EMPLOYMENT TRIBUNALS

Claimant Mr Michael Burke

Respondent British Gas Trading Ltd

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at North Shields **On 6th – 10th August 2018**
Deliberations 23rd & 24th August 2018

EMPLOYMENT JUDGE GARNON
Members Ms R Bell and Ms D Winship
Appearances
For Claimant Ms J Callan of Counsel
For Respondent Mr E Legard of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claims of subjection to detriment on the ground of having made a protected disclosure and unfair dismissal are not well founded and are dismissed.

REASONS (bold print is our emphasis and italics quotes from statements or documents)

The claims and issues

1.1. By a claim form filed on 4 September 2017 the claimant advanced one claim of detriment on the ground of having made a protected disclosure pursuant to section 47B of the Employment Rights Act 1996 ("the Act"). Since then, he resigned his employment and was permitted to include a claim of unfair constructive dismissal .

1.2. In Price v Surrey County Council Carnwath LJ, sitting in the EAT observed "*even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented"*

1.3. The parties' lists needed to be edited and reordered. Also at the outset of the hearing Mr Legard said the issues set out in the first case management discussion following the issuing of the claim in the Watford tribunal and confirmed in this tribunal by Employment Judge Buchanan should be the limit of our enquiry subject only to the addition of issues concerning the constructive unfair dismissal. We respectfully disagree. Whenever an Employment Judge at an early stage is trying to formulate a list of issues from pleadings he may miss something which is contained in the pleading but only becomes clearly

apparent when witness statements are exchanged. In this instance, the alleged protected disclosures listed at 1.3.1.(a) to (c) are not the only disclosures the claimant argues he made. Later repetitions of those allegations, and additions to them, may also be potentially protected which is why we have broadened the formulation of the issues suggested by the parties. The real issues are

1.3.1. Did the claimant make disclosures to Ms Julie Claxton, Mr Kevin Ball, Mr Neville Storey, and/or any other person of potentially relevant failures especially

(a) Mr Neil Foster had made him falsely record he was working when in fact he was absent from work due to an injury sustained in an accident on 23 March 2017

(b) to conceal that, Mr Foster said the claimant had seen a GP on 27th March when he had not

(c) Mr Foster made false statements in a record of the claimant's accident and/or falsely reported his absence in HSE records.

1.3.2. Were these "qualifying disclosures" within the meaning of section 43B of the Act in that they tended to show (a) a criminal offence has been committed or is being committed under section 33 of the Health and Safety at Work Act 1974 by making a false entry in a health or safety record and/or committing fraud by false representation (b) a person had failed, was failing or was likely to fail to comply with a legal obligation to (i) record sickness absence correctly (ii) to conduct a Lost Time Incident (LTI) Investigation (iii) make a RIDDOR report; (c) the health or safety of employees was or was likely to be endangered and/or (d) evidence of the above was or was likely to be concealed.

1.3.3. If so, were the disclosures "protected " within any of s 43C to 43H?

1.3.4. If so, did the claimant suffer detrimental treatment, especially :

(a) failure to (i) explain to him the return to work (RTW) process adequately,(ii) make his obligations clear to him and/ or (iii) carry out a RTW interview;

(b) allocating to him more onerous shifts than others upon his return to work on 2 May 2017, (he was, including out of hours standby, to work 10 out of the next 11 days)

(c) allocating to him work involving the "end of day" process when he had opted out of it;

(d) not referring him to Occupational Health (OH) promptly (he should have been referred on 28/29 March but was not referred until 2 May 2017);

(e) ignoring OH advice for phased return to work;

(f) Lee Storey threatening him on 10 May 2017 saying he would be undertaking the LTI investigation and the claimant would need trade union representation.

(g) not following the Absence Management Procedure (AMP) correctly. In particular Lee Storey made inappropriate contact with him while he was unwell, directed Paul Kirby to visit him at home unannounced, and no-one conducted an Employee Health Review (EHR) in good time;

(h) ignoring his written grievance made at the start of July 2017 and/or not dealing with his grievances reasonably or fairly

(i) not sending the grievance appeal outcome letter was until over a month after it had been drafted (It was dated 11 December 2017 but was not sent until 2 February 2018)

(j) not providing support and/or feedback under the British Gas Speak Up policy

1.3.5. If so, was the claimant subjected to the detriments, at least in part on the ground he had made a protected disclosure?

1.3.6. Did the respondent fundamentally breach the claimant's contract of employment in particular the implied term of mutual trust and confidence i.e. was its conduct , without reasonable and proper cause calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?

1.3.7. Did the claimant at any point waive the breach and affirm the contract of employment? If so, was there "something else" which revived earlier breaches? If so, did the claimant resign in response to that breach? If he did, he was dismissed.

1.3.8. Was the reason for the breach of contract in response to which he resigned that he had made a protected disclosure, or was it a potentially fair reason within the meaning of section 98(1) and section 98(2) of the Act ?

1.3.9. If the latter, was the dismissal fair by the test in s 98 (4)?

2. Findings of Fact

2.1. We pre read statements and heard the claimant and his one witness Mr Steven Burke, his brother (to whom we will refer as " Steven" and for whom Mr Legard had no questions in cross examination). For the respondent we pre read statements and heard Mr Neil Foster, the claimant's manager , Mr Lee Storey , Mr Foster's Manager, Mr Kevin Ball, another manager, Mr Paul Kirby, one of his 2 coaches, (the other being Mr Chris Mason) and Mr Paul Basigara, a senior manager from another part of the British Gas business who conducted the final grievance appeal. We had an agreed document bundle.

2.2. In 2012, the claimant started a relationship with Ms Pakamas Cumpiw, a Thai National. They made plans to marry. Having permanent employment with a good salary would enable him to satisfy UK Visa Requirements for her to settle in the UK once they were married. The claimant decided to re-train from his current career in finance(he has a degree in a finance related topic) and joined the respondent on 16 November 2015 where he became a Smart Energy Engineer (SEE). He and Ms Cumpiw planned to marry in April 2017 in Thailand. In about July 2016, the claimant submitted a holiday request for 3-28 April 2017 , which is longer than normally granted but it was, for reasons to which we will return Mr Foster's statement speaks very highly of the claimant in every respect. So do all the other witnesses for the respondent as regards his performance and commitment prior to the events in question.

2.3. In September 2016 the claimant had some absence for stomach trouble. This was recorded properly as sick leave from the very start. There was no work related incident which caused this absence.

2.4. On 10 February 2017 he had a road traffic accident (RTA) when he drove his vehicle into the back of another . The respondent has an Accident Reporting Line "1313" , in effect an electronic “accident book”. The claimant reported his accident correctly through 1313 which automatically sends his manager an email to alert him to the need for an investigation. The claimant also rang Mr Foster who went out to see him. Afterwards, Mr Foster prepared an accident report which has to be done for any accident whether or not it results in an employee being absent . He exonerated the claimant of driving carelessly. The investigation was thorough. The claimant did not need time off sick.

23- 24 March 2017

2.5. The claimant is “field-based “ and takes his works van home from his last job .On Thursday 23 March 2017 , at approximately 17:30 while driving home, he was involved in another RTA when a vehicle drove into the back of his van. He rang Mr Foster and told him he felt a bit dazed, but was “ OK” so declined Mr Foster’s offer to go out to him. The claimant also reported the accident to the police and on 1313. Mr Lee Storey has been employed by the respondent for around 15 years and in his current role for 5 years which involves the managing of safety, financial budgets, and performance of District 35. Various Line Managers report to him , including Mr Foster. Prior to involvement in this incident he had no specific relationship with the claimant. On Thursday 23 March 2017, when the claimant reported through1313 he had been involved in a RTA Mr Storey was sent a notification . Mr Foster also reported this to him verbally on the day . When a report is made to 1313 this **triggers all HSE investigation processes** . Mr Storey, his line manager John Dalrymple the GMB Health and Safety Representative, Mr Neville (Nev) Storey; the Safety Manager, Martyn Docherty; and Senior Safety Manager, Warren McArdle are kept updated as matters progress. Mr Foster told Mr Storey on 23 March he had offered to attend the scene of the accident but the claimant had assured him the RTA had been low impact ,there were no injuries so this would not be necessary.

2.6. Later the claimant started to feel light headed and nauseous. He woke at roughly 5am on Friday 24 March in pain. The muscles in his neck and left shoulder had gone into spasm. He contacted Steven, who took him to a Hospital A&E department. That day at 6:45am, he entered Sick Absence into “Workday” as “Musculo-skeletal” on a drop down menu which also included something like “ Work Related - Accident”. It would be the latter only in the sense he was driving home from work in the works van. The almost inevitable outcome of any enquiry, unlike the one in February, would be the claimant was blameless and the respondent had no lessons at all to learn from the incident . The claimant added the comment “*Going to A&E. nausea, pain, unable to move across shoulders and neck*” .

2.7. “Workday” is a computer program introduced on 16 August 2016, meant to record everything related to Human Resources, payroll, attendance, holidays and absence. The claimant was trained to use it for a couple of hours before it went live . He was told to use it notify the business he was not fit for work which would **automatically** trigger a notification to his Manager .Nevertheless, and commendably, at 6:47am, he also emailed Mr Foster “*I’m going to A&E, my neck and shoulders are frozen. I’ve put it in Workday for today. I’ll ring you later*”. At A&E, a Consultant said he had whiplash, advised him to rest and consult his GP if symptoms did not improve in 48-72 hours. He was prescribed an anti inlammatory and painkillers. He completed a self-referral form for NHS Physiotherapy.

2.8. At about the same time as Workday was introduced, the respondent changed from having its own OH Department to an external provider" MyHealth", so references to "OH" hereafter are to it . Also a new version of its AMP was issued in August 2016.

2.9. When he returned home he rang Mr Foster at 8:37am and told him all the above including he might need further treatment if symptoms did not improve in the next 48-72 hours. The claimant's case is Mr Foster said "*I **need you** off the sick next week. I need you off the LTA report*". (LTA and LTI are interchangeable terms). The claimant said "*what are you on about, what's an LTA report*"'. Mr Foster explained it was the '*Lost Time Accident Report'*. The claimant said "*I can't move my head; I don't think I'll be at work next week*". Mr Foster replied he would "*clear it with Lee Storey and they would **just make up** tasks the claimant was doing from home, and it would not affect any insurance claims because it would be recorded as Light Duties*". The claimant said again "*I don't know what you're talking about*". Mr Foster said he would speak to him again on Monday.

2.10. Mr Foster does not think he said he "needed" anything rather that he thought it would be better if the claimant was not on the sick. An initial thought which crossed our minds, because we have seen it in other cases particularly disability claims of failure to make reasonable adjustments, is that Mr Foster may have had some target or key performance indicator (KPI) applied to him which would be adversely affected by the amount of sick absence of his team. **It is vitally important** to state not only he, but every other manager who gave evidence, said **no such KPI's exist.**

2.11. Mr Foster's account is not much different. If one of his team is obviously unfit for work and will be absent he would not hesitate to record their absence as sickness. On Friday 24 March he formed the impression the claimant might well be fine by Monday, after a weekend's rest so thought the best thing for him and for the business would be to put him on "modified duties" for the day and see how he was on Monday. He spoke to Mr Storey at the time saying the claimant's situation had changed overnight and he was going to A&E with a frozen shoulder and neck pain . They discussed providing modified duties for the claimant on Friday and, depending how he did over the weekend, he could , return to work on Monday "double-handed" (working with another engineer) or work from home. Although the claimant was a field based employee there are still administrative tasks he could have undertaken whilst at home. Mr Storey would have expected Mr Foster to provide the work and thought he would . He would not have expected the claimant to be recorded as working from home if he was in fact asked to do nothing. Mr Storey flew out of the UK on holiday the next day. Mr Foster "denied" the claimant's entry on Workday as sickness and approved an entry of "Double-Handed Working". Up to one month per year of full company sick pay is made to employees, so the claimant would have been paid in full for this day anyway. Mr Foster says the respondent uses " modified duties" or double-handed working where employees have suffered an injury are not 100% fit for their usual duties but can still carry out some work. This does not count as an absence in AMP or reduce whatever number of days of company sick pay the employee has left to take.

2.12. The claimant's close friend and co-worker, John Mason (father of Chris Mason) texted him at around 11:00am asking how he was. He replied by text and told Mr Mason about the conversation with Mr Foster using these words "*Neil ok … Wants me of the sick on Monday. Even if I just sit in the house"* . Mr Mason replied "*Ha, how's that work? Stop in all week*". The claimant replied "*That's what he said… If I can't work just wants me off the LTA report. Said he'd just square it with butterbean and make something*

up that I was doing." "Butterbean" a nickname for Mr Storey. The claimant forgot about the conversation with Mr Foster and focused on trying to get better, using ice packs and heat, because he was due to fly on 4 April to Thailand. That weekend he was still in pain, had problems sleeping, so coupled with the effects of medication was very tired.

2.13. If an employee is absent from work following an accident this triggers an LTI investigation, separate from the 1313 investigation which is undertaken whether or not it has resulted in an employee being absent. LTI investigations are more formal and involve more people, such as the Trade Union Safety Representative, as standard. They are, like 1313 investigations, to determine the root cause of, and "learnings" from, incidents not to apportion blame. Here there were no learnings to be drawn. No one would ever be disciplined as a result of an LTI investigation unless they had faked evidence. The additional formality of the LTI investigation does make them hard work and costly in terms of managerial time . Mr Foster would rather avoid them. Not having to go through one for the sake of a day or two was a factor in him telling the claimant to change his recording of absence. The untruth being told was purely that the claimant was doing some work when Mr Foster did not try to give him any to do. At no point, during or before this case, has the respondent taken the line that was the correct path for Mr Foster, but they have always understood why did it and it was as much, if not more, for the benefit of the claimant than the respondent.

2.14. Our Employment Judge asked Mr Storey whether in a situation where Mr Foster did not give the claimant any work to do at home, that would mean Mr Foster was in trouble. Without hesitation Mr Storey said "absolutely not". Taking into account Mr Foster's own problems (see 2.20 below) as mitigating circumstances he was definitely not in any. Mr Foster has been an excellent manager so even if it were not for the mitigating circumstances the decision he took was not to avoid investigation of the accident or deny an injury had been caused. It was simply to avoid what he saw as an unnecessary duplication of work. Mr Storey accepts an LTI requires a more formal investigation but the timescales and content are the same for any investigation regardless of whether it results in lost time and the same parties are notified in each case . Mr Foster is very experienced and has carried out a number of investigations including the claimant's February RTA. He is confident Mr Foster would have investigated the incident properly. He, as senior manager, is required to sign that off.

<u>27 – 28 March 2017</u>

2.15. On Monday 27 March the claimant woke around 7:00am. When he checked his work emails, he had received a 'Notification' from Workday to say his 'Sickness Absence Request' for 24 March had been 'denied' . He did not understand why then he remembered the conversation about wanting him off the sick and the LTI Report. He tried to ring Mr Foster at roughly 7:20am but could not get an answer so rang Chris Mason at 7:22am saying "*I've got whiplash and I'm going to be off sick all week. I can't get through to Neil. Do you know if he's at work today*?" Mr Mason replied he would be. The claimant said he had received notification Mr Foster had rejected his sickness absence. Mr Mason explained LTI was time consuming but the claimant should try ringing Mr Foster later.

2.16. The claimant emailed Mr Foster at 7:41am stating "*I'm still not fit enough to return to work. Can you ring me regarding recording it in Workday*" . Mr Foster returned his call at

approximately 7:50am. The claimant told him he was going to be off sick all week and was **hoping to** arrange a GP appointment as he was not much better after the weekend.

2.17. The claimant said "*Look, You've rejected my sickness absence for Friday. Just tell me what I'm supposed to record it as then*?" Mr Foster told him to enter it as Double Handed Working and if he was better later in the week , he could "buddy up" with another engineer. The claimant replied , "*I can't move my head or lift my left arm, there's no way I'm going to be able to buddy up with anyone*". Mr Foster said "*if you can't, you can't*". The claimant did not want to argue about it so did as he was told which meant he remained paid as if he was at work as opposed to being paid full pay as sick .

