EMPLOYMENT TRIBUNALS

Claimant: Mr M Bassnett

Respondent: Nutriculture UK Ltd

HELD AT: Liverpool **ON:** 18, 19, 20, 21, 22, February 2019

BEFORE: Employment Judge Barker
Mrs J L Pennie
Mr W K Partington

REPRESENTATION:

Claimant: Ms A Tyson, Solicitor
Respondent: Mr M Mensah, Counsel

JUDGMENT

The unanimous decision of the Tribunal is that the claimant's claims of automatic unfair dismissal, detriment by reason of having made a protected disclosure and breach of contract fail and are dismissed.

REASONS

Issues for the Tribunal to decide

1. The issues for the Tribunal to decide were as follows:

(i) Whether the claimant made disclosures to his manager Martin Petrie on two or three occasions in October and November 2017 that amounted to protected disclosures falling within the definition set out in section 43B of the Employment Rights Act 1996:

(ii) Whether the claimant believed that the disclosures tended to show one or more of the matters in section 43B(1) Employment Rights Act 1996:-

(a) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (section 43B(1)(b));

(b) that the health or safety of any individual has been, is being, or is likely to be endangered (section 43B(1)(d));

(c) that the environment has been, is being, or is likely to be damaged (section 43B(1)(e)); or

(d) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed (section 43B(1)(f)).

(iii) Whether these disclosures of information were disclosures which showed those matters listed above in the reasonable belief of the claimant;

(iv) Whether the claimant reasonably believed that his disclosures were made in the public interest;

(v) Whether the making of one or more of these disclosures was the reason, or the principal reason for the claimant's dismissal such that his dismissal is automatically unfair, contrary to section 103A of the Employment Rights Act 1996;

(vi) Whether the claimant was subjected to one or more detriments for having made these disclosures contrary to section 47B of the Employment Rights Act 1996. The claimant alleges that he was subjected to the following detriments:

a. Being made to feel intimidated, threatened and that he could potentially lose his job;

b. Suffering anxiety and stress at work;

c. That he had responsibilities stripped from him;

d. That he was not allowed to visit shops to speak with customers;

e. That he was not permitted to develop new product ideas;

f. That he was not permitted to visit a conference;

g. That he was bullied into not filing a grievance;

h. That he had his confidence severely knocked;

i. That he was required to attend the Jobcentre weekly and obtain a taxi licence;

j. That his depression worsened;

k. That he was obliged to get the bus;

l. That his relationship with his partner was damaged;

m. That he was generally harassed by Mr Petrie;

n. His first dismissal on 13 November 2017 which was subsequently rescinded by Mr Petrie.

(vii) Whether the claimant is entitled to notice monies. The respondent says the claimant was dismissed for gross insubordination which amounts to gross misconduct and he is therefore not entitled to notice monies.

2. The Tribunal heard evidence from the respondent's Operations Director, Martin Petrie, who was the claimant's line manager. The Tribunal also heard evidence from Glyn Jones, the Managing Director of the respondent, Paul Williams, the respondent's IT Director and Jacqueline Hocter, the Product Director of the respondent. The Tribunal was supplied with a witness statement for Andrew Ball, Warehouse Operative at the respondent, but Mr Ball did not attend the Tribunal to give evidence and Mr Ball's witness statement has been considered but not given the same weight as if he had attended the Tribunal to give evidence in person. The claimant gave evidence on his own behalf.

3. The Tribunal notes that, of the evidence available to it, namely the agreed hearing bundle, the witness statements and the oral evidence from those witnesses who were cross examined, there were omissions, errors and inconsistencies from all sources of evidence. There were errors in the claimant's witness statement concerning key dates, inconsistencies between the written and oral evidence of the respondent's witnesses, omissions from the agreed bundle and inconsistencies between witnesses' written evidence and the oral evidence that they gave to the Tribunal.

4. Elements of both parties' evidence were found to be unreliable. It became apparent during the course of the hearing that neither Mr Petrie, nor Mr Williams nor the claimant himself were entirely reliable witnesses. Mr Jones and Miss Hocter, were, we found, straightforward and reliable witnesses. The presentation of the evidence in this manner did not assist the Tribunal in making its findings of fact.

5. The Tribunal took time carefully to consider the documentary evidence and the witness statements. The following findings of fact are based upon that careful deliberation.

6. A number of issues were raised in evidence by the parties that were not directly relevant to the issues that the Tribunal had to decide. Where this judgment and reasons is silent on those issues, it is not because they have not been considered but that they were not sufficiently relevant to be included in these findings of fact.

Findings of Fact

7. The claimant was employed by the respondent from 15 May 2017 until 16 November 2017 as a chemist. The claimant told the Tribunal that in approximately August or September 2017 his line manager, Martin Petrie, promoted him to "Nutrient Production Manager", although this was not formally documented. We accept the claimant's evidence in this regard, as Mr Petrie's letter to him dated 13 November 2017 and referred to at paragraph 47 onwards refers to the claimant as "*management*".

8. The respondent's business is the manufacture of vacuum formed plastics for gardening purposes and the manufacture of plant nutrients. In 2015 the respondent acquired the "Plant Magic Plus" business from a competitor. At the time, the claimant's predecessor, Tom Purden, was transferred to the respondent by means of a TUPE transfer and was employed as a chemist, in the role that the claimant subsequently fulfilled.

9. "Root Stim", a plant nutrient, was an important product from the Plant Magic Plus range. The respondent told the Tribunal that the Root Stim product had been on the market for eight years and that the respondent produced it according to exactly the same formula as the previous owners of Plant Magic Plus.

10. Mr Petrie told the Tribunal that when the respondent's previous chemist left the business, the respondent struggled to recruit a suitable replacement. The claimant was put forward for interview by a recruitment consultant who had been given the chemist's job specification by the respondent. The claimant does not have an academic background as a chemist. He has an undergraduate degree in Biology and an MSc in Industrial Biotechnology. The claimant told the Tribunal that he had only studied Chemistry to GCSE level.

