all the surrounding circumstances, we are unable to draw that inference from the matters before us.

97. We have gone on to consider what was the reason for the Claimant's dismissal. Was it redundancy?

98. While there may have been some concern about the Claimant's performance by Mrs Towell, there was no concern about the Claimant's performance expressed after about November 2016. We can see no other potential reason for the Claimant's dismissal other than redundancy.

99. We note that the decision to dismiss the Claimant comes about as a direct result of the decision to end the RDF activities at Sutton Courtenay. In early January 2016 it is being indicated that the Claimant's name is amongst a list of people that ought to be considered at risk of redundancy.

100. There is no dispute that there was a redundancy situation in respect of the Claimant's role because of the decision to cease RDF activities at Sutton Courtenay. The Claimant was in our view dismissed because of the redundancy which arose.

Was the decision to dismiss the Claimant fair or unfair?

101. The Tribunal is unanimously of the view that the decision to dismiss the Claimant was unfair. There are a number of factors which we have taken into account in reaching that conclusion.

102. The Claimant was initially employed to work in the Bletchley as Site Business Manager role. It was the Claimant's good performance in the Bletchley Manager role that led to him being asked to take on an expanded role to include Sutton Courtenay. Even if there were concerns about the Claimant's performance in the combined Sutton Courtenay and Bletchley Manager role, there is no indication that the Claimant's performance in the Bletchley Manger role was questioned. In our view there is no reason why the Claimant could not have successfully returned to perform the Bletchley Manager role after the Sutton Courtenay site had been mothballed in respect of RDF activities.

103. The Respondent failed to give any consideration to the Claimant being offered the Bletchley Manager role as a way of avoiding redundancy. When it was clear that the Sutton Courtenay site was going to cease RDF activities redundancy of the Claimant's role was inevitable. The decision to cease RDF activities at Sutton Courtenay was made on 9 November 2016.

104. A reasonable employer, in our view, would have informed the Claimant that the decision to close the Sutton Courtenay site had been made and would have considered with the Claimant whether it was appropriate to

continue on the basis that the Claimant was giving up the Bletchley Manager role. As already stated above the Bletchley Manager role and the Sutton Courtenay Manager roles were similar; the Claimant could have stood down from one role or the other; the Claimant could have changed his decision from Sutton Courtenay to Bletchley so long as he did so any time before the appointment of the new Manager was made.

105. Having made a decision to recruit to the Bletchley Manager role and then making the decision that they were going to make the Sutton Courtenay Manager role redundant a reasonable employer would have reviewed the Claimant's position and considered ways to prevent redundancy. At the time the Respondent was giving these matters consideration the Claimant was responsible for both the Bletchley and Sutton Courtenay sites. An obvious consideration of a means of avoiding dismissal for redundancy is to consider whether the Claimant could continue working in the Bletchley Manager role.

106. Even on the Respondent's timeline, which we reject, the Claimant was placed at risk of redundancy at a time when he was responsible for the Bletchley site and three weeks before the prospective new manager was due to join the respondent as an employee.

107. Where the recruitment process has begun, a reasonable employer would have considered whether to continue with that recruitment process before any offer of employment was made.

108. Where the stage had been reached where an offer of employment was made to the new Bletchley Manager a reasonable employer would have given consideration to the question whether the new manager should be appointed, or the Claimant offered the Bletchley Manager role.

109. Where the Bletchley Manager role had been filled and employment started consideration should have been given to the creation of a pool for redundancy which included the Claimant and the Bletchley Manager.

110. The Respondent failed at each of these stages to give consideration to how the Claimant's employment may have been continued.

111. We consider that the way the Respondent dealt with the Claimant in the period from November 2016 until to his dismissal was unfair.

112. The Tribunal also is concerned that the Respondent gave no consideration to allowing the Claimant to be placed in the new Contract Manager role at Sutton Courtenay. The Respondent did not consider giving the Claimant a trial period in the role. The evidence that we heard did not explain why the Claimant could not have been considered a suitable person to fill this role in the context of a redundancy situation. The Claimant had previously displayed an ability to learn and his superior performance in the Bletchley Site Business Manager role had resulted in an expansion of his role to include Sutton Courtenay.

113. The conclusion of the Tribunal is that the Claimant was unfairly dismissed.

Breach of Contract

114. The Claimant is entitled to succeed in respect of his claim for breach of contract.

115. The Claimant and Respondent agreed that when the Claimant ceased to have responsibility for the Bletchley site he would revert to his original salary. Until then the Claimant was to remain on the enhanced salary he received when he took on responsibility for the two sites.

