EMPLOYMENT TRIBUNALS

Claimant: Mr D Glavey

Respondent: E.ON Energy Solutions Limited

Heard at: Nottingham

On: 4th, 5th, 6th and 7th November 2019 and 22nd 23rd, 24th and 27th January 2020

Before: Employment Judge Rachel Broughton
Members: Mrs Newstead and Mr Sher

Representatives

Claimant: In Person
Respondent: Counsel – Ms A. Palmer

RESERVED JUDGMENT

The Judgement of the Tribunal is as follows;

1. The Claimant's claim of unfair constructive dismissal under section 94 and 95 (1)(c) ERA is well founded and succeeds.

2. The Claimant's claim of automatic unfair dismissal under section 103A ERA is not well founded is dismissed.

3. The Claimant's claim for detrimental treatment under section 47B ERA is not well founded and is dismissed.

4. The Claimant's claim for unlawful deduction of wages under section 13 ERA is not well founded and is dismissed.

5. The case will be listed for a hearing to determine remedy.

WRITTEN REASONS

Background

1. The Claimant submitted a claim to the Employment Tribunal on 30 July 2018 which included claims of;
   1.1 ordinary unfair dismissal: section 94 and 95 (1) (c) Employment Rights Act 1996 (ERA),
   1.2 automatic unfair dismissal; section 103A ERA,
   1.3 detrimental treatment: section 47B ERA
   1.4 unlawful deduction from wages: section 13 ERA.

2. The Respondent in its response filed on the 19 September 2018, defended the claim of

'ordinary' unfair and automatic unfair constructive dismissal on grounds including that the Claimant was still employed. The Claimant then resigned from his employment without serving notice on 20 September 2018 and applied to amend the claim to add the claims of unfair constructive dismissal. The Respondent did not oppose the application. The Respondent was given leave to file an amended response. No amended response was submitted and no application was made at any point during the course of the hearing to file an amended response.

The Hearing

3. The hearing of the case was hampered by a failure by the Respondent to comply with the Case Management Orders regarding disclosure. Not only had there been late disclosure by the Respondent, it was disappointing that key relevant documents had not been included within the bundle, leading to piece-meal disclosure throughout the course of the hearing causing unnecessary delay and presenting challenges to the Claimant who was unrepresented Documents as fundamental as those relating to the Respondent's policy on whistleblowing had not been disclosed to the Claimant, as part of the general disclosure exercise and therefore not contained within the bundle at the outset of the hearing..

Evidence

4. During the hearing in addition to witness statements taken as evidence in chief, we heard oral evidence from the Claimant, he did not call any witnesses. On behalf of the Respondent we heard evidence from; Stuart Middleton, Supervisor, Paul Pickering, Supervisor, Jackie Brown, Operations Support Coordinator, Richard Jackson, Head of Operations of Infrastructure Services, Pat Shaw, Contracts Manager and Luke Ellis, Head of Strategic Projects and Innovation.

5. We also heard oral submissions from both the Claimant and Counsel. Additionally, Counsel submitted what she referred to as her written skeleton arguments which numbered 38 pages.

6. There was a tribunal bundle consisting of 437 pages and our own written records of the proceedings.

Agreed Issues

7. After discussion between the parties at the outset of the hearing, it was agreed what the issues which potentially fall to be determined by the Tribunal are and these are as follows;

Constructive unfair dismissal

(i) Was the Claimant dismissed in that;

(a) did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant? In that;

- *1 March 2017: verbal abuse by PP*
- *2 March 2017: Chris Roe – verbal abuse*
- *23 March 2017: Failure to complete risk assessment*
- *28 March 2017: way grievance dealt with*
- *Start of September 2017: rejection of standby request/failure to implement OH recommendations / not asked how he was and no follow up/lack of support*
- *February 2018: asked to conduct works on a HGV that I had previously informed management in 2017 that it was out of scope and was breaking the law / told to get on with it.*
- *5 March 2018: called to investigation meeting described as informal but conducted formally/ timesheets had been tippexed*

- *13 March 2018: overtime docked/told could not claim overtime in same way but every other person in yard could/not provided with 12 months' timesheets*
- *April 2018: Graffiti – reported to Pat Shaw but not dealt with*
- *25 April 2018: investigation which lasted for months/ character assassination / Pat Shaw took Claimant off jointing (job he was employed to do) and put him on MEWP vehicle -never worked on a MEWP vehicle before.*

(b) did the Claimant affirm any alleged breach of the trust and confidence term which took place in February / March 2017?