11. From the evidence given by the claimant at the Hearing, the Tribunal finds that the claimant was not particularly enthusiastic about his new role and did not consider it to be particularly well suited to his background and qualifications. However, as he told the Tribunal, he needed a job having recently graduated from university.

12. Although the claimant signed a contract of employment, the claimant's evidence to the Tribunal, which we accept, was that he had never been given a complete job description and although Mr Petrie told the Tribunal that one had been given to the recruitment consultant, there was no evidence that this had been passed on to the claimant. We accept that at the outset of his time working with the respondent, he was not fully aware of the scope and extent of his duties.

13. Both parties told the Tribunal that the basic elements of the claimant's job were to mix together chemicals which were then placed in a large tank and left to ferment for a number of weeks. A warehouse operative then took the fermented product and decanted it into bottles which were subsequently sold. As the claimant's primary role was simply to mix these chemicals, Mr Petrie told the Tribunal that the role would most likely have become routine and unstimulating after about six months. The Tribunal accepts his evidence in this regard.

14. The claimant disclosed a series of WhatsApp phone messages to the Tribunal that were sent between him and Andrew Ball and a further series of messages between him and Paul Lloyd, another employee of the respondent. We note that the tone and content of these messages suggests that until the end of October 2017, the claimant was not closely supervised while at work.

15. Although the claimant told the Tribunal that he was "*busy with his 9 to 5 job*", that is, mixing the chemicals, at other times he told the Tribunal that he was keen to move into the product development side of the respondent's business and suggested several times that he had wanted to get involved in developing new product ideas with Jacqueline Hocter.

16. Ms Hocter's evidence was that the claimant was a frequent visitor to her department and that they talked through his ideas for new products quite regularly. The Tribunal therefore finds on the balance of probabilities that the claimant was not particularly busy, nor did he find the basic elements of his role particularly taxing.

17. Furthermore, the claimant by his own admission and in his witness statement describes himself as "*trying to impress Martin* [Petrie]". The claimant told the Tribunal that he had left school with four GCSEs and had worked very hard to reach a position where he had graduated from university with an MSc degree. Mr Petrie told the Tribunal that this was something that the claimant had discussed with him at interview and that he had found it very impressive that the claimant had, by his own account, been a "*slow starter*" but had graduated with a good set of qualifications. Mr Petrie had admired the claimant's attitude. We therefore find that the claimant was rightly proud of his achievements and was ambitious to move from the product mixing role into the product development role that matched more closely with his interests in the field of biology and that he was keen to impress his new manager and impress on him the extent of his knowledge in the field.

18. The claimant told the Tribunal that prior to beginning work with the respondent he had been attacked while out in public and had undergone facial reconstruction surgery, including surgery on his eye. The claimant told the Tribunal that he was suffering with Post Traumatic Stress Disorder ("PTSD") as a result. He told the Tribunal that this affected his memory and his confidence and that it caused him to react emotionally when under pressure.

19. He told the Tribunal that he had informed the respondent of this when he started work with them, but Mr Petrie disputed that the respondent had ever been told that the claimant had PTSD. He told the Tribunal that on the medical form which the claimant had completed when starting work with the respondent, he had disclosed that he suffered from anxiety and depression but had not elaborated on the cause of that, or notified the respondent that he had PTSD. That medical form was not before the Tribunal in evidence. No medical evidence had been presented by the claimant to support his evidence that he suffers from PTSD and while the Tribunal accepts that the claimant was attacked and has ongoing issues as a result, the precise nature and effect and extent of those issues was not something that the Tribunal has been able to determine or place particular weight on due to a lack of supporting evidence. The Tribunal also accepts Mr Petrie's evidence that the respondent was never told specifically that the claimant was suffering from PTSD during his employment.

20. In early October 2017, on a date said by the respondent to be 6 October 2017 but on a date that the claimant is unable to recall, the claimant told Mr Petrie that contrary to its normal appearance, the batch of "Root Stim" that was fermenting at the time had developed an unusual mould or fungus on it. The claimant said in his witness statement that in addition to telling Mr Petrie about the mould/fungus on the product, he had also raised concerns with Mr Petrie that two of his colleagues, Andrew Ball and Craig Hunt, had become ill and that he was concerned that their illnesses had been caused by handling Root Stim.

21. Although this conversation in early October was initially pleaded by the claimant as his first protected disclosure, during his cross examination the claimant told the Tribunal that he was no longer relying on this disclosure as being his first protected disclosure. On the balance of probabilities, the Tribunal finds that the claimant raised concerns about the Root Stim product with Mr Petrie but did not provide him with any detail about how the product had affected the health of those who handled it on that occasion. The Tribunal also accepts that on 6 October 2017 the claimant told Mr Petrie that he would monitor the situation and report back any further concerns.

The events of 27 October 2017

22. On 27 October 2017 at 9.56 am, the claimant sent an email to Mr Petrie, a copy of which was before the Tribunal in evidence, which had the subject heading "Root Stim (potential hazard)". The email was also sent to Ms Hocter and Stephen Walker who was the other chemist at the respondent. The email states:

> *"Hi Martin,*
>
> *It has come to my attention that there may be a potential health risk whilst handling Root Stimulant and I think we really need to discuss this. Both Craig and AB* [Andrew Ball] *have been ill on separate occasions the following day after handling this product, I understand this may be a coincidence however from what they have described in both cases is a saw (sic) throat and cough could potentially be a result of a fungal containment that is definitely present in the IBC. I have briefed them both on health and safety and the importance of washing hands regularly, especially when handling any organics. As this product is left to ferment for three plus weeks, it has the potential to harbour some nasty organisms in there, we do treat the product with a quick kill and long lasting acticide but up to now the effectiveness of this has not been tested.*
>
> *I am preparing samples to be sent off for microbial analysis to identify the organisms present in the product and to get an idea of the level of contamination that is measured in colony forming unit or CFL. This will give us an idea of the potential risks associated with this product.*
>
> *I will arrange appropriate PPE [Personal Protective Equipment] when I have a better understanding of what is actually inside the product."*

23. The respondent's evidence was that Mr Petrie visited the claimant to discuss this matter the same day. Mr Petrie accepts that he told the claimant that he needed to get some evidence to support his claims. The claimant told the Tribunal that he had shown Mr Petrie a photograph of the mould at the top of the tank and that Mr Petrire had told the claimant that this was "*not evidence*".