116. The Claimant retained responsibility for the Bletchley and Sutton Courtenay sites until the end of February. There was no agreement between the Claimant and the Respondent that the Claimant would receive reduced pay. The Claimant continued to have responsibility for both sites until the end of February.

117. The conclusion of the Tribunal is that the Claimant is therefore entitled to succeed in respect of the claim for breach of contract and unpaid wages for the shortfall in his pay for January and February.

118. The Respondent has stated that the extent of the agreement between the Claimant and the Respondent was that so long as he was actually carrying out work at the Bletchley site he was to be paid at the enhanced rate but because the Claimant was not carrying out work in relation to Bletchley they were entitled to pay him at the reduced rate. The Tribunal reject that position.

119. The Claimant had responsibility for the Bletchley site over the relevant period, that is not in dispute between the parties. That continued to be the case until the end of February when the Claimant handed over to the new manager from 3 March 2017.

Detriment complaints

120. The Claimant has made complaints alleging that he has been subjected to detriment because of making protected disclosures. The Tribunal is not satisfied that the disclosures relied on operated on the Respondent in such a way as to result in the Claimant being subjected to a detriment.

121. The reduction in the Claimant's salary was in our view because Mrs Towell considered that the Claimant was not doing what he should have been in respect of the Bletchley site because of the infrequency of his visits to the Bletchley site. As a result, she took the steps that she did that resulted in the Claimant's salary being reduced.

122. The Claimant and Mrs Towell had discussed a simple reduction in pay, but the Claimant did not agree to it. The Claimant's contract was going to be

varied so that his original salary, subject to intervening pay increases, returned to the level he enjoyed when he was first employed. The Tribunal is not satisfied that the protected disclosures played any part in the decision made by Mrs Towell.

123. The Claimant made an allegation that he was shouted at by Mrs Towell. The Tribunal is satisfied that towards the end of 2016 and the beginning of 2017, the relationship between the Claimant and Mrs Towell was beginning to sour. We note that they had been close friends but there were difficulties in the relationship.

124. We also note that at about this time, Mrs Towell had reservations about the Claimant's performance. She indicated this in her correspondence with HR.

125. Under discussion when the Claimant alleges he was shouted at were matters that concerned an employee, DC, and whether the costs that arise from his employment should be borne by the Claimant's cost centre or an alternative cost centre. In our view it was not the protected disclosures which gave rise to the dispute but genuine disagreement relating to what should happen regarding DC.

126. The Tribunal is satisfied that the failure to halt the recruitment for the Bletchley manager's post and the failure to give the Claimant the opportunity to retain or return to the Bletchley MRF manager's post was not connected to the protected disclosures for the reasons we have previously set out when dealing with the reason for dismissal. We do not consider that considerations arising from the Claimant's protected disclosures played any part in the decisions not to consider the Claimant for the Bletchley MRF manager's post. The failure in our view arises from the poor way in which the Respondent dealt with the redundancy and was not because of the protected disclosures.

127. The Claimant likewise complains that there was a failure to create an appropriate redundancy pool including the Bletchley MRF manager's post and the Sutton Courtenay post or to bump the Claimant. We note the evidence which was given by Mrs Towell in relation to this and her response was that nobody asked her to consider pooling or bumping. We do not consider that there is any connection between the protected disclosures and the failure to either pool or bump.

128. The Claimant says that there was a failure to consider suitable alternative positions by not offering the Claimant the Sutton Courtenay Contracts Manager role. We note that in respect the evidence of Mrs Towell about the requirements for the role and the justification for not ringfencing the role for the Claimant; the duties were different. While we do not necessarily consider that was appropriate or reasonable conclusion, we have no reason to doubt that it was the position held by Mrs Towell. We also considered the fact that Mrs Towell was disinterested in the protected disclosures made by the Claimant. We have not been able to conclude

that the Claimant's disclosures were a reason why the Claimant was not considered for the Sutton Courtenay Contracts Manager role

129. The Claimant says that he was not given a response to his request for information during the individual consultation meeting. This concerned the Claimant's questioning of Nicola Towell as to why he had not been given the opportunity to retain the Bletchley role.

