



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE F SPENCER

MEMBERS MS E THOMPSON
MS E WHITLAM

BETWEEN: MR P CRESSWELL
MS S FIORINI CLAIMANTS
AND
INDEPENDENT HOME SOLUTIONS CIC RESPONDENT

ON: 3rd, 4th, 24th and 25th October 2018

Appearances

For the Claimants: In Person

For the Respondent: Mr E McFarlane, consultant

REASONS

Written reasons for the Judgment given orally on 25th October 2108 given at the request of Ms Fiorini

1. This was a case of ordinary unfair dismissal, automatic unfair dismissal for making a protected disclosure and detriment on the grounds of making a protected disclosure. Ms Fiorini also claims unpaid holiday pay.
2. The Issues were unclear from the claim forms but were set out in a case management summary following a Preliminary Hearing on 29 June 2018.
3. Both Claimants claim public interest disclosure detriments and dismissal. The issues record that the disclosures relied on as set out in the list of issues were that:

- a. They had made a disclosure to Miss Goodall in or about July 2016 about a tendering process for an MS, and that the first and lowest quote was disregarded, and the contract awarded to the second bidder;
 - b. a protected disclosure about the same matter raised with Mr Thomas on 28th June 2017.
4. Those disclosures were said to tend to show a breach of a legal obligation in that they tended to show breaches of contract between the Respondent and the relevant council. (However, during the course of the hearing, it became evident that the Claimants were also alleging fraudulent behaviour by a fellow employee EG).
5. They claim that they were subjected to the following detriments on the ground that they had made such disclosures:
- a. Their confidentiality was breached
 - b. They were exposed to hostility from other members of staff, including an offensive remark by Luke and a death threat.
6. It is also their case that they were dismissed because they had made protected disclosures. (In the case of Ms Fiorini this is a constructive dismissal and in the case of Mr Cresswell an express dismissal.)
7. The Claimants also claim ordinary unfair dismissal. It is not in dispute that Mr Cresswell was dismissed. The Respondent say he was fairly dismissed for conduct. Ms Fiorini says that she resigned in response to a fundamental breach of the implied duty of trust and confidence on the part of the Respondent who
- a. Failed to provide a safe pace of work
 - b. Failed to investigate her protected disclosure
 - c. Breached her confidentiality that she had made a protected disclosure thereby exposing her to recriminations from other members of staff
 - d. Failed to address hostile comments from other members of staff
8. For the Respondent the Tribunal heard evidence from Ms Goodall, a director and former managing director, and also from Mr Haynes and Mr Rendle, who are the joint managers of the Respondent. We also heard evidence from both Claimants and, on their behalf, from Mr Thomas, a former non-executive director of the Respondent We had an agreed bundle of documents and a supplementary bundle provided by the Claimants.

Findings of relevant fact.

9. The Respondent is a “community interest company” in which all the employees are members. It provides equipment and adaptations to enable elderly and disabled individuals to remain in their homes. It acts largely on behalf of a number of local authorities, whose residents have applied to the council to for work or adaptations to be done on their homes. If the Council approves the

work, the council will pass the job to the Respondent who will assess the scope of the work to be done, get quotes or tenders for the work and choose a provider.