24. Mr Petrie told the Tribunal that he and the claimant had disagreements during the claimant's employment as to the extent of Mr Petrie's knowledge of technical matters. Mr Petrie said that the claimant was often willing to tell him, the operations director, that he did not know enough on a particular subject. When asked about how or why he might have felt the need to explain matters to Mr Petire, the claimant told the Tribunal that he was particularly skilled at explaining things to people at a very basic level, and cited his experience working with children as an example. We find that pointing out gaps in Mr Petrie's knowledge was something that the claimant did not shy away from doing. We find that this behaviour on the part of the claimant was likely to cause Mr Petrie to become frustrated with him and consider his behaviour to be disrespectful, in that the claimant's behaviour did not acknowledge Mr Petrie's seniority or experience within the company.

25. The claimant told the Tribunal because this was his area of expertise, that is, the subject covered by his MSc, that he understood how a fermentation process in an open topped tank may expose those around the tank to airborne spores that may result in illness. The Tribunal finds that the claimant thought that Mr Petrie did not appreciate the possible dangers that may be inherent in this fermentation process and that as this was the claimant's area of particular knowledge, that he believed it was his duty to educate Mr Petrie. We also find that, by this stage in the claimant's employment with the respondent, he was looking for ways in which to raise his profile and demonstrate his knowledge and potential to Mr Petrie. The tone and content of the email sent on 27 October demonstrates this.

26. We find that it did not occur to the claimant that Root Stim had been in production for a number of years without incident and that it did not therefore occur to the claimant that Mr Petrie might have a different view of the urgency and seriousness of the situation. Indeed, we find that Mr Petrie did not particularly share the claimant's concerns at the time but nevertheless agreed to his suggestion that he would approach his former university, Liverpool John Moores, to arrange for a sample of Root Stim to be tested to see if any harmful mould or fungal matter was present.

27. The claimant told the Tribunal that he made a number of enquiries to ascertain who may be able to carry out appropriate tests. However, he told the Tribunal that he had not made much progress because he was "*busy carrying out my 9 to 5 job*". However, as noted previously, we find that by this stage the claimant would not have found this core element of his role to be particularly taxing.

28. We note that in the weeks that followed the meeting on 27 October, no progress was made by the claimant in securing a visit by Liverpool John Moores University although the claimant told the Tribunal that this was because he had set aside a batch of Root Stim from the problematic batch to allow that to ferment separately so that it could be tested. However, we note that no contact appears to have been made with the University by this point. We also find that Mr Petrie

expected that the claimant would do this promptly, having raised serious concerns with him and having offered to arrange for the substance to be tested. We also note that, following the disclosure to Mr Petire that Root Stim was a potential hazard, the claimant continued in his role as before, with no issues or difficulties arising in his day to day work from Mr Petire or any other employee of the respondent.

The meeting of 8 November 2017

29. The claimant and Mr Petrie had their regular weekly meeting on Wednesday 8 November 2017. The claimant's account and Mr Petrie's account of this meeting are very different, but by careful consideration of the evidence, the Tribunal's findings of fact as to what took place at this meeting are as follows.

30. We find on the balance of probabilities that during this meeting the claimant again raised the issue of the toxicity of the Root Stim with Mr Petrie. On this occasion, we find that the claimant told Mr Petrie that he and his colleagues had all become ill as a result of handling Root Stim. We find that the claimant told Mr Petrie that the Root Stim product should be completely withdrawn from sale on the basis that it could be harmful to the general public, because he believed that it had affected the health of him and his two colleagues.

31. We find that Mr Petrie then told the claimant that he was making "*wild accusations*" without having obtained proper evidence. Mr Petrie told him that the photograph of the mould growing on the top of the tank was not sufficient evidence of problems with the product. Mr Petrie told the claimant that he had told him to obtain some evidence during their previous discussion on 27 October and he had not yet done so. We find that by 6 November, the claimant had made arrangements for John Moores to visit on 14 or 15 November to take some samples but that nothing further had been done.

32. We find that Mr Petrie reacted with alarm and annoyance at the claimant's suggestion that the whole of the Root Stim product should be withdrawn from sale, particularly given the sparse evidence gathered by the claimant at that point. We note the respondent's evidence as to the importance of the Root Stim product to its business and the negative publicity and damage to its reputation that would result from a product recall.

33. We find that the claimant then told Mr Petrie that he was being put at risk handling Root Stim in the mixing process because Root Stim was produced using potentially hazardous chemicals and that there were no COSHH (Control of Substances Hazardous to Health) risk assessments in place. We note that the claimant does not ask the Tribunal to find that he made protected disclosures about the lack of COSHH assessments in his workplace, but only about the potential risk from Root Stim.

34. The claimant told the Tribunal that Mr Petrie did not want to discuss the COSHH risk assessments during this meeting and told the claimant that it was his responsibility to make sure they were in place if needed. The Tribunal accepts that the claimant at this stage had not appreciated that it was his responsibility to prepare relevant COSHH documents, having not seen a full job specification for his role.

35. Having considered the evidence of both parties, we find that Mr Petrie told the claimant that COSHH documents were not necessary in this situation because there were adequate risk assessments in place which used Material Safety Data Sheets ("MSDS") and that as a qualified chemist, these were adequate for his purposes.