(c) did the Claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the Claimant 's resignation – it need not be the reason for the resignation)?

The Respondent did not file an amended response.

Public interest disclosure (PID)

(ii) *Did the Claimant make one or more qualifying disclosures under section 43B ERA;*

(iii) *Was the disclosure in the reasonable belief of the Claimant;*
made in the public interest?
And;

(iv) *Tend to show that a failure of one of the six relevant failures has occurred/is occurring/likely to occur? The Claimant relies on subsection(s) 43B (1) (a) (b) and (d)?*

(v) *Did the Claimant make a protected disclosure to his employer in compliance section 43C on or around October 2017 and 8 February 2018?*

(vi) *The respondent defends the claims on the basis that the Claimant did not have a reasonable belief that the disclosures were in the public interest and /or tended to show one of the failures under section 43 (1) (a)(b) and (d)?*

(vii) *Did the Claimant make a disclosure externally to VOSA on 13 February 2018 in compliance with section 43H i.e. disclosure of an exceptionally serious nature?*

- *Did the Claimant reasonably believe that the information disclosed and any allegation contained within it, is substantially true? section 43H (1)(b)*
- *Did the Claimant make the disclosure for the purposes of personal gain? Section 43H (1) (c)*
- *Was the relevant failure of an exceptionally serious nature? section 43H(1)(d)*
- *In all the circumstances of the case, was it reasonable for him to make the disclosure? Section 43H(1)(e)*

(viii) *The respondent defends the section 43H claim on the following basis in particular:*

- *That the Claimant did not reasonably believe that the information disclosed was substantially true.*

- *That the relevant failure was of an exceptionally serious nature*
- *That it was reasonable to make the disclosure in all the circumstances*

Dismissal – section 103A – automatic

*(ix) What was the **principal** reason the Claimant was dismissed and was it that he had made a protected disclosure/s?*

Claimant relies on the following treatment which he alleges was because he made on or more protected disclosures.

a. January 2018: unauthorised deduction from wages
b. February 2018: sworn at by PP and SM
c. 12 March 2018: meeting [not freestanding claim under section 47B]
d. 12 March 2018: offensive graffiti on his company vehicle
e. From13 March 2018: prevented from doing overtime
f. From March 2018: the two investigations
g. From March 2018: subjected to rumours accusations including about his and his wife's sexuality and quality of his work: PP/SM/PS
h. March and April 2018: failure to implement OH recommendation
i. Change of job to MEWP vehicle [not a freestanding claim under 47B]

Detriments – section 47B

(x) Did the respondent subject the Claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the Claimant as a matter of law.

(xi) If so was this done because he made one or more protected disclosures?

(xii) The alleged disclosures the Claimant relies on are as follows:
a. The three disclosures set out above.

(xiii) The alleged detriments the Claimant relies on are as follows:
a. January 2018: unauthorised deduction from wages
b. February 2018: sworn at by PP and SM
c. 12 March 2018: offensive graffiti on his company vehicle
d. From 13 March 2018: prevented from doing overtime
e. From March 2018: the two investigations
f. From March 2018: subjected to rumours accusations including about his and his wife's sexuality and quality of his work: PP/SM/PS
g. March and April 2018: failure to implement OH recommendation

Unauthorised deductions

(xiv) Did the respondent make unauthorised deductions from the Claimant 's wages in accordance with ERA section 13 in that one hour's overtime was deducted for work done on 10 January 2017?

(xv) Respondent accepts that the overtime is wages but denies that it was properly due.

(xvi) Time limit: claim out time – if the tribunal is satisfied that it was not reasonably practicable to present a complaint within 3 months, it may be presented within such further time as the tribunal considers reasonable: section 23 (4) ERA

8. Ms Palmer in her oral and written submissions argued that the Claimant had not made a disclosure of information. Following the hearing the tribunal reviewed the previous case

management orders and noted that the Respondent had conceded that the Claimant had made disclosures of 'information' as required by section 43B (1) ERA, in respect of all three of his disclosures, at a previous case management hearing as set out in the Order of Employment Judge Faulkner dated 5 December 2018. Counsel had not referred to this admission during her submissions and the tribunal therefore invited the Respondent on 3 February 2020, to confirm its position. The Claimant was copied into the correspondence. The Respondent confirmed by email of the 10 February 2020, that the concession had been made and that whether the Claimant disclosed information is not an issue for the tribunal but that it is necessary for the tribunal to determine what specific information was conveyed (consistent with the case as pleaded and the evidence).