130. The Tribunal conclude that the Claimant was given a response; it was not a particularly useful response. The Claimant was told that he had been given all the information that he was entitled to which was that the Bletchley manager's role had already been offered to the new manager and the Contracts Manager post was different type of role. We are satisfied that this response was given to the Claimant because it was the Respondent's position. We are not satisfied that the fact that the Claimant made protected disclosures played any part in the way that Mrs Towell responded.

131. There is a dispute between the Claimant and Mrs Towell as to whether Mrs Towell manhandled the Claimant by frisking him on 27 April 2017. We prefer the Claimant's account of this incident. However, we are not satisfied that the protected disclosures had anything to do with the way which she behaved. It was the souring of the relationship and the distrust that Mrs Towell had of the Claimant, the fear that she was being recorded by the Claimant. This may have been due to Mrs Towell feeling that she was being asked to disclose to the Claimant more information than she should and worried her that what she said to the Claimant might become known. We are not satisfied that it was in any sense connected with the fact that the Claimant had made protected disclosures that she behaved in this way. We consider that the same explanation applies to the behaviour of Mrs Towell on 3 May 2017when she threatened the Claimant with the end of their personal relationship.

132. The criticisms made of the Claimant in the interview process as explained in the feedback provided to the Claimant represent views held by Mrs Towell of the Claimant's performance. We are satisfied that Mrs Towell has some concerns about the Claimant's performance. She did not make clear what were failings in the performance of the Claimant as opposed to failings in performance of sites that the Claimant was responsible for. The Claimant maybe should have understood her general criticisms of the performance of these sites as including criticisms of him. At the point that criticism of the Claimant is clear it is self-serving criticism to justify the decisions which have been made. However, we are satisfied that the core of the issues raised in the criticism of the Claimant is based on valid criticism, that is genuine criticism of the Claimant's performance. We are not satisfied that the criticisms were made because the Claimant had made protected disclosures.

133. The Claimant complains that Mrs Towell and Mr Smith alleged that he was undergoing performance management or had performance management

issues, thus he says he suffered a detriment. For the reasons we have already set out, the position was that the Claimant was not undergoing formal performance management. Performance issues were discussed with the Claimant. They represented Mrs Towell's view. We are not satisfied that it was because the Claimant made protected disclosures.

134. The Tribunal has heard evidence from Mr Smith in relation to the Claimant's grievance. We are satisfied that Mr Smith has given an accurate explanation of the reasons that he rejected the Claimant's grievance. We are not satisfied that there is evidence from which we could conclude that the disclosures made by the Claimant played a part in the decision made by Mr Smith.

135. The Claimant complains that there were fresh allegations of poor performance raised against him during the grievance appeal; that in the appeal Mr Longdon failed to reasonably address the Claimant's grievance of 9 April 2017. To the extent that there was poor decision or poor investigation we are not satisfied that there is any basis to link that to the protected disclosures that the Claimant made.

136. Having considered the evidence which has been given in respect of the grievance appeal hearing, the Tribunal was not satisfied that the way that was dealt with, and the conclusions reached were connected to the Claimant's protected disclosures.

137. The conclusion of the Tribunal is that the Claimant's complaints that he suffered detriment because of making protected disclosures are not well founded and the complaints are dismissed because the Respondent has been able to show that the reasons for its actions were unconnected to the protected disclosures.

Polkey

138. A question arose as to whether this is a case where there should be a Polkey reduction. The conclusion of the Tribunal is that there is no basis for a Polkey reduction. On the evidence that the Tribunal has heard, had there been adequate and proper consideration of the Claimant for the Bletchley role, there is no basis on which we consider it is possible to say that that would have resulted in the Claimant's dismissal for any reason. The Claimant had previously performed the Bletchley's manager role and had done so with some success.

Judgment

139. The conclusions of the Tribunal are that the Claimant was unfairly dismissed; the Claimant's complaint about automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed; the Claimant's complaint that he was subjected to a detriment because he made protected disclosures is not well founded and is dismissed; the Claimant's complaint of breach of contract and

unpaid wages succeeds and the Respondent is ordered to pay to the Claimant the sum of £587.80.

Remedy Hearing

140. A hearing to decide the remedy that the Claimant is entitled to recover in respect of unfair dismissal shall take place on **14 December 2018**.

141. If the parties require any further case management orders to be made, or require a reconsideration of the date for remedy hearing which has been listed without consultation of the parties, they should write to the Employment Tribunal specifying the nature of their application within 14 days of the date on which this Judgment is sent to the parties.

_____
Employment Judge Gumbiti-Zimuto

Date: 26 September 2018

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office