36. We find on the balance of probabilities that this meeting then became heated and acrimonious. The claimant insisted to Mr Petrie that the current health and safety protections for him and his colleagues were inadequate and said that Mr Petrie did not appreciate the risks that they were exposed to. We find that Mr Petrie in turn questioned the claimant's credibility for raising such issues without any evidence and said that as a result his position at the respondent was "*questionable*". We find that the meeting developed into an argument and ended acrimoniously.

37. The claimant's evidence, which we accept, was that he had become highly emotional by the end of this meeting and that he was so upset that he was off sick the following day, 9 November. His evidence was that he returned to work on Friday 10 November but that he was still "*very emotional*" on that day. There was reference in the claim form and the claimant's witness statement to him seeing Bill Tately, the respondent's Sales Director about raising a possible grievance about Mr Petrie but the Tribunal was supplied with no further evidence in this regard. The claimant elsewhere in his evidence seeks to assert that Mr Petrie prevented him from raising a grievance but this was not raised in the claimant's witness statement, in which he states that he decided not to proceed with his grievance in case it damaged his relationship further with Mr Petrie. On the balance of probabilities, the Tribunal finds that this was the reason for the grievance not being raised and not that the claimant was prevented from doing so.

The events of 13 November 2017

38. On Monday 13 November, the claimant returned to work. Mr Petrie's evidence was that, because of their acrimonious conversation on 8 November, he decided to see the claimant that day to try to repair their working relationship. It was Mr Petrie's evidence that the claimant was verbally aggressive from the outset of their conversation that day. It was the claimant's evidence that Mr Petrie was aggressive from the outset and came out with accusations "*out of the blue*". On the balance of probabilities, we find that the claimant was still agitated as a result of the conversation on 8 November and that, whatever had been said at the outset of the conversation on 13 November, matters quickly escalated into another argument.

39. We find that on 13 November, the issue of COSHH risk assessments for Root Stim was mentioned, either by the claimant or by Mr Petrie, and that Mr Petrie became frustrated because, in his view, he had delegated the matter to the claimant to produce any relevant COSHH assessments and the claimant had not done this. The claimant's evidence was that he did not know how to produce COSHH assessments and that he had not received sufficient help or support from Mr Petrie in order to do so.

40. As the argument between the two escalated, we find on the balance of probabilities that the claimant, who was already in a somewhat emotional state, became agitated with Mr Petrie. From the evidence of both parties we find that Mr Petrie did not react well to the claimant addressing him in this manner and took

exception to his tone. Mr Petrie, we find, told the claimant not to address him in that way and the claimant continued to do so, and when Mr Petrie warned him to stop and he did not, Mr Petrie told the claimant that their working relationship had broken down and that he was dismissed.

41. We find that the claimant told Mr Petrie that he had no authority to dismiss him in that way and demanded to see Glyn Jones, the managing director, who was situated in the respondent's building across the road. We accept the claimant's evidence that Mr Petrie said, "*fine, go and see him, but it won't do you any good*" and together they walked the five-minute journey over the road to Mr Jones' office.

42. On arrival, Mr Petrie told Mr Jones that they needed to speak to him in the board room. When Mr Jones came into the board room, Mr Jones's evidence to the Tribunal was that the claimant told him that Mr Petrie had just sacked him and asked whether he had the right to do so.

43. Mr Jones told the Tribunal that he confirmed to the claimant that Mr Petrie did have the authority to dismiss him. Mr Jones told the Tribunal that the claimant then told him that he had raised health and safety concerns with Mr Petrie. Mr Jones told the Tribunal that when Mr Petrie then tried to speak to Mr Jones about the issues that had been raised, that the claimant repeatedly interrupted Mr Petrie and was dismissive and disrespectful towards him. We accept Mr Jones' evidence that the claimant addressed Mr Petrie in front of him in this way. Mr Petrie told Mr Jones that he was no longer needed and Mr Jones left the room.

44. It was agreed by the parties that Mr Petrie, having noticed that the claimant had become very emotional, having told him and Mr Jones that he would lose his flat and his car without his job, took the decision to withdraw the dismissal. He told the claimant that he was not sacked and that he was to go back to work. The claimant did so.

45. It was Mr Petrie's evidence that the claimant did not immediately go back to work but that he had a lengthy conversation with him about imposing a Performance Improvement Plan and that the claimant had agreed to this. The claimant's version of events was that there was no discussion at the end of their conversation and that the Performance Improvement Plan was simply handed to him in a letter at the end of the same day, 13 November.

46. The claimant's evidence is preferred in this regard. We do not find it credible that, given how heated the conversation had been, that Mr Petrie immediately engaged in a lengthy discussion with the claimant about a Performance Improvement Plan. On the balance of probabilities, we find that Mr Petrie took time to consider what to do next and drew up the letter dated 13 November 2017. We accept the claimant's evidence that this was handed to him at the end of the day. The letter was before the Tribunal in evidence and contains both a warning and also the conditions of the Performance Improvement Plan.

47. The letter states:

> *"Following the discussions of last Wednesday and this morning I want to confirm in writing that I found your behaviour to be completely unacceptable,*

> *falling well short of the levels I expect from management in the company. To be clear, you have every right to raise business concerns, whether health and safety related or anything else. However, it is not acceptable for you to raise issues in the manner in which you did. Without any exaggeration on my part, you put yourself in a position where you raised serious issues without providing one shred of fact or supporting documentation and then expected me to just to take your word for it. To be clear, I will never work in that way it is important that you understand this. I expect you to back up assertions with supporting evidence.*
>
> *On the subject of being your manager, there are other points you have to be clear about. I stated to you in the aforementioned discussions that due to your tone and attitude I was not prepared to accept your behaviour and that, if it continued, I would be considering your future employment with the business. You took this to be a threat and I can understand why. However, as I hope I made clear, I do not make threats. What I said was an accurate reflection of the situation at the time. That lack of respect I felt coming from you was getting to the point where I felt if it continued, then your position would become untenable. I will go further now and say that, although we have reached a position of compromise, you will be summarily dismissed if ever there is any repeat".*

48. The letter continues:-

> *"Moving forward I instructed you that I was placing you on a Performance Improvement Plan… if you do not achieve the objectives then, amongst other considerations (including whether to increase the length of the Performance Improvement Plan), it will call into question your ongoing employment with the company".*

49. The letter instructed the claimant that over the course of the Performance Improvement Plan, he was to focus entirely on production and have no involvement with product department nor take part in any shop visits, which we accept he had done previously. The claimant was given an end date of 15 December for the Performance Improvement Plan and given the task of supporting all product formulae with MSDS or COSHH sheets where necessary. The letter concluded by confirming that the claimant would not be able to continue in his employment if he did not meet terms of the Performance Improvement Plan.