2.18. In August 2017 the claimant received documents under a Subject Access Request (SAR) from British Gas Privacy Team including redacted emails titled 'HSES Event Submitted for Investigation – Potential LTI'. At 9:18am on 27th March , Martin Docherty, the Safety Manager asked Mr Foster "*Can you provide an update on Michael's condition and if he has returned to full duties or remains on modified*?" Mr Foster replied by email at 9:37am, "*I have spoken to Michael this morning. He still has stiffness in his neck so will remain at home and complete some admin work for the district. Once his condition improves later in the week, he will go out and buddy up with another Smart Energy Expert"*. The claimant says Mr Foster "*knew this to be untrue*" . We partly disagree. Mr Foster was just being over optimistic about his recovery but knew the claimant was doing no admin work from home.**We find that morning** Mr Foster abandoned hope the claimant would be back soon, reflected on the claimant remaining shown as on modified duties and emailed Mr Docherty, as Lee Storey was on annual leave. He agreed the claimant should go on the sick if he could not be given any modified duties to do. At that point Mr Foster decided, at least provisionally, to instigate an LTI investigation.

2.19. The claimant could not get a GP appointment that day and was told to call back next day at 8am. At 12:30pm he noticed numerous missed calls from Mr Foster on his work phone. Around the same time, John Mason had texted to say Mr Foster had sent a message to the team on 'Whatsapp' that he was starting sickness absence**.** The claimant emailed Mr Foster at 12:43pm "*Sorry I missed your call. Just checked my phone. Can you ring me back*" At about 12:45pm Mr Foster did and asked if he could work from home. The claimant replied "*you know I can't, I told you that this morning. I can't move my head and the tablets I'm taking are knocking me out*". Mr Foster said "*if you can't work from home, you'll have to report sick and put it in Workday*". He told the claimant to record his absence as on sick on Workday. At 13:02 the claimant did so for 27- 31 March entering "musculo-skeletal" . His statement says "*I knew something wasn't right because I had repeatedly told Neil on Friday and Monday morning I was unfit for work and he wouldn't let me record my sickness absence. At 12:50pm on 27/03/2017, I replied to Johnny's text message, that Neil had gone sick with high blood pressure, stating "Told me I was on Light Duties but rang me back saying I had to go on sick if I can't work in the house".*

2.20. Mr Foster's statement explains what the claimant could not have known. Around this time Mr Foster was having personal difficulties which were impacting on his mental health. The details will not figure in these reasons due to the privacy rights of his extended family. Suffice to say he was coping with a crisis not of his making and accepts his decision making was affected. He had not slept at all on the night of Sunday 26 March 2017 due to these issues. He should have reported sick first thing on Monday 27 March 2017. He was not thinking clearly and says his recollection of that day is not perfect.

When he first rang, he **thinks** the claimant said he was going to get a GP appointment that day. An email entitled '*Michael Burke –RTA –LTI*' from Mr Foster at 13:32 to all who would attend a telephone conference about the LTI said "*In preparation for the call: Monday 27/03/2017. Michael contacted me at 7:30am and said he still has pain in the neck/shoulder area – he feels the medication isn't working so is returning to the doctors this morning and he will update on his return – but felt happy enough to work from home as per Friday. I have spoken to Michael after his GP visit – the dosage has been increased and he has been told to rest – he cannot drive and now due to the effects of his medication/GP advice to rest he isn't fit to perform any duties and is going to report sick*". Mr Foster accepts this email suggests the claimant had visited a GP that morning which he had not. Mr Foster can only assume he thought he had been to a GP in between their two calls. The claimant says Mr Foster just "*made it all up*".

2.21. After speaking to Mr Docherty Mr Foster contacted Julie Claxton, who was acting in the absence of Lee Storey as his manager, telling her he needed time off. He explained the incident involving the claimant, telling her this was now an LTI and handed over management of it to her. That afternoon a telephone conference was held to discuss the LTI. Ms Claxton told Mr Foster he had to dial in, so he did though on sick. As far as Mr Foster can remember the other people on the call were Ms Claxton, Mr Dalrymple, Mr Docherty, a Trade Union Safety Representative and Warren McArdle (Senior Safety Manager). The call was to check the employee's welfare and agree actions to investigate.

2.22. Ms Claxton rang the claimant leaving a message. At roughly 16:30 he returned her call. She said she was standing in as District Manager for Lee Storey, and **she and Kevin Ball** were picking up Mr Foster's managerial duties. Mr Foster had told her the claimant had been working from home on Friday 24 and Monday morning 27 March but **after he had visited his GP** , he had reported sick so a LTI Investigation would take place. He said '*What are you talking about! What Investigation*?". She repeated what Mr Foster had told her and said they needed to take a statement from him regarding the accident as they do it for every LTI. The claimant said he had never been working from home on 24 or March , and had been sick since 24th and not seen a GP on 27 March . Ms Claxton started to say "*Neil's told me that*…" he interrupted her and said "*I don't know what Neil has told you. I wasn't there. But I think I would know if I had been working from home. And I haven't been! And I think I would know if I had seen a GP this morning. And I haven't seen a GP. Neil's made it all up*".**This is the first potential protected disclosure**

2.23. At this point, the claimant says he did not know what was going on, His statement says " *but I knew it was serious and Julie Claxton was extremely dismissive of my version of events and I felt her tone was aggressive towards me. Julie Claxton told me Kevin would be contacting me to arrange to take a statement and it was imperative it was done before I took annual leave on 04/04/2017, and that I had to see a GP as soon as possible and get a sick note… Julie Claxton then told me I had completed my sickness absence incorrectly, that I should have entered it as an Accident at Work. I said "I put musculo-skeletal because that's what I thought it was. I'm not trained on Workday. I'm trained to fit meters. That's your job, you're a Manager you're trained on Workday, I'm not".* Ms Claxton told him OH would make contact within 48 hours to assess him , and that Kevin Ball would contact him later to arrange to take a statement for the LTI Investigation. She sent an email to numerous Managers that evening saying he had told her he had not visited a GP that day. His statement says *I felt stressed after the conversation with Julie Claxton. It was her aggressive manner and I felt she was dismissive of everything I was telling her. I*

*felt anxious Neil Foster had been **lying** that I was working from home and then had **made up** a GP Appointment I'd supposedly attended. I didn't know what was going on but I knew whatever it was, it was serious because Neil had **invented a story** to hide it.*

2.24. The claimant quotes company policy "*If you say your illness is related to your work environment or activities, your Manager will refer this to Occupational Health as soon as possible*" . He says Mr Foster and Ms Claxton both knew he needed support from OH and if Mr Foster had recorded his absence correctly from 24th, he would have received an automatic referral to OH . We do not accept they both knew he needed such support as in their eyes he appeared to be getting the support he needed from the NHS. Ms Claxton thought it was a minor accident with minor injuries .The other point to note is that she must have been laden with work as Mr Storey was on leave and Mr Foster on sick.

2.25. She and other managers were trained to use Workday but did not understand it properly . Absence recorded as "musculo-skeletal" would have triggered an automatic referral to OH only if it had continued for seven days . Had it been entered as an Accident at Work, it would trigger an automated referral straightaway unless, as in this case, the claimant made the common error of selecting from the drop down menu " part day" absence. In such circumstances no referral would be made automatically . The claimant considers this to be detrimental treatment as he was forced to fund private treatment to help recover. It may well be a detriment but it was definitely not on the ground he had made a protected disclosure. It was because of misunderstandings of new systems. Mr Foster did not make a referral because he went off sick and left matters to be handled by Ms Claxton. She did not make one because she erroneously believed when the claimant corrected Workday one would be made automatically without human intervention. This erroneous belief was shared by Mr Ball where he became involved. Mr Storey who has a better understanding of Workday was on leave. Making a referral was not his job anyway.

2.26. At 5:30pm on 27 March the claimant was going over the conversation with Ms Claxton, as he says " *in my head, stressing over it*." As she had demanded he see a GP as soon as possible, he rang the GP. The receptionist said they had had a cancellation and booked him in for the next day. In the meantime Mr Ball telephoned the claimant. At 19:04 he returned the call . Mr Ball said he needed to visit him next day at his home to take a statement for the LTI . The claimant told Mr Ball he was worried about the process as he had never heard of a LTI and about how he felt Ms Claxton had been very aggressive, demanding he see a GP, and dismissive of everything he told her. Mr Ball tried to reassure him , saying LTI was company policy, and he appreciated Ms Claxton could come across that way, but she was "*alright and to ignore it*". The claimant texted John Mason at 19:43 after Ms Claxton's call telling him they were doing an "***investigation on me**, and 'from the conversation, sounded like a trial'*. He felt stressed from the conversation with Ms Claxton and says he " *knew something was wrong*".

2.27. His statement then says Mr Foster "*as a Manager was "a custodian of the company's finances and has an obligation to ensure that an employee's timesheet is correct so that they are only paid what they are entitled too. I believed that by falsely recording my time as Double Handed Work, Neil was committing **timesheet fraud**, and **I had unwittingly become involved** in it. Centrica is a listed company, if Managers are committing financial impropriety and authorising timesheets they know to be false, then I believed it was important that it was investigated and that suitable internal controls were in place to ensure that people can have faith the company's finances are in good hands".*

2.28. Pausing there, what the claimant is saying is true but the entire running an operation where managers are based in an office and the operatives are working in the field relies upon **mutual** trust and confidence. Therefore a course of action which saves time and money on an LTI investigation which simply duplicates the1313 investigation, benefits the claimant in a way every other employee and the union would welcome, promotes co-operation from the operatives at little or no cost to the respondent. While it is strictly an incorrect entry, few, if any, reasonable people would regard it as fraud.

2.29. The claimant's statement continues " *I had to search in Google for 'Lost Time Report' as I had never heard of it. I realised it was part of the HSE records and related to absences following Accidents at Work. I had been taught about the Reporting of Injuries, Diseases and Dangerous Occurrences (RIDDOR) and the Health and Safety at Work Act (HASAWA) in the British Gas Academy. As I understood it, all accidents at work had to be recorded honestly and correctly and any Lost Time and Injuries arising from an accident at work had to be recorded and reported honestly and correctly in the company's Accident Book and to the Health and Safety Executive (HSE). I believed Neil and Lee Storey were* ***falsifying*** *Health and Safety records. As Julie Claxton informed me that when I went sick, she had to conduct a Lost Time Investigation into the accident, I assumed that if I hadn't gone sick as per Neil's plan, there would have been no need for a Lost Time Investigation. I believed that Neil and Lee Storey were* ***not conducting proper Health and Safety Investigations which endangered employees*** *and customers. I believed recording accurate records and completing investigations were an integral part of maintaining a safe working environment for employees and customers. If I had been working in someone's house and was injured using a faulty piece of equipment for example, then if the root cause wasn't identified by conducting these investigations, other employees and potentially customers could be at risk of similar injury*". What he says is true, but the example at the end is nothing like these facts. **1313 is a digital "accident book ".** The HSE records do show the absence commencing on the 27th not 24th but as Mr Basigara explained that is a draft not a final report**.** He also explained the fundamental fallacies in the claimant's beliefs. As a matter of law his beliefs do not have to be right, as we will explain later, but they must be, **when judged against the facts he knew at the time**, objectively reasonable. If his view was reasonable when it was formed any disclosure then made would be protected , but if when he has the full facts he continues making allegations of serious impropriety which no reasonable person could suspect, the reasonableness of his belief at the time he repeats the allegations has to be reassessed.

2.30. Mr Basigara's statement says, and we accept,
In raising the subject of recording time as double handed working I believe the Claimant was trying to suggest that Neil Foster and/or Lee Storey were 'covering up' work related injuries so that these would not be reported or investigated properly as required by Health & Safety Laws. However, the basis for this assertion is not sound as everything that includes medical treatment, modified duties or restricted duties is classed as a recordable injury; there is no real difference if the individual has taken time off or not. As the Claimant's manager told him to carry out modified duties this is considered a recordable injury. All recordable injuries require a thorough investigation within a timely manner, which includes site visits, pictures and root cause analysis all where applicable. The Claimant also correctly recorded his accident on our 1313 accident reporting phone line and in doing so set the Respondent's investigation process in motion himself. An example of this is the Claimant's own accident from February in 2017 which did not result in any lost time but for which a full accident investigation report was completed.

I believe the Claimant was also suggesting that not recording him as absent was to avoid having to complete a RIDDOR report. However, it was ***clarified to him on several occasions*** *that road traffic accidents and injuries are specifically excluded from RIDDOR. It was also clarified to him that for other incidents, only absences or modified duties in excess of 7 days have to be reported through RIDDOR. It is irrelevant for a RIDDOR report whether or not there was actually lost time*

2.31. The claimant attended a GP Appointment at roughly 8:30am on Tuesday 28 March still in pain. He explained British Gas were 'on my back' to get a sick note and he was going abroad to get married, flying on 4 April . The GP gave him a sick note and advised he do some stretch exercises and use an Ibuprofen gel on the affected areas.

2.32. Mr Storey returned from holiday on Monday 3 April 2017. During his absence Ms Claxton sent him an email which he read on his return confirming that over the weekend of 25/ 26 March the claimant's situation had deteriorated such that he felt unable to return to work on Monday 27 March. Mr Foster had arranged an LTI call which took place on that day which he attended despite having just commenced sickness absence himself. Mr Storey believes this demonstrates he had no hesitation in doing an LTI when it became clear the claimant was not in fact fit to undertake modified duties. Ms Claxton's email accepted Mr Foster said the claimant was working from home on Friday and Monday when he had repeatedly told Mr Foster he was unfit for work. For the reasons given above Mr Storey was not in the least disturbed by this.

2.33. On 28 March the claimant was extremely worried about what to do regarding what he considered to be "***malpractice"*** by Mr Foster and Mr Storey. He made a total of 10 phone calls to Union Safety Representatives Jason Walker and Nev Storey and GMB Branch President Adam Pearce between 10:00am – 10:30am but could not get through to anyone so left voicemails. Mr Nev Storey returned his call at about 10:30am. The claimant told him everything which had happened and that Mr Ball was coming to his house that afternoon to take a statement . He said he was worried he had unwittingly become involved in something illegal and asked him for advice what to do about it. Nev Storey said "*You've done nothing wrong. When Kevin Ball comes to take your statement, just tell the truth,*". **This is the second potential protected disclosure as Mr Nev Storey was probably a " person responsible " under s 43C(b) (ii)** (see law section)

2.34. The claimant contacted people he had trained with at British Gas Academy for Union Representative's numbers. A text he sent at the time to someone called Mark reveals what he was thinking. Mark texted "*What have you done Burkie* ? .The claimant replied " *Nout you wouldn't have done. Van crash. On the sick but my manager rejected it* ***to fiddle his figures****. Got me to put it as light duties and said I could sit in the house. Now he's on the sick-I've had to sign off. They're doing an investigation for lost time accident at work. Looks* ***dodgy as fuck*** ". No one other than the claimant thinks it was dodgy at all. More importantly, Mr Foster did not have any figures to fiddle.

2.35. Kevin Ball has been employed for around 8 years, but only in mid March 2017 took up his first managerial role. He had a little knowledge of the claimant. Ms Claxton had asked him to conduct an initial fact finding meeting. He rang the claimant on afternoon of Monday 27 March to arrange a visit. On Tuesday 28 March he visited the claimant's house and went through when and where the incident had happened. He remembers the

claimant asked a few questions about how absence should be recorded and checked if the way in which his had been was correct. He said he had spoken to Mr Foster on Friday 24 March who told him to enter double handed work rather than sick on Workday. Mr Ball's statement says " *At the time it was just a conversation we were having, there was no particular weight behind the Claimant's questions and I didn't get the impression that it was a big issue for the Claimant*".**This is the third potential protected disclosure.**

2.36. Mr Ball too thought not recording the day as sickness absence would have been more for the claimant's benefit . If he was capable of doing some light duties it would avoid a day counting as absence in AMP. Mr Ball did tell him he would discuss with Lee Storey how the absence on Friday 24 March 2017 had been recorded . He did so later and from memory says he too thought this had probably been done for the claimant's benefit. If the clamant had raised health and safety concerns Mr Ball, whose background is in health and safety, would have gone to Lee Storey or, if the complaint was about him , to HR and or the health and safety team. He accepts the claimant did seem concerned a LTI Investigation was being undertaken. Mr Ball told him not to worry as it was standard practice. After visiting the claimant he went to the site of the incident took some photographs of it and the van and prepared a Report which he submitted to Lee Storey.

