EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100210/2019

Held in Inverness on 10, 11, 12, 13 & 14 June 2019

Employment Judge M Sangster
Tribunal Member E McCall
Tribunal Member F Parr

Mr P Mullery	**Claimant** **In person**
Avanti Environmental Group Limited	**Respondent** **Represented by** **Ms K Barry** **Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that:

1. the claimant was not subjected to a detriment on the ground of having made protected disclosures; and
2. the claims for unfair dismissal and automatically unfair dismissal do not succeed.

All claims are accordingly dismissed.

E.T. Z4 (WR)

REASONS

Introduction

1. The claimant presented a complaint of unfair constructive dismissal. The respondent denied that the claimant had been dismissed, asserting that the reason for the termination of the claimant's employment was resignation.

2. The claimant claimed that he was subjected to detriments as a result of making protected disclosures, and that this dismissal was also automatically unfair as a result.

3. Following initial consideration of the claim, the claimant was ordered to provide details of the disclosures he relied upon as protected disclosures. He did so on 11 March 2019 and, at a case management preliminary hearing on 20 March 2019, this was accepted as an amendment to his claim.

4. Parties were ordered, at the case management preliminary hearing on 20 March 2019, to prepare witness statements for use at the final hearing. The claimant was also ordered to provide further particulars of his claim.

5. The claimant prepared a 'Statement of Events' dated 7 April 2019, which was provided to the respondent and was taken as his witness statement. The respondent's witnesses prepared their statements by reference to that document.

6. The claimant gave evidence on his own behalf and also led evidence from his wife, Wendy Mullery. The respondent led evidence from Austin Mackay (**AM**), Operations Manager, Neil Barker (**NB**), Divisional Director and Mike Quarry (**MQ**), Regional Operations Manager for the respondent's parent company, Tradebe UK Limited. Statements were provided for all witnesses other than the claimant's wife. The respondent agreed that she could give oral evidence, notwithstanding the fact that no statement had been prepared and exchanged in advance.

7. A joint set of productions was lodged

Issues to be Determined

8. The issues in this case were:

Constructive Unfair Dismissal

a. Did the factual allegations made by the claimant amount to a breach of any express or implied terms of the claimant's contract of employment?

b. If so, were such alleged breaches (taken alone or cumulatively) sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement for the claimant to treat the contract as terminated?

c. Did the claimant, by his conduct, waive any such breaches with the result that he did not remain entitled to terminate the contract?

d. Was the claimant's resignation in response to any alleged repudiatory breach?

e. If the claimant was dismissed: what was the principal reason for dismissal; was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ('**ERA**'); and, if so, was the dismissal fair or unfair in accordance with s98(4) ERA?

Public interest disclosure (PID) / "Whistleblowing"

a. Did the claimant make a qualifying disclosure within the meaning of s43B(1)(a) or (b) ERA?

b. In particular:

i) Did the claimant make a disclosure of information which in the claimant's reasonable belief tended to show:

- that a criminal offence had been committed, was being committed or was likely to be committed;
- that the respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject?

ii) If so, did the claimant reasonably believe that the disclosure was made in the public interest?

c. If the claimant made a qualifying disclosure, was the qualifying disclosure also a protected disclosure as a result of it being made in accordance with any of s43C to 43H ERA?

d. If the claimant did make protected disclosure(s)

i) Did the respondent subject the claimant to any detriment on the ground that he had made a protected disclosure in terms of section 47B ERA?

ii) Was the reason, or if more than one the principal reason, for the claimant's dismissal the fact that the claimant had made a protected disclosure and was the dismissal therefore unfair within the meaning of section 103A ERA?

9. The protected disclosures asserted by the claimant are summarised as follows:

a. A report made to Mike Kerins, Managing Director, in July 2017 that a trailer was being loaded with scrap materials but the vehicle had not been weighed in.

b. A report made to AM in late summer 2017 that an administrative assistant, who was married to a senior manager of a competitor, was taking commercially sensitive material off company premises on a memory stick, so she could work from home.

c. A report made to AM and NB in March 2018 that one of the respondent’s consultants had removed 4 tipping skips and 4 IBC trolleys from site.

d. A report made to AM in April 2018 that the same consultant borrowed a vehicle from the respondent and used it to remove some of the respondent's scrap metal from site, both without the respondent's permission.

e. A report made to MQ on 26 September 2018 that the employee of a client requested a payment for scrap metal to his own personal account, rather than to the bank account of the client company.

10. The detriments asserted by the claimant, and stated as being as a result of him making protected disclosures, are summarised as follows:

a. AM shouting at him immediately following the disclosure in July 2017;
b. At the end of October 2017, receiving a text from NB requiring him to return to work when he was on bereavement leave;
c. No action being taken when, in November 2017, he reported a consultant taking Red Diesel from the site;
d. In December 2017, prior to a meeting with a competitor, being informed by NB *'don't give them too much information'*;
e. In December 2017, being informed that his duties were to be restricted;
f. Not receiving the full amount of his bonus in February 2018;
g. Being informed in/around March 2018 that his purchase order limit was restricted to £100;
h. On 3 April 2018, NB being obstructive in relation to the claimant's expenses;
i. On 30 April 2018, AM forwarding one of his emails to NB and the tone and content of NB's subsequent emails being unacceptable;
j. An email from NB dated 17 May 2018 asking the claimant to come into work for a few hours when on annual leave;
k. An exchange with AM on 28 May 2018, whereby AM failed to inform the claimant of potentially unsuitable dates for a key client visit, prior to the claimant sending proposed dates to the key client;

l. NB failing, on 20 June 2018, to take the new owners of the respondent's business to the site managed by the claimant, during their visit to Scotland;

m. NB failing, during June 2018 to visit one of the key client's managed by the claimant, when he had arranged to do so;

n. AM and others, in the summer of 2018, instructing one of the claimant's colleagues to report back to them on the claimant's movements;

o. Not receiving a bonus in August 2018 and, when questioning NB as to the reasons for this, receiving an unacceptable/upsetting response;

p. NB holding his exit interview in Café Nero on 4 October 2018; and

q. On 5 October 2018, following his resignation, NB sending a threatening email to the claimant.

