EMPLOYMENT TRIBUNALS

Claimant: Mr M Tingling

Respondent: CBRE Managed Services Limited

Heard at: London Central

On: 3, 4, 5, 8 & 19 July 2019

In Chambers: 7 & 8 October 2019

Before: Employment Judge Khan
Ms H Craik
Dr V Weerasinghe

Representation
Claimant: Mr S Meachem, Solicitor
Respondent: Mr D Soanes, Solicitor

RESERVED JUDGMENT

(1) The unanimous judgment of the tribunal is that the claim for unfair dismissal by reason of making protected disclosures is not upheld.

(2) The majority judgment of the tribunal is that:

(i) the claim for unfair dismissal is not upheld.

(ii) the claim for detriment on the ground of making a protected disclosure is not upheld.

(3) All of the claims are dismissed.

REASONS

1. By an ET1 presented on 21 May 2018, the claimant brought claims for unfair dismissal, automatic unfair dismissal by reason that he made protected disclosures and detriment on the grounds that he made protected disclosures. The respondent resists these claims.

The Issues

2. The issues on liability that we were required to determine were based on an agreed list of issues based on the list of issues set out in EJ Goodman's Order dated 7 September 2018. This list was refined by the tribunal following discussion with the parties at this hearing. These issues are set out below.

Unfair dismissal

2.1 What was the reason for dismissal?

The respondent asserts that it was third-party pressure to dismiss which is relied on as some other substantial reason ("SOSR") of a kind which can justify dismissal, under section 98(1)(b) of the Employment Rights Act 1996 ("ERA").

The respondent withdrew its reliance on the potentially fair reason of conduct in the alternative.

2.2 If the tribunal finds that this was the reason for the claimant's dismissal, did the respondent act reasonably in treating this as a sufficient reason justifying dismissal, applying the band of reasonable responses?

In particular:

2.2.1 How important was the third party's continued business to the respondent?

The claimant agreed that the third party's continued business was important to the respondent.

2.2.2 Did the respondent understand why the third-party wanted the claimant removed?

a. Having regard to the ACAS code and guidance (to the extent to which they apply in an SOSR case) did the respondent carry out any, or any adequate investigation, or give the claimant a fair opportunity to make representations?

b. What did the respondent know or believe about the factual accuracy of the allegations against the claimant when it (a) suspended and (b) dismissed him?

2.2.3 To what extent did the respondent consider what could be done to alleviate any injustice?

2.2.4 Did the respondent take adequate steps to ensure an injustice was not being done to the claimant?

a. Did the respondent make adequate efforts to persuade the third-party to change its mind?

b. Did the respondent make sufficient effort to redeploy the claimant to discharge its duty to avoid injustice to the claimant, in all the circumstances, including its size and administrative resources, the claimant's length of service, the satisfactoriness of his service and the difficulties he faced in obtaining other employment?

2.2.5 If the process adopted by the respondent was defective, was this a mere procedural lapse, or was it more fundamental or substantive going to the heart of the issue of fairness?

2.3 Does the respondent prove that had it adopted a fair procedure the claimant would have been fairly dismissed in any event? If so to what extent and when?

2.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

Protected disclosures

2.5 Did the claimant make any protected disclosures?

There have been numerous iterations of the protected disclosures relied on by the claimant in these proceedings. The claimant relied on a single protected disclosure in his ET1. He was given leave to provide further particulars of any earlier disclosures he sought to rely on as confirmed in EJ Goodman's Order. He then served a schedule consisting of 27 disclosures on 20 October 2018. Finally, the agreed list of issues prepared by the parties in advance of the final hearing referred to an appendix consisting of six disclosures. This list also referred to additional detail in relation to one of the disclosures (i.e. PD4) as noted below. We confirmed with the claimant that these were the disclosures on which he intended to rely. Our findings of fact are based on the following six disclosures enumerated in this final list:

2.5.1 At around 11.20 am on 30 June 2017 the claimant reported to Mr Metcalfe that an engineer, Killian Valles, had stopped one of the main pumps during his weekly sprinkler test procedure. Mr Metcalfe confirmed that Mr Valles had been told to turn both the main sprinkler pumps off when the claimant had been instructed to carry out the weekly sprinkler tests. The claimant told Mr Metcalfe that in his 20 years of carrying out the weekly sprinkler test he had never experienced this unprofessional situation. He informed Mr Metcalfe that he had stopped the

test and asked him to contact him when it was safe to restart the test. ("PD1")

The respondent disputes that this was a protected disclosure.

2.5.2 At around 1.40 pm on 27 October 2017 the claimant reported to Mr Ramage that the gong had not sounded during a sprinkler test indicating that water would not reach the point of fire via the sprinklers. He also reported this on his log and PDA. ("PD2")

The respondent agreed that this was a protected disclosure.

2.5.3 At around 12.30 pm on 3 November 2017 the claimant reported to Mr Ramage that he had found the sprinkler bypass valve open. The implication of this was that the valve had been left open and there had been no fire protection in the building for up to seven days. He also reported this on his log and PDA. ("PD3")

The respondent agreed that this was a protected disclosure.

2.5.4 At around 8.00 am on 8 November 2017 the claimant reported to Mr Perry that he had not been provided with a copy of a site-specific method statement for sprinkler isolations. The claimant also relies on several previous unspecified occasions when he says he reported health and safety concerns to Mr Ramage in relation to a lack of a method statement. ("PD4")

The respondent disputes the facts alleged by the claimant and it also disputes that these facts, if found, amounted to a protected disclosure.

2.5.5 Between 2 January – 18 December 2015 the claimant reported to his managers, probably Gavin Shaw or Jamie Gray, that the main pump No 2 at 20 Old Broad Street was faulty and out of service and waiting to be repaired. He also reported this in weekly sprinkler test sheets. ("PD5")

The respondent agreed that this was a protected disclosure.

2.5.6 Between 29 May 2015 – 25 March 2016 the claimant reported to his managers, probably Mr Shaw or Mr Gray, that the main pump No 1 Tower 42 was faulty and out of service and waiting to be repaired. He also reported this in weekly sprinkler test sheets. ("PD6")

The respondent agreed that this was a protected disclosure.

2.6 In respect of PDs 1 & 4 (if it is found that the claimant disclosed the information he relies upon):

2.6.1 Was this a disclosure of information?

2.6.2 If so, did the claimant have a reasonable belief that this information tended to show that:

a. the health or safety of residents of Tower 42 had been or was likely to be put at risk or

b. the respondent had failed, was failing or that it was likely to fail to comply with a legal obligation to which it was subject?

i. In respect of PD1, the claimant did not specify which legal obligation the respondent breached or was at risk of breaching.

ii. In respect of PD4, the claimant relies on the requirements of regulations 3 & 5 of the Management of Health and Safety at Work Regulations 1999 ("MHSWR").

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

2.7 The respondent accepts that these disclosures, if found, were made in accordance with section 43C ERA.

Detriment – Protected disclosures

2.8 If protected disclosures are proved, was the claimant, on the ground of any protected disclosure found, subject to detriment by the respondent in that he was suspended from duty on 17 November 2017?

Dismissal – Protected disclosures

2.9 Was the making of any proven protected disclosure the principal reason for the dismissal?

2.9.1 Has the claimant produced sufficient evidence to raise the question of whether the reason for the dismissal was a protected disclosure(s)?

2.9.2 Has the respondent proved its reason for the dismissal, namely third-party pressure to dismiss?

2.9.3 If not, does the tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for dismissal? The tribunal must be astute to consider whether making disclosures (if proved) can be separated from the manner in which they were made.

Procedure

3. We heard evidence from the claimant. For the respondent, we heard from: Scott Perry, Contract Manager; Rob Ramage, Engineering Manager; Ollie Metcalfe, formerly Area General Manager (now Business Unit Leader); Michael Clark, Area General Manager; Erin Hynes, formerly HR Manager (now HR Business Partner).

4. There was a hearing bundle which exceeded 500 pages.

5. We also admitted into evidence additional documents, including internal vacancy lists for the relevant period, which were disclosed by the respondent on our direction.

6. We considered oral and written submissions from both parties and a bundle of authorities provided by the claimant.

7. Both parties exchanged supplemental witness statements in the week before the hearing. The claimant served a second short supplemental statement on the first day of the hearing. The respondent did not object to this on the basis that it had adequate time to review this statement and was permitted to put supplemental questions to its witnesses to address any new evidence arising.

The Facts

8. Having considered all the evidence, we make the following findings of facts on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

9. The respondent provides facilities management services to clients. One of these clients is Tower Management Services Limited ("the client") which manages Tower 42, 25 Old Broad Street, in the City of London. We accepted the respondent's unchallenged evidence that this is a prestigious and important contract.

10. The claimant was employed by the respondent from 26 June 1984. At the date of his dismissal he had been employed as an electrician, in the role of Day Engineer based at Tower 42 for over 22 years. He was part of the respondent's engineering team in Tower 42. From October 2015 he was line managed by Rob Ramage, Engineering Manager.