2.37. The claimant's account of the visit differs. He says he narrated everything that had happened including that Mr Foster had told him he **needed** him off the sick to **avoid** a LTI investigation , had denied his sickness absence request for 24 March and **pressured** him to record it as Double Handed Working and to do the same the following week. He said Mr Foster had said he had cleared everything with Lee Storey and they were going to **make up tasks** he was completing from home. Mr Foster had told Ms Claxton the claimant was working from home on Friday 24 and Monday 27 March . Then when Mr Foster went sick on 27 March , he had **invented a GP appointment** to explain that the claimant was suddenly taking sick leave. The claimant says he told Mr Ball it was **all lies**, and Mr Foster had made it all up to cover up what **they** were doing. He started showing Mr Ball the emails he had stating he was unfit for work and the Notification from Workday showing his sickness absence had been "denied" Mr Ball showed him an email which contained a passage that he had been working from home on Friday 24 and Monday 27 March but after he had attended a GP Appointment he had taken sick leave later that day. The claimant showed Mr Ball a copy of the sick note dated Tuesday 28th The claimant says Mr Ball said "*tell me it again and I'll write it all down'*.

2.38. We believe neither the claimant nor Mr Ball are telling deliberate untruths. Mr Ball was a somewhat reticent witness when trying to play down matters which reflected badly on the competence of the respondent especially in respect of referral to OH to which will come in the moment, but otherwise was credible and reliable . His primary role was to investigate the incident itself on which there would inevitably be a conclusion the claimant was blameless, not the recording of the sickness on Workday, so the impact of whatever the claimant said about that did not "register " with him . Because of his health and safety background he exceeded his brief to a certain extent in going into OH matters. For the claimant's part, he intended to give an account making robust and detailed allegations because that is how he felt. However when it came to the meeting with Mr Ball we do not believe he was anywhere near as forthright as he now says, and maybe believes, he was.

2.39. The claimant says Mr Ball explained OH would contact him within 24-48 hours, to put support in place for when he returned to work. The claimant said he had been off

since Friday and OH had not contacted him yet. Mr Ball replied they would definitely be in touch, " *just give it a day or two*". On Thursday 30 March at 17:03 the claimant rang Mr Ball to say he was still waiting for OH to contact him and asked him to make a referral as he wanted to put in place help for when he returned to work. Mr Ball said he thought Ms Claxton was dealing with it but he would make the referral. The claimant waited all day for OH to contact him on Friday 31 March but they never did.

2.40. He emailed Mr Ball on Saturday 1 April at 12:48 informing him he was still waiting and asking him to explain the RTW process. He was under the impression OH would be actively involved in his RTW, would assess his condition and put support in place. He was unsure what to do on his return to work on 2 May . On 3 April at 14:00, he emailed Mr Ball , Ms Claxton and Mr Foster informing them he did not expect to be fully recovered when he returned to work so that they were aware of his condition and could put support in place. He quotes Company Policy which states "*Please speak to your manager if you believe you need to use the service (of Occupational Health) and ask them to refer you*" . He feels they had **ignored** his requests.

2.41. Mr Ball is now very familiar with the respondent's OH process and AMP but when he visited the claimant he was not . Workday was a relatively new system at the time and the respondent had just changed OH providers. He thought a referral to OH would have been automatically made when the claimant entered sick absence on Workday. This was not so. Mr Ball has been shown the emails of 1 and 3 April 2017 but does not remember receiving these at all. He does not work weekends so the earliest he could have seen them would be 3 April 2017. He receives around 200 emails every day and although he tries to read and respond this is not always on the day they are sent. He suspects he did not get around to reading them until after the claimant went on holiday on 3 April 2017 and did not see any point progressing a referral until he saw how he was on his return.

2.42. Mr Lee Storey accepts there was a delay in the claimant being referred to OH and believes it came about as a result of inexperience with using "Workday" and transition to "MyHealth". Prior to Workday people rang in to notify of absence and this was logged over the phone. Under the new system people enter their absence themselves through Workday and OH are supposed to automatically pick up when a referral is required through Workday. However, when the claimant first logged his, he entered it as a part day absence so he was not automatically given an OH assessment. Mr Storey would have expected Workday to automatically refer to OH a musculo-skeletal injury immediately but now knows it does not. He readily agreed there were problems with Workday when it was introduced as people's understanding of how to use it was poor.

2.43. On 29 March the claimant attended a private physiotherapist consultation. The physiotherapist manipulated his neck and shoulder, gave him some stretch exercises , advised him to keep using heat treatments and said it could take **up to 8 weeks** to make a full recovery. He explained he needed to fly on 4 April as he was getting married. He arranged another appointment for Monday 3 April . He did not book any more sessions as he already had an NHS physiotherapist appointment arranged for 2 May .On 4 April , he flew to Thailand, had a fantastic time and was extremely happy and relaxed when he arrived back in on 29th April . He had not "closed his absence" on Workday before he left and was unfit for work before he flew. He accepts he was rightly shown as on annual leave from 3 April 2017 until 1 May 2017 inclusive.

2.44. Included in the documents provided under the SAR was the presentation Mr Ball produced regarding the LTI. The claimant says Mr Ball had "***doctored*** *my statement and* ***removed my report of malpractice*** *when he had typed it up. Kevin's version of events was completely different to what I had told him when he visited my house on 28/03/2017 I was relieved that I had reported it to Nev Storey initially, and he could back me up and that I had the time stamped text messages I had sent to Johnny on 24/03/2017 which said Neil was telling me he needed me off the Lost Time Accident Report and they would make things up that I was doing from home.*
Company Policy lists 'serious dishonesty at work' as an example of gross misconduct I had never been working from home or seen a GP on 27/03/2017, the HSES Compliance Officer was being deliberately misled by those Managers in the email threads. I felt vindicated somewhat, all this information would have been available to Mark Harrington when he investigated my Grievance and I hoped the company would ***take action***.
The claimant does not say what " action " he wanted. He completely misses the point **none of this information had any place in the actual report into the LTI.** The allegations of impropriety by his managers would potentially have been matters over which the claimant could have raised a grievance and/or those managers could have been subjected to disciplinary action. For the rest of April all managers involved did not give a second thought to what had happened. As far as they were concerned the LTI was progressing, OH should have been "in autopilot", the claimant would probably be all right when he returned and ,if he was not, all he had to do was report sick .

Return to work 2-3 May

2.45. On Sunday 30 April the claimant checked his emails. There was not a single reply from any Manager. He had never had a problem with Management before. He believed it was deliberate because he had a strained conversation with Ms Claxton on 27 March and reported Mr Foster and Lee Storey's malpractice to Kevin Ball on 28 March . Following that, he thinks they "ignored" requests to be referred to OH and his emails. He decided to contact the two coaches, Chris Mason and Paul Kirby, and ask them how to return to work. At 12:55pm, he emailed both saying he still had some problems with his neck and shoulder was attending Physiotherapy on 2 May and asked what he had to do Neither replied. It was a Sunday and the day after was a bank holiday.

2.46. That night he checked the Roster as the shifts for May had not been communicated to him before he left. In mid March 2017 , there had been a Team Meeting during which Mr Foster had said they might have to change how they worked the Out of Hours shifts (Out of Hours Standby shifts are 18:00pm-06:00am Monday – Saturday and 09:00am-06:00am Sundays and Bank holidays They are well paid and in this rural area actual call outs are infrequent). Mr Foster was open to suggestions and Chris Mason was tasked with finding a solution for the summer Roster. Mr Foster sent an email on 23 March, the day of the RTA, stating they were going to change Out of Hours shifts to ensure everybody had a reasonable break between them . Mr Mason held a meeting on 28 March to discuss the roster. The claimant did not attend as he was absent after his RTA and did not know the outcome . Mr Foster does not know what was done while he was absent from 28 March until 22 May .

2.47. Mr Foster had accommodated the long leave request because the claimant was such a good employee. We accept he told the claimant at the time he would have to pick up some extra Out of Hours cover as the rest of the team were covering his Out of Hours

whilst he was away in Thailand and these would need to be repaid. **This is exactly what we would have expected Mr Foster to say, as his leave covered three Bank holidays.** At the time of their discussion, the claimant was perfectly well , it was done to help him out and changes to the Out of Hours cover were not even in contemplation .

2.48. On Sunday 30 April , the claimant realised he had two emails from Chris Mason about the summer roster, one sent on 10 April and the other, which included the full roster for May, sent on 25 April He had been allocated an Out of Hours shift on 2 May , his first day back and on 18, 23, 26 and 29 May despite, he says , " managers knowing" he had been injured, had not worked for 5 weeks, and had been advised it would take up to 8 weeks to make a full recovery. When Mr Mason drafted the roster he did not know how the claimant would be. If the claimant had returned feeling well he would have been aggrieved at not getting his share of lucrative shifts. The claimant quotes Company Policy which states "*If an employee returns to work after a period of long term absence (four weeks or more): hold a meeting with them to welcome them back to work..., implement any reasonable adjustments*". He assumed when he had a RTW Interview and OH got involved his duties would be adjusted. He started to worry '*what was going on*' .

2.49. Another issue is the End of Day process which came about because Dispatch were not able to send a job if the estimated length exceeded the shift time an engineer had left to work. So if they had a 2 hour job available and an employee only had 90 minutes left to work he could not be sent that job and they would lose 90 minutes of his productive working time for the sake of 30 minutes overtime. As a result the respondent agreed with GMB Trade Union employees could **automatically** be sent work estimated to exceed their working day by no more than an hour. Employees could opt out of the End of Day process on a daily basis by telling their line manager or coach before 10am. Managers would update Dispatch and they **should not** automatically send the engineer such work but occasionally they do. Dispatch can still contact an engineer to **ask** if he was prepared to work later. If a job is issued outwith those terms the engineer can contact Dispatch and request the job is removed from him.

2.50. On 2 May at 7:03am, the claimant emailed Mr Mason and Mr Kirby 'opting out' of the End of Day Process that day . He rang Mr Mason at 7:25am who asked how he was. He replied *he was* returning to work but not fully recovered still had stiffness in his neck, could not look over his left shoulder and was still "aching a bit" across his shoulders too. He said " *I need to take it easy*" and told Mr Mason he had a physiotherapist appointment that afternoon . Mr Mason said he knew nothing about it . The claimant said "*I emailed Neil, Kevin and Julie Claxton before I left the country that I still had problems and I was attending physio today.* ***I can't believe they haven't passed any of the information onto you*****".** The claimant simply did not appear to us able to accept any manager can overlook things or make a mistake or be justified in making adaptations to what would ideally happen under established procedures even when under the extra workload caused by Mr Foster's sick absence. Mr Mason agreed he could go to the appointment . The claimant also told him he did not have a working GIST card which allows him to work on prepayment gas meters and must be 'refreshed' every month . Mr Mason said "*Paul Kirby has the GIST card machine and he'll visit you later to clear them".* The claimant did not know Mr Mason was Acting Manager at the time. He quotes Company Policy "***You and your Manager*** *need to hold a Return to Work Meeting to check how you're doing. Your Manager will arrange this to take place as soon as possible*" The claimant says Mr Mason should therefore have been the one to hold a RTW

Interview. When absent on 29 September 2016 the claimant had a RTW Interview with Mr Foster before he returned and he updated Workday to say the RTW was complete.

2.51. At roughly 7:45am the claimant turned on his Work Tablet and his first job appeared. He completed a Stock Pick Up at 8am, and went on to two jobs. At roughly 11:30am, Mr Kirby rang him and said he was coming to clear his GIST cards. At roughly 12:10pm, they met in a car park . The claimant's version is Mr Kirby asked how he was. He replied he was "*getting there*", but still aching across his shoulders, had some discomfort looking up and down, and could not look over his left shoulder. He demonstrated his range of movement and said " *What are they thinking giving me all those Out of Hours shifts? It's my first day back at work after a car accident*". Mr Kirby told him it was only fair he had to catch up on shifts because he had been on holiday and his colleagues had to do extra while he was away. Mr Kirby asked about his holiday and wedding, while he cleared his GIST cards.

2.52. Mr Kirby had been employed by for over 7 years. His role is the day to day organising and running of the geographical area and safety/coaching visits with engineers He liaises with Dispatch to ensure efficient running. He had a close working relationship with the claimant whom he describes was a model employee, who always seemed happy and was good at his job. He had done RTW meetings in a previous employment but not with this respondent because he was not "managerial grade". He does not remember the claimant's email of 30 April 2017 at all. It is likely he left it for Mr Mason to deal with as he was acting up into Mr Foster's role. Also, he was particularly busy during this period because he was the only coach left on duty.

2.53. He was asked to visit the claimant on 2 May 2017, **to conduct a RTW meeting** because prior to his annual leave the claimant had been off sick. **He is not sure who asked him or when.** A manager normally conducts an RTW but Mr Kirby was available and, as he was refreshing the GIST card could " kill two birds with one stone". He was not really familiar with the AMP but felt comfortable with what he was required to do. When they met he says they "*had a chat*". The claimant was in very good spirits. Mr Kirby was a very credible witness , admitting without hesitation when he could not recall but adding in oral evidence small details , on this point saying he could not recall meeting someone " *so elated*" as the claimant was that day. Mr Kirby asked whether he was fit to work and he said he had a limited mobility when he looked to his left but apart from that was fine. He told him he had a physio appointment later that day. Mr Kirby was satisfied he seemed fit to work and noticed he was lifting his tools with no apparent difficulty. He denies he sat in his van throughout, but may have when refreshing GIST cards. The claimant gave no indication he was anxious and did not ask any questions or raise any concerns about how his absence had been recorded. If he had, Mr Kirby would have raised the issue with Lee Storey or, if there was a concern relating to him , with his superior Mr Dalrymple. The claimant did not ask for a reduced workload. If he had Mr Kirby would have tried to accommodate his request. As with the apparent clash of evidence relating to the discussion with Mr Ball on 28 March, we have two versions not far apart in factual content, but differing in the emphasis placed on certain parts. We prefer the evidence of Mr Kirby but that does not mean we think the claimant is lying.

2.54. Mr Lee Storey says when the claimant returned from Thailand Mr Foster was still on sick , Mr Ball was still involved with the LTI investigation and in touch when the claimant returned to work on 2 May 2018. Mr Kirby and Mr Mason are both at the same

level of seniority. Mr Mason was officially the "acting" Manager but both were “mucking in” to cover Mr Foster’s absence. Mr Storey **thinks** he asked Mr Kirby to see the claimant on 2 May 2017 . It may have been Mr Mason or Mr Ball or maybe more than one of them. Mr Kirby reported the claimant said he was fine to work but still a little stiff. Mr Storey is familiar with the AMP and whilst someone more senior than a coach normally conducts RTW meetings they are not a complex task. He believes Mr Kirby carried it out as should have been done in the circumstances. If the claimant had been absent for a longer period or with a more significant health problem a more formal RTW may have been appropriate but at the time Mr Storey understood the claimant had suffered a minor injury more than 5 weeks' earlier and had been enjoying annual leave in the interim. In those circumstances and in Mr Foster’s absence , a chat in a car park was enough.