Findings in Fact

11. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

12. The respondent provides environmental solutions including the collection, treatment and final disposal of waste materials across a number of sites in the UK. There are a number of divisions within the respondent company, one of which is Highland Waste Services (**HWS**). That division has two sites in Scotland, at Invergordon and Evanton. Approximately 14 people are based at the Invergordon site, and 2 at Evanton.

13. The claimant commenced employment with the respondent on 18 June 2012 as a Commercial Manager for HWS. His employment was latterly governed by a Service Agreement dated 1 April 2014. This stated that, in addition to his annual salary, '*a bonus of up to £3,000 may be offered…(depending upon performance to agreed targets).*' It also confirmed that the claimant's employment could be terminated by either party giving 3 months' notice.

14. The respondent had a whistleblowing policy, which the claimant was aware of. This stated that whistleblowing concerns could be raised with line managers or the HR team.

15. The claimant was primarily based at Invergordon, but he was responsible for managing the Evanton site and was lead account manager HWS's main client, Lifescan. The claimant was also responsible for business development and, in 2013, was tasked with building up a wheelie bin collection service, which he did successfully.

16. Bonuses were paid quarterly (in February, May, August and November) to key individuals, based on business performance, rather than personal targets. Other than the provisions of the claimant's service agreement, there were no other documents or agreements specifying the bonus arrangements. When the business was performing to the requisite level, the claimant generally received quarterly bonus payments of around £500. He did not receive quarterly bonus payments in excess of £750.

17. In the course of his employment, there was no limit on value of items the claimant could purchase, but in practice, he would always obtain quotes for purchases and discuss these with this line manager and AM, prior to instructing these.

18. From the commencement of his employment until May 2017, the claimant reported to and worked closely with the then Divisional Director of HWS. The Divisional Director was however suspended on 8 May 2017 and, in June 2017, was dismissed for gross misconduct for stealing scrap metal from the company. MQ conducted the investigation into the Divisional Director's conduct and interviewed the claimant in the course of that.

19. Following the suspension of the Divisional Director, the claimant and AM, who was previously the Invergordon Site Manger, but was by that point the Operations Manager for HWS, required to run the business for a short period. At that stage, the claimant and AM were of equal grade, both reporting directly

to the respondent's Managing Director. They previously had limited direct contact with each other, as both had reported directly to the Divisional Director. They were both shocked by the actions of the previous Divisional Director and felt let down by him, AM particular so as, up to that point they had been friends outwith work also, with their families socialising together. The period which followed was particularly busy and stressful for both the claimant and AM, given the additional duties which they required to assume.

20. In July 2017, the claimant noticed that a van and trailer drove into the yard at Invergordon without going across the weighbridge at the site entrance. It was a requirement that there was a record of what scrap metal was brought onto and taken off the site and the weight of this. The respondent required this information for its SEPA records, and to invoice for goods. The claimant telephoned Mike Kerins, the respondent's Managing Director, to inform him of this. He told Mike Kerins that there was a trailer in the yard being loaded with metal racking, and that the trailer did not go over the weighbridge on its way into the yard. Mike Kerins instructed him to stop the vehicle if it attempted to leave site without going across the weighbridge. The claimant accordingly positioned himself by the site exit and, when the van attempted to exit the site without stopping at the weighbridge, he stopped the driver. The driver agreed to go onto the weighbridge at that time and return to the site once he had unloaded, so the vehicle could be weighed again. The driver reversed the vehicle onto weighbridge, at which point AM came out of his office to find out what was going on. He was agitated and frustrated that the claimant was involving himself in this matter. An argument ensued, with raised voices on both sides, and AM swore at the claimant. The goods were not scrap which had been brought onto the site, but rather old racking which had been used on the site. No SEPA records were accordingly required. AM had agreed that the individual could have the racking in return for a favour the individual had done for the respondent, in recovering a broken down vehicle.

21. AM telephoned Mike Kerins after the incident to inform him of it. Mike Kerins did not mention his conversation with the claimant. AM realised with hindsight

that he should not have raised his voice or sworn at the claimant. He went to the claimant's office shortly after to apologise for his outburst, saying he dealt with the incident badly. He told the claimant that he had spoken to Mike Kerins and informed him of the circumstances. He told the claimant that he was not doing anything fraudulent, rather he was doing a favour for someone in return for a good deed. The claimant and AM had a long discussion and AM opened up to the claimant about some personal difficulties he was experiencing at the time. The claimant accepted AM's apology and offered his support to AM in relation to the personal difficulties he was experiencing. They both also discussed the situation in relation to the previous Divisional Director being dismissed and how they both felt shocked, let down and at a loss without a leader in their business. AM felt this was a turning point, for the better, in his professional relationship with the claimant.

22. In/around July 2017, NB, who also ran another of the respondent's divisions and continued to do so, was brought in as Divisional Director of HWS. NB lives in Stirlingshire and, following an initial period where he attended more regularly, generally attended Invergordon once a week. From that point onwards, both the claimant and AM reported directly to NB.

23. In July/August 2017, the respondent recruited an administrative assistant. The individual appointed was married to a senior manager of a competitor, albeit that the senior manager worked in the housing department, rather than waste services.

24. In/around September 2017, the claimant asked the administrative assistant for some data in relation to a customer. She reached into her bag for a memory stick and retrieved the data from that. She explained that she had been working from home, so had taken spreadsheet data on a memory stick to do so. The spreadsheet contained key data in relation to all of the customers of HWS. The claimant immediately approached AM. He explained that the administrative assistant had taken commercially sensitive information on the memory stick out of the office, for the purpose of working from home.

He explained the contents of that information and highlighted that the administrative assistant's husband worked for a competitor. The claimant explained that he was not happy with her doing so. AM indicated that he was aware of this, and had no issue with it. There was no further discussion between the claimant and AM in relation to this and neither brought the matter up again.