10. It employs some 12 or so staff, made up of technical workers, caseworkers administrative staff and managers. Both the Claimants were employed as caseworkers. They had relatively long service, both having commenced their employment in 2009.
11. In September 2016 Mr Cresswell spoke to Mr Haynes (who at that time was employed as finance officer). He was concerned about some documents which he believed provided evidence of malpractice by another employee EG. Mr Cresswell explained that he was concerned because a quote from a contractor (for adaptation to be made to the home of MS) had been backdated and increased to match that of a higher quote from another contractor. Mr Cresswell also told Mr Haynes that he had seen EG shredding some documents and deleting emails. He felt that he lowest quote had not been used and that EG was acting in collusion with the winning contractor. Mr Haynes went with Mr Cresswell to see Miss Goodall, who at that time was the managing director, to report it. Ms Goodall understood that Mr. Cresswell thought that EG had deliberately arranged or fixed a price with a contractor.
12. Ms Goodall obtained the file. She discovered that the tender was first won by Premier Adaptations Ltd, but shortly after winning the tender, the proprietor of that company had died. The council (the Respondent's client) was pushing for a quick job of work. EG had then asked a 2nd contractor to undertake the job at the same price as that had been quoted by Premier Adaptations. Ms Goodall told Mr Cresswell what she had found (although this was not documented). Mr Cresswell was not satisfied, but took matter no further at that time.
13. Seven months later, in April 2017, Ms Fiorini was off sick. On Monday 5th June 2017 Ms Goodall held a welfare meeting with her. Mr Cresswell attended as her companion. At the welfare meeting, Ms Fiorini gave Miss Goodall a letter dated 1st June (129) in which she raised issues about bullying and unacceptable behaviour by a former manager, LG, who had caused her great distress and upset. LG had resigned in July 2016.
14. More relevantly, her letter records that "*issues which have been highlighted and not resolved, lay heavily on my shoulders, I believe this could potentially affect everybody's jobs and the future of IHS which causes me great concern.*" The letter says that "*the tender processes clearly haven't been followed by some and has been open to abuse.*" "*Is it possible that work is being carried out covertly whist in work time. Should this not be investigated.*" Ms Fiorini also told Miss Goodall that "*external people think IHS is corrupt, referred to irregularities in the tender process, and a duty to ensure that taxpayers' money was not spent on personal gain. The accusations were vague, and no specific instances of malpractice were set out in the letter. However, Ms Fiorini and Mr Cresswell said that they would provide Ms Goodall with the evidence on Ms Fiorini's return*

to work. Ms Goodall agreed that she would share any evidence provided with Mr Thomas and Mr Mir, the non-executive directors.

15. Ms Fiorini returned to work on 15th June. We accept Miss Goodall's evidence that after she returned to work Ms Goodall asked both Claimants if they had put together the evidence of their concerns and was told that it would be forthcoming.
16. In fact, unknown to Ms Goodall, the Claimants had gone to see Mr Thomas on 13 June 2017. At that time Mr Thomas was a non-executive director. They raised their concerns about discrepancies in the tender documents with him. Mr Thomas asked for paperwork to evidence this and the Claimants provided a bundle of papers to him on 28th June (133).
17. Mr Thomas was vague in evidence about what the paperwork provided to him showed. In any event he did nothing about it until 17th August 2017 when he telephoned Miss Goodall to arrange a meeting for 22nd August 2017 at the Respondent's offices. Mr. Cresswell accepted that they had not told Mr Thomas what specific allegations they were making, and that they had just asked Mr Thomas to look at things.
18. At that meeting Mr Thomas said that he had been approached by some members of staff who had raised some concerns. Ms Goodall says, and we accept, that although Mr Thomas did not name the Claimants, she understood that he was talking about Mr Cresswell and Ms Fiorini, as they had previously alluded to concerns of that nature at their meeting in June. Mr Thomas did not name any clients, specific files or local authorities or bring any paperwork with him.
19. Mr Thomas told the tribunal that he felt that Ms Goodall was upset that the Claimants had come to him and not approached her first. That impression was obviously correct as after the meeting Ms Goodall sent a cross email to the Claimants (146A) complaining that they had not brought her the evidence but had taken it to Mr Thomas.
20. When Mr Thomas met with Miss Goodall, she had in fact already resigned as managing director and had accepted a part time job at another charity. She had agreed, however, that she would stay on at the Respondent until a new manager was appointed. On 18th August 2017 Mr Haynes and Mr Rendle had sent an email around all staff offering to stand jointly to fill the role and asking others to signal their intention to stand for the role so that it could be covered internally.
21. Although Miss Goodall had intended to stay until a new manager was appointed, once she learned that the Claimants had gone to Mr Thomas and

not brought their concerns to her she decided to go immediately. On the evening of 22 August, she left late and, before doing so, wiped her name of the whiteboard.