2.55. On 2 May at 13:24, the claimant rang Mr Ball on his work phone, about an hour after Mr Kirby had visited saying he was just about to have a Physiotherapy session but was still waiting for OH to contact him . Mr Ball replied “*You’re joking*!”. The claimant asked if he could follow up the OH referral. Mr Ball said he would “*make a referral for you straight away*” and he did . The claimant says this shows Mr Ball had not referred him **when he agreed to on 30 March** although the claimant had informed him twice by email he had not been contacted by OH. It may well be Mr Ball did say in March “ ***I*** *will refer you*” , but we are convinced what he meant was a referral would take place and assumed Workday and/or Ms Claxton had done that. Mr Ball phoned OH and when they emailed to acknowledge the call he was told a case had not been raised yet because it had not come through as an automatic referral due to the reason for absence being not properly entered on Workday. Mr Ball requested a case was opened. He chased this up on 3 May 2017 and was told they had put through a referral and the next step would be for them to assign a case manager and be in contact with the claimant about an assessment.

2.56. At 13:32, the claimant attended a consultation with an NHS physiotherapist who explained because he had not been using certain muscles it was normal to be aching. He was given stretch exercises and booked the next available appointment for 6 June .

2.57. Returning to Mr Kirby’s RTW meeting , Mr Foster told us he is familiar with the AMP and has conducted many RTW’s documented on RTW forms. However, when Workday was introduced the training he received was not very good and it took quite a while for managers to figure out how to use it properly . Many were under the impression they no longer had to complete an RTW form as there were specific boxes they had to complete on Workday about the RTW process. He, and many other managers thought completion of the Workday boxes together with an entry in the coaching log was to replace using the RTW form. They now know they should also submit an RTW form on Workday. Mr Kirby remembers someone senior to him told him he had to update the claimant’s coaching log to record their conversation. He did so stating “ *Dropped in to see Michael Burke at 5 East Green, West Auckland, DL14 9HH, following his return to work after a weeks sickness following an RTA. Since then Michael has also had four weeks holiday which included his wedding in Thailand. Michael said he was fine to work, but still had a little stiffness in his neck and has slightly limited mobility in his neck when looking to his left. He had an appointment with a physio this afternoon, but reiterated he was fit to work*” . Vitally important is that Mr Kirby emailed that extract from the coaching log to the claimant, copied to Mr Ball, Mr Mason and Mr Storey at 19:58. The email said “ *please see below entry in coaching log following today’s visit. Glad to see you are recovering well*.” At no point did the claimant contact Mr Kirby to correct that entry. Mr Kirby says it is quite

normal for him to send copies of coaching logs by email with a copy of the entry and if engineers disagree with it they would not hesitate to contact him, whereupon they would agree an amendment to the coaching log.

2.58. The claimant says when at near 10 pm he noticed Mr Kirby's email he thought he had not said he was fit to work, saying Mr Kirby never asked and was only there to refresh GIST cards. He now says he did not see a point in replying because he had spoken with Mr Ball and thought support would be put in place. We do not accept the claimant's version of what happened in the car park. Mr Kirby's account of the meeting was wholly credible and is supported by this entry. The claimant says he did not know until August, when he received the Grievance Outcome Letter, Mr Kirby was saying their conversation that day constituted a RTW meeting. The discussion was informal , but it served its purpose . The claimant says this was a detriment because **a manager** should have conducted a RTW Interview **before** he returned to work. We disagree.

2.59. On Wednesday 3 May at 7:25am the claimant emailed Mr Mason and Mr Kirby opting out of the End of Day process. At 7:40am he contacted Mr Kirby saying he was not receiving any work to his tablet to complete. He was scheduled to be on a training course that day which had been cancelled, and presumed no-one had put him back into the rota so the planning team knew to book work in for him. Mr Kirby said he should buddy up with another engineer, Rob Harle, for the day. Between 9:30am-10:30am, Mr Ball rang the claimant from Mr Mason's phone saying a case had been opened with OH and they would contact him later that day. They did not until the next day .

4-9 May

2.60. On Thursday 4 May at 7:25am the claimant emailed Mr Ball and Mr Mason saying he was still waiting for OH to contact him . Mr Ball replied by email stating a case had been opened and they would be in touch soon. At 7:35am, the claimant emailed Mr Mason and Mr Kirby was 'opting out' of the End of Day process. He started his day as normal. Included in the documents provided under the SAR in August 2017 were some from OH showing that on 3 May Mr Ball had spoken to OH . The entry says " *Kevin called in looking for support for Michael .He has been off work for around five weeks following a road traffic accident and has now returned to work this week .it wasn't logged on Workday and therefore didn't come through as a case to us but Kevin would like for us to assess his fitness for returning to work , help to support his recovery with self-help/ guidance and also to see if any adjustments/ modifications need to be considered as part of a RTW plan*" This is not, as the claimant's statement suggests, a request for OH to "construct a return to work plan" He feels managers should have intervened with his workload and amended duties (including Out of Hours shifts) pending OH assessment. We disagree. He did not ask for action and no manager could be expected to deduce from what they knew he needed any.

2.61. At roughly 10:30am, he received a call from OH to assess his fitness to return to work. He explained his problems. The case worker documented his comments in an assessment and said he needed to be placed on Light Duties ,they would liaise with his Manager to arrange it and book him a consultation with a Physiotherapist.

2.62. We find Mr Mason tried to reduce the claimant's work allocation to 80% **of his own initiative** with Dispatch but this had to be done by a manager so Mr Ball effected this.

The claimant would have been able to **"work at his own pace".** Reducing allocation of work to 80% just means the team gets 100% of targeted time work for every fit engineer but only 80% for the claimant. The effect is he is allowed extra time on each job.If a fit engineer takes two and a half hours to do a job targeted for 2 hours , he would be asked why. He may have a good explanation such as the meters were hard to access in an old property . The claimant would not even be asked to explain. As each job is completed the engineer logs it on his tablet, which triggers the allocation by Dispatch of the next job. As Mrs Callan rightly said, if an engineer is not told the 80% reduction applies to him, the reduction is useless. However we cannot accept the claimant was not told partly because of his own evidence, and partly because we accept every engineer would know the phrase "work at your own pace" meant that he need not achieve target times so could take breaks to stretch his muscles at any time. The claimant's own evidence is Mr Mason told him, though not until Friday 5 May, he was to be on an 80% allocation but until the following week Dispatch already had booked jobs on the basis of a full team being 100% fit . The claimant says had it been communicated to Dispatch he was on a reduced work allocation, he does not believe they would have given him the equivalent of 6 jobs on 4th May but that is wrong. Dispatch will send a job as soon as the engineer enters on his tablet the last job has finished. It is up to the engineer to take time, during or after the job, to do such things as stretching exercises . Mr Mason had explained to him the workload had been planned on the basis of every engineer having a 100% allocation that week, but not the next . All the claimant had to do was tell Dispatch he could not do as much work as quickly, and there would have been no repercussions for the claimant at all

2.63. The respondent would, if necessary, reduce an employee's working hours on a temporary basis as an alternative to permitting him to work at his own pace . Included in the documents provided under the SAR in August were those now at A 289 and C32-39 which show OH recommended a phased return Week 1 – 50%, Week 2 – 75%, Week 3 – 75%, Week 4 – 100% . An Initial Assessment states "*Michael was in an road traffic accident 6 weeks ago and sustained soft tissue injuries and whiplash. He has returned to work but is struggling with some of his duties. I am suggested a phased return for 3 weeks*" It documents the history of the condition which includes "*Returned to work on May 2nd also. No neuro. No headaches or dizziness. On Light Duties this week*". The claimant believes Mr Ball inferred to OH he was on Light Duties, while he was waiting to be assessed. He probably did because he knew he had actioned Mr Mason's suggestion to that effect The claimant's statement says " *I started to realise the depths of the victimisation and it was worse than I realised at the time*."

2.64. Mrs Callan said the documents suggest Amanda Clifton from OH spoke with Mr Ball on 4 May and recommended a Phased Return which he did not implement . Mr Ball denies this. A closer inspection of the documents shows what was likely to have happened. It was definitely Mr Ball who spoke to OH on 2 and 3 May, and it is to him OH should have reported. Page A293 headed " feedback call" from Ms Clifton to Mr Ball sets out a phased return as recommended above. The call duration is shown as 15 minutes then there is an entry which reads "***Due*** *04/05/2017 08.00*." At the top of the page there is an entry " *Call outcome Call objective complete*" .

2.65. If one turns to page C35 there are a list of " Activities" which unfortunately show no times. The third entry from the bottom is a phone call and reads " ***Attempted*** *feedback with Kevin…"* The activity status is shown as "*Completed*". The maker of the call was Ms Clifton. Our member Ms Winship spotted this and wondered if Ms Clifton did not actually

speak to Mr Ball but tried to at 8am and failed. The **attempt** would then rightly be shown as " Completed" . There is a reason for her not trying again. RTW plans for employees are uploaded to Workday so she probably assumed Mr Ball would be informed without further human action of the phased return recommendations. We believe Mr Ball did not see the OH recommendation at any time, as only line managers have access to their employees' Workdays. He was not the claimant's line manager. If he had been told about a phased return he would have ensured this was implemented. Mr Mason could not access the claimant's Workday record either because he was only acting as line manager and did not have the seniority of grade to access Workday . Mr Foster was off sick. Mr Lee Storey had no access either. It is likely the entry OH uploaded was not noticed by anybody. The person most likely to have access to the Workday record of the claimant was Ms Claxton, but if she believed Mr Mason was doing the day-to-day management of the area and Mr Ball was also involved, she would have no need to take action . As the issue of whether a phone call was made was important, we raised this matter during the hearing to give the respondent an opportunity to make further enquiries. With the passage of time and Ms Clifton being on holiday no more light could be thrown on the matter. On balance of probability, we find no phone call took place and the Workday record was not seen by any manager who should have taken action to implement it.

2.66. By 14:05 the claimant had completed a job, logged having done so on his tablet and was due to start his 30 minute break. At 14:25 another job appeared on his tablet. He had opted out of the End of Day process and this took him over time When he saw the job he tried to ring Mr Kirby twice but it went to his voicemail. The phone lines to Dispatch are closed until 15:00pm but Managers and Coaches have a direct line to Dispatch. He questioned the job in emails to Mr Mason , Mr Kirby and Dispatch. At 14:43, Dispatch replied stating "*Can you do that if I get someone to jump on with you*?" He agreed to do the job only as they promised to send another engineer to help. He considers this detrimental treatment as his 'Opt Out' was not "actioned". As Mr Ball explained Dispatch's job is just to get someone to cover the work. However, if someone has opted out , he could just say "No" with absolutely no negative repercussions. He has seen the claimant's communication with Dispatch on 4 May 2017 and it is clear from a comment Dispatch made they would owe the claimant a "*box of chocolates*" there was no obligation on him . At about 15:50-16:00 an engineer Simon Hodgson rang the claimant and asked if he still needed a hand. He was roughly 30 minutes away and the claimant said there was no point him coming as he was just finishing so there would be nothing for him to do by the time he got there. He feels it was a detriment as he was being overloaded. He would have refused to do the job if they had not promised support, no support was available on time and Dispatch knew that. We doubt they would have known but even if they did , the claimant was agreeing to do a favour , not being expected to do the job.

2.67. The claimant says Mr Kirby "ignored" the phone calls , was copied into the emails so would have known why he was ringing him and as a coach, his job is to support engineers. The claimant had rang Mr Kirby several times in the past to ask for support completing a job, and he had always been available or rang straight back. The claimant completely misses two points. First as will be seen later this was the busiest time of day for Mr Kirby. Secondly, comparing what Mr Kirby habitually did, when he was one of two coaches with the manager in place, with what he did when Mr Foster was away and the other coach was acting up to his role is an invalid comparison. Mr Kirby agrees it is possible the claimant called him twice on 4 May 2017 and did not receive a response. He spends a lot of his working day driving and the respondent has a policy of not using

mobile phones whilst driving. He would deal with calls when parked up in his vehicle. He does return calls if somebody has left a voicemail, but the claimant had not. . There are times when his day is so busy, he does not return every missed call. He has seen the email between the claimant and Dispatch which he was copied into but does not recall receiving it at the time but that is probably because the claimant appeared to be happy with the outcome at the time. He agrees the claimant opted out of End of Day process before 10am and the work would take him beyond his normal end of shift , but Dispatch may have been asking a favour of the claimant to do the job as it was only slightly over the timescale. He could still have said no.

2.68. On Friday, 5 May , at 7:06am the claimant emailed Mr Mason and Mr Kirby 'opting out' of the End of Day process that day. At 7:11am he emailed them stating "*I have a 30 minute physio consultation between 1-1:30pm this Monday, 8th May, organised by Myhealth*". At roughly 9:00am he had arranged to pick up some equipment from Mr Mason who asked how he was and he explained. The claimant said Mr Ball had told him he did not think British Gas arranged physiotherapy sessions anymore but Mr Mason said he thought did, so he decided to wait and see what came of the telephone consultation on Monday. We did not hear from Mr Mason but do not believe he told the claimant **OH had recommended** an 80% work allocation but simply that he would be on 80% but until the next week Dispatch had allocated a full workload to the team The claimant was annoyed the reduced work allocation did not start straight away. He says he felt ***"they"*** did this ***"out of malice towards me".*** There is no evidence to support that inference .

2.69. On Sunday, 7 May, the claimant had an Out of Hours Standby Shift from 9:00am . He would be on call until 6:00am the following morning. He was still not sleeping properly and generally felt run-down.He does not say he was in fact called out . On Monday, 8 May he was scheduled to work from 9:30 – 18:00. When working to a 18:00 finish time, one is exempt from the End of Day process . He was given and completed 5 meter exchanges that day. At 13:15 he had a telephone consultation with a Physiotherapist named Brendan, organised by OH who opted to give him an exercise programme which he said he would send that afternoon. After the consultation, the claimant contacted Mr Kirby who asked about it and the claimant told him

2.70. On Tuesday, 9 May , he was given a Job at roughly 15:45-15:50 after the End of Day cut off at 15:40. He had completed 6 jobs that day. He rang the customer and attempted to cancel the job and re-plan it but the customer explained they had taken a day's holiday and waited in all afternoon He agreed to complete the job. He says contacted the customer rather than Dispatch or Mr Kirby "*because Paul Kirby had **ignored** my calls on 4/05/2017 and Dispatch had **misled** me. I realised that my workload had not been reduced by Chris, because if it had been, I would not have been given 6 jobs to complete by planning in a day. I was very frustrated and I was starting to become anxious and worry about it. When Occupational Health got involved with my Return to Work and nothing changed I realised I was **deliberately being ignored and victimised**. I decided to complain about my Return to Work the following day*." **By this time he knew he had licence to " work at his own pace" and all he had to do was tell Dispatch " No" .**

10-11 May

2.71. At 12:11pm on Wednesday, 10 May the claimant emailed Mr Ball and Mr Mason asking them to help get his exercise programme from OH as he still had not received it.

He already had two sets of exercises, one given to him by a private physiotherapist before he went to Thailand and another by an NHS one on 2nd May. He also complained about the RTW process in these terms:
" *I would like to add that I do not know British Gas return to work procedures but from my perspective, I am disappointed in the process so far.*
After my lost time interview, I personally chased to get an appointment with Myhealth on 4 occasions-eventually they made first contact 6 weeks later. I was given no advice regarding returning to work despite contacting various SEM's and feel it is a tick box exercise at present in every aspect
I am eager to start my exercise program. I would like to add I have had 3 physio consultations since my accident and already been given some stretches. In the 7weeks following my accident, my restricted movement has only improved from manipulation.
Apologies for venting my frustration but I am focused on making a quick recovery so I can carry out my work properly and safely."

2.72. **This could be a protected disclosure in itself , if the claimant had a reasonable belief it showed his health and safety was being endangered and it was in the public interest to say so.** His statement says he felt he was being victimised for reporting Mr Foster and Lee Storey . He says Mr Mason **just ignored** the email. Mr Mason probably did not reply beacuse he knew Mr Ball had or would. Mr Ball replied at 12:22pm suggesting the claimant contact OH directly as he did not think they would speak to him due to confidentiality. He reiterated the initial delay was due to the way his absence was recorded. Mr Ball, as he was very new in his role, copied it to Lee Storey.