25. On Sunday 8 October 2017, the claimant's 28 year old son took his own life. The claimant messaged NB to inform him of this and that he would not be in work. Shortly thereafter the claimant received an email from Mike Kerins telling him to take as much time off as he needed and not to worry or rush back to work. AM also sent a text to the claimant saying that if he needed anything he should let him know.

26. The respondent reassigned responsibilities to ensure cover whilst the claimant was absent. The respondent's policies provided for one week's bereavement leave, but this was extended indefinitely for the claimant. The claimant was not certified as unfit to work by his GP during his absence.

27. NB liaised with the claimant during his absence. He offered counselling services through the respondent's healthcare scheme, which the claimant took up. NB also discussed with the claimant the possibility of death in service benefit for the claimant's son, as he had worked for the respondent for a week prior to his death. NB subsequently investigated this and a successful claim was made under the respondent's policy. AM attended the service for the claimant's son.

28. The claimant returned to work just over three weeks after his son's death. No return to work interview was conducted by NB when the claimant returned. The claimant did however have a detailed discussion with AM on the day he returned, with NB's knowledge and approval. AM was extremely sympathetic and concerned for the claimant. He informed him that if at any stage he didn't want to be at work, he should just leave and send AM a text. He should work

whatever hours he wanted. The claimant informed AM that he hoped being back at work would help him get back into a routine and take his mind off things. AM stated that in 3/6 months' time the claimant may feel unable to deal with the pressures of work. If that did occur, he should take time off if he needed it at that point. He informed the claimant that he should do whatever he wanted and that he had AM's, and the company's, full support. The terms of this discussion were reported back to NB by AM.

29. AM understood that the claimant had returned to work of his own volition. The claimant did not indicate to him that there was any catalyst for his return.

30. Following his return to work, the claimant was supported by his colleagues who were, as AM was, very concerned for the claimant. He was sponsored by them when he took part in a sponsored walk for a mental health charity, in his son's memory, and given time off to do so. The respondent also contributed fuel for the minibus that was used for the event. In December 2017, AM stated to the claimant that he was aware that the return to work date in the new year coincided with his son's birthday, so indicated that there was no requirement for the claimant to return until the following week.

31. In December 2017, the claimant was due to visit a competitor. He emailed NB to inform him of this and he responded stating, as he would with anyone visiting a competitor, *'don't give them too much information'*. The claimant did not raise any concerns in relation to this at the time.

32. Towards the end of December 2017, discussions took place between the claimant and NB in relation to the administrative assistant taking over more administrative tasks from the claimant, to allow him to focus more on business development. The claimant agreed to this and did not raise any concerns. It was implemented from January 2018, freeing the claimant up for around two days per week.

33. In March 2018, prior to locking up the site one evening, the claimant found Allan Mackay, a former founding director of HWS, and now consultant with

the respondent, loading a company trailer with 4 tipping skips and 4 IBC trollies. Allan Mackay told the claimant that he was taking these to his yard. The claimant felt that Allan Mackay was stealing the goods, given that he could only use one and there was no reason for him to be taking 4 of each. The claimant informed AM the following morning what he had seen and, together they telephoned NB, to inform him of this. The claimant recounted to NB what he had seen Allan Mackay do. NB then sent an email to Allan Mackay, copied to the claimant and AM, informing him that he should not remove any material or equipment from HWS without NB's prior express permission.

34. On 3 April 2018, the claimant emailed NB asking him to look into an expenses' claim which he had submitted. NB responded asking him who approved his expenses and suggested that he contact another member of staff for assistance. The claimant did not raise any concerns in relation to NB's response. The claimant did not ordinarily claim expenses, so this may have been his first expenses claim since NB became his line manager.

35. On/around 14 April 2018, the claimant raised with AM that he had seen Allan Mackay load scrap metal into an HWS lorry and remove this from site. He showed AM a picture he had taken on his phone (which was not very clear, so neither could make out what it was) and showed AM the tracker from the vehicle. AM investigated this by reviewing CCTV footage and speaking to others on site. On reviewing the CCTV footage he saw chairs in the truck, which he had asked Allan Mackay to remove from site. He informed the claimant of this and that he had requested that Allan Mackay remove the chairs, so this was authorised. He showed him a still from the CCTV footage.

36. On 30 April 2018, the claimant sent an email to a major supplier for the respondent generally and who also provided equipment for HWS's key client, Lifescan. The email concluded with the claimant asking the supplier to cancel an invoice. The claimant's email to the supplier was terse and unfriendly (the claimant accepted this in cross examination). AM was copied into that email

and was concerned about the tone of it, so he forwarded it to NB. Given the broader relationship with the respondent generally, NB then raised concerns with the claimant about this, in an email sent to both the claimant and AM. There was an ensuing email exchange. The claimant's response to NB was 'stroppy' (again, the claimant accepted this in cross examination). After raising queries with the claimant, which were not answered, NB sent an email stating '*We'll talk about it on Wednesday. You said in your email to Pat (Trident) to cancel the invoice so what is your issue and why are you been so aggressive (again), firstly to me (which I can tell you is a mistake) but also to a key supplier servicing a key customer. If I was Pat at Trident you would not like the response and I would come up, pick up the machines and take back*.'

37. On 18 May 2018, NB emailed the claimant and AM to confirm that neither would receive a bonus for Q1 of 2018. He explained the reasons for this, which were related to the performance of the business. Neither the claimant, nor AM, received any bonuses in 2018.

38. At the end of May 2018, there was a change in the ownership of the respondent company. They were acquired by Tradebe UK. In advance of this, on 17 May 2018, NB sent an email to AM and the claimant indicating that the acquisition was likely to go through that month, so it was imperative that month end was closed out properly. He requested that they each ensure that everything was in place for this. He indicated that he was conscious that they both had leave booked around the end of the month, but stated that it was important they both put in place plans to ensure appropriate cover for the month end arrangements, even if that meant coming in for a few hours to get things closed out. The claimant did not raise any concerns about this, but changed the dates of his planned holiday to avoid being absent at the year end.