22. The next day staff were surprised to find that Ms Goodall was not there and that her name was no longer on the whiteboard. It was the subject of much discussion and staff became aware that Ms Goodall had left and did not intend to return.
23. Mr Rendle says that on 23rd August all the staff knew that Mr Thomas had visited Miss Goodall the day before and that many people it said they suspected that Mr Cresswell and Ms Fiorini had gone to Mr Thomas to further their issue against EG. The Respondent is a very small operation. We accept that it had become common knowledge that the Claimants had an issue with EG, that everyone in the office knew that the Claimants had concerns about EG's conduct. They believed that he was living beyond his means and questioned how he was able to afford his lifestyle. We accept that those concerns by the Claimants were genuine, but we also accept that they had not made any secret of them.
24. Mr Rendle spoke to Ms Fiorini, who was with Ms Stevenson, and said to them that they should put aside any differences they had and pull together for the good of the company. The Claimant says that Mr Rendle "basically" told her to stop her personal vendetta against EG." We do not accept that. However, we do accept that Mr Rendle had directed his comments about pulling together to Ms Fiorini.
25. It is the Claimants' case that the attitude of the other employees to both of them changed after Mr Thomas' visit and that they were being blamed for raising concerns.
26. The Claimants believe that on 22nd August Miss Goodall had told everyone in the office after Mr Thomas visit that they had blown the whistle. They believe that she had breached their confidentiality, and it was this which caused the attitude of staff within the office to change. Miss Goodall denies telling any of the staff about the content of her meeting with Mr Thomas.
27. On the balance of probabilities, we do not accept that Ms Goodall told the other staff about the content of her meeting with Mr Thomas. The Claimants have made that assumption because they noticed a change in the atmosphere in the office. In the tribunal's view while there may have been a change in the atmosphere in the office, this was just as likely to be attributed to the fact that Ms Goodall, who was the managing director of the Respondent had walked out without explanation. In such a small organisation staff are bound to talk about why that was and to make a link with the meeting the previous day with Mr Thomas. We find that while most of the staff made an assumption that the meeting was about the Claimant's concerns about EG, that assumption was not

arrived at as a result of any breach of confidentiality on the part of Ms Goodall but because it was already common knowledge within the organisation that the Claimants had concerns about EG.

28. On 25th August (the Friday before a bank holiday) Luke, Ms Goodall's son, said to Mr Fiorini "see you next Tuesday". The Claimant believed that this was offensive "from his tone and the look on its face". A colleague commented that that wasn't very nice.
29. Ms Fiorini complained to Mr Thomas on 28th August (150) about the remark which Luke had made but Mr Thomas did not report it further. The first time that Mr Rendle was aware of this allegation was on 22nd November (see below). We have not heard from Luke and on balance, given that Ms Fiorini reported this to Mr Thomas within a few days, we accept that that remark was made and that it was intended to be offensive.
30. On 19th September there was a secret ballot of employees at the Respondent in which Mr Rendle and Mr Haynes were appointed as joint managers of the Respondent. Ms Fiorini accepts that she voted for that arrangement.
31. The conversation which Mr Thomas had had with Ms Goodall on 22nd August was a vague and non-specific. Mr Thomas had said he would provide the documentation which he had received from the Claimants but in fact he did nothing until 4th October when he asked for a further meeting of the directors. (Although Miss Goodall had resigned, she remained a non-executive director of the Respondent.) That meeting took place on 17th October at Ms Goodall's house, but the 3rd director, Mr Mir did not attend. It was at that meeting that Miss Goodall was given the documents that had been given to Mr Thomas by the Claimants in June, some 4 months earlier. The bundle consisted of emails and drawings mostly relating to projects that EG had been involved in and was about 8cms thick.
32. Mr Thomas had prepared an agenda or list of concerns for the meeting (170) which referred, amongst other matters, to "irregularities in invoicing", "inadequate record-keeping" and "conceivable fraudulent activities undertaken by staff and contractors". For some unknown reason, at the end of that meeting Mr Thomas took that list of concerns away. Ms Goodall chased him for a copy of the list so that they could try to begin an investigation but Mr Thomas did not respond.
33. EG resigned on 12th October (165). He had obtained another job. He said he was fed up with the "whispering behind his back". On 17th October, however, EG said that he had changed his mind and would now stay with the Respondent. There was a spontaneous round of applause from other staff which, Mr Cresswell told us "really annoyed him". The Claimants walked out.

That afternoon Ms Goodall showed Mr Rendle the bundle of documents that had been passed to her.