2.73. At roughly 12:25pm, Lee Storey rang the claimant, which he had never done before. The claimant's version of their conversation is that Mr Storey said "*Michael. I've read you're email and you're wrong the business has done everything they should for you*". He replied "*No. I'm not wrong. That's my opinion. That's how I feel about. And I feel you're doing absolutely nothing for me*. *I didn't have my Return to Work Interview conducted by Occupational Health until 3 days after I had returned to work. I'd chased for a referral 4 times before my annual leave and had been completely ignored. I was being promised things but they were doing absolutely nothing for me*". Mr Storey replied it was down to how his absence was recorded and he believed the claimant was under the care of the NHS, had suffered whiplash that was usually treated through stretch exercises, and the business no longer provided physiotherapist consultations. The claimant said "*I should have been working with Occupational Health 7 weeks ago, I'd chased Managers for a referral but they'd ignored me. I could have been 7 weeks further along in my recovery*". Up to this point, Mr Storey's version is very similar.

2.74. The claimant then said Mr Storey started getting aggressive and told him "*You need to see you're GP*". He replied "*I've already seen my GP, I've had 3 Physiotherapist sessions, I don't need to see my GP again*". Mr Storey told him "*If you're not fit for work, you need to see your GP*". I replied "*I never said I can't work. You have a duty of care to support me back to work. I was involved in a car accident which was an accident at work, and you have a duty to support me back to work. You're doing nothing for me*". Mr Storey does not recall this but he may well have said something like it because GP's often issue " fit notes" saying a patient is fit for work, but only with some adjustments.
.
2.75. The claimant then says Lee Storey became more disgruntled and said '*This is the second accident you've been involved in Michael, is that right*?" I replied "*Yes*" . Again Mr

Storey does not recall this but he may well have said something like it if, in his mind, the conversation had " moved on " to the second topic he had telephoned the claimant to discuss. Mr Storey said he was handling the LTI Investigation and thought it was a good idea to do it as soon as possible, and the claimant would need to be **represented by** his Trade Union Representative at that meeting. The claimant says he " ***just froze when he said it***". He believed Mr Storey was trying to intimidate him and the LTI Investigation would become a disciplinary hearing. He felt Mr Storey was behaving like this because he had reported his involvement on 24 March as malpractice to Mr Ball on 28 March . He says he felt trapped, did not know what to do, his career was in jeopardy and he could lose everything. He started to panic, **linking** events such as Mr Kirby sending him the Coaching Log, telling him it was fair he should do more Out of Hours shifts because he had been on leave, not replying to emails and overloading him with work as all showing he was being victimised because he had raised concerns. Objectively viewed, these links are groundless. How could he be taken to a disciplinary hearing over another vehicle driving into the back of his ? We asked him this and he had no cogent answer.

2.76 . This is another instance of content not being greatly in dispute but perceptions being poles apart . Lee Storey phoned the claimant as he was concerned by the content of his email and also as needed to discuss the LTI. He says " *I would never have spoken with him in an intimidating manner. That's not how I conduct myself. I do recall discussing that we would need to conclude the LTI and that this would involve the GMB Trade Union Representative but this was in his capacity as a Safety representative. I did not threaten him with a disciplinary at any time during the call or at any other time.* We accept this, but it may be Mr Storey came across as " disgruntled" not with the claimant but with OH and Workday .This would explain him saying " British Gas" personnel had acted properly .

2.77. Mr Storey also says *" He told me that he hadn't received the stretches from MyHealth so after the call with the Claimant I* ***phoned*** *My Health* ***to chase them*** *and emailed the Claimant to confirm they would be sending him the exercise programme that day. I also confirmed I would be in touch shortly about the LTI review and if he needed anything else to let me know*." Mr Storey contacted OH who said they were sending the exercise programme. The claimant arrived home at 17:45. He had not received the exercise programme from OH. He had been stressing all afternoon over Lee Storey's phone call. He rang OH at 17:55 and asked them to send the exercise programme. He was told the physiotherapist had left for the day, but a message would be left for him to do it first thing in the morning.

2.78. On Thursday, 11 May , at roughly 10:30am, Mr Storey rang to ask the claimant how he was getting on with the exercise programme. He would not have done this if , as the claimant suggests, he was victimising him. When the claimant said he had not received them, Mr Storey said, "*that's frustrated me*". The claimant replied "*How do you think I feel. I've been chasing Occupational Health for nearly 7 weeks but I'm just being messed about*". Mr Storey replied "*Leave it with me. I'll ring you back in 30 minutes*". He did not ring back that week.

2.79. We have already set out some findings which indicate the claimant was seeing sinister implications in acts and omissions which to any objective observer would appear benign. The way in which an operation like that of the respondent has to manage engineers working in the field, that is not in a factory where they can be seen by managers and see managers themselves when they need to, is that everybody seems to have to

cope with a veritable hailstorm of emails and voicemails. It is inevitable that some matters will be delayed or even forgotten. To the claimant this was his whole world, in that not only his job but his future with his wife in the UK depended on him being able to get back to being the model employee which he had been happy to be for nearly two years. For the managers trying to cope under the pressure of Mr Foster's absence, the claimant was one of many tasks they had to deal with. Whilst there is no objective reason for what happened from here on, this was the turning point. As will be seen, the claimant himself accepts his mental health started to deteriorate. That is an understatement. It plummeted.

12-16 May

2.80. On Friday 12 May , while working on a customer's gas and electric installation, the clamiant could not remember what he had done 5 minutes previously or remember performing any safety checks. He re-tested the installation and still could not remember doing it. He says this was the first sign his mental health was deteriorating. We see earlier signs of him overreacting but not of lack of concentration . That night Steven and a friend, Michael Lee, visited him . Steven noticed he was not his normal self and asked "*What's up*?". He explained and Steven said "*You need to see a doctor*". On Saturday, 13 May , he contacted the '111 NHS Helpline' and attended a GP consultation at Hospital after which Steven stayed the night because he could see something was not right.

2.81. On Sunday, 14 May , at roughly 17:00, the claimant was at his parent's house for dinner, could not eat anything, went to the bathroom and broke down in tears. This was certainly a major escalation of symptoms of mental illness in comparison to the stress he had experienced before.

2.82.On Monday, 15 May , at 00:22, with Steven's help, he emailed Mr Mason "*I'm going to be off sick this week*". At 01:34, he entered sickness absence from Monday 15 to Friday 19 May into Workday and recorded the reason as '*Work Related Stress'*. This was approved in Workday on 16 May At roughly 6:00am Steven rang 111 NHS Helpline. The Operator arranged an emergency GP Appointment for that morning.

2.83. At 7:33am, Steven rang Mr Mason in the claimant's presence but could not get through so left him a voicemail saying "*Michael's going to be off sick all week. He's been to Hospital on Saturday and his condition has deteriorated and I've had to phone 111 NHS Helpline and they've arranged an Emergency GP appointment this morning.* ***I'll get back to you when I know more***". Steven is the claimant's designated Emergency Contact with British Gas. Mr Storey was unaware of the email but learned Mr Mason received the voicemail. However, Mr Mason did not receive an update so attempted to call the claimant on 15 May 2017 but received no answer and no return call.

2.84. At roughly 10:30am, the GP gave him a sick note for 2 weeks with the diagnosis 'acute stress and anxiety', said he would book him in to see a Counsellor and told Steven to try and keep him away from any kind of stress. That day Lee Storey forwarded the OH exercise programme. The claimant says OH records show Lee Storey only made a request for the exercise programme on 15 May at 8:42am once he learned the claimant was absent with Work Related Stress. **That is one conclusion which could be drawn from the documents, but as we have already seen, the documents which OH produce can be ambiguous. We have no reason to believe that Mr Storey had not made earlier contact with OH by telephone even if no record of that exists.**

2.85. John Mason texted the claimant at 12:40 asking how he was. The claimant replied telling him. At 14:10, John Mason texted to say his son, Chris, had contacted him asking what was the wrong and John Mason told him the GP diagnosis.

2.86. The Workday entry made by the claimant on 15 May 2017 appears to have been approved on 16 May 2017 by Ms Claxton. This suggests she was still Mr Foster's official deputy so she, if any, manager would have received the OH recommendation for a phased return. Lee Storey was not sure what was going wrong considering his injuries from the accident had been relatively minor. By this point, the most any of the managers involved knew was that a model employee had work related stress but none of them knew what at work was causing that stress or what they could do to alleviate it, except pushing OH to do as they had said they would, and Mr Storey had done that already.

17th May

2.87. On 17 May 2017 Lee Storey attended a meeting along with Jason Walker one of the claimant's trade union representatives. He told Mr Walker of his concern that no-one could not get in touch with the claimant and thinks it was Mr Walker who gave him the claimant's personal phone number. Lee Storey left a voicemail on the claimant's work phone at 12:14 saying he had a report the claimant had been to hospital on Saturday but had no contact since. **This shows Mr Storey tried the work phone first** . The claimant's father later told him someone had rang their house on 17 May "*around dinnertime*" , and asked to speak with 'Michael'. His father said words to the effect "Michael doesn't live here, he's at home, Can I ask who's calling?" The caller 'hung up' on him. His father said it sounded like they were from near Newcastle, similar to a Geordie accent. Lee Storey has such an accent. The parent's phone number was listed with British Gas as an emergency contact number. If this call was from Mr Storey, and he does not recall making it , it shows he was trying his best to make contact by normal means .

2.88. The claimant's records show it was 12:19pm when Lee Storey made the call to his personal number. The claimant saw the caller number, recognised it was Lee Storey and ended the call. He says *The call led me to suffer a panic attack and it took 5-10 minutes for my brother to calm me down. I had never given Lee Storey my personal mobile phone number or agreed to be contacted on it; previously Lee Storey had only contacted me on my work phone! Lee Storey was not my Line Manager; Chris should have been responsible for dealing with my absence. As an experienced Manager, Lee Storey would be aware that he was pursuing a course of conduct that was not listed in any of British Gas policies and procedures. I had reported Lee Storey for malpractice on 28/03/2017.*

2.89. Once the claimant had calmed down he checked his work phone as he assumed somebody would have emailed him if it was important. There were no emails from anybody. Mr Storey had tried to call him to check on his well being and see if there was anything he could do to help. The voicemail he left which was listened to by Mark Harrington as part of the claimant's grievance. He found it was a "supportive ".

2.90. The claimant says
I was in a very fragile state. I began to despair completely. I suffered a panic attack, started crying my eyes out, hyperventilating, and my stomach cramping as I began to believe that Lee Storey was insinuating I had gone AWOL. If an employee takes unauthorised absence, they could face disciplinary action and might not be eligible to

receive company sick pay. As Lee Storey had already threatened me on 10/05/2017 when he told me I needed to be represented by my Trade Union, which had made me feel extremely uneasy and intimidated at the time, I assumed that he was now inferring that I had gone AWOL and that I could face disciplinary action for being AWOL. Given my mental health at the time, this caused me considerable distress. My brother managed to calm me down after 30 minutes or so and ***kept reassuring me that everything would be OK*** *and that he was looking after me. I couldn't remember if I had entered my Absence in Workday.* ***I logged in to Workday and saw I had entered my Sickness Absence with 'Work Related Stress' on 15/05/2017 and that it had been approved by Julie Claxton on 16/05/2017 and my brother explained that British Gas knew that I was not AWOL.***

2.91. The words we have emboldened show Steven being logical while the claimant is clearly frightened of being thought of as AWOL. In his statement, the claimant cites many passages from various company policies. On this point he says :
The Company policy states that if I'm not well enough to maintain contact, your Manager will try to stay in touch with a third party, for example a family member, colleague or friend you've nominated for this purpose .My brother, Steven, is my Emergency Contact and he initiated contact with my Manager, Chris, on 15/05/2017 and informed him I would be absent all week. At no point did anybody try to contact my Emergency Contact and ask for an update about my condition. On 15/05/2017, my friend, John Mason, my Manager's Father, informed my Manager, Chris, that I had been diagnosed with stress and anxiety and was booked to see a counsellor. I believe that British Gas should have followed their own policies and contacted my Emergency Contact, Steven, or John Mason if they required an update. ***It is my understanding that I only have to inform my employer of my absence, I am not required to discuss my absence if I do not wish too.*** *While I would have liked to discuss my absence at the time, my health was in a critical condition and I was incapable of doing so, this was conveyed to British Gas by my brother, Steven, on 15/05/2017. I believe Lee Storey harassed me because I had reported them for malpractice. I believe he wanted to put pressure on me and cover his tracks, talk me round before I submitted a formal complaint against him and the other Managers and Coaches that had victimised me and were involved in malpractice and covering up my initial disclosure.*
Emergency Contacts are not meant for this purpose .The claimant is effectively saying he should have been " left alone" . When he later asked for communications by email only, the respondent complied . He also says later he felt " isolated" but he asked to be.

2.92. He continues *Company Policy states "If you don't make contact with us, don't respond to calls, or don't provide necessary medical certificates, we'll consider you as being on unauthorised absence. This constitutes absence without leave and our AWOL/disciplinary procedure may apply"*
There was never any chance the claimant would have been subjected to disciplinary process for being " AWOL" where he had logged absence on Workday, had a medical certificate and communicated via a third party with his managers . He adds *Paul Basigara later claimed in his Grievance Appeal Outcome Letter that "You did not comply with the company attendance policy. As part of the policy you are required to call your Line Manager and inform them of the reason for your absence…There were no exceptional circumstances allowing contact to be through a relative rather than directly from yourself" I had taken Lee Storey's voicemail to mean he was treating my absence as AWOL and I believe Paul Basigara's comments show that I was right to feel threatened at the time.*

As will be seen when we deal with Mr Basigara's evidence, the only reason he was covering this topic at all was that the claimant insisted everything be covered. What Mr Basigara says is probably correct but no manager had suggested the claimant would be treated as is AWOL and we find no basis for his allegation " *policies were deliberately not followed. My Health, Safety and Wellbeing was endangered by their actions …".*

2.93. He continues
Company policy states "As a company, we aim to avoid causing any distress to any employees who are unfit for work and aim to maintain an appropriate balance between the needs of an individual and our business requirements. We will treat each case sensitively" Lee Storey was not my Line Manager and should not have been involved in my absence. … I do not believe there was a business requirement that justified Lee Storey's actions to make contact with me at any cost. **He ignores the significance of Mr Foster being absent and Mr Storey having to do duties he would normally leave to others .**

2.94. Mr Storey was going to ask Mr Walker to go to the claimant's home address to check he was okay but Mr Kirby was in the area so he decided to ask him to go instead. This was not a "home visit" under the AMP but simply trying to get in touch with the claimant to understand what was wrong. At 14:29, Mr Kirby arrived at the claimant's house, unannounced. The claimant saw a British Gas van pull up. When he saw it was Mr Kirby, he had a panic attack and hid upstairs. Steven answered the door. After speaking to Mr Kirby, Steven went upstairs and the claimant asked him to check Mr Kirby had gone. He checked from the bedroom window and Mr Kirby was still in his van, for at least another 17 minutes which Steven timed him on his iphone. The claimant says Mr Kirby ought to have known he was pursuing a course of conduct that was not detailed in any of British Gas' Policy and Procedures adding *Company Policy states that Home Visits have to be arranged with the employee beforehand, that an employee has a right to be accompanied at any meeting by their Trade Union and ensure the employee is comfortable with the purpose of the visit. Paul Kirby disregarded the company policy and was not a Manager so could not conduct a meeting about my Health. In the Grievance Interview, Paul Kirby claimed he conducted a Point of Contact visit with me as they had received no contact from me yet British Gas have no such policy. I felt Paul Kirby had been victimising me by making up that coaching log stating I told him I was fine, ignoring my emails and ignoring my requests for support while I was at work, therefore, I perceived him as a threat and I felt he had arrived at my house to put pressure on me. I felt … they were hounding me and continuing to victimise me…"*
This was not a visit covered by any policy but a final attempt by managers who were concerned to find out what was troubling the claimant.