39. On 28 May 2018, the claimant emailed HWS's key client in relation to dates for a potential visit to them in week commencing 11 June 2018. He copied in AM, who responded immediately to say that he thought the new owners,

Tradebe, may be visiting that week. He indicated that NB would be able to confirm and copied him in. NB confirmed that was correct and that, as soon as he had a definitive date for the visit, he would let the claimant know. The claimant did not raise any concerns about the email exchange with either AM or NB.

40. The Tradebe visit in fact took place the following week, on 19 & 20 June 2018. The plan was for the new owners to visit both the Invergordon and Evanton sites during their visit, so NB requested that both sites be tidied in preparation for this. It transpired however that there was not enough time during the visit for the new owners to also visit the Evanton site.

41. On 22 June 2018, NB emailed the claimant and AM to confirm discussions he had had with the new owners about the structure of the business. He confirmed that AM would become General Manager for HWS with effect from 1 July 2018 and that the claimant would report to AM. The claimant would continue to manage the Evanton site, be responsible for new business development and would continue as lead account manager for Lifescan, which would have a higher profile in the future.

42. AM and the claimant discussed the change in structure following NB's email and the claimant indicated to AM that he was happy with the decision and wished him well in the new role. The claimant did not raise any concerns in relation to the new structure with NB.

43. The claimant had introduced NB to Lifescan at the start of June 2018 and arrangements had been made for NB to carry out an audit for them, free of charge, to try to further develop the relationship with them. NB however forgot to diarise this, so missed the appointment. The client telephoned the claimant when NB did not arrive and the claimant, in turn, called NB. NB apologised to both the claimant and the client and arranged for an alternative date for the audit to take place. The claimant did not raise any concerns with NB in relation to this.

44. On 26 September 2018, the claimant informed MQ on the telephone that an employee of a client had asked for payment for scrap metal to be paid into his personal account, rather than to the business account of the client company. He advised MQ that the individual had indicated that HWS had his personal bank account details on file, which suggested to the claimant that a direct payment had been made previously. The individual had indicated that AM was aware of the arrangement. MQ thanked the claimant for bringing this to his attention and indicated that he would arrange for the matter to be investigated. He indicated to the claimant that he should not speak to anyone else about his concerns, including his line manager, NB, so that there were clear communication lines between MQ and the claimant.

45. The claimant confirmed his concerns in writing in an email to MQ on the same date.

46. MQ spoke to his manager about the allegations made by the claimant and it was agreed that NB, as Divisional Director for HWS, should investigate. MQ informed the claimant, on/around 27 September 2018, that NB would be investigating his concerns. The claimant did not raise any concerns with MQ in relation to NB being appointed to investigate.

47. The claimant resigned on 2 October 2018. The trigger or catalyst for his resignation at that point was being informed by MQ that NB would be investigating the concerns he had raised. His resignation letter simply stated *'Please accept this as my formal resignation.'* It was sent by email to NB, copied to AM, at 9.28pm. AM immediately sent a text to the claimant asking if he was sure about his decision and asking if they could have a catch up in the morning to discuss.

48. AM did meet with the claimant the following morning. They discussed the claimant's resignation and AM asked if he was sure he was making the right decision and if this was what he really wanted to do. The claimant indicated

that it was and that he was done, he just wanted to leave. He didn't provide any reasons for his resignation to AM. AM asked the claimant if he would prefer to be at home during his notice period and he stated that he would.

49. On 4 October 2018, the claimant met with NB at Café Nero in Inverness to discuss his resignation. Arrangements had been made in advance for the meeting to take place at Café Nero, and the claimant had not raised any concerns in relation to the choice of venue. NB had chosen this particular venue as he was aware it was quiet, so thought it would be appropriate. At the meeting, NB indicated to the claimant that his employment would end that day, and he would receive a payment in lieu of his 3 month notice period. NB sought to complete an online exit interview form, with input from the claimant, on his laptop. The claimant was however unhappy at the meeting being held in a public place and declined to provide details to NB regarding his reasons for leaving, as a result. He did not however explain this to NB. He merely declined to provide reasons.

50. That night the claimant sent an email to AM and NB, highlighting some outstanding work and stating that if he thought of anything else, he would let them know. He stated that they could email him if they had any questions.

51. The following day, on 5 October 2018, NB replied to that email, thanking the claimant for the information and confirming he had been processed as a leaver. He reminded the claimant of the restrictive covenants in his service agreement, which he confirmed continued for 12 months post termination. NB concluded the email by stating *'As I said yesterday if there is anything at all that I can help with or any references that you need then all you need to do is ask (assuming no backlash from you). Take care mate and I genuinely hope everything works out for you and the family.'*

52. On 9 October 2018, the claimant wrote to Christian Hagerup, a Divisional Director of another of the respondent's divisions. His letter was headed *'Late*

Grievance'. In the letter he stated that his resignation was motivated by the following issues:

a. He had reported several instances of misappropriation of company goods and equipment by Allan Mackay. On 26 September 2018 he also reported an incident to MQ re the employee of a client requesting a direct payment.
b. He had been sidelined by AM and NB and stopped from conducting his contractual duties including all decision making and negotiations, He was forced into conducting menial tasks and trivial administrative duties. He believed this was due to the fact that he had made the above reports of wrongdoing.
c. He disagreed with the appointment of the administrative assistant, as she had strong ties to a competitor company.
d. Whilst he had previously received bonus, this had stopped.

53. The claimant also referred to the fact that no handover arrangements were put in place following his resignation and the terms of the email from NB dated 5 October 2018, but these were clearly not motivations for the claimant's resignation, as they occurred following this.

54. MQ was appointed to conduct a fact finding investigation in relation to the claimant's grievance. He had discussions with the claimant, NB and AM in the course of that investigation. He produced a report at the end of that process, which did not support the claimant's position.

55. The report was then provided to the claimant and another manager, who had been appointed to hear the grievance. The claimant attended a grievance meeting on 14 November 2018 to discuss his grievance. During the meeting the claimant indicated that he would like, as an outcome to the grievance, his restrictive covenants to be waived. Following the meeting it was decided that the claimant's grievance should not be upheld. A letter was sent to the

claimant on 21 November 2018 confirming this and providing a right of appeal.