11. The claimant's employment was transferred several times prior to his transfer to the respondent in May 2013. Because of his substantial length of service, he was one of the highest paid members of the engineering team. At the date of his dismissal, the claimant's gross annual salary was £45,000. The starting salary of the engineer who replaced him in March 2018 was £38,000. The claimant had also retained a package of benefits, that included 30 days' leave, six months' occupational sick pay at full pay, a contributory pension scheme and private medical insurance cover. This package was superior to the standard terms and conditions introduced by the respondent in 2016 which applied to new employees from this date.

12. He was employee of the year in 2009 out of 250 onsite employees.

13. The respondent provided facilities management services to the client under a supply of services agreement dated 1 May 2013. Clause 3.20 of this agreement provided that

> "The Client retains the right to have any of the Service Providers personnel removed from working on any of the installations."

This was an unfettered right which the client could exercise at will and without any requirement to justify or explain its decision. The claimant was not made aware of this provision prior to his suspension in November 2017.

14. The managing agent for the client was BNP Paribas Real Estate Advisory & Property Management UK Ltd ("BNP"). Barry Rushmer, General Manager, and Andy Botha, Technical Services Manager, were employed by BNP and based at Tower 42.

15. The respondent encouraged its engineers to report at least four hazards every month. These were discussed by the engineering team at weekly toolbox meetings. The claimant raised more hazards than his colleagues.

16. The claimant was a conscientious and methodical worker. He ensured that all work was done safely and using the correct equipment. For example, he used a desk surfer instead of standing on a desk. Another example was that he would barrier off wider areas than other engineers in order to complete tasks such as the removal of ceiling tiles. The claimant also wanted an audit trail for all work done. Overall, this meant that some jobs took longer or were delayed until he was provided with the correct equipment or information.

17. The claimant performed various maintenance tasks within the building as instructed via a personal digital system ("PDA"). He was assigned jobs by the client's helpdesk and logged his activities for each job on his PDA.

18. One of his routine tasks was to conduct weekly tests of the sprinkler system. He carried out this test at around 10.30 am every Friday. He had done this for over 20 years.

19. The sprinkler system was one of two fire protection systems in the building, the second being a PA system with automated voice instructions for evacuation of the building in the event of a fire. From around 2013 the claimant became concerned about the risk to health and safety if a fire started during this isolation although he did not raise his concerns formally or in writing at this time. The claimant's concerns about fire safety were heightened following the Grenfell Tower fire in June 2017.

PDs 5 & 6

20. In 2015 the claimant reported to one of his managers, Mr Shaw or Mr Gray, that one of the two main pumps at 20 Old Broad Street was faulty and out of service and awaiting repair. He also documented this in weekly sprinkler test sheets between 2 January – 18 December 2015. He reported the same issue with one of the two main pumps in Tower 42 to Mr Shaw or Mr Gray which he documented in weekly sprinkler test sheets between 29 May 2015 – 25 March 2016. The risk in both cases was that there was only one operational pump to feed the sprinkler system in an emergency and no fail-

safe pump. The respondent accepts that these verbal and written reports were protected disclosures.

21. In order for it to be tested the sprinkler system had to be isolated or deactivated i.e. locked out of all sources of electrical supply. This meant that the water pumps that fed the entire system would be switched off by building security. The pumps would then be restored when the test was completed. Prior to 2016, the entire sprinkler system serving all 42 floors had to be deactivated in order to test the system. In early 2016 the sprinkler system isolation process changed. The system was isolated floor by floor. A message would be relayed from the engineer on site to security via the helpdesk before and after the pumps were isolated on each floor. This process was further modified in 2017 when the engineer was required to contact security directly before and after isolating the sprinkler system on each floor. The claimant refused to do this. He instead continued to contact the helpdesk who had to relay his messages to security. We find that the effect of this was that these weekly tests took significantly longer that if claimant had complied with the new procedure.

22. *The minority (Dr Weerasinghe) accepts the claimant's evidence at paragraph 4 of his supplementary statement, that "I never took three to five hours to just carry out the sprinkler test, this is completely untrue." The minority considers that Mr Metcalfe's version is an embellishment because an increase from two hours to three to five hours caused by the claimant going through the helpdesk is not plausible.*

Improvement notice

23. On 26 June 2017 Mr Rushmer wrote to the respondent to issue an improvement notice together with a list of "Improvement Subjects". This list included:

    a. "Lethargic attitude" in providing day and shift engineer cover
    b. Statutory documentation not being available for inspection by auditors
    c. Staff training / skills levels were "not appropriate"
    d. Lack of care in the sprinkler system operation
    e. Lack of clarity on how safety systems are maintained
    f. Lack of adherence to legislation
    g. Engineers were not reporting "obvious issues"

    Mr Rushmer wrote:

    > "The list is varied and you may consider trivial in some areas, but I wanted to give you and your team the fullest opportunity to correct your procedures and restore the trust that should exist in this relationship."

    Although his concerns related to the engineering team, Mr Rushmer did not name any individuals. The respondent was told that Mr Rushmer would review this list each month before he completed a final review in September. The potential impact of this notice was that unless all issues specified in this list had been resolved within three months Mr Rushmer would instruct the client to terminate the contract. We accept the respondent's unchallenged evidence that this was the first time that the client had issued an improvement notice.

24. In the same month Scott Perry became the Contract Manager for Tower 42. He reported to Ollie Metcalfe, Area General Manager. They were both responsible for resolving these issues and safeguarding this prized contract.

PD1

25. On 30 June 2017 the claimant reported to Mr Metcalfe that Killian Valles, another engineer, had stopped one of the main pumps during his weekly sprinkler test. He complained that he had never experienced such an unprofessional situation in over 20 years of carrying out this test. He relies on this as being a protected disclosure. He says that that the risk was that there were two engineers working on the system at the same time.

26. The claimant accepted that he raised his voice and referred to "you people" when he complained about this issue to Mr Metcalfe. He agreed that the use of this language by which he meant "management" could have been perceived negatively. The claimant also agreed that the client's helpdesk staff were close by. Mr Metcalfe felt that the claimant's outburst had been directed not only to himself but to the helpdesk staff.

27. During his first six weeks in post, Mr Perry overheard the claimant talking in a confrontational way to Mr Ramage and with Sally Cowes on the helpdesk. He discussed the claimant's manner with Mr Metcalfe whose focus was on operational priorities, especially the need to deal with the improvement notice. This meant that the claimant's conduct was not addressed.

Training incident

28. A training event for the engineering team was organised on 18 July 2017. This had been arranged at short notice partly in response to the training issues that had been identified by Mr Rushmer. An external trainer was brought in to deliver the training. The lack of notice for this training upset the claimant and Mr Webber, another engineer, who were also concerned that they would be required to work through their lunch break. The claimant was also concerned that the training would finish after 5.00 pm as this would impact on his childcare responsibilities. The claimant and his colleagues spent over an hour arguing with the trainer. There were angry exchanges. Mr Perry and Mr Ramage intervened several times to facilitate between the team and the trainer. The outcome was that the training was cancelled and the trainer refused to return to site as he did not believe this was a conducive environment for training because of this confrontational behaviour.

29. We accept the respondent's unchallenged evidence that the training room was about 20 metres away from the office shared by Mr Rushmer and Mr Botha with a clear line of sight.

30. This incident was discussed at a meeting the next day with the claimant and his managers. The respondent's record of this meeting noted that the client (BNP) had requested a meeting as it was "unhappy and angry". The claimant continued to complain that the respondent had not given sufficient notice and time for this training.

31. At the toolbox talk on 24 July 2017 it was agreed that the respondent would give adequate notice of future training and all breaks, and any overtime or time off in lieu necessary to facilitate this training would be agreed in advance.

32. We find that whilst the claimant and his colleague had genuine concerns about the way that this training had been organised their confrontational behaviour was a factor which led to the cancellation of this training. We also find that this incident was witnessed by Mr Rushmer and / or Mr Botha and they were aware that the claimant's and Mr Webber's actions had resulted in the cancellation of training. Training was one of the issues identified in Mr Rushmer's improvement list and was therefore a high priority for the client. For the same reason, training was also a priority for the respondent.

33. We find that as a result of this incident Mr Metcalfe and Mr Perry became more concerned about the impact of the claimant's actions on their relationship with BNP and the contract with the client.

34. The improvement notice was signed off by the client in late September / early October 2017. This meant that Mr Rushmer was satisfied that the respondent had taken action to address the issues set out in his list. However, the service being provided by the respondent remained under review. With the contract due to end in 2018, we accept the respondent's evidence that it was concerned about the risk that it would not be renewed.

PDs 2 & 3

35. On 27 October 2017 the claimant reported to Mr Ramage that a sprinkler test showed that water would not reach the point of fire via the sprinkler system. At the next weekly test, on 3 November 2017, he reported to Mr Ramage that a sprinkler bypass valve had been left open. The risk was that there had been no fire protection for up to 7 days. The respondent accepts that these were both protected disclosures.

36. The claimant was concerned about the lack of a "closed loop" method statement in relation to fire protection systems i.e. a written statement which stipulated that any operations on the sprinkler system must start with isolation and end with reinstatement. This was not the same as a risk assessment. The respondent felt that a method statement was unnecessary as these steps were already being taken by its engineers. There was no written risk assessment for sprinkler isolation. Mr Perry said that this was not required because each engineer on site would conduct a dynamic assessment i.e. an in situ assessment when completing the task. The claimant agreed that he had been working that way. He wanted a method statement to ensure consistency.