2.95. Mr Kirby recalled Lee Storey asked him to visit the claimant to check on his welfare as he was concerned about him. When he knocked on the door, Steven answered and told him the claimant was really ill, on medication for his mental wellbeing and had not been out of bed. He recalls this information was an absolute shock to him as he knew the claimant as such a positive and outgoing individual. He recalls feeling " *very uncomfortable*" as Steven kept telling him how ill the claimant was because Mr Kirby is a colleague on the same grade as the claimant and did not think he should be hearing such personal details . He says the talk lasted about 5 minutes. There are details in Mr Kirby witness statement which are wrong as he admitted, but his recollection of the talk with Steven fits precisely with hard evidence as to timings. After he finished talking to Steven, he returned to his van. He spends a great deal of time on the phone and computer talking

to engineers and/or Dispatch, usually around 2.30pm, whom he describes as " sometimes needing a lot of help ". He sat in the van making calls and sending e-mails According to his vehicle tracker he was stopped at the claimant's address for a total of 23 minutes from 14.29 to 14.52. If one subtracts the 17+ minutes Steven timed him as being in the van it leaves about 5 minutes that the conversation lasted. We accept this. Some time that day, but he cannot recall when, Mr Kirby reported to Mr Storey he had spoken with Steven who had told him the claimant had serious mental health problems . The claimant says *After the events of Wednesday 17/05/2017, the phone calls, and Paul Kirby's unannounced visit, my mental health severely deteriorated I was terrified that I was on the brink of another breakdown. I felt that those Individuals actions endangered my Health, Safety and Wellbeing.* **Objectively, this was a visit, conducted unannounced for good reason, out of concern for the claimant with absolutely no sinister motives.**

2.96. On Friday 19 May the claimant emailed Mr Mason "*Due to my condition and to aid in my recovery, I would appreciate it if the business contacted me by email if necessary*" . He attached a sick note from 15-30 May . Following this Mr Storey was not involved in the claimant's absence as Mr Foster returned from his own sickness absence on 22 May.

2.97. Mr Foster emailed the claimant on 23 May "*I am not one to harass anyone who is off sick.... There is no underlying agenda behind a phone conversation between us – it's just for me to make sure that you are OK and to understand if I can help you at all*". The claimant says " *I believe Neil made the comment because he knew that Lee Storey's had harassed me.*" We reject that . Mr Foster was shocked to hear the claimant was still off sick and aware he had requested to only be communicated with by email which is what he did saying he was sorry to hear he was unwell and just wanted to talk.

2.98. The claimant did call him back and spoke very negatively about Lee Storey, saying an LTI needed to be investigated. It seemed to Mr Foster the claimant thought he had been on trial. The claimant says he used words to the effect, "*I'd gone back to work after my accident and they hadn't supported me, ignored all my requests, broke their end of day policies, gave me extra shifts and when I complained, Lee Storey had argued with me then threatened me that I needed to be represented by my Trade Union when he conducted the Lost Time Investigation. I asked him if he could provide the information from the Lost Time Investigation as I was constantly worrying about it*". He recalls Mr Foster said he did not understand why the claimant would need a Trade Union Representative with him during the LTI investigation, which he did not . Mr Foster did not know the context of the conversation was that a Trade Union **Safety** Representative would need to be there . Mr Foster tried to explain investigations have to take place and are about learnings not blame. He said he would look into the LTI investigation and try to make sense of what was going on and then let the claimant know.

2.99. The claimant adds that Mr Foster said " *people were saying I was taking the piss being off sick but he didn't care, he just wanted me back on his team*". We accept Mr Foster's evidence he did not say anyone thought the claimant was " *taking the piss*". Rather the claimant said he believed some people (namely Lee Storey) thought he was making his illness **and the accident up** to which Mr Foster replied he " *wasn't bothered what other people thought*" and his priority was to support the claimant in getting better and back to work. The claimant's statement says
After the conversation, my mood was extremely low and I was very anxious, worrying who was telling people 'I was taking the piss' and who exactly they were telling it too. I

presumed it was the same individuals that had victimised and harassed me as no-one else could have known why I was absent. When Neil mentioned he would discuss it with Lee Storey, I feared Lee Storey would tell him I had reported them and he would no longer support me. Neil never got back to me. I began to feel isolated…" .

2.100. By this point the claimant's perceptions had become totally irrational . No-one could possibly think the accident had been made up or covered up. It was already a 1313 investigation and Mr Foster recorded it as an LTI on 27th March . More importantly, it had been contemporaneously reported to the police. No-one could think the claimant had mis-recorded his absence because **he entered it as sickness** and Workday showed Mr Foster " denied" that entry and told him to enter modified duties. As for his physical problems after the accident, there were several medical diagnoses of whiplash, and OH had recommended treatment. The view Mr Foster "abandoned " him is also groundless.

2.101. After the call, Mr Foster was away for a few days in Belgium until 5 June 2017 then returned to work for a short period before going on holiday to Florida until the beginning of July 2017. On 6 July 2017, he emailed the claimant to arrange a catch up to complete an Employee Health Review (EHR). He does not remember receiving a response to this and they did not have a face to face meeting.

2.102. On 12 June , the claimant noticed a missed call from Mr Mason on his work phone. He emailed him saying he was really struggling but hopefully would get the help he needed. Mr Mason never replied and the claimant says " *I felt isolated*" .He was receiving the limited contact he had asked for. During June 2017, he contacted Jason Walker and GMB Branch President Adam Pearce who said he could submit a formal grievance against all those involved. He explained his mental health was poor and asked for help doing it. He alleges they said they did not have the time and just to write down what he had told them. We did not hear from either of them but it would be unusual for any Union representative to refuse to find time to help a member who said he was too ill . It may be they, like everyone else, thought his concerns about the entry of his absence on Workday were unfounded and his complaints of victimisation not likely to be true.

2.103. On 30 June, the claimant contacted the British Gas Privacy Team by email and made a SAR He wanted information to support his grievance as he believed there was email evidence showing Mr Foster and Mr Storey were " *falsifying the Lost Time Accident Report and that Neil had invented a GP Appointment to cover up his malpractice. I also wanted any information regarding the Lost Time Investigation because I believed Kevin and Lee Storey would have covered that up too. I had asked Neil Foster to provide information to me on 24/05/2017 but he had never got back to me and I wanted to keep any contact with him to an absolute minimum so did not follow it up with him*."

Grievances

2.104. We are not going to deal with these in the detail they are dealt with in the witness statements or the documents. The claimant does not say he was not afforded the opportunity to have his grievance heard . His case is that all the grievance handlers went through the motions of listening to him but then reached perverse conclusions contrary to the evidence . Mrs Callan argued there are two ways in which what happened during the various grievances could be relevant. At one level, they were a cover-up in retaliation for him having made a protected disclosure. In the alternative, whatever the motivation, they

were so mishandled as to be at least a contributing factor in a breach of the implied term of mutual trust and confidence. We will be rejecting both propositions for reasons we will give and simply do not need to go into every detail to support our conclusions.

2.105. On 3 July the claimant submitted a grievance against Mr Foster, Mr Storey, Mr Kirby, Mr Ball and Ms Claxton to Jason Walker and Adam Pearce with three key points:
(a) Mr Foster and Mr Storey deliberately not recording Sickness Absences following accidents at work but entering it as Modified Duties so they did not have to fulfil their legal and managerial obligations to conduct LTI Investigations or make RIDDOR reports He says " *Their malpractice was hidden from the wider business in a trail of emails in which they had invented a story that I was working from home to support the ward and through the invention of a fictitious GP appointment and diagnosis to avoid suspicion*"
(b) he reported this malpractice on 28th March in accordance with the British Gas Speak Up policy. This was not investigated as per policy and covered up.
(c) Following his disclosure of malpractice, he had been victimised, bullied and harassed which led to a breakdown. While absent, diagnosed with '*acute stress and anxiety'*, he was harassed when Mr Storey rang his personal mobile phone, left a voicemail on his work phone and sent Mr Kirby to his house unannounced "*under the guise 'that the business had received no contact from me'*

2.106. He then gives this explanation of his motives :
I raised a grievance because I wanted British Gas to investigate my concerns properly and fairly. I believed that those Managers were not following company policies and had endangered not only my health, safety and wellbeing but were also endangering other British Gas' employees and customers. I believe those Managers had endangered both myself and customers by victimising me, overworking me, and ignoring OH's advice, culminating in me working in a customer's house on 12/05/2017 and being unable to remember whether I had completed my safety checks as I was run down and had reached breaking point mentally. The consequences could have been fatal. I expected that British Gas would investigate my grievance properly and ***take action*** *to prevent this from happening to other employees and I hoped they would support me back to work.* ***My career was extremely important to me and was the key to my future with my wife."***

He does not say what action he wants taken, but despite his protestations to the contrary it appeared to us he wanted somebody disciplined.

2.107. He gives an unlikely account of what happened next saying Jason Walker rang him on about 4 July to say British Gas "*would not accept*" the grievance, Lee Storey was absent as his son was ill and because he was a District Manager, he had to be informed before a grievance could be **submitted** against him. Like the claimant we do not believe such a policy could exist. We believe what Mr Walker told the claimant was simply that the grievance could not be **progressed** until Mr Storey returned. At some point Jason Walker advised he should have no contact with Mr Foster because he had submitted a grievance against him and another Manager should be assigned responsibility for him .

2..108 Mr Mark Harrington was to hear the grievance . The claimant wanted the hearing at his own home so he could have his family with him . Mr Harrington refused that but between 26 and 28 July offered the claimant three venues progressively nearer to his home. He suffered a panic attack worrying about travelling there and how he would cope

without his family to support him . On 29 July he told Mr Harrington and Jason Walker he could not attend but would try to do it by telephone. Mr Harrington agreed

2.109. On 31 July the claimant emailed Mr Harrington what he calls a summary of the points he wished to convey. It ran to six typed pages referencing every act he considered victimisation, bullying or harassment to the respective company policy and enclosed a 25 page "timeline" Steven had prepared and roughly 40 screenshots of evidence. This was sent at 16:26 on the evening before the telephone call due to be between 10 and 11 am

2.110. On 1 August Mr Harrington rang and said he was with a note taker. The claimant says his first thought was '*Where is my Union Rep!'.* The claimant did not say, as Mr Harrington's minutes do, he did not want a Trade Union Representative but says he was too frightened to speak out and ask for one . He cites Company Policy "*If you attend a grievance meeting or appeal hearing, You have the* ***right to be*** *accompanied to this meeting by a work colleague or trade union representative*" . The right to be accompanied does not mean the respondent should arrange it for him.

2.111. Mr Harrington did not provide a copy of the minutes. The claimant only received them in October due to a further SAR . He does not agree with the key facts recorded and says . *I felt physically sick and extremely depressed when I realised the extent of the victimisation I had suffered, Kevin* ***had hidden*** *Occupational Health's Phased Return to Work Programme and their assessment of my condition from me.* The claimant made the understandable but we find incorrect assumption Mr Ball had seen what he now accuses him of hiding.

2.112. He says the grievance outcome Letter was a "***sham***" , Mr Harrington had ignored company policies, made false claims and ignored the evidence provided by saying :
(a) Mr Kirby was his manager at the time and could therefore conduct a RTW Interview.
(b) those involved had falsified the Attendance Record to support him , even though by doing it, it denied him an automatic referral to OH
(c) British Gas did not have to implement OH recommendations and he was responsible for managing his own RTW.

2.113. On any objective view what Mr Harrington meant was clear. On point (a) Mr Kirby was, along with others, covering Mr Foster's absence and therefore an **acceptable** person to do the RTW meeting. On point (b) there was no falsification, simply an inaccurate entry done to support him, and it is simply not true this was the cause of delay in his referral to OH. On point (c) there is no compulsion to adopt OH recommendations but arrangements were made to reduce his workload and he was responsible for ensuring he took advantage of such arrangements. We share Mr Harrington's views

2.114. Mr Harrington had interviewed Mr Foster, Mr Ball and Lee Storey together rather than conducting separate interviews. We accept, as did the later grievance managers, this was not good practice. He did not interview Ms Claxton who was named in the grievance or Nev Storey. There was absolutely no reason to do so because there was no dispute about their parts in the events. He did not interview Mr Kirby who was allowed to submit a statement instead, but for no sinister reason just to avoid delay. The fact Mr Harrington did not set out everything the claimant had raised and delivered, swiftly on 4 August, a concise rejection of the main points raised in four pages, does not mean he ignored the evidence he was presented with.

2.115. On 7 August the claimant emailed Nev Storey because, he says, Nev Storey knew the claimant had reported Mr Foster and Lee Storey's malpractice on 28 March. He replied by email confirming that. He did not know what the claimant had said to Mr Ball. Nev Storey was not called to give evidence by the claimant. Had he been in our view he could have contributed nothing because there is no dispute as to the call or its content

2.116. On 10 August the claimant appealed the grievance outcome by a 9 page email. Steven helped him write it identifying inconsistencies in statements, company policies and the evidence they had collected. That day , Mr Foster emailed the claimant to try to arrange a catch up call The claimant replied it would not be appropriate for Mr Foster to be the manager involved in his sickness absence management anymore as he was referenced in his grievance. Mr Foster arranged for Mr Liam Casey do so from then.

2.117. On 13 August 2017 the claimant contacted British Gas PIDA Officers by email and explained his situation He included evidence received from his SAR, which had arrived recently. A medical report prepared about him by an experienced and highly respected consultant psychiatrist Dr Brian Martindale, gives an opinion as to his mental state at the end of August 2017 "*It is possible that his severe anxiety has led to some subsequent misinterpretation of various managers' behaviour or whether they have misinterpreted his requests for help and they have lost trust in him. However, his loss of trust is now transferred all authority figures at his work and is of such a degree that it is now difficult for him to be objective as to their intentions. There was nothing in Mr Burke's account for me to believe that he was telling me other than his perception of events*."

2.118. On 29 August , he received an email from Sin Kwan Lee, British Gas Speak Up Manager, saying "*in light of the evidence you have provided to us, arrangements are currently being made for an independent Manager to fully re-hear your grievance*" . She advised the grievance appeal should be heard by an independent manager from a different area of the business. Mr Paul Angus was appointed.

2.119. On 8 September , he attended his first EHR conducted by Liam Casey. He complains he had been absent since 15 May and it had taken 117 days to have one when Company Policy states an EHR should be arranged as soon as possible after 28 days of absence. How could it be when he was demanding to be left alone? He says **"***I believe I was* ***deliberately ostracised*** *for reporting Neil and Lee Storey and raising a grievance complaining about how I had been treated*". We reject that.

2.120. Mr Angus, after some communication with the claimant to clarify his grievance, invited him by email of 13 September to a meeting on Wednesday 20 September 2017. **On 14 September the claimant issued these proceedings.** The claimant says " *I did not notice at the time that Paul Angus had amended the points of my grievance in his letter*" .All Mr Angus had done was to try to condense and " group" the allegations into a more manageable form. The claimant attended on 20 September. At the start he asked to record the meeting .Mr Angus said the minutes would be read out at the end agreed and signed by all present. He handed Mr Angus copies of the script he was reading, which detailed three key points in full, and over 100 pages of evidence. He talked him through each point and explained what he thought was the relevant evidence.

2.121. A couple of days later he received the 11 page minutes of the meeting. He says he started getting extremely anxious as a lot of key facts and information had either been

omitted or changed. He says " *I had also read word for word from a script yet the note taker just kept writing, words to the effect, 'Michael read from his timeline' and hadn't documented the information I conveyed*." This is the worst point he made before us . It is perfectly normal for any minute taker simply to make a note that somebody is reading from a script a copy of which everyone present has . His Union Representative Nev Storey had been with him at the meeting and when the claimant asked him what to do he said to submit his own version of events where possible. He had not taken notes at the time, but had informed Steven of everything he could remember, straight after the meeting. His statement says: *The minutes **consumed me**, I was that stressed about being misrepresented again I spent the next few days glued to them and became obsessed with trying to submit an amended version as best I could. Seeing the state I was in, my brother tried to help me and we would stay up until the early hours amending them. I emailed my version of events on 01/10/2017*.**In essence, he expanded 11 pages to 53** .