34. The following day, 18th October, Mr Rendle asked to see EG in the in his office. He told EG that concerns had been raised about his financial integrity and he might prefer to move on to the new job rather than go through a protracted investigation. Mr Rendle did not say who had raised the concerns but EG already knew. EG was angry, referred to “*those two out there*” and said, “*I could kill them*”. Mr Rendle says that this was not said in an angry way but in a frustrated way. Nonetheless we are satisfied that the words were said in an angry way and that he was speaking loudly enough for Mr Cresswell and Ms Fiorini to have overheard his comments. On balance, however, we do not find that he said “I will kill them” as postulated by the Claimants but that he said that he “could kill them” or words to that effect.
35. Ms Fiorini emailed Mr Thomas (178) on 19 October complaining about a breach of confidentiality and about having heard EG saying that “I’ll kill them”. However, Mr Thomas did not bring this email to the attention of the management and the Claimants did not raise it with management until 22nd November.
36. Mr Cresswell did not come to work the following day. He texted to say he was not coming into work, but not why. In fact, he did not return to work again before he was dismissed in March 2018. Miss Fiorini worked on the 19th, was off sick on 20th October, worked 4 days of the following week and then went off sick on 25th October and did not return until her resignation.
37. Ms Fiorini had sought assistance from her union representative as early as June 2017. She met the union in September for the first time. On 19th October the union representative put forward a settlement proposal (176-178).
38. On 30th October Miss Goodall, Mr Mir, Mr Thomas, Mr Haynes and Mr Rendle met to talk about the disclosures. Mr Thomas said he didn’t understand the documents and could not do the investigation. Mr Thomas agreed to contact the Claimants to ask them to explain their concerns or clarify how the documents provided evidenced their concerns and how they related to the points in Mr Thomas’s agenda. The Claimants subsequently said they were not prepared to expand and clarify those concerns. In evidence they said that they were not prepared to do so because they had “lost faith in the management”, but this was not the best way to ensure that their concerns were understood.
39. In the meantime, Mr Rendle sought to investigate the documents, without any further assistance from the Claimants. On 9th November he provided the results of his initial investigation to Mr Thomas, Mr Mir, Miss Goodall and Mr Haynes (192). We consider that he produced an honest appraisal of the issues. He concluded that there were two files which warranted further investigation, but that the remaining ones did not reveal evidence of any impropriety, although

there were some errors (caused by laziness), and some promises that the Claimants themselves had made to clients which were not true.

40. Mr Cresswell remained off work. He did not provide any sick certificates. Miss Fiorini also remained off work but provided sick certificates. It became clear to the Respondent via text messages from Mr Cresswell that their absence from work was due to the concerns that they had raised. Mr Haynes and Mr Rendle therefore asked to meet the Claimants at the Fox Revived pub on 22nd November 2017 to discuss them. (197-205) This meeting was covertly recorded by Ms Fiorini.
41. At that meeting the Claimants again raised old issues about LG (who had resigned in July 2016) and maintained that their confidentiality had been broken, making their presence in the office intolerable and that there was not a safe working environment due to having overheard EG making “a death threat” against them. Ms Fiorini also complained about the Luke comment. This was the first time that anyone other than Mr Thomas at the Respondent was made aware that they considered EG to have made a “death threat” or the Luke comment.
42. Mr Cresswell told the directors that he wanted to work from home and that he would not return to work until an investigation had been done “to his satisfaction”. Ms Fiorini said she needed a “safe working environment”. Both also remained aggrieved by the situation with LG who left in 2016, Ms Fiorini saying that LG had made her life hell and that this was condoned by Ms Goodall.
43. Following that meeting, Mr Rendle asked EG to provide a personal statement to the Claimants, about the reference to the words that “he would kill them.”. (210) In that statement EG said he did not recall saying that, and it was not in his nature to do so. He said that his only intention was to come to work and not make unnecessary trouble with anyone and that he would not allow his personal feelings to detract from his job and how he interacted with work colleagues.
44. Mr Rendle sent the outcome of his investigation to the Claimants on 28 December 2017 (230). This contains an explanation of all of the items raised. In respect of the MS case he concluded that there was no evidence of impropriety. He did accept that the Respondent’s tender process had not been of the high enough standard for quite a long time and that it was a cause for concern, but he also concluded that he could find no evidence of impropriety or wrongful gains by EG. He noted that following the introduction of an electronic portal system, those general issues had been addressed, and that from 1st January the tender process would be handled by the finance team. Despite the comment that Mr Rendle made to EG on 17th October (which might suggest that Mr Rendle wanted to provide EG with a way out), we were impressed with Mr Rendle as a witness, and we are satisfied that Mr Rendle had conducted an honest and conscientious investigation into the matters that the Claimants had raised, and that he had found no impropriety.