Job 7489

37. On 6 November 2017 the claimant was assigned job 7489. The specific task was to change a light fitting. This required disconnection of the sprinkler system. Mr Botha contacted security on 7 November 2017 to ensure that the system would be isolated for this job from 7.00 am. This job had a P4 priority which required a response within one hour and completion within

two hours. It needed to be completed before office hours on 8 November 2017 to avoid disruption to the office tenants.

38. Prompted by this job allocation, the claimant asked Mr Perry for a site-specific method statement for the isolation of the sprinkler system at the weekly toolbox meeting on 7 November 2017. Mr Perry told the claimant that there was one in operation. He understood that the claimant was asking for a standard operating procedure for sprinkler head false activation. He therefore misunderstood the claimant's request.

39. When Mr Perry attended on site the next day he was surprised to see that job 7489 had not been completed. The claimant asked him for a copy of the method statement for sprinkler isolations. Mr Perry went into his office and returned with a standard operating procedure for sprinkler head false activation. He told the claimant that he did not have a method statement for sprinkler isolations. Although Mr Perry says that he did not understand that the claimant was requesting a method statement on 8 November 2017, we do not accept this. We find that the claimant repeated his request for a method statement on 8 November 2018 and he was upset when Mr Perry told him that this document did not exist.

40. The claimant told the tribunal that this was "the last straw for me and that was when I made my stand". As the claimant later wrote on 14 December 2017 "I went on to explain that I was not happy with doing this task on a verbal basis". The claimant felt very strongly about this issue. He felt he had been misled by Mr Perry. The claimant agrees that he raised his voice to Mr Perry. We find that the claimant was confrontational. The majority of the tribunal (Employment Judge Khan and Ms Craik) also finds that in taking this stance the claimant was in effect refusing to complete this job in the absence of a method statement.

41. Mr Perry told the claimant to leave this task and that he would get back to him. We do not accept Mr Perry's account that he agreed to suspend this job because the claimant told him that the client had not given permission to isolate the sprinklers. We prefer the claimant's evidence that he did not say this as Mr Perry would have been able to check that permission had been given via the eLog. It is notable that when Mr Perry subsequently wrote to the claimant to complain about this incident on 15 November 2017, he did not refer to this allegation i.e. that the claimant has misled him about not having the client's permission to isolate the sprinklers. This omission in a near-contemporaneous document is inconsistent with Mr Perry's evidence on this point.

42. The claimant asked to speak to the health and safety manager. He did not say why. Mr Perry gave him the telephone number for Ann Green, QHSE Manager. He wrote this down in his pocketbook. Mr Perry emailed Ms Green at 1.02 pm to say that "The explanation for the procedure I have given hasn't been deemed acceptable by the engineer and he therefore would like to run this past yourself".

43. The claimant relies on his complaint about the lack of a method statement as being a protected disclosure. In contending this he relies on Mr Perry's engineering background. He also relies on three or more occasions when he alleges that he reported health and safety concerns to Mr Ramage in relation to the lack of a method statement. The claimant was unable to specify the dates when he reported these concerns to Mr Ramage or what information he disclosed to Mr Ramage on each of these occasions. Mr Ramage did not recall the claimant raising these concerns with him.

44. Mr Perry told the claimant that he would need to speak to Mr Botha about the delay to job 7489. His evidence was that he told Mr Botha that the claimant had said that the client had not given permission for the job. We have found that the claimant did not say this to Mr Perry. We find that Mr Perry conveyed to Mr Botha that the claimant had refused to complete this task. The majority of the tribunal (Employment Judge Khan and Ms Craik) finds that in conveying this to Mr Botha, Mr Perry did not refer to health and safety because he did not view it as a health and safety issue but as another example of the claimant being obstructive.

45. *The minority (Dr Weerasinghe) finds that Mr Perry told Mr Botha that the claimant had raised a health and safety issue and was refusing to complete the job until that issue was resolved. This is consistent with the site removal letter which clearly alludes to a refusal to follow a management instruction. Furthermore, it was common practice to disclose health and safety issues raised by the engineers to the client. The respondent agreed that it encouraged its engineers to raise such issues. Moreover, the minority finds that Mr Perry would have told Mr Botha that he (in his opinion) had adequately addressed the issue that the claimant had raised but notwithstanding the claimant remained unhappy, refusing to complete the job. This is consistent with Mr Perry's email to Ms Green referred to at paragraph 42 above.*

46. We accept Mr Perry's evidence that Mr Botha was not particularly pleased and expressed his disappointment that the respondent had let down a tenant in the building once again.

47. Mr Perry handed over this matter to Mr Ramage. Mr Perry told him that the client was very unhappy and that it was incumbent on him to try to resolve this situation. Mr Ramage completed a method statement and handed a copy to the claimant after lunch. There is a dispute between the claimant and Mr Ramage about whether the claimant asked Mr Ramage for a method statement. It is not necessary for us to make any findings on this. It is agreed that the claimant did not refer to health and safety during any exchanges with Mr Ramage on this occasion. The claimant says that this method statement was defective as it was not a closed loop. In spite of this, he followed up on job 7489 the next day.

48. Between his discussion with Mr Perry in the morning and being given the method statement by Mr Ramage after lunch the claimant did not follow this issue up with Ms Green. He had other jobs to complete. He was also waiting for Mr Perry to revert to him. However, the majority of the tribunal

(Employment Judge Khan and Ms Craik) finds that the claimant had the opportunity and means to contact Ms Green but he did not make this his priority.

49. On 10 November 2017 Mr Perry asked the claimant how he thought job 7489 had gone. The claimant said not very well. He referred to the lack of a method statement which he said had delayed the job. He apologised for raising his voice on 8 November 2017. We do not accept Mr Perry's evidence that the claimant was angry and confrontational. We accept the claimant's evidence that this was a short exchange at the end of his shift and he did not raise his voice on this occasion.

Job 7694

50. The claimant was assigned job 7694 on 15 November 2017. The specific task was to investigate a faulty light. This job had a P3 priority which required a response within 30 minutes and completion within two hours. The client had arranged for access to the site at 12.30 pm.

51. The job was assigned to the claimant at 11.05 am. He acknowledged this job at 11.07 am when he contacted the helpdesk and explained he was on another job (7686). The task was not reassigned to another engineer until 1.28 pm. It therefore remained assigned to the claimant, in the meantime.

52. The claimant completed job 7686 by 12.00 pm. Although he expected that job 7694 would be reassigned, this job was still live on his PDA until 1.28 pm. He did not check his PDA. He did not contact the helpdesk. He went to lunch at 1.00 pm. The majority of the tribunal (Employment Judge Khan and Ms Craik) finds that the claimant was not being proactive in relation to this job. There was no apparent reason, other than his lunch break, why the claimant could not have completed this job at 12.30 pm.

53. *The minority (Dr Weerasinghe) accepts the claimant's explanation in his oral evidence that it was incumbent upon the helpdesk to contact him and therefore finds the fault lies primarily with the helpdesk. The minority notes that Mr Clark, who heard the claimant's appeal, did accept the claimant's version of events without an investigation. The minority finds that there were no multiple requests for this task. This appears to be an embellishment by Mr Perry in his email of 21 November 2017 to Mr Metcalfe.*

54. The job was reassigned to the claimant at 1.35 pm. He was at lunch until 2.00 pm. He logged on site at 2.19 pm. He was unable to proceed because the tenants were sitting close to the light fitting. He returned on site the next day but was unable to complete the job as replacement parts needed to be ordered. The job was completed on 22 November 2017.

55. This job was assigned by Chloe Benson, who worked for Mr Rushmer. We accept the respondent's unchallenged evidence that her office was approximately six feet from the office of Mr Rushmer and Mr Botha, with a direct line of sight. It is likely that Mr Rushmer was made aware that this job had been delayed, either by Ms Benson or by one of her colleagues on the helpdesk.

Letter of concern

56. On 14 November 2017 Mr Perry sought advice from Erin Hynes, HR Manager, about the claimant's conduct. Ms Hynes advised Mr Perry that whilst she understood that there had been ongoing concerns about the claimant's conduct she did not believe that disciplinary action was warranted at this stage because the respondent had not taken any steps to address this. Mr Perry then sent her a draft letter of concern to be forwarded to the claimant. This referred to the delay to job 7489 and his discussion with the claimant. It also referred to the claimant's lack of trust in the respondent and his characterisation of the office team as "you people". Ms Hynes amended this letter. The final version included her additional wording that the claimant had been "unprofessional and confrontational", "extremely negative" and "insubordinate", together with a warning that any further "instances of unprofessional behaviour" could lead to an investigation. As we have already noted, this letter did not refer to an allegation that the claimant had misled Mr Perry about the client withholding permission for the sprinkler isolation on 8 November 2017.

57. Mr Perry also discussed this letter with Mr Metcalfe.

58. We accept Mr Perry's unchallenged evidence that when he gave this letter to the claimant later that day the claimant was not pleased and stormed out of the room.