50. We find that the contents of the letter corroborate Mr Petrie's evidence to the Tribunal that he did not object to the claimant making disclosures to him about health and safety matters, or problems with the respondent's products, but that he was not prepared to tolerate the manner in which the claimant spoke to him, or the fact that he continued to complain about issues with the respondent's products without obtaining the evidence that had been agreed.

51. The claimant's evidence was that he had several discussions with Mr Petrie on Tuesday 14 and Wednesday 15 November. He told the Tribunal that Mr Petrie hardly ever visited his area of work prior to the implementation of the Performance Improvement Plan, but thereafter Mr Petrie was a frequent visitor and that he felt that this amounted to harassment. The claimant told Mr Petrie during these discussions

that he was not able to produce the COSHH documents for the Root Stim product because he did not feel competent to carry out the task, due to a lack of experience. His evidence was that he asked for the prior COSHH and risk assessment documents for that product.

52. The Tribunal notes that Mr Petrie's responses to the claimant in contemporaneous emails were not particularly helpful. Also, Mr Petrie's evidence to the Tribunal as to the content and location of the COSHH documents was inconsistent. We find that by this point Mr Petrie was avoiding assisting the claimant with the task of creating the COSHH assessments. The Tribunal notes that following the claimant's dismissal, Stephen Walker, the respondent's other chemist, was tasked with producing the COSHH assessments and received a significant amount of help from Ms Hocter and also assistance from Mr Petrie. This assistance could have been given to the claimant but was not. On the balance of probabilities, we find that this was because of the deteriorating relationship between him and Mr Petrie.

53. By 16 November, John Moores University had visited the respondent's premises and had taken a sample of Root Stim for investigation. Again, the evidence of what happened next that day varies wildly between the account given by the claimant and that given by Mr Petrie. We accept that by the 16 November the claimant had been subject to several days of much closer scrutiny by Mr Petrie and that their working relationship was volatile.

54. On Mr Petrie's account, during a conversation, the claimant lost his temper, swore at him and told him to leave him alone. The claimant's version of events was that during the conversation, Mr Petrie abruptly became annoyed with him and told him that he was dismissed. Considering the evidence of both parties, we find that Mr Petrie and the claimant again became embroiled in an argument and given that only four days previously, the claimant had been given a final warning and placed on a Performance Improvement Plan for the same behaviour, Mr Petrie summarily dismissed him.

55. The claimant and Mr Petrie's evidence as to how the claimant came to leave the premises that day varied dramatically. However, how the claimant left is not material to the findings of fact that we need to make to determine the issues that the claimant wishes us to decide.

56. The claimant left the respondent's premises the same day and appealed against his dismissal in a letter to Mr Jones on 24 November 2017. He told Mr Jones that he believed he was dismissed because of having made a protected disclosure.

57. Mr Jones interviewed the claimant on 6 December 2017 and subsequently interviewed Paul Williams, Andrew Ball and Craig Hunt about the matter. Only Mr Williams agreed to provide any evidence but the evidence provided was not directly relevant to the claimant's grounds of appeal. We note that the claimant was not interviewed again after the members of staff had been interviewed. Furthermore, although Mr Jones told the Tribunal that he had spoken to Mr Petrie about the claimant's appeal no notes of that conversation were in the bundle of evidence before the Tribunal.

58. We note that the claimant's appeal was carried out without any regard to due process and failed to comply with the ACAS Code of Practice. The claimant was not accompanied at the appeal hearing despite asking Andrew Ball to accompany him. The text messages in the bundle of documents before us appear to show that Andrew Ball consented to accompany him but was not called into the meeting.

59. No notes are available of the appeal meeting, which is particularly regrettable given that the claimant did not have a companion in the meeting with him. No notes are anywhere in the bundle of documents to show what steps were taken to investigate whether the claimant was dismissed for making a protected disclosure to Mr Petrie. There is no indication of whether Mr Jones considered any other documents or correspondence or evidence before reaching his decision.

60. Mr Jones wrote to the claimant on 18 December and told him that he had carried out "*what I believe to be the most thorough investigation possible*". He told him that it was clear to him "*that analysis on product/mould/issues you raised were already being investigated on your advice and approved by Martin….*On the matter of COSHH assessments he notes "*…it was your responsibility to create new up to date versions but failed to do so…*".

61. He further states "*… bearing in mind I was witness to one exchange between Martin and you and given your conduct at that exchange I can see no other option that would have been open to Martin. Certainly, he acted in accordance with the terms and conditions of employment set out for such occurrences.*"

62. Mr Jones told the Tribunal that he was referring to the conversation that the claimant had had with Mr Petrie in front of him in the board room on 13 November. However, the Tribunal notes that the conversation that Mr Jones witnessed was between the claimant and Mr Petrie after Mr Petrie had summarily dismissed him. This does not appear to have been taken into account by Mr Jones in reaching his conclusion as to the appropriateness of the claimant's behaviour.