Introduction

9. The case covers incidents over a period of approximately 18 months, we shall therefore briefly summarise the case before turning to our specific and detailed findings of fact. The case in summary is that the Claimant was employed by as a cable jointer. There was an incident with one of his supervisors Paul Pickering and a member of the management team, Christopher Roe, in March 2017. This concerned a Health and Safety issue raised by the Claimant which resulted in the Claimant submitting a grievance. The Claimant then made three alleged protected disclosures in October 2017 and February 2018 relating to issues he raised about whether a requirement for him to collect stock in an 18 Tonne HGV was in breach of the Tachograph Regulations. The Tachograph Legislation is set out in the EU Drivers and Tachograph Rules Goods Vehicles (EC Regulation 561/2006) which have direct effect and implementation of the EC Regulations in the UK by the Community Drivers and Recording Equipment Regulations 2007. We are concerned in this case with the two exemptions which remove the requirement for a tachograph for vehicles exceeding 3.5 Tonne. The two exceptions are commonly referred to as the Tool Box Exemption and the Road Maintenance Exemption (the Exemptions)

10. One of the alleged protected disclosures was an external disclosure to the DVSA (formerly VOSA). The Claimant complains that he was subjected to a number of detriments on the grounds that he made one or more of the alleged protected disclosures There was an investigation into his behaviour following anonymous complaints from two of his colleagues which related principally to alleged stress and pressure caused by a number of issues including the Claimant's disclosure to DVSA. The Claimant resigned and complains of constructive unfair dismissal, automatic unfair dismissal and detrimental treatment because of his alleged protected disclosures. There is also a claim for an alleged unlawful deduction relating to one hour of unpaid overtime.

Findings of Fact

Background

11. The Claimant was employed by the Respondent as a cable jointer based at the Respondent's West Hallam site in Derbyshire (the 'Depot'). The Claimant had continuity of service from 20 January 2000, 18 years of service as at the date of termination.

12. Prior to becoming a Cable Jointer, the Claimant had been employed by the Respondent as a HGV/HIAB driver based at the Rochdale branch. On completing a training course with the Respondent, he was offered a role as Cable Jointer at the Depot, and relocated his family to take up this new role. The Claimant qualified as a jointer in April 2016.

13. It is not in dispute that before the events which are the subject of this claim, the Claimant had an unblemished service. He was well thought of amongst his peers and his supervisors. Mr Stuart Middleton, a supervisor at the Depot, in an investigation meeting on 16 July with Mr Ellis (page 272) referred to the Claimant thus; "*Two years ago he was amazing, our best worker, unbelievable, doing everything."*

Sickness Absence

14. We find that the Claimant had some underlying mental health issues. He had a period of stress-related absence from work, on 24 January 2017 until 6 February 2017.

Incident – 1st and 2 March 2017

15. The complaints start with an incident in March 2017. It is common between the parties that the Claimant was required on 28 February 2017, to work on the National Powergrid Network (NPG) as part of a contract between the Respondent and Derbyshire County Council, to fit light emitting diodes (LEDs) to street lights. It is not in dispute that the Claimant had not worked on the NPG network previously. He had worked as a jointer for almost a year and was working on this job with an apprentice jointer, Christian Carr.

16. The Claimant raised concerns that he had not been provided with the correct equipment to work on the NPG lighting columns, namely the correct type of cable and cable joint shells.

17. It does not appear to be in dispute that the Claimant was told by a colleague, Neil Morris a jointer with 10 years' experience who had experience of working on the NPG network, that he was using the incorrect aluminium cable and that he actually needed to use copper cable. The Claimant was also concerned that he had not been supplied with the correct joints, he was struggling to use the resin or heat shrink joints on the large PVC cables used on this network.

18. The Claimant was working with electrical systems. The risk of using the incorrect equipment or procedures would present a very serious health and safety risk.

19. It is not in dispute that the Claimant sought some reassurance from Mr Pat Shaw (his direct line manager who was not based at the depot) that the equipment he had been supplied with to work on the NPG network was correct. The Claimant did not want to risk his 'ticket' (i.e. his certification) to work on the NPG network.