Site removal letter

59. On the same date i.e. 15 November 2017 Mr Rushmer wrote to Mr Metcalfe to request the removal of the claimant and Mr Webber from the contract. This letter was hand delivered by Mr Rushmer to Mr Metcalfe on site. It stated:

> "I write further to our various meetings/reviews of the quality of the Norland/CBRE service delivery, which as you are aware is not meeting our expectations. One blockage to success has been identified as the unhelpful, unprofessional and disruptive behaviour of your employees known as …[MW] and Michael Tingling, who have failed to carry out reasonable instructions and have not co-operated with us, the client.
>
> We therefore wish to employ the site removal clause 3.20 in our commercial agreement of these employees.
>
> We would ask that these members of staff are removed from site and replaced with appropriately skilled replacements to limit any further disruption to our business."

60. We find that this decision was triggered in part by Mr Rushmer's review which had resulted in the improvement notice and ongoing review of the respondent's service.

61. *The minority (Dr Weerasinghe) also finds that the principal reason for this 'trigger' was the information / misinformation that was conveyed to Mr Botha by Mr Perry following the 8 November 2017 event. The reason for this is that the letter clearly alludes to a failure to follow reasonable instructions.*

62. Mr Metcalfe discussed this letter with Ms Hynes the next morning when she advised him to suspend the claimant and Mr Webber.

Suspension

63. The claimant was suspended on full pay on 17 November 2017 by Mr Metcalfe, when Ms Hynes was also in attendance. He was given a letter confirming his suspension which noted:

> "BNP Paribas has formally requested your removal from site with immediate effect. We have no alternative other than to comply with this request pending investigation".

He was told that a meeting would be arranged to discuss this removal request which could result in his dismissal. When he asked for an explanation Ms Hynes told him that the respondent did not know what these reasons for this decision were.

64. Ms Hynes emailed the claimant on 19 November 2017 to summarise their meeting. She said that the site removal "is not due to an internal investigation into your conduct but initiated from the client" as a result of a "review of our service". She said that Mr Metcalfe would ask the client to reconsider its decision. She had also contacted Stephen Palmer, Talent Resourcing Manager, to support the claimant with redeployment. She noted that the claimant had asked to remain on the same terms if redeployed but this could not be guaranteed.

65. The claimant replied, when he requested a copy of Mr Rushmer's letter.

66. The respondent began sending the claimant weekly internal vacancy lists from around 17 November 2017. The claimant's evidence was that he was annoyed to receive these vacancy lists at first as he wanted the respondent to focus on the reasons for his site removal instead of redeployment.

67. Mr Metcalfe instructed Mr Perry to investigate Mr Rushmer's reasons for requesting the claimant's site removal. Having done so, Mr Perry emailed Mr Metcalfe on 21 November 2017 to provide the following information:

> "There have been two instances over the last 2 or 3 weeks where MT [the claimant] has ignored requests made by Tower management that have resulted in occupiers being let down and left frustrated.
>
> There has always been an excuse for this however it has always been weak and felt it's merely been an attempt to put up blockers to slow down works.
>
> Please see both examples below.
>
> - Refusing to isolate the sprinkler system
> - Ignoring a request to attend a floor to investigate a faulty light multiple times"

As we have found, Mr Rushmer was aware of both issues in which the maintenance work had not been completed on time and this had impacted on the client's tenants.

68. Mr Metcalfe spoke to Mr Rushmer three times between 15 – 28 November 2017. He understood that Mr Rushmer's concerns about the claimant had accumulated over time and the two examples he had given Mr Perry were only the most recent incidents. Mr Metcalfe's initial focus was to encourage Mr Rushmer to reconsider his decision. He wrote to Mr Rushmer on 28 November 2017, when he referred to the same two examples, to formally request that he reconsider his decision and allow the claimant to return to site. Mr Metcalfe described the claimant as a valued member of the team with a considerable length of service and valuable experience, and skills. He said that the respondent was satisfied with the claimant's overall performance, he was a "good worker" and "having had discussions with him I am confident that he is committed to doing a good job". Mr Metcalfe suggested that if reinstated the claimant could be put on a performance improvement plan. This was Ms Hynes's idea. We find that in making this proposal the respondent was impliedly accepting that the client's concerns about the claimant were well founded. The majority of the tribunal (Employment Judge Khan and Ms Craik) also finds, however, by making this proposal Mr Metcalfe was offering to take concrete action in order to assuage Mr Rushmer's concerns.

69. *The minority (Dr Weerasinghe) finds Mr Metcalfe's letter to Mr Rushmer a half-hearted attempt to make Mr Rushmer reconsider his site removal request for the following reasons: (a) Mr Metcalfe focuses on the claimant's work capability instead of the behaviour / conduct issues complained of; (b) Mr Metcalfe could have consulted the claimant prior to writing to Mr Rushmer in order to ascertain whether Mr Rushmer might have been misinformed; and (c) Mr Metcalfe's proposition to implement a performance improvement plan does indeed implicitly concede that the claimant was at fault. Moreover, the said proposition was not meaningful without an understanding of the reasons behind the claimant's alleged refusals (if there were any) to carry out instructions.*

70. Mr Rushmer replied on 1 December 2017 to confirm that having "given this serious matter the attention it deserves" his decision to remove the claimant stood.

71. This was the extent of the respondent's investigation into the reasons for Mr Rushmer's decision to remove the claimant from site.

72. The claimant wrote to Ms Hynes on 4 December 2017 to complain that he did not know the reason for his site removal and he asked again for Mr Rushmer's letter. He also complained that the respondent's focus was not on resolving this issue but on redeployment.

73. Mr Metcalfe wrote to the claimant on 5 December 2017 to confirm that the client had given the following reasons for his site removal:

    a. He had ignored requests by Tower 42 management.
    b. He had refused to isolate the sprinkler system on 8 November 2017 (job 7489).
    c. He had ignored a request to investigate a faulty light multiple times on 15 November 2017 (job 7694).

Mr Metcalfe also confirmed that the client had declined to reconsider this decision.

74. Ms Hynes emailed the claimant on the same day about a formal review meeting. She emphasised that the respondent was not investigating any misconduct issues. The claimant was told that his employment would be terminated if the client had not changed its mind and he had not found an alternative role.

75. The claimant wrote to Mr Metcalfe on 14 December 2017 to complain about his site removal especially because he had not been given the chance to address the reasons for this decision. He explained what had happened at the meeting with Mr Perry on 10 November 2017 and the events on the morning of 8 November 2017 and he denied refusing to complete job 7489 or ignoring job 7694 multiple times. He also noted that since the Grenfell Tower fire he had repeatedly asked for a method statement to carry out the sprinkler isolation on safety grounds. He did not explain what these safety grounds were.

76. The review meeting took place on 21 December 2017 with Mr Metcalfe and Ms Hynes. The focus of this meeting was the redeployment process. The claimant said that he wanted the respondent to find him the same type of role in the same area on comparable terms. Turning to his removal from site, the claimant complained that he had not been asked for his version of events. He denied the allegations relating to jobs 7489 & 7694. Mr Metcalfe told him that the client was not required to give its reasons for this decision. He had instead asked the client to reconsider its decision based on the claimant's length of service, availability and attendance but they had refused to reinstate him. The respondent considered that an internal investigation into the claimant's conduct was unnecessary.

Dismissal

77. The claimant was invited to a meeting on 22 January 2018. He was told that his employment could be terminated at this meeting.

78. This meeting was chaired by Mr Metcalfe. The claimant was accompanied by a trade union representative. Mr Metcalfe confirmed that the claimant would be dismissed with notice. He noted that vacancies had been identified but the claimant had not deemed them to be suitable because they did not have comparable salaries. The respondent proposed that it would continue to explore redeployment during the claimant's three-month notice period. His representative requested that the claimant was instead paid a lump sum in lieu of notice and accrued annual leave. It was agreed that Mr Metcalfe would continue to call the claimant each week for the remaining period of his employment. The claimant said that he would not consider a salary of £40,000 as this was still £6,000 less than his own. He also said that he would not accept a role on the respondent's standard benefits.

79. The claimant's dismissal was confirmed in writing by Mr Metcalfe on 26 January 2018 when he explained that this decision had been taken "As BNP Paribas have requested your removal from site and have confirmed that their decision is final". It was agreed that the claimant would receive a

payment in lieu of notice so that his dismissal would take effect on 22 February 2018. The respondent agreed to continue to explore redeployment opportunities in the meantime. By requesting his notice to be paid in a lump sum, the claimant foreshortened the period over which redeployment could otherwise have been explored, by two months.

80. The claimant appealed his dismissal on 31 January 2018. He did not refer to protected disclosures or any health and safety concerns that he had raised. In essence, the claimant complained that the respondent had failed to conduct a fair investigation, it had not provided him with a clear rationale for Mr Rushmer's decision or given him the chance to put forward his own version of events. He also complained that Mr Metcalfe had been involved in both the investigation and dismissal meetings.