45. As regards their concerns about a safe working environment he had spoken to EG, who had said that he could not recall the words alleged to have been said and if he did say anything like that, he did not mean them. He said that no-one had given EG the names of those who had raised concerns, but that it would have been apparent who had raised them. There was no breach of confidentiality.
46. Mr Cresswell had not been at work since 19th October and had not sent any sick certificates. The Respondent had chased him several times for sick certificates. (195). Despite the fact that he had not provided sick certificates the Respondent had continued to pay him his full salary. In his letter of 28 December 2017 containing the outcome of the investigation Mr Rendle instructed Mr Cresswell to return to work on 2 January 2018.
47. A similar letter was sent to Ms Fiorini. However, as she had been providing medical certificates, she was told that, should she not return to work in the New Year, a welfare meeting would be arranged. Neither returned to work.
48. On 4 January 2018 the Claimants lodged a formal grievance. They stated that they had made protected disclosures (though again no specific information was referred to) and that "*Since making that disclosure our confidentiality has been breached and as a result we have faced bullying and harassment from our colleagues and manager and most troubling an audible death threat from EG on 18th October 2017*" (236). Mr Rendle acknowledged the grievance on 9th January 2018 (240) and invited both to a meeting on 17th January to discuss it. (This was then rescheduled for the 6th February to enable the Claimants' trade union representative to attend.)
49. The Respondent wrote to Mr Cresswell on 9th January 2018 asking him to return to work on 15th January and saying that any further absence after that date would be regarded as an authorised and unpaid. Mr Cresswell did not return to work.
50. The Respondent wrote to him again on 22nd January (247) asking him to attend an investigatory meeting on 29th December 2018 to discuss his absence. (The date was clearly an error). On 30th January a second letter was sent asking him to attend a disciplinary meeting on 9th February to discuss his unauthorised absence from work. Mr Cresswell did not attend the disciplinary meeting scheduled for 9th February
51. Both Claimants attended a grievance meeting on 6 February 2018. Mr Cresswell wanted to work from home. Mr Rendle said he would think about it but wrote refusing that request on 16 February 2018 (263) saying that this would not be practical.
52. On 21st February Mr Rendle discovered that Mr Cresswell was working with one of the contractors appointed by the Respondent. On 22nd February Mr Rendle asked Mr Cresswell for an explanation (275). Mr Cresswell responded

confirming that he had been working for other contractors, since the Respondent had stopped paying him from the 16th January.

53. In the meantime, the Claimants' grievance was investigated by Deminos, the Respondent's HR advisers. On 26th February Mr Bechervaise of Deminos wrote to the Claimants concluding

- a. That there was no breach of confidentiality. EG had become aware that the Claimants were alleging irregularities in his work from conversations he had overheard between the two of them.
- b. On the balance of probabilities, while a comment about killing them was made by EG, this was not a death threat and the words were a figure of speech.

54. On 6th March Mr Cresswell was invited to a disciplinary hearing on 9th March to discuss his unauthorised absence from work during which he had been working for a contractor. Mr Cresswell responded to that invitation by an email (290) which reads (sic)

"Dear Adrian, "Are you taking the piss you have answered none of the required requests from our grievance and you want to investigate me I have had enough of your attitude I will not be attending your meeting as per email I will be taking to this my solicitor and local papers and local councils I have had enough of your covering up and will be asking for written statements from all members of staff which I required to be signed stating they were not informed that we disclosed information."

Mr Cresswell did not attend the meeting which was held in his absence. Mr Rendle wrote to Mr Cresswell the same day dismissing him for gross misconduct (being absent from work without authorisation and accepting paid work elsewhere) with effect from 22nd March. On 12th April, Mr Cresswell lodged an appeal (332) but then failed to attend the hearing on 30th April.