63. The claimant subsequently reported the respondent to the Health and Safety Executive ("HSE"). The HSE contacted the respondent on 8 December 2017 and asked for evidence about concerns raised regarding the use of chemicals on site and specifically that harmful bacteria/fungus was produced during the fermentation of Root Stimulant. The claimant had also reported that there was the use of potentially carcinogenic materials in the product "Ignition" and unsafe storage of ammonium nitrate and the HSE asked for information about these issues also. All of these issues were been raised by the claimant with Mr Petrie, particularly on 8 and 13 November but only the issue relating to Root Stimulant is relied upon by the claimant as a protected disclosure.

64. The HSE asked the respondent for the COSHH risk assessment for Root Stim and details of any bacteria or fungus found during the production of Root Stim. Mr Petrie responded in a lengthy email to the HSE on 14 December. The Tribunal notes that by this point, the respondent had tasked Stephen Walker with the assistance of Ms Hocter to produce COSHH documents for Root Stim and attached these to the email to the HSE. In the email, Mr Petrie blamed the claimant for a lack of progress made on the COSHH documents and also supplied the analysis of the mould found in Root Stim which the respondent had employed a company called Geneus to

investigate as John Moores University were taking too long to respond to their queries. Geneus had provided information that the mould was not harmful but was the result of inadequate mixing of that particular batch of Root Stim which the respondent blamed the claimant for. The Tribunal was told that the HSE took no further action following Mr Petrie's email.

The Law

65. Disclosures qualify to be considered protected disclosures if they fall within the definition set out in section 43B of the Employment Rights Act 1996. That is, they must, in the reasonable belief of the worker making the disclosure, be made in the public interest and tend to show one or more of the matters in section 43B(1) Employment Rights Act 1996 ("ERA"). In the claimant's case, he alleges that his disclosures tend to show:

(a) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (section 43B(1)(b));

(b) that the health or safety of any individual has been, is being, or is likely to be endangered (section 43B(1)(d));

(c) that the environment has been, is being, or is likely to be damaged (section 43B(1)(e)); or

(d) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed (section 43B(1)(f)).

66. Protected disclosures must also be made in accordance with one of the six methods of disclosure set out in ERA. The claimant here relies on section 43C, disclosure to employer or other responsible person.

67. A worker or employee must show that they have a reasonable belief that the information disclosed tended to show the relevant failure. There must be some objective basis for the worker's belief (***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4 EAT***). The standard applied is partly determined by the personal circumstances of the discloser and therefore a higher standard is applied to professionals as opposed to lay persons.

68. Tribunals are advised that their task, in relation to matters of public interest, is not to determine what is in the public interest, but instead to determine whether the individual employee had a belief that what he disclosed was in the public interest and whether that belief was reasonable (***Chesterton Global (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979***).

69. A qualifying disclosure can still count as a qualifying disclosure even if the employee or worker is wrong in their belief, provided that it is demonstrated that the belief was reasonable.

70. Where a claimant can show that the making of one or more of these disclosures was the sole or principal reason for the claimant's dismissal, such

dismissal is automatically unfair, contrary to section 103A of ERA. The test for establishing the reason for dismissal is set out in ***Abernethy v Mott Hay & Anderson [1974] IRLR 213*** and is "*the set of facts known to the employer, or it may be the beliefs held by him, which cause him to dismiss the employee*".

71. Employees and workers making protected disclosures are given protection from being subjected to detriments for having made such disclosures by virtue of section 47B of ERA. The threshold for establishing that such disclosures caused such detriments is lower than that for establishing that disclosures caused a dismissal as per s103A ERA.

72. On termination of their contract of employment, employees have a right either to a statutory minimum notice period by virtue of s86 ERA or the notice period set out in their contract of employment, whichever is greater. However, should the employee have committed an act or acts of gross misconduct or gross negligence, the employer is entitled to instantly dismiss the employee without affording them the right to notice.

Application of the law to the facts found:

a) Did the claimant make disclosures qualifying for protection?

73. The parties agree that the claimant made disclosures on 6 October, 27 October and 8 November. The Tribunal must decide if they amounted to protected disclosures within the meaning set out in section 43B of ERA.

74. It is accepted by both parties that disclosure was made to the claimant's employer in accordance with s43C of ERA. As to whether the claimant believed that the disclosures tended to show one or more of the matters in section 43B(1) of ERA, the claimant has failed to put forward evidence to establish on the balance of probabilities that the matters set out in sections 43B(1)(b), (e) and (f) occurred. The claimant has failed to show that he reasonably believed that the respondent has failed to comply with a legal obligation to which it was subject, that the environment has been damaged or that information tending to show any matter falling within any one of these paragraphs is being or is likely to be deliberately concealed.

75. There was no evidence before the Tribunal as to which specific legal obligation existed that the respondent failed to comply with. The claimant also provided no evidence in support of his allegation that the environment has been, is being or is likely to be damaged. This was not discussed at all in his witness statement nor was any supporting documentation provided for the Tribunal to consider.

76. In relation to whether any matter is being deliberately concealed, the respondent submits that the evidence points wholly to the contrary. The Tribunal agrees with the respondent's submission on this point. We accept that the claimant was urged both to investigate the problems with the Root Stim product and to create COSHH assessments for Root Stim. We do not find that the respondent was seeking to conceal matters.

77. It is however accepted by the Tribunal that disclosures were made which in the claimant's belief tended to show that the health and safety of any individual has been, is being, or is likely to be endangered (section 43B(1)(d) ERA). The claimant disclosed that he believed there was a potential health risk while handling Root Stim in that he and his colleagues were ill the day after handling it with a sore throat or cold. The claimant believed that this was because of a fungal contaminant that may have been present in the product.

78. Was the claimant's belief in this disclosure reasonable? The Tribunal accepts that it was. Applying the level of reasonableness appropriate to somebody with an MSc in Industrial Biotechnology, we accept that the claimant considered which fungal contaminants may have been present in the fermentation process and which, when in an open-top tank, may spread into the air, particularly where mould/fungus was visible. The claimant noted that he and his colleagues had been ill and linked matters together. We find that therefore the claimant had a reasonable belief that their health and safety either had been or was likely to be endangered.