81. The respondent had not disclosed Mr Rushmer's letter to the claimant by this date despite his repeated requests.

Redeployment

82. The respondent's internal vacancy bulletins listed vacancies by job title and city, sector by sector.

83. From late November 2017, Mr Metcalfe supported the claimant with redeployment by calling him every week to discuss any vacancies that the claimant was interested in. Mr Metcalfe also contacted the relevant hiring manager to request details of the terms and conditions, location and a job description for any vacancy the claimant expressed an interest in. The claimant was then required to complete a formal job application.

84. The claimant also received support from Mr Palmer from 27 November 2017. Mr Palmer agreed to circulate the claimant's CV to hiring managers and talent resourcing managers.

85. From late December 2017 Ms Hynes also contacted hiring managers to request details of any specific roles in which the claimant had expressed an interest.

86. The claimant was interested in electrician roles in a non-supervisory / non-managerial capacity, based in London, working day shifts and not located on a critical i.e. high-risk site.

87. He expressed an interest in the following vacancies between 10 January – 12 February 2018, but did not apply for any of these roles for the reasons set out below:

    a. Day Shift Technician: salary too low i.e. £35,000
    b. Multi Skilled Technician: salary too low i.e. between £29,100 – £36,300
    c. Multi Skilled Engineer: salary too low i.e. between £32,000 – £36,000
    d. Multi Skilled Engineer: salary too low i.e. between £28,000 – £30,000
    e. Building Services Technician: salary too low i.e. between £22,000 – £25,000
    f. Building Service Engineer: salary too low i.e. £38,000

g. Electrical Technician: based in Manchester
h. Electrical Shift Technician: night work required
i. Senior Engineer: a mechanical engineer role

88. The claimant emailed Ms Hynes on 12 February 2018 to express an interest in two vacancies (i.e. the vacancies listed above at paragraph 87 g & h). He said that he would consider a lower salary and listed his current benefits package which he said he hoped to retain but asked "please advise me if not all of the above I will be able to keep on transfer to a new position within the company". This was the first time the claimant indicated that he was prepared to compromise on his pay and benefits, although he did not clarify the minimum salary he would accept or which benefits he would agree to forego. He had previously told the respondent, on 22 January 2018, that he would not accept a salary of £40,000 which ruled out all of the otherwise potentially suitable roles he had expressed an interest in.

89. Ms Hynes replied when she reiterated that any new role would be offered on its own terms and conditions. She told the claimant to contact hiring managers for any role he was interested in to discuss i.e. negotiate this. We accept the respondent's evidence that the cost of any increase in pay or additional benefits would have been borne by the local budget holder and based on the commercial contract they had with the client.

90. Neither of the two roles were suitable for the claimant in any event, as one was based in Manchester and the other required night work.

91. The claimant did not make any further expressions of interest, nor did he contact hiring managers for any other vacancies to discuss whether they would be willing to improve on the terms and conditions offered. He felt that this would be a futile exercise.

92. The respondent did not otherwise consider ringfencing the claimant's terms and conditions. Mr Metcalfe's evidence was that "I didn't push for this myself…I wasn't willing to go out of my way to help him because it would have simply been a matter of moving a problem. His attitude and behaviours would have been disruptive elsewhere."

93. The claimant's employment terminated on 22 February 2018.

94. Mr Rushmer's site removal letter was not sent to the claimant until 13 March 2018.

Appeal

95. The claimant's appeal hearing took place on 19 March 2018 when he was accompanied by a trade union representative. This hearing was chaired by Michael Clark, Area General Manager. The claimant agreed that the client had the right to request his removal. He complained that he had not had an opportunity to address the alleged reasons for his site removal before Mr Rushmer reviewed his decision. He also complained that Mr Rushmer had been misinformed that he had refused to carry out work. He said that he was seen as awkward because he ensured health and safety at work. This was the first time he referred to health and safety in connection with the

decision to remove him from site and his dismissal. In respect of redeployment, the claimant said that he could not afford to take the kind of drop in salary consequent on taking up a position elsewhere as well as losing his preferential benefits. The claimant was not therefore prepared to make any significant compromises on his pay and benefits.

96. After this hearing Mr Clark emailed Mr Metcalfe to ask him to go back to the client "to determine if there is still an opportunity for Mr Tingling to communicate direct with the client and defend the points raised by the client at Tower 42".

97. Mr Metcalfe emailed Mr Rushmer on 3 April 2018 when he referred to their discussion earlier that day and Mr Rushmer's refusal to meet the claimant. He wrote "As you stated, you have expressed what the reasons are behind your decision already, which was based on a review of the engineering services on site". There was no direct evidence from Mr Rushmer as he was not a witness.

98. The claimant's appeal was dismissed. This was confirmed in writing on 5 April 2018 when Mr Clark told the claimant that the client had refused to reconsider its decision or to meet with him. Mr Clark also noted that the client had refused to allow the claimant access to Tower 42 to collect his tools in December 2017. We find that this was further evidence of the client's antipathy towards the claimant. He confirmed that the claimant had been dismissed because the client had invoked its right to remove him and this has superseded any internal processes, including a conduct review, and no alternative role had been identified. Mr Clark did not make any findings in relation the reasons for the claimant's site removal. His evidence was that he accepted what the claimant had written in his letter dated 14 December 2018. Mr Clark did not, however, investigate these allegations because he did not believe this was necessary.

Relevant Legal Principles

Unfair dismissal

99. Under section 98(1) ERA, it is for the employer to show:

> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.'

100. If the employer fails to discharge this burden the dismissal will be unfair.

101. If the employer does establish a potentially fair reason for dismissal then the tribunal must go on to decide whether this dismissal was fair or unfair, applying section 98(4) ERA and at this stage the burden of proof is neutral.

102. Section 98(4) ERA provides that:

> [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

SOSR – Third party pressure to dismiss

103. Third party pressure to dismiss can amount to SOSR (see Dobie v Burns International Security Services (UK) Ltd [1984] IRLR 329, CA).

104. The employer must show that there was some pressure. However, if this pressure is improper then an employer may fail to establish SOSR.

105. It is not enough for the employer to establish SOSR. The tribunal will need to consider whether it was reasonable to dismiss the employee because of the third party pressure.

106. The employer does not have to establish the truth of any allegations made against the employee or agree with the request by the third party to dismiss him. As the EAT noted in Henderson v Connect (South Tyneside) Ltd [2010] IRLR 466 it would be:

> "harsh for an employer to have to bear the consequences of the client's behaviour, and Parliament has not chosen to create any kind of mechanism for imposing vicarious liability or third party responsibility for unfair dismissal".

107. The employer must, however, consider any injustice caused to the employee by the client's stance and the extent of this injustice: including length of service, the satisfactoriness or otherwise of their record and the difficulties faced in obtaining new employment (see Dobie). It must then do everything it reasonably can to avoid or mitigate any injustice (see Henderson). This may include trying to change the third party's mind and taking active steps to redeploy the employee. This might also include a consideration of whether the employer should have taken steps earlier to pre-empt the problem (see Bancroft v Interserve (Facilities Management) Ltd UKEAT/0329/12/KN).

108. But these are not decisive factors. The primary focus is whether the employer's response to the employee's predicament is reasonable under section 98(4) ERA (see Henderson). Cases will arise where it is reasonable for the employer to give way to a demand by a client even if that demand is unreasonable and causes injustice to the employee.

Protected disclosure

109. For there to be a protected disclosure, a worker must make a qualifying disclosure, as defined by section 43B ERA, and do so in accordance with sections 43C – 43H ERA.

110. Section 43B ERA provides that a qualifying disclosure means 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 six categories of failure:

> (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 and 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.

111. Section 43L(3) ERA provides that where the information is already known to the recipient, the reference to the disclosure of information shall be treated as a reference to bringing the information to the attention of the recipient.

112. A qualifying disclosure must accordingly have the following elements:

> 112.1 It is a disclosure (taking account of section 43L(3), if relevant).
>
> 112.2 It conveys information. This requires the communication of sufficient factual content or specificity to be capable of tending to show a relevant failure (see Kilraine v Wandsworth LBC [2018] ICR 1850, CA). It may be possible to aggregate separate communications but the scope is not unlimited and whether there has been a composite disclosure will be a question of fact for a tribunal (see Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540, EAT). Where the failure is said to relate to a legal obligation, save in cases where the breach is patent (see Bolton School v Evans [2006] IRLR 500, EAT), the worker is required to have disclosed sufficient information to enable the employer to understand the complaint at the time the disclosure is made (see Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06).

112.3 The worker has a reasonable belief that this information tends to show a relevant failure. This has both a subjective and objective element so that the worker must have a subjective belief and this belief must be reasonable (see Kilraine). In considering this the tribunal must take account of the individual characteristics of the worker (see Korashi v Abertawe Bro Morgannwg Local Health Board [2012] IRLR 4, EAT).

112.4 The worker also has a reasonable belief that the disclosure is made in the public interest. A tribunal must first ask whether the worker believed that the disclosure was in the public interest, at the time that it was made, and if so, whether that belief was reasonably held (see Chesterton Global Ltd v Nurmohamed [2017] IRLR 837, CA). There is no legal definition of "public interest" in this context. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case. Relevant factors could include: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer (see Chesterton).