56. The claimant appealed by letter dated 9 January 2019. The claimant lodged his Employment Tribunal claim on 14 January 2019 and the appeal was not addressed by the respondent.

57. The claimant commenced alternative employment on 7 January 2019, earning the same salary as he had with the respondent.

Relevant Law

Protected Disclosure

58. Section 43A of the Employment Rights Act 1996 ("ERA") provides:

"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

59. A qualifying disclosure is defined in section 43B as *"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;*
c. *That a miscarriage of justice has occurred, is occurring or is likely to occur;*
d. *That the health or safety of any individual has been, is being or is likely to be endangered;*
e. *That the environment has been, is being or is likely to be damaged; or*

f. That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

60. Section 43C states that *'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...."

61. In, ***Kilraine v London Borough of Wandsworth*** [2018] EWCA Civ 1436, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f).' Grammatically, the word 'information' has to be read with the qualifying phrase 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

"36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill

J in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

Detriment Claim

62. Section 47B ERA states that *'A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.'*

63. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 confirms that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An 'unjustified sense of grievance' is not enough.

64. Whether a detriment is 'on the ground' that a worker has made a protected disclosure involves consideration of the mental processes (conscious or unconscious) of the employer acting as it did. It is not sufficient for the Tribunal to simply find that 'but for' the disclosure, the employer's act or omission would not have taken place, or that the detriment is related to the disclosure. Rather, the protected disclosure must materially influence (in the sense of it being more than a trivial influence) the employer's treatment of the whistleblower (***NHS Manchester v Fecitt and others*** [2012] IRLR 64).

65. Helpful guidance is provided in the decision of ***Blackbay Ventures Ltd (t/a Chemistree) v Gahir*** [2014] IRLR 416 at paragraph 98:

"It may be helpful if we suggest the approach that should be taken by Employment Tribunals considering claims by employees for victimisation for having made protected disclosures.

1. Each disclosure should be identified by reference to date and content.

2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.

3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.

6. The Employment Tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether

each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.

7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.'

Automatically Unfair Dismissal

66. S103A ERA states that *'An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure.'*

67. Where, as in this case, a Tribunal requires to identify whether a protected disclosure was the reason or principal reason for dismissal in a constructive dismissal case, the Tribunal requires to focus on the employer's reasons for its actions, rather than the employee's response (***Berriman v Delabole Slate Ltd*** [1985] ICR 546 (CA))

Constructive Unfair Dismissal

68. As an employee with more than two years' continuous employment, the claimant had the right not to be unfairly dismissed by the respondent, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal, which occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it without notice by reason of the employer's conduct (s95(1)(c) ERA).

69. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce International Ltd*** [1998] AC 20).

70. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).

71. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy, but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

72. In order for there to be a constructive dismissal, not only must there be a breach by the employer of an essential term such as the trust and confidence obligation; it is also necessary that the employee resigns in response to the employer's conduct (although that need not be the sole reason - see ***Nottinghamshire County Council v Meikle*** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.

73. The Court of Appeal in ***Kaur v Leeds Teaching Hospital NHS Trust*** [2018] EWCA Civ 978 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the ***Malik*** term?

(5) Did the employee resign in response (or partly in response) to that breach?

74. If an employee establishes that he has been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

75. If the Tribunal determines that the employee was unfairly dismissed, and in a case (as this case is) where the employee does not seek re-employment, the Tribunal must determine what, if any, compensation to award.

Submissions

76. The claimant indicated that he raised concerns and, after doing so, attitudes towards him changed, leading to him being victimised, his authority and responsibility being diluted and his working conditions becoming intolerable to the extent that he had no option but to resign. He summarised the disclosures made and the detriments he suffered as a result. He confirmed that the final straw, which led to him resigning after much sole searching, was the company instructing NB to investigate the allegations he brought to their attention in September 2018. The detrimental treatment continued following his resignation, in the form of the exit interview and the terms of the email from NB on 5 October 2018.

77. For the respondent, Ms Barry referred the Tribunal to the relevant statutory provisions. She also referred to the cases of ***Western Excavating (ECC) Limited v Sharp*** and ***Omilaju v Waltham Forest London Borough Council*** and the relevant tests set out therein. She stated that the last straw relied upon by the claimant was entirely innocuous. There was no breach of contract either singularly or cumulatively. The constructive dismissal claim should therefore fail.

78. In relation to the asserted protected disclosures she referred to the cases of ***NHS Manchester v Fecitt and others*** and ***Blackbay Ventures Ltd (t/a Chemistree) v Gahir*** in relation to the approach the Tribunal should take. She summarised the evidence in relation to each alleged protected disclosure and each alleged detriment. She stated that there was no link between the alleged protected disclosures and the alleged detriments.

Discussion & Decision

Protected Disclosures

79. The Tribunal firstly considered each of the matters relied upon by the claimant as protected disclosures. The Tribunal's conclusions in relation to each are as follows:

a. The report made to Mike Kerins, Managing Director, in July 2017 that a trailer was being loaded with scrap materials but the vehicle had not been weighed in. The Tribunal concluded that the claimant did make this report to Mike Kerins. It was a disclosure of information which the claimant reasonably believed to be in the public interest and which he reasonably believed showed that a criminal offence, theft, was being committed. The disclosure was therefore a qualifying disclosure. The information was disclosed to the managing director of the respondent company, so fell within the scope of s43C(1)(a) ERA. The claimant's disclosure was accordingly also a protected disclosure (the **First Protected Disclosure**).

b. The report made to AM in late summer 2017 that an administrative assistant, who was married to a senior manager of a competitor, was taking commercially sensitive material off company premises on a memory stick, so she could work from home. The Tribunal noted that, in late summer 2017, AM and the claimant were colleagues of equal standing. AM could not be said to be the claimant's employer: he had no express or implied authority over the claimant. The respondent's whistleblowing policy, which the claimant was aware of, clearly stated that disclosures required to be made to line managers or the HR team. The Tribunal did not consider that any information imparted to AM could amount to a protected disclosure, as it was not made in accordance with any of sections 43C to 43H ERA.