79. The respondent disputes that the claimant held a reasonable belief that the coughs, colds and sore throats the claimant and his colleagues had suffered were caused by an issue with Root Stim. However, the claimant is not a doctor and so it was not unreasonable of him to not have been able to rule out or to precisely identify the cause of the illnesses in him and his colleagues.

80. Was it the claimant's reasonable belief that the disclosures were made in the public interest? In the case of ***Chesterton***, Tribunals were advised that the task was not for the Tribunal to determine what was in the public interest but whether the individual employee had a reasonable belief that the disclosure of information was in the public interest. In the instant case, the claimant believed that it was in the interest of him and his colleagues to tell the respondent about the issues with Root Stim. Did the claimant's view of the issues with Root Stim extend to the public interest?

81. In the circumstances of this case, the alleged breach by the employer is one which potentially endangers health and safety and is therefore not in the nature of a private contractual matter only affecting the individual making the disclosure. Furthermore, the Tribunal has made findings of fact that the claimant asked Mr Petrie for a product recall such that the Root Stim product be withdrawn from general sale. We find that the claimant believed that there was risk to the health of the end user from that product, which was on sale to the general public. Therefore, the test of whether the claimant had a reasonable belief that it was in the public interest for this to be disclosed has been made out.

b) What was the cause of the claimant's dismissal?

82. Was the claimant's disclosure the principal cause of his dismissal? As this is a case where the claimant has less than two years' service, the claimant is claiming automatic unfair dismissal as per section 103A of ERA and can only establish that he has been unfairly dismissed if he can show that the sole or principal reason for his dismissal was the making of a protected disclosure. The burden of proof lies with him.

83. Tribunals are reminded that the question to ask is: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? On the balance of probabilities, the Tribunal finds that the causal link between the dismissal and the claimant's protected disclosures is not made out in the circumstances of the case. We find that the claimant's dismissal was not solely or principally caused by the disclosures that he had made. It was instead caused principally by his attitude towards Mr Petrie and the lack of progress he made in the tasks that he had been given as of the end of October 2017. Our reasons for this conclusion are as follows.

84. The claimant made disclosures in passing on 6 October, in full on 27 October and again on 8 November. The claimant was told to investigate the Root Stim issue and to produce the appropriate COSHH documentation that he alleged was missing. Thereafter Mr Petrie and the claimant repeatedly spoke about the potential health and safety risks in the workplace. The claimant continued to complain to him about these issues. However, during this time, it would have been apparent to Mr Petrie that the claimant had made little or no progress with the tasks that he was set, which were to address these very issues.

85. Furthermore, we find that in repeatedly raising issues with Mr Petrie, the claimant became increasingly argumentative and disrespectful towards him. Mr Petrie, we find, grew frustrated with the claimant's apparent lack of progress and with the "*wild accusations*" he believed him to be making without the evidence to support them and also he became increasingly unwilling to tolerate the manner in which the claimant spoke to him during this period.

86. The claimant was initially dismissed following an argument on 13 November 2017. The argument was caused, we find, by the claimant's attitude towards Mr Petrie. It was clear that the claimant considered that Mr Petrie had an inadequate knowledge and understanding of the health and safety issues being raised by him. Mr Petrie found the manner in which the claimant spoke to him disrespectful and took issue with the claimant's tone. This is recorded in detail in Mr Petrie's letter to the claimant of 13 November, which we find is an accurate contemporaneous record of his views and the motivation for his actions.

87. The claimant was reinstated and put on a Performance Improvement Plan, elements of which included creating the COSHH documents that the claimant said were missing. The claimant repeatedly clashed with Mr Petrie over the days that followed. We find that Mr Petrie had by this date become exasperated with the claimant's complaints, lack of progress and belligerent attitude and, noting that the claimant had less than two years' service, considered that the claimant ought no longer to be working for the respondent. This was the reason for his dismissal.

88. We have made references in our findings of fact as to the inadequacy of the respondent's dismissal and appeal process. Had the claimant had two years' service so as to be eligible to make a claim of unfair dismissal, the respondent's actions could have resulted in a finding of unfair dismissal as per s98(4) ERA. However, due to the claimant's inadequate length of service, this cause of action is not available to him and we make no substantive determination in that regard.

c) Has the claimant been subjected to detriments?

89. The claimant alleges that he was subjected to a series of detriments for the reason that he made protected disclosures. Not all of the detriments set out on the claimant's list, which will be examined individually below, were established on the evidence before the Tribunal. However, we find that those detriments which were established on the balance of probabilities were not caused by the fact of the disclosures having been made to the respondent, or to Mr Petrie individually.

90. The making of the disclosures brought the claimant to Mr Petrie's attention and caused them to be more closely involved with each other in work, in a way that they had not been previously. On making the disclosures that he made over a period of several weeks, and having been set the task of investigating the problem with Root Stim, the claimant's performance and attitude at work became something that Mr Petrie observed closely. The claimant, in the opinion of Mr Petrie, failed to complete the allocated task as quickly or efficiently as he thought he should. We have made no findings as to the reasonableness of Mr Petire's views, only those as to his motivation for having acted in the way that he did.

91. They argued on several occasions and it is clear that tempers flared on each occasion. Mr Petrie is a director at the respondent and we found that he expected a degree of deference and respect from the claimant, which he increasingly found wanting in the weeks leading up to his dismissal. It is this set of circumstances, we find, that caused the claimant to suffer several detriments. The disclosures may have started the chain of events that followed, but we find that it was the claimant's own behaviour and attitude that caused him to suffer detriments at work.

92. The first detriment complained of by the claimant is that he was made to feel that he could lose his job because of issues raised over Root Stim. We accept that the claimant was made to feel that he could lose his job. However, no threats were made to his employment on the first two occasions when he raised issues with Root Stim, which was on 6 October and 27 October 2017.