113. Whether the information amounts to a disclosure and whether the worker had a reasonable belief that this information tended to show a relevant failure must be considered separately by a tribunal but these issues are likely to be closely aligned (see Kilraine). If a statement has sufficient factual content and specificity such that it is capable of tending to show a relevant failure then it is likely that the worker's subjective belief in the same will be reasonable. Equally, if the statement lacks the requisite detail then it is likely that the subjective belief will not be reasonably held.

114. A qualifying disclosure is protected if it is made to the employer (section 43C ERA).

Detriment – Protected disclosures

115. Section 47B ERA provides that a worker has a 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 made a protected disclosure.

116. Once it is has been established that a worker has made a protected disclosure and that he was subjected to a detriment, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2) ERA).

117. The correct approach on causation is for the tribunal to consider whether the making of the detriment materially influenced – in the sense of being a more than trivial influence – the employer's treatment of the worker (see NHS Manchester v Fecitt [2012] IRLR 64, CA).

Dismissal – Protected disclosures

118. Section 103A provides that a dismissal will be automatically unfair dismissal if the reason or principal reason for dismissal is that the employee made a protected disclosure.

119. The burden of proving the reason or principal reason is on the employer (see Kuzel v Roche Products Ltd [2008] IRLR 530, CA).

ACAS Code on Disciplinary and Grievance Procedures

120. In reaching their decision, tribunals must also consider the ACAS Code on Disciplinary and Grievance Procedures if relevant. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

121. In the context of a dismissal, the Code applies where disciplinary proceedings are, or ought to be, invoked against an employee (see Lund v St Edmund's School, Canterbury UKEAT/0514/12/KN).

Conclusions

Unfair Dismissal

Issue 2.1: What was the reason for dismissal?

122. The majority (Employment Judge Khan and Ms Craik) finds that there was third-party pressure to dismiss the claimant and this was the reason for the claimant's dismissal. This is because:

122.1 Mr Rushmer exercised clause 3.20 of the supply of services agreement on 15 November 2017. We do not find that this pressure was improperly applied by Mr Rushmer, on behalf of the client. He was concerned that the claimant's ongoing employment would disrupt the client's business. He exercised his client's contractual right to insist on the claimant's removal from site to protect his client's business.

122.2 The effect of this decision was that the respondent was required to remove the claimant from site.

122.3 Mr Rushmer restated this decision on 1 December 2017. As he refused to reconsider this decision, the respondent dismissed the claimant because he had not been redeployed into an alternative role on the date his dismissal was due to take effect.

122.4 This was a substantial reason of a kind which can justify dismissal.

123. *The minority (Dr Weerasinghe) accepts the site removal was the direct result of Mr Rushmer exercising clause 3.20 of the client's agreement.*

However, dismissal was entirely the decision of the respondent. The minority finds that the dismissal was because of alleged misconduct and that this reason was couched as an SOSR. In reaching this conclusion, the minority considers the following:

(a) In relation to redeployment, Mr Metcalfe's evidence was that "I didn't push for this myself…I wasn't willing to go out of my way to help him because it would have simply been a matter of moving a problem. His attitude and behaviours would have been disruptive elsewhere". Furthermore, in his oral evidence, Mr Metcalfe said that he was not willing to increase the claimant's salary because of behaviour issues.

(b) Ms Hynes, whilst saying the respondent would not guarantee the claimant's existing pay and terms, asking the claimant that he should have negotiated pay and terms with the recruiting managers himself thereby setting an impossible task because no senior management support was offered.

Furthermore, the minority finds that the allegations of misconduct were unfounded because most were not put to the claimant contemporaneously and none were investigated. No disciplinary action was taken with respect to any of the allegations. Therefore, the minority finds the dismissal substantively unfair. Alternatively, the minority finds the dismissal unreasonable under section 98(4) ERA as reasoned below.

<u>Issue 2.2.1:</u> How important was the third party's continued business to the respondent?

124. The claimant agreed that the client's continued business was important to the respondent.

<u>Issue: 2.2.2:</u> Did the respondent understand why the third-party wanted the claimant removed?

125. We find that the respondent understood why the client had requested the claimant's site removal for the following reasons:

125.1 In requesting the claimant's site removal, Mr Rushmer referred to "unhelpful, unprofessional and disruptive behaviour" a failure to carry out reasonable instructions and a lack of cooperation with the client. Mr Rushmer did not initially provide any examples of this behaviour. The respondent agreed to look into this. Mr Perry did so and we have accepted his evidence that Mr Rushmer gave two examples of the claimant's alleged conduct: he refused to complete job 7489 and he ignored a request to complete job 7694 several times.

125.2 Mr Metcalfe also spoke to Mr Rushmer on three occasions between 15 – 28 November 2017. He then referred to the same two examples when he wrote to Mr Rushmer on 28 November 2017.

125.3 Mr Metcalfe's evidence was that Mr Rushmer gave the most recent examples he could recall. We accept Mr Metcalfe's evidence that he felt he already knew what these reasons were i.e. that the claimant

was unhelpful, unprofessional, disruptive and uncooperative. There had been other incidents of the claimant's conduct that Mr Metcalfe and Mr Rushmer were aware of that were consistent with Mr Rushmer's complaints:

a. The claimant had been involved in the training incident on 18 June 2017. It is likely that this incident played some part in Mr Rushmer's decision as it involved the claimant and Mr Webber who were both identified in Mr Rushmer's site removal letter.
b. The claimant had raised his voice at Mr Metcalfe on 30 June 2017 when he referred to "you people" in close proximity to the helpdesk staff.

125.4 The respondent also understood that Mr Rushmer had made this request against the background of his ongoing review of its service and his view that the claimant's removal was necessary to protect the client's business.

Does the ACAS Code apply?

126. We do not find that the ACAS Code applied because this was not a case in which disciplinary proceedings were invoked, or ought to have been invoked, by the respondent.

What did the respondent know or believe about the factual accuracy of the allegations against the claimant when it suspended and dismissed him?

127. We remind ourselves that an employer is not required to ascertain the factual accuracy of allegations relied on by a third party in these circumstances. Whilst an employer will generally be expected to understand the reasons why a third party has requested the site removal of one its employees, an investigation is not required. This does lead inevitably to procedural injustice and where the allegations are unfounded, to substantive injustice.

128. As we have already found, the respondent understood Mr Rushmer's reasons for requesting the claimant's site removal.

129. The respondent did not conduct an investigation. It did not believe that an investigation was required. Its focus was to persuade Mr Rushmer to change his mind and then to support the claimant with redeployment. This meant that the claimant did not have an opportunity to address the reasons for Mr Rushmer's decision prior to his dismissal.

<u>Issue 2.2.3:</u> To what extent did the respondent consider what could be done to alleviate any injustice?

130. We find that Mr Rushmer's decision was likely to cause significant injustice to the claimant for the following reasons:

130.1 The claimant had been employed by the respondent since 1984 and he had worked in the same role at Tower 42 for over 22 years.

130.2 He had not been the subject of any previous disciplinary issues.

130.3 It was likely that he would have had difficulties obtaining employment on the same or similar pay and benefits, because of the package of pay and benefits he had accrued over his substantial period of service. This would have been evident to the respondent as it was aware of the variance between the claimant's pay and benefits with its standard terms.

130.4 The respondent had not disclosed the existence of the site removal clause to the claimant until his suspension. He was not therefore under notice of the client's unfettered right to exclude him.

131. However, in considering the extent of this injustice we must also take account of our findings that the claimant had conducted himself in a way which was consistent with Mr Rushmer's complaints: he had been involved in angry exchanges during the training incident on 18 June 2017; he had raised his voice at Mr Metcalfe when he referred to "you people" in close proximity to the helpdesk staff on 30 June 2017; he had raised his voice at Mr Perry on 8 November 2017. The majority of the tribunal (Employment Judge Khan and Ms Craik) has also found that the claimant refused to complete job 7489 and he was not proactive in relation to job 7694.

132. The respondent was required to consider what steps it could reasonably take to alleviate this injustice. The majority of the tribunal (Employment Judge Khan and Ms Craik) finds that the steps that it considered and took to address this injustice were to invite the client to change its mind and to support the claimant with redeployment.

133. *The minority (Dr Weerasinghe) has found at paragraph 69 above that Mr Metcalfe's efforts to persuade the client to change its mind were half-hearted. Furthermore, the minority considers there is no evidence to support that Mr Metcalfe applied his mind to alleviate the substantial injustice to the claimant during the redeployment process.*

134. Whilst Mr Perry was about to start to tackle what he saw as the claimant's confrontational and obstructive behaviour, the respondent did not address its concerns about the claimant at earlier stage when this could have prevented the client's demand for his site removal.

<u>Issue 2.2.4:</u> Did the respondent take adequate steps to ensure an injustice was not being done to the claimant?

Did the respondent make adequate efforts to persuade the third party to change its mind?

135. The respondent took the following steps to persuade the client to change its mind:

135.1 Mr Metcalfe contacted Mr Rushmer on three occasions in November 2017 to discuss his decision.

135.2 Mr Metcalfe wrote to Mr Rushmer on 28 November 2017 to invite him to reconsider his decision, when he referred to the claimant's long service and valuable experience and skills, he vouched for the claimant's future conduct, and suggested performance management in order to reassure the client.