2.122. Mr Angus investigated by interviewing Mr Foster, Mr Kirby , Mr Lee Storey ,Mr Ball ,Mr Mason and Ms Claxton. He made further email enquiries of Mr Foster, considered comments on the hearing minutes provided by the claimant and looked at information relating to his OH referrals. He then issued his decision on 6 October 2017. The key part of the letter reads "*Although your sickness absence .. was not correctly recorded, this is a separate issue to the accusation of Neil Foster and Lee Storey not fulfilling their obligations of recording accidents at work*." In essence, this was the same view as formed by Mr Harrington later by Mr Basigara, those who conducted the Speak Up investigation, and now by us. Nobody argues Mr Foster did the right thing, but everyone else accepts, what he did was for the right reasons. No one but the claimant thinks there is a general practice of avoiding recording accidents at work or that anybody in management resented the initial disclosures he made. This makes it improbable they took **retaliatory** action against him for making them. Our finding is they did not do so.

2.123. Mr Angus saw an email from Mr Foster dated 29 September saying the claimant had **agreed** to do extra shifts before he went on annual leave. We find, in principle, he did agree. The claimant says " *Though I had evidenced Neil was not telling the truth, I also felt it was a mute* (he means moot) *point, as regardless of why I was given the shifts – I felt they had a duty of care to me. I believed it would have been reasonable for them to take me out of the shifts when I returned to work and I had told them I hadn't fully recovered from my injuries.* He says this now and it is a fair point, but was totally obscured by his allegations that the reasons for the shift allocation amounted to victimisation and harassment. He was never prepared to contemplate the shifts were arranged before any of those involved could predict would return less than 100% fit, and base his argument on the simpler premise that whatever the cause of the steps he wanted not having been taken , there came a point when they should have been.

2.124. The claimant says the 3 page outcome letter "*was another sham grievance and Paul Angus had not investigated my grievance properly*" . He says Mr Angus *"falsely claimed Kevin Ball had sent me an action log summary of our conversation on 28/03/2017 and based his decision making on this document*" When the claimant contested it by email on 6 October Mr Angus in the claimant's words "*re-wrote his Outcome Letter and gave different reasons for not upholding the point of my grievance*" The objective truth is when Mr Angus responded on 9 October 2017 with a revision to his letter, he effectively acknowledged he had mixed up Mr Ball sending an action log about 28 March with Mr Kirby sending an action log about the 2 May meeting. The claimant simply does not

appear to realise managers can make mistakes particularly when confronted such a volume of information. Mr Angus still believed Mr Ball's evidence the claimant did not **emphasise concerns of malpractice** during the meeting on 28 March.

2.125. The claimant says Mr Angus "*ignored the fact that Occupational Health's Phased Return to Work Programme was not implemented and did not address the issue*" . It is true the matter does not receive attention in the outcome letter because **the fact of non-implementation** was completely masked by the allegations OH referrals had been deliberately slowed and their recommendations ignored in retaliation for his making protected disclosures . The claimant also says Mr Angus did not Interview Nev Storey to ascertain whether the claimant had reported malpractice to him on 28 March.As with Mr Harrington, there was no reason why he should because there was no dispute he had spoken to him or what was said.

2.126. The claimant also alleges Mr Angus claimed Mr Foster falsely recorded his attendance in order to help the claimant but when interviewed by Mr Angus, Mr Foster had said he did it because he felt under pressure over reporting of LTI's . The two are not mutually exclusive, it was , as we have found, both. However, the claimant thinks it is one or the other because he says Mr Angus "***ignored*** *Neil's comments*." Finally and most importantly the claimant says Mr Angus "*believed what the Managers had told him unequivocally and did not challenge them, even when he had evidence showing they were not telling the truth*." This is precisely the point we tried to get the claimant to address, as did Mr Basigara, as to what he wanted from the grievance. Basically he wanted it to turn into a disciplinary trial of Mr Foster Mr Storey Mr Ball , Mr Kirby possibly even Ms Claxton.

2.127. The claimant emailed the PIDA Officers on 9 October vented his frustration and asked somebody to take control of the grievance process as it was damaging his health He quotes Company Policy states "*The Manager you've raised the complaint with will ensure we carry out a prompt, fair and thorough investigation with all the parties involved*" The claimant does not believe Mr Angus investigated his grievance fairly as he was being victimised for raising concerns. We disagree entirely.

2.128. His brother helped him write his appeal which he emailed on 10 October listing 20 points he said showed the process had been a sham and pointing out numerous "lies" managers which he said Mr Angus **chose to ignore**.

2.129. Paul Basigara has been employed by another part of the British Gas business for around 15 years. He is a senior level 5 manager who has been involved in many grievance hearings and appeals. He had no prior knowledge of the claimant. He was sent relevant papers in advance, Including the initial grounds for appeal, by Ms Lesley Stout, Employee Relations Manager. There were also various emails between the claimant and her and discussions between her and other parties, including in relation to the claimant's Speak Up complaint . His statement includes :
The grievance appeal hearing was originally scheduled for 31 October 2017 but had to be postponed as the Claimant raised a complaint with his trade union about the trade union representative who had been supporting him, Neville Storey The grievance appeal hearing was then rearranged for 15 November 2017 and ***the evening before*** *the hearing the Claimant provided his final grounds of appeal. When I received these it struck me just how large the document was. It was significantly larger than any appeal I had ever seen or dealt with.*

The Claimant attended the grievance appeal hearing on 15 November 2017 accompanied by Gary Barker, his Trade Union Regional Officer. I started by trying to agree a summary of the Claimant's points of appeal. I would often do this with a view to then going through those points in more detail. This enables me to ask questions about what the individual wants from the outcome of the grievance and thus progress to solve the real issue. However, as the meeting with the Claimant progressed it became clear he wanted to go through every single point of his grievance individually as he had a comprehensive pack of information he felt wasn't considered in the original grievance. The hearing became much more of a listening exercise due to the level of content the Claimant had attached to the grievance. To respect this I tried to ensure a focus on the areas the Claimant wanted to be addressed, for example whether there was something to suggest decision making was not in line with policy ... ..

2.130. Mr Basigara noticed a theme emerged during the meeting that the claimant felt Mr Angus had not taken certain points into account so Mr Basigara allowed him to express all points he felt relevant but he adds .
A key part of the grievance process is resolution and there have been rare occasions during my career when people have been unable to articulate a resolution. When employees have such an attitude it makes the grievance and appeal process very difficult as our policy is focussed on resolving disputes. One of the first things I asked the Claimant was how he saw this situation being resolved, a question to which I would normally expect answers such as an apology, a phased return to work or working for a different team. Unfortunately it was very clear the Claimant did not want a resolution

2.131. The grievance hearing was from 10:30 until 17:30 on 15 November 2018 and. 10:40 - 14:40. on 28 November 2018. In the interim the claimant raised further queries with Ms Stout . On 21 November he emailed the Speak Up Team and asked for an update on the Speak Up Investigation into his report of malpractice . He was informed it was still under investigation. The Speak Up Team became involved on 13 August and the claimant says nearly 11 months later he had not received the outcome or seen a report into my disclosure of malpractice. He has now, but in our judgment it was wholly unreasonable he should expect the Speak Up process to progress at the same time as he was appealing the grievance outcome. It would be a duplication of effort, not dissimilar to having a 1313 and LTI investigation simultaneously.

2.132. The second day was 28 November . The claimant asserts Mr Basigara was "*again disinterested and dismissive of everything I evidenced"* throughout . At the end he asked Mr Basigara when he could expect to have the Outcome Mr Basigara accepts he said, he would have it in 2 weeks. However, it took considerably longer. Following the meeting he did attempt to summarise the claimant's key grounds of appeal but he resisted that approach On 8 December , he interviewed Mr Angus.

2.133. Mr Basigara had two significant concerns. The first was that the part of the business in which the claimant was working might not **investigate** accidents in accordance with policy. The claimant said he had an accident in February 2017 which **had not been investigated**. The second was to ensure the motivation for the home visit by Mr Kirby was not to pressure the claimant . He looked into these matters with particular care but ultimately at all points raised by the claimant as best he could

2.134. On the first point Mr Basigara's statement says

" As I have already said, I left the hearing with the Claimant concerned that accident investigations may not be being properly undertaken in the Claimant's part of the business. This was because the Claimant claimed he had an accident in the past which had not been reported or investigated. If no investigation had taken place this would have been a significant problem and would have validated some claims made by the Claimant. However, when I looked into the accident I actually found that there had been a really comprehensive investigation into what had been quite a minor incident The Claimant had been very vociferous in the meeting and adamant no investigation had taken place. This meant that when I did find such a detailed investigation it reinforced an emerging concept that perhaps it was the Claimant, rather than Paul Angus, who was getting things wrong.
We agree entirely

2.135. On the second point Mr Basigara, accepted , as we have, the motivation was entirely concern for the claimant in circumstances where other means of speaking with him had failed .

2.136. On other points Mr Basigara covered his statement admits certain failings eg
The Claimant also had significant issues about the return to work ("RTW") which was conducted by Paul Kirby. The Claimant maintained that no RTW was undertaken. I believe he expected it to be a sit down discussion in a room with a form completed in detail with him but that is not what usually happens in practice. I saw the RTW email Paul Kirby sent the Claimant as well as the entry he made to the coaching log and I also noted the Claimant did not raise any issues about this with Paul Kirby at the time. I think the RTW could have been more comprehensive and structured but there was a face to face discussion here. In some instances RTWs take place over the phone. I was also aware the Claimant said Paul Kirby as a coach should not have undertaken the RTW and Chris Mason, as the acting SEM, should have undertaken this in Neil Foster's absence on sick leave. I don't think that it was ideal for a coach to undertake an RTW but the purpose is to have a supportive discussion assessing from a health and safety perspective if someone is fit to return to work. On that basis I think it was okay for a coach to undertake the RTW. If the Claimant had been absent for a longer period I would have expected a more formal RTW but that would have from the point of view of assessing if the employee should be progressed through the Respondent's absence management procedure.

Another key point of the Claimant's grievance was that he believed he was given additional shifts when he came back from holiday. This was investigated by Paul Angus through speaking with both Neil Foster and Chris Mason and I am satisfied the correct conclusion was reached that it had been agreed with the Claimant he would undertake additional OOH shifts on his return from annual leave due to the length of his annual leave. This was not something I thought was unusual with my experience of operations.

When reaching my final decision the only issue I felt needed more research than had been undertaken by Paul Angus, was the point in time the Claimant was referred to occupational health. When the Claimant hurt himself and visited hospital there should have been an immediate referral to occupational health, however this did not happen immediately. The British Gas occupational health supplier changed around the same time the Claimant injured himself. The Workday system which was used to record absence was also relatively new at this time and I found that this was likely to have caused his manager's misunderstanding of the referral process. Despite this the Claimant was referred to occupational health at a later date, and although there was a delay in his being

referred to occupational health he had been receiving treatment from a physiotherapist following his visit to Accident and Emergency. As a result the Claimant was under the care of a healthcare professional, and while an occupational health assessment should have taken place sooner, it did not have a significant impact on him.

2.137. **No objective reading could view this as a "whitewash" of failings, let alone a cover-up.** Mr Basigara spent around 9 days in total on the grievance appeal. . On 2 January 2018 , the claimant emailed Mr Basigara and Ms Stout chasing the outcome. He quotes Company Policy "*The manager dealing with the grievance may conduct, or authorise, an investigation of the facts at any stage. If they decide to do this, they'll let you know that an investigation is likely to delay the resolution of your grievance*" Mr Basigara freely accepts he did not communicate to the claimant enough about the causes of delay . The claimant is oblivious to (a) the contribution he made to the delay by refusing to summarise anything, (b) Christmas and New Year holiday periods intervened and most importantly (c) in the part of the business Mr Basigara works, which involves keeping central heating systems running in cold weather, this is the busiest time of year.

2.138. Mr Basigara did not want to condense the points of grievance too much as the claimant felt the original grievance was properly investigated due to summarisation by Mr Angus. The approach he took was to set out fully each one of the 45 grounds of appeal (including all sub-grounds) and answer the points one by one. He issued the outcome letter on 5th February 2018 which ran to about 70 pages . It was dated 11 December but this was a simple administrative error in that he started drafting it then but did not finalise it until just before 5 February. He says in his statement " *I have never dealt with an appeal which had so many points raised and where an appropriate summary could not be made. In my experience appeals may consider 3 to 5 points, however I did do as the Claimant wished ... This is why the response took the length of time it did*" .

2.139. Of this totally credible explanation for the letter being dated 11 December the claimant says he still thinks it was finalised on that day and deliberately not sent because Mr Basigara concluded his investigations on 8 December when he interviewed Mr Angus and was just trying to cause the claimant distress . We reject this entirely. The claimant also says that when he read the letter he felt Mr Basigara had not investigated his grievance properly or fairly, acted unreasonably and been "*vexatious"* . Nothing could be further from the truth. This was one of the most thorough investigations we have ever seen. The fact Mr Basigara reaches conclusions the claimant does not like not mean they are perverse, as the claimant suggests. We checked with Mr Basigara his conclusion, in summary, was that what Mr Foster did originally was wrong, albeit done for good reasons, the OH referral should have been quicker and would have been but for managers misunderstanding Workday and the workings of MyHealth, but that there was no conspiracy, no attempt by managers to hide what they had done, no resentment at the making of the original disclosure, therefore no victimisation or harassment. He confirmed that was his conclusion. It is ours too.

2,140. On 5 February the claimant submitted his resignation with immediate effect and explained he felt they had breached the implied term of trust and confidence and failed to provide a safe working environment free from victimisation, bullying and harassment . His statement says" *I know my mental faculties are no longer the same. I am degree educated and used to have an excellent memory and I was intelligent. Now, I read information, but I cannot absorb it – it just does not sink in*." There was absolutely no sign

of diminished mental faculties when the claimant gave evidence before us. His mastery of an enormous document bundle was outstanding. The puzzle which we shall try to address in our conclusion is why in the claimant's eyes something as trivial as what happened in the last few days of March became such a major issue for him and why in the space of two weeks from returning to work he was seeing sinister motivations in acts and omissions which to everybody else appeared innocent, if at times in breach of policies and/or mildly incompetent.

2.141. Mr Basigara is now aware that simultaneously a separate investigation was being conducted following his Speak Up complaint about whether or not the issues he raised were a concern across the business generally. He was not involved in that at all but has since been made aware the outcome was that the investigation found there was no evidence of individuals being discouraged to report illnesses/injuries

3. RELEVANT LAW

3.1. Section 43B defines "qualifying disclosure" and includes

" *any* ***disclosure of information*** *which,* ***in the reasonable belief*** *of the worker making the disclosure, is* ***made in the public interest*** *and* ***tends to*** *show one or more of the following—*

(a) that a ***criminal offence*** *has been committed, is being committed or is likely to be committed,*

(b) ***that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,***

(d) that ***the health or safety of any individual has been, is being or is likely to be endangered,***

(f) that ***information tending to show any matter*** *falling within any one of the preceding paragraphs* ***has been, is being or is likely to be deliberately concealed****.*

(5) In this Part " ***the relevant failure ",*** *in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).*

3.2. Section 43C says
(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a) to ***his employer****, or*

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) ***any other matter for which a person other than his employer has legal responsibility,***

to that other person.

3.3. Section 43L(3) says "*Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to* ***bringing the information to his attention*****."**

3.4. Section 47B says

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(2). This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

3.5. Section 48 includes

(1A) A worker may present a complaint to an employment tribunal that he has been ***subjected to a detriment*** *in contravention of section 47B.*

(2) On a complaint under subsection .. (1A) .. it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

3.6. A person is subjected to a detriment if a reasonable person may take the view the act or omission in question places him at a disadvantage (Shamoon-v-Royal Ulster Constabulary). Having an unjustified sense of grievance is not subjection to detriment.