c. The report made to AM and NB in March 2018 that one of the respondent's consultants had removed 4 tipping skips and 4 IBC trolleys from site. For the reasons noted above, the Tribunal did not

consider that any disclosure of information by the claimant to AM could amount to a protected disclosure. The Tribunal found however that the claimant and AM called NB to report the claimant's concerns to him. During the course of that telephone call the claimant explained to NB what he had seen. This was a disclosure of information which the claimant reasonably believed to be in the public interest and he reasonably believed showed that a criminal offence, theft, was being committed. The disclosure was therefore a qualifying disclosure. The information was disclosed to NB, the claimant's line manager, so fell within the scope of s43C(1)(a) ERA. The claimant's disclosure was accordingly also a protected disclosure (the **Second Protected Disclosure**).

d. A report made to AM in April 2018 that the same consultant borrowed a vehicle from the respondent and used it to remove some of the respondent's scrap metal from site, both without the respondent's permission. For the reasons noted above, the Tribunal did not consider that any disclosure of information by the claimant to AM could amount to a protected disclosure.

e. A report made to MQ, on 26 September 2018, that the employee of a client requested a payment for scrap metal to his own personal account, rather than to the account of the client company, and that AM was aware of and/or facilitated this. The Tribunal concluded that the claimant did make this report to MQ. It was a disclosure of information which the claimant reasonably believed to be in the public interest and which he reasonably believed showed that potentially criminal fraudulent activity was taking place, as well as a breach of a legal obligation to account to HMRC. The disclosure was therefore a qualifying disclosure. The information was disclosed to MQ. Whilst MQ was not the claimant's line manager, he was more senior than the claimant and the claimant was aware that he had conducted the investigation into disciplinary allegations against the former Divisional

Director of HWS. In light of this, the Tribunal concluded that this disclosure was made to the claimant's 'employer' so fell within the scope of s43C(1)(a) ERA. The claimant's disclosure was accordingly also a protected disclosure (the **Third Protected Disclosure**).

Detriment Claim – S47B ERA

80. The Tribunal then considered whether the claimant was subjected to any detriment by an act, or a deliberate failure to act, by his employer on the ground that he made a protected disclosure. As indicated above, the Tribunal found that three disclosures amounted to protected disclosures. Before considering each alleged detriment in detail, the Tribunal considered the circumstances surrounding each disclosure, given the potential relevance to whether any of the protected disclosures materially influenced (in the sense of it being more than a trivial influence) the respondent's treatment of the claimant. The conclusions of the Tribunal are as follows:

a. The First Protected Disclosure. There was no evidence before the Tribunal that AM was informed that the claimant made any disclosure to Mike Kerins. AM stated in evidence that he spoke to Mike Kerins following his altercation with the claimant, but Mike Kerins did not mention that the claimant had phoned him. The Tribunal accordingly found that AM was not aware of the First Protected Disclosure. Even if AM had been informed of this (which the Tribunal found was not the case), it was clear from the evidence that AM accepted he was in the wrong, apologised to the claimant and that apology was accepted by the claimant. The matter was never discussed again and the Tribunal concluded that, following the long conversation between the claimant and AM after the incident, they put the altercation behind them. The Tribunal did not feel that AM bore any grudge towards the claimant following this incident: on the contrary the Tribunal accepted AM's evidence that the conversation between him and the claimant following the altercation was a turning point, for the better, in their relationship. There was no evidence before the Tribunal which suggested that the

NB had been informed of the First Protected Disclosure. The Tribunal accordingly did not feel this could have, consciously or unconsciously, have materially influenced NB's treatment of the claimant.

b. The Second Protected Disclosure. The Tribunal found that, following the Second Protected Disclosure, Allan Mackay was informed, in writing, that he should not remove any materials or equipment from HWS without prior express permission. The claimant was copied into that email exchange. It is clear from that that action was taken in relation to the claimant's concerns. There was no evidence presented to the Tribunal that NB expressed any dissatisfaction or concern at the claimant raising this issue with him.

c. The Third Protected Disclosure. The Tribunal noted that MQ instructed a full investigation into the claimant's concerns regarding the request from the client employee and AM's involvement in and/or knowledge of this. He informed the claimant of this and that the claimant should continue to liaise with him if he had any further queries.

81. The Tribunal's conclusions in relation to each detriment asserted by the claimant, taking into account the above findings, are as follows:

a. AM shouting at the claimant, immediately following the protected disclosure to Mike Kerins in July 2017. The Tribunal found that this did occur, but that AM was unaware that the claimant had made the First Protected Disclosure at the time of the altercation. Whilst this was a detriment, it was in no way linked to or influenced by the fact that the claimant made the First Protected Disclosure.

b. In October 2017, the claimant receiving a text from NB requiring him to return to work when he was on bereavement leave. The claimant's position was that NB's text stated *'you being off is not working, you need to come back to work even part time'*. He stated that he returned

to work solely as a result of that text, under fear of losing his job, but did not feel ready to do so. A copy of the text message was not produced to the Tribunal. The Tribunal did not accept that a text in these terms was sent. The claimant had been fully supported up to that point and there is no reason why NB's approach would change suddenly at that stage. If the text had been sent, the Tribunal concluded that the claimant would have:

i. raised concerns with NB in relation to this;
ii. raised it with the Managing Director, Mike Kerins, who had personally informed the claimant that he should take as much time off as he needed and not to worry or rush back to work;
iii. mentioned this to AM on his return to work;
iv. raised it with HR, or as a grievance, at the time;
v. attended his GP to obtain certification confirming that he was unfit to work;
vi. mentioned it in the late grievance or appeal; and/or
vii. retained a copy of the text.