135.3 Mr Metcalfe also contacted Mr Rushmer again on 3 April 2018 to canvass a meeting with the claimant. Although the claimant had been dismissed by this date there was still a possibility of reinstatement had Mr Rushmer agreed to meet the claimant and reconsider his decision.

136. We have considered the injustice faced by the claimant. However, this was an important contract for the respondent in which the client had an unfettered right to request the removal of any of its employees. The majority (Employment Judge Khan and Ms Craik) finds that in these circumstances the steps taken by the respondent were adequate.

137. *The minority (Dr Weerasinghe) has found at paragraph 69 above that Mr Metcalfe's efforts to persuade the client to change its mind were half-hearted.*

Did the respondent make sufficient efforts to redeploy the claimant to discharge its duty to avoid injustice to the claimant, in all the circumstances, including its size and administrative resources, the claimant's length of service, the satisfactoriness of his service and the difficulties he faced in obtaining other employment?

138. We must weigh the steps taken by the respondent against the injustice faced by the claimant. We must also take account of the size and administrative resources of the respondent. We remind ourselves that the duty on the employer is to take such steps are as reasonable to avoid or mitigate any injustice.

139. The respondent provided the claimant with the following support with redeployment:

139.1 It sent the claimant weekly vacancy bulletins from around 17 November 2017.

139.2 Mr Metcalfe supported the claimant with redeployment at weekly telephone calls to discuss any vacancies he wished to explore.

139.3 Mr Metcalfe and Ms Hynes contacted recruiting managers to obtain details of any vacancies that the claimant expressed an interested in which were then forwarded to him.

139.4 Ms Hynes referred the claimant to Mr Palmer for assistance with redeployment. Mr Palmer agreed to circulate the claimant's CV to hiring managers and talent resourcing managers.

140. The majority of the tribunal (Employment Judge Khan and Ms Craik) finds that the steps taken by the respondent to redeploy the claimant were reasonable:

140.1 We were taken to the weekly internal bulletins from which it was evident that the respondent is a large and well-resourced employer employing engineers across a variety of sectors and locations. We take account of this.

140.2 We take equal account of the fact that the claimant had access to a significant number and wide range of potentially suitable vacancies over the three-month period he had to explore redeployment. Despite this, he expressed an interest in a total of 12 vacancies and he did not apply for a single job. The issue for the claimant was the disparity between the pay and benefits he had accrued because of his substantial length of service and those applicable to any vacancy that would otherwise have been suitable for him.

140.3 We have found that the claimant was not prepared to compromise on his pay and benefits:

a. This was the claimant's clear position until 12 February 2018.

b. Although the claimant wrote to the respondent on 12 February 2018 to indicate that he was prepared to consider a compromise on his pay and benefits, he did not clarify the degree to which he was prepared to compromise. This was only 10 days before his dismissal was due to take effect.

c. As we have already noted, at his appeal, the claimant said that he could not afford a reduction in salary in addition to losing his preferential benefits. He did not say that he agreed to forego these benefits.

d. The claimant was upset by how he had been treated. He was a very long-standing employee who had accrued substantial contractual benefits and he had been suspended without an investigation. He faced the choice between dismissal or redeployment on reduced terms. He felt that it was unfair to have to accept inferior terms.

e. Mr Meachem, for the claimant, confirmed during closing submissions that the only means by which the respondent could have mitigated the injustice to the claimant was to have redeployed him on ringfenced terms i.e. the same terms. This was consistent with how the claimant's case was put to the respondent's witnesses.

140.4 The claimant was therefore only prepared to consider redeployment into another electrician role on the same pay and benefits. No such roles existed.

140.5 The respondent did not consider ringfencing the claimant's pay and benefits once a suitable role had been identified. We do not find that this was unreasonable or was outside the range of reasonable responses. There was a substantial variance between the claimant's contractual terms and the respondent's standard terms. We also find that the claimant did not fully engage with the redeployment process: he did not apply for a single job in three months; and, as we have already noted, by requesting a payment in lieu of notice, he opted to bring the date of his dismissal forward by two months instead of continuing to explore redeployment over this period.

141. *The minority (Dr Weerasinghe) refers to Henderson in which the EAT commented that, if there was a clear injustice to the employee, the employer would be expected "pull out all the stops" to try to mitigate the injustice. The minority view is that that there was indeed substantial clear injustice to the claimant as itemised above at paragraph 130 and that the respondent had not "pulled out all the stops" to alleviate the said injustice. Mr Metcalfe's evidence at paragraph 73 of his statement which is set out at paragraph 92 above negates all of the efforts listed in paragraph 135 above. Furthermore, the respondent did not identify any special support measures that were offered to the claimant in view of the clear injustice.*

Issue 2.2.5: If the process adopted by the respondent was defective, was this a mere procedural lapse, or was it more fundamental or substantive going to the heart of the issue of fairness?

142. The majority of the tribunal (Employment Judge Khan and Ms Craik) finds that the dismissal process was not defective and was within the band of reasonable responses.

142.1 We have found that the respondent was not required to investigate the allegations relied on by Mr Rushmer for his decision to request his site removal.

142.2 The respondent met with the claimant on 17 November 2017 when it suspended him because Mr Rushmer had invoked the client's right to request his removal from site. The respondent told the claimant the reason for his suspension.

142.3 The respondent met with the claimant on 21 December 2017 when he was advised that Mr Rushmer had refused to reconsider his decision. The claimant was told that an investigation would not be conducted. The respondent's focus was on redeployment.

142.4 The respondent met with the claimant on 22 January 2018 when his dismissal was confirmed subject to his redeployment into an alternative role.

142.5 The respondent met with the claimant on 19 March 2018 to consider his appeal and the outcome was confirmed in writing on 5 April 2018.

143. *The minority (Dr Weerasinghe) finds that there was a substantive defect in the process because Mr Metcalfe did not consult the claimant prior to writing*

to Mr Rushmer asking him to reconsider. Mr Metcalfe consulted the claimant and disclosed the specific complaints raised only after the decision was confirmed by Mr Rushmer.

<u>Issue 2.2:</u> Was the decision to dismiss a fair sanction i.e. was it within the range of reasonable responses?

144. We have reminded ourselves that the injustice visited on the claimant is not the decisive factor in evaluating the fairness of a dismissal and that we must avoid substituting our own views. We must instead consider whether dismissal was within the range of reasonable responses open to a reasonable employer.

145. The majority of the tribunal (Employment Judge Khan and Ms Craik) finds that dismissal was within the range of reasonable responses.

145.1 Mr Rushmer exercised the client's right to insist on the claimant's site removal. He refused to change his decision notwithstanding the respondent's attempts to dissuade him. The claimant could not therefore continue to work at Tower 42.

145.2 The Tower 42 contract was an important one for the respondent. It had received its first improvement notice and the service it provided remained under review. The contract was due to end in 2018 with a risk that it would not be renewed.

145.3 The respondent established and understood the reasons for Mr Rushmer's decision. We have found that it was not required to investigate or evaluate the accuracy of these reasons. We have also found that the claimant had conducted himself in a way which was consistent with Mr Rushmer's complaints.

145.4 The respondent's focus was on redeployment as this was the only practical and available means of avoiding the claimant's dismissal. This was reasonable in the circumstances.

145.5 We have found for the reasons set out above that the steps taken by the respondent to support the claimant with redeployment were reasonable. In particular, we have found that the failure to redeploy the claimant on ringfenced terms was within the range of reasonable responses.

146. *The minority (Dr Weerasinghe) concludes that dismissal was a penalty which no reasonable employer could have imposed and, as such, the claimant's dismissal was unfair. In reaching this conclusion, the minority has considered the following factual matters:*

- *Mr Metcalfe incorrectly sought to mitigate the significant injustice suffered by the claimant only in trying to persuade Mr Rushmer to reconsider his decision but not at the dismissal stage. There was no evidence either contemporaneous or otherwise that he applied his mind to alleviate the injustice to the claimant at the dismissal stage.*

- *The claimant was not consulted and given an opportunity to defend the allegations until after the client had confirmed its decision not to reconsider.*
- *Being a large company, the respondent could have ringfenced the claimant's pay and terms but instead Ms Hynes offered no management support to the claimant in this regard whilst telling the claimant the onus was on him to renegotiate his terms with the recruiting managers.*

Public Interest Disclosure

Issue 2.4: Did the Claimant make any protected disclosures?

147. The Respondent agrees that PDs 2, 3, 5 & 6 were protected disclosures. It disputes that PDs 1 & 4 were protected disclosures.

PD1

148. We do not find that PD1 amounted to a protected disclosure for the following reasons:

148.1 The information disclosed by the claimant was that two engineers had been scheduled to work in the same place at the same time to perform tasks which could not be completed together and this was unprofessional.

148.2 We remind ourselves of the guidance in Kilraine that

> "In order for a statement or disclosure to be a qualifying disclosure…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 [43B](1)".