55. Ms Fiorini continued to be absent from work and sent sick certificates to the Respondent. She remained on full pay. By letter dated 11 April 2018 she resigned "on the grounds of constructive dismissal" (331) saying that she "was unable to return to her job as caseworker due to

- *Whistleblowing/breach of confidentiality*
- *The unsafe work environment*
- *The death threat made against me*
- *Breach of duty of care in management/inconsistent practices*
- *The effect this has had on my mental well-being".*

Although the letter of resignation does not refer to any period of notice, the Respondent accepted her resignation with effect from 9th May 2018, allowing for a period of notice, during which she remained at home on sick pay.

Conclusions

Did the Claimants make protected disclosures?

56. The first issue for the Tribunal was whether the Claimants had made protected disclosures as defined in the legislation. The protected disclosures relied on as set out in the list of issues were that:
- a. They had made a disclosure to Miss Goodall in or about July 2016 about a tendering process for an MS, that the first and lowest quote was disregarded, and the contract awarded to the second bidder;
 - b. A protected disclosure about the same matter raised with Mr Thomas on 28th June 2017.
57. Section 43 of the Employment Rights Act 1996 sets out the definition of a protected disclosure. To summarise, a disclosure is protected if a worker discloses information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show (inter alia) 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 to comply with any legal obligation to which he is subject.
58. In order to qualify for protection, the disclosures must have sufficient factual content and specificity such that they can be said to “tend to show” that there has been a breach of a legal obligation or a criminal offence. (*Kilraine v London Borough of Wandsworth 2018 EWCA Civ 1436*)
59. In *Eiger Securities LLP v Korshunova UKEAT/0149/16* the EAT held that those claiming whistleblowing protection will have to identify the obligation that has or might be breached. “The identification of the obligation does not have to be detailed or precise, but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.”
60. Guidance on how to approach the question of whether a protected disclosure has been made was given in *Blackbay Ventures Ltd v Gahir 2014 IRLR 416*
- a. identify each disclosure by reference to date and content;
 - b. identify each alleged failure or likely failure to comply with the legal obligation and/or that matter giving rise to the endangering an individual's health and safety;
 - c. Save in obvious cases the source of the obligation should be identified by reference to statute or regulation;
 - d. determine whether the claimant had the necessary reasonable belief;

- e. where a detriment short of dismissal was alleged, identify the detriment and the date of the act or deliberate failure to act;
 - f. determine whether the disclosure was made in the public interest.
61. Mr Cresswell disclosed to Miss Goodall by Mr Cresswell in or about July 2016 specific information about a particular contract which had been awarded. He believed that this was in breach of the Respondent's contractual obligations to the Council and that EG might be involved in some way in "backhanders." This was a reasonable belief at that time, given the backdating and other matters. This disclosure was made in the public interest.
62. In relation to the information provided on 28th June by both Claimants to Mr Thomas the Claimants now rely only on the MS contract issue. Although they did not precisely identify this legal obligation to the Council, Ms Fiorini said that EG had "falsely inflated the quote which was illegal under the tender" and that "extras" had been included on invoices in circumstances in which the Claimant's alleged that they should not have been included. The Claimants had provided a bundle of paperwork which they believed tended to show that there had been a breach of a legal obligation to the Council. We find that this was a reasonable belief and that the disclosures were in the public interest.
63. We are also satisfied that the Claimants disclosed "information" with sufficient specificity to meet the Kilrairie test and that they made protected disclosures about the MS contract within the meaning set out in section 43.

Were the Claimants subjected to detriments or dismissed because they had made those disclosures?

64. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by any act, or failure to act, by his employer, done on the ground that the worker has made a protected disclosure. A worker also has the right not to be subjected to any detriment by another worker of his employer done in the course of the other workers employment on the ground that the worker has made a protected disclosure.
65. Section 48(2) provides that in a case of detriment for making a protected disclosure it is for the employer to show the ground on which any act or deliberate failure to act was done.
66. Section 103A of the ERA provides that if the principal reason for the dismissal is the fact that an employee made a protected disclosure then that dismissal is automatically unfair.