In any event, the Tribunal found that NB was not aware of the First Protected Disclosure. Accordingly, even if the text was sent, it would not have been on the grounds of the claimant making a protected disclosure.

c. No action being taken when, in November 2017, he reported a consultant taking Red Diesel from the site. The claimant alleged that he raised with AM that Allan Mackay was taking Red Diesel from the site, but AM did nothing, which made him feel that his reports of theft were irritating and unnecessary, and he was not valued. This was first mentioned by the claimant in his witness statement. The Tribunal did not accept that this report was made by the claimant. Had it been made, it would have been mentioned in the document detailing the protected disclosures prepared by the claimant and submitted to the Tribunal on 11 March 2019. The Tribunal accordingly found that the

claimant was not subjected to a detriment by AM not taking his report of wrongdoing seriously, as no such report was made. In any event, given that AM was not aware of the First Protected Disclosure, his actions at that point could not have been materially influenced by the First Protected Disclosure.

d. In December 2017, prior to a meeting with a competitor, NB stated to the claimant '*don't give them too much information'*, which the claimant stated made him feel undervalued and was derogatory, given his experience. The Tribunal accepted that this comment was made, and would be made by NB to anyone visiting a competitor. The Tribunal did not accept that this amounted to a detriment. A reasonable worker would not take the view that they had been disadvantaged in the circumstances in which they had to work as a result of this comment. In any event, NB was not aware of the First Protected Disclosure, so his actions at that point could not have been materially influenced by the First Protected Disclosure.

e. In December 2017, being informed that his duties were to be restricted. The claimant stated that he was informed by NB, by email, in December 2017 that, with effect from January 2018, he would no longer be responsible for managing the Evanton site, one of his key responsibilities. He stated that, by 9 January 2018, it was clear that the Evanton site was being neglected, so he resumed oversight of the site, of his own volition, but administrative tasks were removed from him. The Tribunal did not accept that responsibility for the Evanton site was ever removed from the claimant. Had it been, the Tribunal concluded that

    i. the claimant would have retained the email in which he was informed of this;
    ii. the claimant would have raised concerns about this at the time;

iii. the claimant would have mentioned this is his grievance in October 2018;

iv. the respondent would have raised concerns about him resuming oversight after only a few working days; and/or

v. it would not have been stated in an email from NB on 22 June 2018 that the claimant would continue to manage the Evanton site.

The Tribunal accordingly did not accept that responsibility for the Evanton site was removed from the claimant. The claimant was accordingly not subjected to the detriment alleged. Administrative tasks were however removed from him and allocated to the Administrative Assistant. He agreed to this and this did not amount to a detriment. A reasonable worker would not take the view that they had been disadvantaged in the circumstances in which they had to work as a result of this reallocation of duties. It was entirely appropriate for the Administrative Assistant to take on administrative tasks, allowing the claimant, as Commercial Manager, to focus on the substantive aspects of his role.

f. Not receiving the full amount of his bonus in February 2018. The claimant indicated that, as he had achieved 180% of his personal target, he should have received a bonus at that level. Whilst the claimant may have had a personal target, the Tribunal did not accept that this was used to calculate bonus: that was calculated by reference to the performance of the business. The Tribunal also noted the terms of the claimant's Service Agreement, which stated that the claimant's potential bonus was capped at £3,000 per annum and the fact that the claimant never received more than £750 per quarter. The Tribunal therefore did not accept that the claimant had any contractual entitlement to a higher bonus, or that he was subjected to any detriment in relation to the bonus paid to him in February 2018.

g. Being informed, in/around March 2018, that his purchase order limit was restricted to £100. The Tribunal did not accept that there was any change to the position in/around March 2018. The position prior to March 2018 was that the claimant had authority to raise purchase orders in excess of £100, but would generally discuss these with NB or AM. The Tribunal found that there was no change to this practice in/around March 2018. The claimant was accordingly not subjected to the detriment alleged.

h. On 3 April 2018, NB being obstructive in relation to the claimant's expenses. The claimant acknowledged that he seldom submitted expenses claims and this may have been the first one which he had submitted to NB, around 9 months after NB became his manager. In that context, whilst NB ought to have been aware that he required to approve the claimant's expenses, the Tribunal could understand why NB asked the claimant 'who approves your expenses?' The Tribunal noted that NB did direct the claimant to someone who could assist the claimant. In this context, the Tribunal felt the terms of NB's email were simply an oversight on his part, given the circumstances. The Tribunal did not feel that NB's reaction was in any way motivated or influenced by the fact that the claimant had, by that point, made the Second Protected Disclosure.

i. On 30 April 2018, AM forwarding one of his emails to NB and the tone and content of NB's subsequent emails being unacceptable. The Tribunal found that the tone of the claimant's email to one of the respondent's main suppliers was terse and not friendly. AM forwarded the claimant's email to NB as a result and he raised concerns with the claimant. The claimant's response was, as he accepted himself, stroppy. The comments made by NB in relation to the emails from the claimant were entirely related to the tone of the claimant's emails. They were not, in any way, related to the Second Protected Disclosure.

j. An email from NB dated 17 May 2018 asking the claimant to come into work for a few hours when on annual leave. The claimant accepted that he was able to change the date of his holiday to suit himself, and subsequently did so following this email. The Tribunal therefore did not feel that this request amounted to a detriment. In any event, the email was addressed to both the claimant and AM, with the same request being made of each individual, so was not related, in any way, to the fact that the claimant had made the Second Protected Disclosure.

k. An exchange with AM on 28 May 2018, whereby AM failed to inform the claimant of potentially unsuitable dates for a key client visit, prior to the claimant sending proposed dates to the key client. The Tribunal found that this was not a detriment: a reasonable worker would not have taken the view that they had been disadvantaged in the circumstances in which they had to work and AM's actions were in no way influenced by the fact that the claimant had made the Second Protected Disclosure.

l. NB failing, on 20 June 2018, to take the new owners of the respondent's business to the site managed by the claimant, during their visit to Scotland. The new owners were not taken to the Evanton site solely because it transpired there was insufficient time to do so. The fact that the claimant had made the Second Protected Disclosure did not influence this in any way.

m. NB failing, during June 2018 to visit one of the key client's managed by the claimant, when he had arranged to do so. The Tribunal accepted that NB simply forgot to diarise the meeting on his return to the office and, as a result, missed the appointment. The fact that the claimant had made the Second Protected Disclosure did not influence this in any way.