Applying this guidance we do not find that the information relied on by the claimant amounted to a disclosure of information for the purposes of section 43B(1) ERA. The claimant was only disclosing his unhappiness about the way in which work had been scheduled. He did not convey sufficient information which tended to show that the health and safety of Tower 42 residents was at risk or that the respondent had breached a legal obligation.

148.3 For the same reasons, although we find that it is likely that the claimant had a subjective belief that this information tended to show that there was a risk to the health and safety of residents we do not find that this was reasonably held. The information disclosed by the claimant simply revealed the inefficiency of scheduling two engineers at once. The information did not refer to any potential or actual hazard, explicitly or implicitly.

148.4 We do not find that the claimant had a subjective belief that this information tended to show that the respondent was in breach of a legal obligation. He did not specify which legal obligation the respondent had breached or was at risk of breaching and the information he disclosed conveyed no obvious legal breach. Even

had we found that he had a subjective belief in this we would not have found that it was reasonably held for the reasons we have already given.

PD4

149. There is a dispute of fact about the information that the claimant conveyed to Mr Perry on 8 November 2017 which is said by the claimant to amount to a protected disclosure. We have found that the claimant did complain that he had not been provided with a site-specific method statement for sprinkler isolations.

150. The claimant also relies on three previous occasions when he says he reported health and safety concerns to Mr Ramage. We prefer Mr Ramage'e evidence that the claimant did not report these concerns to him. The claimant provided no dates when he raised these concerns with Mr Ramage. Nor did he provide any detail of the information he says he disclosed on each of these occasions. He also agrees that he did not refer to any health and safety concerns with Mr Ramage on 8 November 2017.

151. We therefore find that the information disclosed by the claimant was that there was no site-specific method statement for sprinkler isolations on 8 November 2017 to Mr Perry.

152. The majority of the tribunal (Employment Judge Khan and Ms Craik) does not find that this amounted to a protected disclosure.

152.1 Applying the guidance in Kilraine we do not find that this was a disclosure of information which tended to show that there was a relevant failure for the purposes of sections 43(1)(b) or (d) ERA.

a. The claimant complained about the lack of a method statement. He did not make any reference to health and safety. Nor did he refer to any potential or actual hazard to the residents of Tower 42. He did not therefore convey sufficient information that tended to show that this lack of a method statement endangered the health and safety of Tower 42 residents.

b. We also find that he did not convey sufficient information which tended to show that the respondent was in breach of a legal obligation. The claimant relies on regulation 3 MHSWR i.e. the requirement on an employer to make risk assessments and / or regulation 5 MHSWR i.e. the requirement on an employer to make arrangements for the planning, organisation, control, monitoring and review of preventive and protective measures. The claimant's disclosure did not refer to either of these regulations. Nor did it disclose sufficient information from which Mr Perry could understand that the respondent was breaching these legal obligations. Nor were these breaches patent. In respect of regulation 3 MHSWR, the claimant accepted that a method statement was not the same as a risk assessment. The claimant's complaint that a method statement was lacking did not therefore, without further information, tend to show that the

respondent had failed to make a risk assessment. In respect of regulation 5 MHSWR, as we have noted, Mr Perry's view was that the risks were assessed by the engineer on site on each occasion the sprinkler was isolated. The claimant did not, in any event, convey any specific information which tended to show that a lack of a method statement meant that the respondent had breached the requirement to make the required arrangements for preventative and protective measures.

152.2 For the same reasons, although we find that it is likely that the claimant had a subjective belief that this information tended to show that there was a risk to the health and safety of residents in Tower 42 we do not find that this belief was reasonably held.

a. The claimant complained about the lack of a method statement. He did not explain why he was concerned about this. As we have noted, he did not refer to any potential or actual hazard to the residents of Tower 42.

b. The claimant relies on Mr Perry's engineering background but we find that this did not have the effect of implanting this missing information. A further element was needed i.e. some information which linked the lack of a method statement with the risk to the health and safety of residents in Tower 42.

152.3 We do not find that the claimant had a subjective belief that this information tended to show that there was a breach of a legal obligation. The claimant did not refer to any legal obligations when he requested a method statement on 7 & 8 November 2017 with Mr Perry, or with Mr Ramage on 8 November 2017 and he did not contact Ms Green on 8 November 2017 to discuss or report any concerns. Nor did not refer to any legal obligations in any contemporaneous documents. This is inconsistent with his assertion that he viewed this issue as giving rise to a breach of a legal obligation. He also agreed that a method statement was not the same as a risk assessment.

152.4 Even had we found that the claimant held such a subjective belief we would not have found this to have been reasonable. These breaches were not patent and for the reasons we have already given the claimant did not otherwise provide any specific information which tended to show that the lack of a method statement amounted to a breach of one or both of these regulations.

153. *The minority (Dr Weerasinghe) finds that the relevant information was embedded in the terminology that the claimant used in asking for a method statement and furthermore the information was conveyed to an engineer and in that context it would have been clear to the recipient and no further expansion was necessary. On questioning the claimant, he said that he did use the correct terminology i.e. a method statement and also said that this term is in prominent usage in his field of engineering and that it was common knowledge that this was linked to safety. None of this was contested by the respondent. The minority also finds that the claimant had a reasonable*

belief being an engineer himself that the lack of a written method statement could potentially endanger life. Furthermore, the minority notes and accepts the claimant's evidence at paragraph 11 of his statement where he says "Over a period of time I began to recognise that the building's fire protection and evacuation systems were being isolated but not reinstated when they should have been. I recognised this problem as arising from the lack of a 'closed loop' standardised procedure to ensure that all those having access to the systems would re-instate them after isolation". At paragraph 27 of his statement, Mr Metcalfe states that the claimant would use health and safety concerns as a way to avoid or delay doing jobs. The minority rejects this hypothesis because Mr Metcalfe does not explain as to why and to what end the claimant would seek to delay jobs after many years of fault-free service. The minority finds the legal obligation in relation to the disclosure falls within regulation 5 MHSWR.

<u>Issue 2.5</u>: Did the respondent suspend the claimant on the ground of any protected disclosure found?

154. The decision to suspend the claimant was taken by Mr Metcalfe on Ms Hynes's advice. This advice was based on Mr Rushmer's decision to invoke clause 3.20 of the agreement to request the claimant's site removal. As we have already noted, Mr Rushmer made his request in the following terms:

> "We would ask that these members of staff are removed from site and replaced with appropriately skilled replacements <u>to limit any further disruption to our business</u> [emphasis added]."

155. Mr Rushmer made it very clear that the removal of the claimant and Mr Webber was required to limit any further disruption to the client's business. We find that the effect of this request was that the respondent had no other practical option than suspend the claimant with immediate effect.

156. The majority of the tribunal (Employment Judge Khan and Ms Craik) finds that the decision to suspend the claimant was not materially influenced by the protected disclosures he made.

156.1 The respondent had no other option than suspend the claimant. It therefore had no discretion to exercise. Accordingly there were no other factors that were capable of materially influencing this decision.

156.2 Even if this were not the case, we find that the decision to suspend the claimant on 17 November 2017 was not materially influenced by PDs 2, 3, 5 or 6. There was no evidence that the suspension was influenced by any of these protected disclosures.

156.3 We have found that PD4 was not a protected disclosure. Had we found that it was, we would not have found that it had any material influence on the respondent's decision to suspend the claimant. There was no evidence before us that either Ms Hynes, who advised Mr Metcalfe that the claimant's suspension was required, or Mr Metcalfe, who applied this advice when he decided to suspend the claimant, were aware of PD4.

157. *The minority (Dr Weerasinghe) finds that the respondent has not discharged the burden of proving that the claimant's suspension was not materially influenced by PD4 as required by Fecitt. The minority has found that PD4 was a protected disclosure. The site removal letter alludes to a failure to carry out reasonable instructions which is what the claimant was alleged to have done on 8 November 2017 when he asked for a method statement. Furthermore, the proximity in time of three events – the date of the disclosure on 8 November 2017, the date of the 'conduct letter' from Mr Perry to the claimant on 15 November 2017 and the date of the site removal letter from the client on 15 November 2017 – is significant. Therefore, it cannot be said that the suspension which directly stemmed from the site removal letter was not materially influenced by PD4. Mr Perry's explanation was that the claimant had refused to complete job 7489 stating that he had no permission from the client. However, this explanation was not consistent with the site removal letter which alluded to a failure to carry out a reasonable instruction which could only have come from Mr Perry's conversation with Mr Botha. The minority concludes that the respondent has not discharged its burden of proof and therefore the detriment is founded.*

Issue 2.6: Was the reason or principal reason for the Claimant's dismissal the making of protected disclosures?

158. The majority of the tribunal (Employment Judge Khan and Ms Craik) has found that the claimant was dismissed because of third-party pressure to dismiss, for the reasons we have already given. *The minority (Dr Weerasinghe) has found the reason for the claimant's dismissal to be misconduct couched as an SOSR.* For these different reasons, we do not find that the reason or principal reason for the claimant's dismissal was that he made a protected disclosure.

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Employment Judge Khan

Date 2 December 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

3 December 2019

FOR EMPLOYMENT TRIBUNALS