"An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

67. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower, (*Fecitt v NHS Manchester 2012 IRLR 64*), whereas section 103A requires the protected disclosure to be "the principal reason" for the dismissal. The former however is not a "but for" test.
68. Section 48(3) of the ERA provides that an employment tribunal shall not consider a complaint of detriment for making a protected interest disclosure unless it is presented "*before the end of the period of 3 months beginning with the date of the act, or the failure to act, to which the complaint relates or, where that act or failure is part of a series of similar acts or failures the last of them*", There is a limited discretion to extend time for such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of the period of three months.
69. We deal first with the detriments. The detriments relied on (see paragraph 6.4 of the list of issues) is that (i) their confidentiality was breached by Ms Goodall and (ii) they were exposed to hostility from other members of staff, in particular the Luke comment.
70. In relation to the breach of confidentiality we have already found that Ms Goodall did not tell other members of staff that the Claimants had been raising concerns about EG. We have found that after Mr Thomas' visit to Ms Goodall on 22nd August, staff in the office arrived at their own conclusions. The Claimants had not made a secret of their concerns about EG.
71. The Claimants refer to being exposed to hostility but the only examples that we have been given are the comment from Luke and what the Claimants refer to as the "death threat". Again, as set out on the facts, we accept that Luke said "see you next Tuesday" and having not heard from Luke and, on the balance of probabilities, we find that this was intended to be offensive. We infer that he made this comment because he was aware that his mother had been very upset by the fact that the Claimants had gone to see Mr Thomas (as she saw it) behind her back, rather than coming to her with information about their concerns. Arguably this was not on the ground that the Claimants made protected disclosures but because he felt his mother had been bypassed, but on balance this is sufficiently linked to (or influenced by) the protected disclosure that we find that this comment was made on the ground they had made protected disclosures.
72. In relation to EG's remark "I'll kill them", we do not accept that this was a death threat. We do not accept that the Claimants genuinely feared for their lives. (Although the Claimants told Mr Thomas what EG had said, neither of them reported this to any executive member of management at the Respondent until nearly three months later on 22nd November at the meeting at the Fox Revived pub). The Claimants accepted that EG had never been aggressive or physical throughout the time that they had worked together. We do not accept that the Claimants genuinely felt that they would be in danger if they returned to work in

the office. The remark was made to Mr Rendle in circumstances of stress and behind closed doors. It was obviously a figure of speech. The Claimants were aware of this. It was not intended to be overheard by the Claimants and it is not credible that they genuinely feared for their safety as a result. EG had been aware of their hostility towards him for some time and there had never been any previous issues.

73. In relation to the Luke comment, while we have accepted it was a detriment on the ground of the protected disclosure, this complaint is out of time. It was made on 25th August. Ms Fiorini contacted ACAS on 12 January 2018 (and the claim was submitted on 26th April). The time limit had by then expired. As she was in contact with her union from October, we cannot say that it was not reasonably practicable for her to have presented her claim in time and her complaint is therefore out of time.
74. Was the principal reason for Mr Cresswell's dismissal that he made protected disclosures? If it was then his dismissal is automatically unfair (Section 103A of the ERA above). The Respondent says the principal reason for his dismissal was gross misconduct, namely his unauthorised absence from work and working elsewhere without permission.
75. We do not accept that Mr. Cresswell was dismissed because he made protected disclosures. Mr. Rendle had spent a considerable amount of time investigating the disclosures. The Respondent had sought to understand their concerns, without any active assistance from the Claimants. When Mr. Cresswell absented himself without leave they continue to pay him his full salary while the investigation was continuing and then until 16 January some 2 weeks after the outcome of the investigation had been communicated to him. This was an employer who wanted him back at work, not one who wanted him gone. He was dismissed because he was absent from work without leave.
76. In relation to Ms Fiorini we do not accept that the circumstances of her resignation amount in law to a dismissal (see below) and her claim under section 103A fails.

Ordinary unfair dismissal- Mr Cresswell.

77. All employees with over two years' service have the right not to be unfairly dismissed. It is for the Respondent to show that the reason for an employee's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Misconduct is a potentially fair reason for dismissal.
78. If the employer can establish that the principal reason for dismissal was a genuine belief in the Claimant's misconduct, then the Tribunal will consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the

substantial merits of the case.”