93. On the third occasion, we accept that he was made to feel he could lose his job. However, we find that the claimant had during that conversation made other more widespread allegations about, for example, possible exposure to carcinogens with the "Ignition" product and had gone on to say that the whole Root Stim product should be subject to a product recall. He therefore increased his demands on Mr Petrie whilst having no evidence to prove the allegations that he was making. It was the increased severity of the allegations made by the claimant with no evidence and the lack of commercial awareness displayed by him that caused Mr Petrie to question his credibility and question his future with the respondent and not the fact of him raising health concerns about Root Stim. Therefore the claimant was not made to feel he could lose his job because he raised concerns over the safety of Root Stim.

94. The second detriment the claimant says he suffered was anxiety and stress at work. He also says that he was harassed by Mr Petrie because of over-supervision. We note that the allegation of anxiety and stress at work has not been fully particularised. However, in relation to whether he was harassed by Mr Petrie, we notice that prior to the Performance Improvement Plan being implemented, there had been little direct supervision of the claimant. Following the Performance

Improvement Plan the claimant was quite closely supervised. We find that this is because Mr Petrie had realised that the claimant was not making progress with the tasks that had been allocated to him, which included arranging for the testing of a sample of Root Stim. The claimant also told the Tribunal that before 13 November "*everything had been fine*", in that he had been given the go ahead to investigate the Root Stim issues. We note that all of the claimant's disclosures had been made by 13 November, and so we therefore do not find that the protected disclosures were a material cause of the increased supervision by Mr Petrie, which the claimant says caused him anxiety and stress.

95. The third detriment that is that the claimant alleges that his responsibilities were stripped from him. This allegation has not been particularised at all. The Tribunal had no information as to which responsibilities the claimant had that he then no longer had. This issue also did not become clearly established during the course of the hearing. On the balance of probabilities, we find no evidence to suggest that the claimant had responsibilities removed from him on account of having made protected disclosures.

96. The fourth detriment was that the claimant was not allowed to visit shops to speak with customers and the fifth was that the claimant could not develop new product ideas. We accept that the claimant had previously been permitted to visit customers and develop new ideas with Ms Hoctor and was subsequently told that he could not. We accept that these amount to detriments, but not that these detriments were because of the protected disclosures. The claimant was told that the reason for these restrictions were that he needed to focus on the matters in his Performance Improvement Plan which was imposed because of his attitude towards Mr Petrie and because of the lack of progress made by him in completing the tasks that he had been set.

97. The sixth detriment, that he was not allowed to visit a conference, was not particularised in any way by the claimant. There was no evidence before the Tribunal that he had been given agreement to go to a conference or that this had been withdrawn subsequently. We do not accept that the claimant was subjected to this detriment.

98. The seventh detriment, that the claimant was bullied into not filing a grievance directly contradicts the evidence in the claimant's witness statement, which was that he chose not to raise a grievance. There was no evidence before the Tribunal that Mr Petrie or anyone else bullied him or pressured him into not raising a grievance. The claimant has not established on the balance of probabilities that he was subjected to this detriment as there was not sufficient evidence before the Tribunal to substantiate this allegation.

99. The claimant further claims that he had his confidence severely knocked, suffered a worsening of his depression and damage to his relationship with his partner. The Tribunal was provided with very little evidence of these issues, which are more relevant to an assessment of remedy. However, we accept that it is highly likely as a result of the events to which this claim relates, that the claimant suffered the detriments described. We do not accept that this was caused by the claimant making a protected disclosure. On the contrary, having made the protected disclosures in October, the claimant was delegated the task of finding out what the

problem was. Having complained about the lack of COSHH, the claimant was delegated the task of creating the COSHH documents that he thought were missing. It was clear that the respondent wished the claimant to complete this task and had assumed that he was competent to do so.

100. The claimant alleges that he was not given enough support by the respondent to complete the tasks allocated to him, although this was not pleaded as a detriment itself. We accept that the respondent could have provided the claimant with more assistance in, for example, completing the COSHH assessments. However, we do not find that making the protected disclosures themselves caused the claimant's confidence to be knocked, his depression to worsen or his relationship with his partner to suffer, but the events that came thereafter.

101. The claimant complains of other detriments which are his weekly attendance at the Job Centre, getting a taxi licence and getting the bus. He alleges that these were detriments caused by making the disclosures. The Tribunal notes that his weekly attendance at the job centre and obtaining a taxi licence were steps the claimant took to mitigate his losses, which he is required to do. We do not necessarily consider getting the bus to be a detriment and were not provided with any evidence as to why this would be a detriment for the claimant. Again, we consider these issues are more relevant to an assessment of damages to injury to feelings and do not find that making the protected disclosures caused weekly attendance at the Job Centre, obtaining a taxi licence and having to get the bus. These matters occurred as a result of the claimant's dismissal and not because of his protected disclosures.

102. Finally, the claimant alleges that he was subjected to a detriment in that he was dismissed for the first time and was subsequently reinstated. We accept that this dismissal caused the claimant to suffer a detriment. However, as with his second and final dismissal, we find on the balance of probabilities that the protected disclosures were not the reason for the dismissal, but instead was caused by the claimant's behaviour towards Mr Petrie at work.

Wrongful dismissal – is the claimant entitled to notice pay?

103. We note that the claimant's contractual notice entitlement is to a month's notice pay. However, the claimant was dismissed for gross insubordination. We accept that the claimant was disrespectful to Mr Petrie on two occasions within the space of four days. We accept Mr Jones' evidence that this was witnessed by him on one occasion. We note from the respondent's contract of employment issued to the claimant that gross insubordination was classed as gross misconduct. We accept that the respondent dismissed the claimant for gross misconduct and therefore the claimant is not entitled to a week's pay.

____

Employment Judge Barker

Date__20 May 2019_________________

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 May 2019

FOR THE TRIBUNAL OFFICE