n. AM and others, in the summer of 2018, instructing one of the claimant's colleagues to report back to them on the claimant's movements. The claimant alleged that, in the summer of 2018, he was informed by a junior colleague that he should *'watch himself and be careful'*, but the colleague refused to provide any further explanation. By the time of the hearing before the Tribunal, the claimant produced a written statement from the individual (who did not give evidence before the Tribunal) dated 11 March 2019. The statement reiterated what he had told the claimant and went on to say that he had been informed by AM, Allan Mackay and another individual, Ross Whitehead, that he should telephone them to confirm the claimant's movements. The claimant stated that he only received this information following the termination of his employment, as he is now working again with the individual who provided the statement. The Tribunal did not find this evidence to be credible. If the statement had been made for the claimant to *'watch himself and be careful'* he would have raised this with AM or NB at the time, or in his grievance or appeal. He did not do so. The individual who provided the statement was not called, so the terms of the statement he provided could not be challenged in any way. In these circumstances, the Tribunal found that the detriment alleged did not occur.

o. Not receiving a bonus in August 2018 and, when questioning NB as to the reasons for this, receiving an unacceptable/upsetting response. Neither the claimant nor AM received any bonus payments in 2018. This was due to the performance of the business, rather than any protected disclosures made by the claimant. This is clear from the fact that AM was treated in the same manner. The claimant also alleged that, on challenging this with NB, he was informed by NB *'You only got your last quarter bonus because I pushed it through, you were hardly here for much of last year'*. The claimant took this to mean quarter 4 of 2017 and a reference to his bereavement leave. The Tribunal did not accept that this was said to the claimant. The previous quarter was

the period from January – March 2018 (payable in May 2018) not the previous year. Neither the claimant nor AM received a bonus in May 2018, and NB's email of 18 May 2018 confirmed the reasons for this. The alleged statement makes no sense in that context, or taking into account the fact that the claimant only had 3 weeks off as bereavement leave. For these reasons, the Tribunal did not accept that the claimant was subjected to the detriment alleged.

p. NB holding the claimant's exit interview in Café Nero on 4 October 2018. The Tribunal accepted that NB chose Café Nero as he thought it was quiet and noted that the claimant raised no concerns in relation to the choice of venue, either prior to or during the meeting. The Tribunal did not accept that NB's choice of venue was in any way motivated or influenced by the fact that the claimant had made protected disclosures.

q. On 5 October 2018, following his resignation, NB sending a threatening email to the claimant. The claimant objected to the use of the words *'assuming no backlash from you'* which he took as a threat. The Tribunal found these words to be ill advised, but, given the overall context of the email, accepted that this was a reference to the claimant not breaching his restrictive covenants, rather than any reference to him having made or making protected disclosures. The fact that the claimant had made the protected disclosures did not influence this in any way.

82. The Tribunal accordingly did not find that the claimant was subjected to any detriment by any act, or any failure to act, by the respondent on the ground that he made protected disclosures.

Automatically Unfair Dismissal Claim – s103A ERA

83. Having found that the respondent's actions were not influenced in any way by the protected disclosures made by the claimant, the Tribunal concluded that

claimant was not unfairly dismissed by reference to section 103A of the ERA. The reason or principal reason for the termination of his employment was not that he had made a protected disclosure.

Constructive Unfair Dismissal Claim – s94 ERA.

84. The claimant relied upon a series of events as being conduct calculated or likely to destroy the mutual trust and confidence between the parties, with the last straw being the appointment of NB to investigate the concerns the claimant raised with MQ on 26 September 2018.

85. In considering the claimant's claim of constructive dismissal, the Tribunal considered the tests set out in ***Kaur v Leeds Teaching Hospital NHS Trust***. The Tribunal's conclusions in relation to each element were as follows:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? The Tribunal noted that the most recent act on the part of the respondent, which the claimant stated caused or triggered his resignation, was the appointment of NB to investigate the concerns which he raised with MQ on 26 September 2018.

(2) Has he or she affirmed the contract since that act? The Tribunal noted that the claimant resigned on 2 October 2018, a few days after being informed by MQ of the fact that NB would be investigating the concerns he had raised. The Tribunal found that the claimant had not affirmed the contract in that period.

(3) If not, was that act (or omission) by itself a repudiatory breach of contract? The Tribunal found that the act of appointing NB to investigate the concerns raised by the claimant was not, by itself, a repudiatory breach of contract. The claimant raised concerns about the actions of the employee of a client and whether AM had awareness of this. The respondent was entitled to appoint the director in charge of the division

where the wrongdoing was alleged to have taken place to investigate these concerns. He had not been implicated in any way. The respondent accordingly had reasonable and proper cause for its actions in appointing NB to investigate.

(4) If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the ***Malik*** term? The Tribunal noted that the Court of Appeal in Omilaju stated that the act or omission relied upon need not be unreasonable or blameworthy, but it must, in some way, contribute to the breach of the implied obligation of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence. The Tribunal took into account the fact that, whilst the claimant had raised concerns in relation to NB's conduct in the Tribunal proceedings, he had not done so at any stage during his employment. Accordingly, neither NB nor any of his superiors were aware of the fact that the claimant had concerns about NB's conduct towards him. In these circumstances, and in light of the points mentioned above, (namely that NB was not implicated and was the director in charge of that division) it was an entirely innocuous act for NB to be appointed to investigate the concerns raised by the claimant. Whilst the claimant interpreted this act as hurtful and destructive of his trust and confidence in the respondent, the action of appointing NB to investigate was not capable of contributing to any breach of the implied obligation of trust and confidence. The appointment of NB to investigate was entirely reasonable and justifiable in the circumstances.

86. Given that that the final straw relied upon by the claimant did not amount to a breach of contract of itself, and did not form part of a course of conduct which, viewed cumulatively, amounted to a (repudiatory) breach of the implied duty of

trust and confidence, the claimant's claim of constructive unfair dismissal must fail.

Employment Judge:	**Mel Sangster**
Date of Judgment:	**09 July 2019**
Date sent to parties:	**11 July 2019**