79. We are satisfied that the reason for Mr Cresswell’s dismissal was misconduct. Mr Cresswell does not deny that he had been absent from work and had not provided sick certificates. He does not deny that he had accepted paid work elsewhere.
80. We are also satisfied that dismissal was a fair response to that conduct. It was plain that Mr Cresswell no longer considered himself to be bound by the terms of his contract of employment. He had ignored repeated requests to provide sick certificates. He was plainly in fundamental breach of his contract. The Respondent had continued to pay Mr Cresswell, notwithstanding his unauthorised absence. They had made a number of attempts to get him back to work. The Claimant’s email to Mr Rendle of 6th March was extremely hostile. No employer could continue to employ an employee in the circumstances.
81. The Claimant was given an opportunity to have a hearing but chose not to attend any of the disciplinary meetings. Although he appealed, he chose not to attend his appeal hearing.
82. We are also satisfied that, given this conduct, the Respondent was entitled to dismiss Mr Cresswell without notice
83. Was Miss Fiorini dismissed? Ms Fiorini resigned on 11th April and it is her case that the circumstances of her resignation were such that she should be taken to have been constructively dismissed by the Respondent.
84. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.” It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; (ii) the breach must be an effective cause of the employee’s resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.
85. Ms Fiorini claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important; conduct which destroys trust and confidence it is not in breach of contract if there is reasonable and proper cause. It is the impact of the employer’s behaviour (assessed objectively) on the employee that is significant - not the intention of the employer (Malik v BCCI [1997] IRLR 462).
86. We are satisfied that there was no fundamental breach of contract. Ms Fiorini, together with Mr Cresswell, had raised concerns about EG and about the tendering processes at Respondent. We accept that these were genuine

concerns held by the Claimants. However, although there was some delay in investigating their concerns, that delay was caused by Mr Thomas not passing on the documents which the Claimant had provided to him to the company for over 3 months. In any event, it was not the delay which led to Ms Fiorini's resignation, as she did not in fact resign until after an investigation had been undertaken and concluded.

87. Once the papers had been passed to Ms Goodall she took action. Mr Rendle was tasked with investigating. The Claimants are not satisfied with the outcome of that investigation but have not been able to explain in what way the investigation was deficient. We are satisfied that Mr Rendle undertook the investigation in good faith, that he sought to understand what the Claimant's concerns were and to deal with them. He sought to reassure the Claimants about EG by asking him to write a personal statement. We do not accept that it would be dangerous for the Claimants to have returned to work or that their personal safety would have been at risk. We do not accept that Ms Goodall breached their confidentiality. Nor do we accept that the Respondent did not provide her with a safe place of work.
88. In short, we do not accept that the Respondent had breached the implied duty of trust and confidence or any other implied or express term of Ms Fiorini's contract such as would entitle her to resign and claim constructive dismissal. As for the Luke comment, Luke was not a member of management and Ms Fiorini did not resign until some 8 months later, by which time she had affirmed the contract. In any event we do not consider that this was the reason why she resigned and note that it was not specifically referred to in her resignation letter.
89. For those reasons the claims of unfair dismissal fail and are dismissed.

Holiday pay

90. Finally, Ms Fiorini claims unpaid holiday pay. It is not referred to in her claim form, or in the list of issues, but the Tribunal accepted that we would deal with this by way of amendment to the claim. Ms Fiorini is aggrieved because in the letter acknowledging her resignation Mr Rendle noted that she had accrued 28 days unused holiday which would be paid in the final payment. However, after checking the entitlement again the Respondent only paid her entitlement for the leave year in which she resigned (3.21 days) plus a further 5 days carry forward, expressed to be discretionary.
91. The Respondent's holiday year runs from 1st April to 31st March. Her contractual entitlement was 30 days. However, contractually carry forward is not permitted under the contract without prior arrangement (or where the employee was on statutory absence such as maternity leave). However, it also provides: "*If a period of sickness prevents an employee from taking the minimum leave due under European law as implemented under the Working Time Regulations 1998*

then that leave will not be forfeited unless you have had an opportunity to take leave and have elected not to do so.”

92. Ms Fiorini took 11 days holiday in the previous holiday year (plus 9 bank holidays). The Respondent concluded that she had been paid her EU entitlement (20 days) to pay for holiday accrued but not taken.
93. The claim for holiday pay is dismissed.

Employment Judge F Spencer
Dated: 8th March 2019

NB Since the oral reasons were given and before these written reasons were finalised, Ms Fiorini asked for a reconsideration of the holiday pay element of the decision. This is dealt with separately.