3.7. In Cavendish Munro Professional Risks –v-Geduld, Slade J drew a distinction between a disclosure of information and simply voicing a concern, raising an issue or setting out an objection. That distinction was qualified in Kilrane-v-London Borough of Wandsworth ,

3.8. In Darnton-v-University of Surrey and in Babula-v-Waltham Forest College , it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In Babula , Wall L.J. said*"..a belief may be reasonably held and yet be wrong…. Provided his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor, (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence - is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute.*

3.9. The requirement the disclosure is "made in the public interest" has been explored in Chesterton Global-v- Nurmohamed and Parsons-v-Airplus International . Our decision does not turn on that point so we need say no more about those cases

3.10. The respondent says any protected disclosures the claimant wee in no sense whatsoever the cause of any detriment or the reason for dismissal , which in a constructive dismissal case is the reason for the breaches of contract in response to which an employee resigns (see later). In protected disclosure detriment the quest is for the "reason why" the detrimental conduct took place and it is for the respondent to show that,

and in dismissal claims to show the reason for dismissal . In Kuzel-v-Roche Products Mummery L.J. explained thus:

57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. ..

58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal

3.11. As in direct discrimination and victimisation claims under the Equality Act 2010, the "reason why" the respondent acted as it did is the key question. In any case where one is seeking the" reason why" some older discrimination cases contain useful dicta . King-v-Great Britain China Centre said it was " *unnecessary and unhelpful to introduce the concept of a shifting burden of proof"*, where a claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant on a particular ground , inferences properly drawn from primary fact may establish on balance of probabilities the ground for the treatment in question. However, Glasgow City Council –v-Zafar held unreasonableness of treatment does not show the reason why something was decided ,neither does incompetence see Quereshi-v- London Borough of Newham. As Elias J (as he then was) said in Law Society –v- Bahl

Employers often act unreasonably, as the volume of unfair dismissal cases demonstrates. Indeed, it is the human condition that we all at times act foolishly, inconsiderately, unsympathetically and selfishly and in other ways which we regret with hindsight. It is however ***a wholly unacceptable leap*** *to conclude that whenever the victim of such conduct is black or a woman then it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination, it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way.*

3.12. If a claimant proves the respondent treated him adversely shortly after he made a protected disclosure, evasive or equivocal replies by the respondent's witnesses and failure to give a credible explanation may be enough to establish the ground for the treatment was as the claimant alleges. However, if a witness appears at times reluctant to admit something, that may be for a reason other than hiding victimisation of the claimant for having made a protected disclosure . As Elias P said in Bahl

Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.."

3.13. The fact a worker may have made protected disclosures once does not mean subsequent disclosures of information could not also be protected Panayiotou v Kernaghan EAT/0436/13 so a disclosure made in March may be repeated in a grievance

3.14. Panayiotou also dealt with the distinction between the fact of a disclosure and the manner of the disclosure. The case concerned a policeman who had made a number of valid protected disclosures. The Tribunal found he was not happy with the outcome in cases he raised and the difficulty for his employer was not because of the disclosures made but his campaign for his employer to take the actions he believed to be appropriate and, when it did not , allege matters were being covered up. Lewis J noted the Tribunal's finding "*the employer was motivated by the fact that Mr Panayiotou would campaign relentlessly if he were not satisfied with the action taken following his protected disclosures*" , observed s.47B does not prohibit a distinction being drawn between the making of protected disclosures and the manner or way in which a worker "*goes about the process of dealing with protected disclosures …"* and held such a principle accorded with Bolton School v Evans and Martin v Devonshires Solicitors [2011] ICR 352 the latter concerning victimisation under the Sex Discrimination Act .As said in Martin …: *"Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had say, .. made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact the distinction may be illegitimately advanced made in some cases does not mean it is wrong in principle."*

3.15. A worker is subjected to a detriment by an act by his employer or by '**any deliberate failure to act'** if it is done on the ground he has made a protected disclosure. If such a conclusion is to be made the Tribunal should determine when the deliberate failure took place (Blackbay Ventures Ltd (t/a Chemistree) v Gahir UKEAT/0449/12, where it was also held there "*had to be a finding that a conscious decision to take no action had been arrived at*". A 'deliberate failure to act' could occur where an employer failed to stop an ongoing course of events which subjected a worker to a detriment although, at the same time, it might be difficult to find the failure was causative of the detriment if that was being caused by the ongoing course of events and not the failure to stop it (Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108)

3.16. Section 95(1)(c) of the Act provides an employee is dismissed 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."

3.17. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract, Western Excavating (ECC) Ltd v Sharpe [1978] IRLR 27. The conduct of the employer must be more than just unreasonable to constitute a fundamental breach.

3.18. In WA Goold (Pearmak) Ltd v McConnell 1995 IRLR 516, the EAT held an employer is under an implied duty to 'reasonably and promptly afford a reasonable opportunity to employees to obtain redress of any grievance they may have. Other implied terms are that employers will take reasonable steps to ensure health and safety (Waltons and Morse -v- Dorrington) and take complaints, in that case of harassment, but it could be of victimisation, seriously, (Bracebridge Engineering _v Darby)

3.19. Where the employer has not breached any express or other implied term , an employee may rely on the implied term of mutual trust and confidence. What does it mean? In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, the EAT, said: -"*It is clearly established that there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term,* ***it is not necessary to show that the employer intended any repudiation of the contract****. The Employment Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that* ***its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer****. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."*

3.20. The House of Lords in Malik v BCCI. said that if conduct, objectively considered, was likely to cause serious damage to the relationship between the employer and the employee, a breach was made out irrespective of the motives of the employer. The conduct must be without "reasonable and proper cause" and that too must be objectively decided by the Tribunal. It is not enough the employer thinks it had reasonable and proper cause. Bournemouth University v Buckland 2010 ICR 908

3.21. An employer is liable for the acts of its managers towards subordinates done in the course of their employment whether the employer knew or approved of them or not Hilton International v Protopapa.

3.22. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period, Lewis v Motorworld Garages [1985] IRLR 465 This is sometimes called the last straw doctrine, and was explored in London Borough of Waltham Forest v Omilaju [2005] IRLR 35. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. Viewed in isolation it need not be very unreasonable or blameworthy conduct, though an entirely innocuous act cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in the employer. An employee only needs a " last straw" if there has been an earlier affirmation Kaur-v-Leeds Teaching Hospital

3.23. Resignation is acceptance by the employee that the breach has ended the contract. Conversely, he may expressly or impliedly affirm the contract and thereby lose the right to resign in response to the antecedent breach. There is a lengthy explanation of the principles in WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, which the Court

of Appeal confirmed in Henry v London General Transport [2002] IRLR 472, but in this case give the short but effective explanation in Cantor Fitzgerald v Bird [2002] IRLR 267, that affirmation is "*essentially the legal embodiment of the everyday concept of 'letting bygones be bygones'"* will suffice. Delay of itself does not mean the employee has affirmed the contract but if it shows acceptance of a breach, then in the absence of some other conduct, reawakening the right to resign (see Omilaju), the employee cannot resign in response to that breach.

3.24. Even if there has been a fundamental breach which has not been affirmed, if it is not at least in part the effective cause of the employee's resignation, there is no dismissal, see Jones v F.Sirl Furnishing Ltd and Wright v North Ayrshire Council, EAT 0017/13

3.25. Section 103A provides an employee is to be regarded as unfairly dismissed if the principal reason for it is that he made a protected disclosure. Section 98 (1) requires the respondent to show the reason for dismissal . The reason in a constructive dismissal case was explained in Berriman v Delabole Slate Company [1985] ICR 546 as *the reason for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer*."

4. Submissions

4.1. Both Counsel handed in written submissions . The main detriments alleged are as set out in the issues and their cumulative effect is advanced as the fundamental breach of contract in response to which the claimant resigned .Ms Callan clarified she alleged the delayed referral to OH, the poor RTW process, Mr Storey telephoning the claimant on 10 and 11 May, his sending of Mr Kirby to see the claimant on 17 May , the handling of the three grievance stages(in particular the making what the claimant thought were perverse findings) and the delay in sending the outcome letter were argued not only as detriments on the grounds of him having made a protected disclosure but in the alternative constituent parts of the breach of the implied term of mutual trust and confidence.

4.2. Mr Legard succinctly put his case as being one of " *perception versus reality*" . Even what the claimant genuinely believed in most cases were not beliefs which would have been held by an objectively reasonable person.

5. CONCLUSIONS

5.1. The claimant did make disclosures to his employer via Ms Claxton, Mr Ball, and to a person responsible Mr Nev Storey that Mr Foster had made him falsely record he was working when in fact he was absent from work, tried to conceal this by saying the claimant had seen a GP on 27th March when he had not, and made false statements in a record of the claimant's accident and/or falsely reported his absence dates in HSE records.

5.2. These were "qualifying disclosures" in that at the time he made them, based on the facts known to him ,he had reasonable cause to believe they tended to show (a) a criminal offence had been committed under the Health and Safety at Work Act 1974, and fraud by false representation (though on the criminal test of dishonesty in R-v-Ghosh it had not) (b) a person had failed to comply with a legal obligation to (i) record sickness absence correctly (ii) conduct an LTI Investigation (iii) make a RIDDOR report; (c) the health or safety of employees was likely to be endangered if this practice was widespread

and/or (d) evidence of the above was or was likely to be concealed. He also made a qualifying disclosure by email and orally to Mr Storey on 10 May that his health, and potentially that of others, would be put at risk by poor OH referrals and poor RTWs , and he had reasonable cause to believe that too, though it simply was not true that a delay of 1.5 working days in recording him as absent due to sickness was the reason for the later delay in OH "supporting" him.

5.3. These disclosures were "protected " within s 43C

5.4. His beliefs though reasonable at the time were wrong and based on early assumptions he made which coloured his perceptions. These included (a) Mr Foster had "figures to fiddle" (see para 2.10) when in reality he did not. (b) not recording his absence as sickness would result in the accident and/or his injury being concealed and (c) the recording of sickness absence on Workday would automatically generate an immediate referral to OH. He then made what Sir Patrick Elias described in Bahl as a wholly unacceptable leap that the " reason why "he experienced detriments was that he had made the disclosures . We will return to causation shortly.

5.5. When disclosures were repeated and allegations of a conspiracy against him added, to various people in his grievances and otherwise, after he had been furnished with perfectly sound explanations , his beliefs ceased to be reasonable. Moreover, the addition of the allegation of a conspiracy to hide the truth in order that managers could repeatedly engage in unlawful conduct was never a reasonable belief. Why did he hold it ? Dr Brian Martindale's opinion as to the claimant's mental state in August 2017 is the same opinion we have formed but there is evidence, from as early as March 2017 before he had what he describes a breakdown, to suggest he had a tendency to draw improbable inferences and see sinister implications in what to everyone else appeared to be entirely innocent and explicable events. Ms Callan said the medical report gives no indication of previous mental illness. However, the tendencies we identified need not be as a result of a mental illness but rather simply a trait of personality. In some protected disclosure cases we have seen claimants raising concerns in bad faith, to shield themselves from legitimate disciplinary action. We wish to make it absolutely clear we do not believe for one moment the claimant has ever raised concerns for any personal gain or improper motive.

5.6. The claimant was treated in ways he reasonably saw as detrimental in that:
(a) the RTW process, especially the reduction to 80%, was not adequately explained to him so as to make his obligations clear as early as it should have been

(b) only an informal a RTW interview was carried out on 2 May when he expected a more structured one (however the informal "chat" with Mr Kirby on 2 May was for good reason and, so the respondent's managers reasonably thought ,all that was needed)

(c) he had onerous shifts on his return to work on 2 May 2017

(d) he was asked, but not compelled, to work at the "end of day" when he had opted out

(e) he was not referred to OH promptly

(f) OH advice for phased return to work was not implemented

5.7. The following cannot reasonably be viewed as detriments

(a) what Lee Storey said to him on 10 May 2017. He did not **threaten** him he would be undertaking the LTI investigation and the claimant would need trade union **representation**

(b) Lee Storey and others trying to make contact with him from 15 to17 May or Paul Kirby visiting him at home unannounced. This was **not** failure to follow AMP, because the contact was informal based on concern and no part of the AMP was ever being engaged

(c) no-one conducting an EHR before Liam Casey. This was due to the claimant not wanting contact and the respondent respecting his wish

(d) written grievances being ignored or perverse findings made. They were dealt with reasonably and fairly (see further comment in 5.9. and 5.10. below)

(e) the appeal outcome letter being sent over a month after it had been drafted. It was not.

(f) not being given adequate support under the British Gas Speak Up policy. He was.

5.8. We find no deliberate failures to act as explained in Blackbay. We do find mistakes were made , but not deliberately, particularly on referral to OH to which we will return in the context of the "ordinary" unfair dismissal claim

5.9. His repeated allegations of improper motives for what Mr Foster did and conspiracy by managers made in the grievances and accompanying documents, which were very lengthy, ceased to be a reasonable perception when the explanations as to incident being investigated under 1313 anyway and the problems with Workday and the new OH provider were explained to him . Even before then the link was tenuous .

5.10. The key question is causation. Managers tend to resent protected disclosures which bring upon them some internal or external scrutiny which they do not welcome. In this case the abiding impression with which we were left was none of the managers believed they had anything to hide. What Mr Foster did was wrong and he, along with all other managers, has been told not to do it again. No-one other than the claimant , including his union representatives, see it as serious or requiring any further "action". Even at this hearing the claimant was unable or unwilling to articulate what action he wanted taken. In other cases we have often seen employers who believe because they have rules or policies an employee who breaches those rules should be dismissed regardless of the circumstances or the consequences. Such employer's defences usually fail because of the case of Ladbroke Racing -v-Arnott, which says the circumstances must always be taken into account when looking at fairness. In this case, we see the claimant adopting a hard line approach to any departure by Mr Foster and/or Mr Lee Storey from the respondent's rules or policies, even where that departure causes no harm to anybody.

5.11. The claimant was not subjected to any detriments, even in part, on the ground he had made a protected disclosure. Protected disclosures are usually a barrage of information. The approach in Panaylotou is not necessary if one divides the barrage into parts which do pass the test of being protected and those which do not. His criticisms of the grievance include that not all of the points he made were recorded as having been dealt with by the grievance managers. Because of that he brands them m a " sham" . We have not set out all the evidence we heard either,but that does not indicate we did not consider it fully. Rather we aim to ensure any reader of these reasons, especially the claimant, is not in a situation where they cannot see the wood for the trees. We find the

handling of the grievances was, viewed objectively, perfectly adequate. What appeared to the claimant as whitewashing was due to Mr Harrington and Mr Angus rejecting, succinctly and robustly, the non valid accusations of a conspiracy rather than the valid parts identified above.

5.12. His best point was the "ordinary " unfair dismissal claim based on the handling of the OH referral and his RTW. We reminded ourselves for a breach of the implied term of mutual trust and confidence the intention of the respondent is irrelevant to whether they breached the term . The question is " was its conduct , without reasonable and proper cause calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?"

5.13. The claimant did not at any point waive any breach or affirm his contract of employment and we disagree with Mr Legard on that point However we agree with him the causes of both of these problems were the combined effect of (a) the introduction of new systems in the form of Workday and a new OH provider , (b) the absence on sick leave of Mr Foster, (c) the reasonable assumption by managers the claimant would return from his leave substantially better than when he left and they knew he had NHS help. A vital point made by all the respondent's witnesses was that managing employees who "work in the field" is not like managing workers based in a factory. Because they do not see one another all the time but rely on phones, emails and "tablets", some degree of improvisation is needed especially when a team is " a man down" , more so if the man is the captain, Mr Foster . A more structured RTW would have taken place but for his absence. There cannot be a business in the land which has not had teething problems when new systems designed to be better in the long term are first introduced. The efforts made to "push " OH were genuine, even if not always successful

5.14. Viewed as a whole , the deficiencies fall far short of the test in Woods. There was no fundamental breach of contract entitling the claimant to resign, therefore no dismissal

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T M GARNON EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 31st August 2018