20. The Claimant asserted in cross examination that he was told by Pat Shaw not to work on the NPG network until the issue of what equipment to use was resolved; "*Pat told us to down tools until he got clarification."* Mr Shaw in his own witness statement at paragraph 9 states; *"I had made a site visit to Coal Aston, Derby on 28 February 2017, where Mr Glavey spoke to me about his concerns in relation to the NPG joint kits. Mr Glavey had said that he would not carry out any more work on the NPG network until he had written confirmation from E.ON that the cables and jointing kits they were being told to use were correct, As such I told Mr Glavey he should not carry out any further work on the NPG network...I sought alternative work for Mr Glavey whilst we sought to provide him with assurance that the materials were correct".*

21. Mr Shaw confirmed in the grievance on 28 March 2017 (page 112) that on the 28 February he had "*advised no further works until discussion had taken place and all was resolved".* Mr Shaw did not dispute the accuracy of the notes of the 28 March 2017.

22. We find that Mr Shaw did give the instruction to the Claimant not to work on the NPG contract until the Respondent had given him assurance with respect to what were the correct cable and joints to use.

Wednesday 1 March 2017

23. It is not in dispute that there was discussion between some of the operatives at the Depot on the afternoon of the 1 March 2017 concerning the correct equipment to use on the NPG network. Present were Neil Mellows, Stuart Middleton, Christian Carr and the Claimant. Mr Middleton, a supervisor had been asked by another supervisor at the Depot Mr Pickering to check the NPG website to determine the equipment required and feed this back to the Claimant.

24. It is not in dispute that Mr Paul Pickering could hear the conversation amongst the men from his office, whereupon he left his office and walked to where the men were still talking about the correct equipment. It is also not in dispute that Mr Pickering threw joint kits he was holding onto a glass table near to the Claimant and swore at the Claimant in frustration that the claimant was still discussing the equipment despite Mr Middleton identifying that the NPG website indicated both type of cables could be used.

Thursday 2 March 2017

25. The following morning, Thursday 2nd March 2017, a senior manager Chris Roe attended at the Depot at the request of Mr Pickering. It is common between the parties that Mr Roe visited the Depot in order to show the Claimant what shells and cable to use.

26. The Claimant alleges that Mr Roe was not listening to his concerns, became angry and swore at the Claimant stating; "*you are not fucking listening to me*" and picked up a piece of cable off the table and "*smashed*" it down onto the table next to the Claimant.

Formal grievance - 5 March 2017

27. The Claimant raised a formal grievance by letter of the 5 March 2017 (100 – 104). The Claimant complains in his grievance letter of returning home after this incident with Mr Roe and of feeling anxious, having only recently returned to work following a period of work related stress and that this was a breach of the implied term of mutual trust and confidence. He relies on these early events as part of his claim of constructive unfair dismissal following his resignation about 18 months later.

28. The letter of grievance is handwritten by the Claimant and addressed to Pat Shaw. The letter refers to the Claimant submitting the grievance because; "…*I feel that the past week was a total disregard for safety" and "I went home that night feeling stressed and anxious thinking I was at fault for simply bringing up a health and safety concern."*

Work Related Stress Absence – From 9th March 2017

29. The Claimant was then absent from 9 March 2017 with another episode of work-related stress. There was a Referral to Occupational Health by Pat Shaw on 14 March 2018.

Grievance Report

30. Pat Shaw carried out an investigation in to the Claimant's grievance and prepared a report which is undated (105-106). The Claimant confirmed to the tribunal that he; "*thinks he saw this document at the time of the grievance"* and we find therefore on a balance of probabilities that he did see it.

31. Mr Shaw refers in the report to being on site on 1 March but not witnessing the incidents on the 1 or 2 March. He refers in his witness statement to having gathered witness statements from those who had been present. Although Mr Shaw's fairly short report, which is just over one page, is disclosed in the bundle, none of the witness statements taken by Mr Shaw, apart from Mr Middleton's (disclosed by the Claimant), were contained in the bundle. The report does not set out what evidence each of the witnesses gave. Mr Shaw in his report refers to the witnesses who were present on the 1 March being the Claimant, Christian Carr, Neil Morris and Stuart Middleton and two other men (referred to as Dave and Steve) who arrived part way through the incident. He refers to those present on 2 March as; the Claimant, Mr Morris, Mr Carr, Frank Geehan and Alex Broughton and Rennie from Derbyshire.

32. Mr Shaw records in the report the following key findings from the investigation;

- That the Claimant had raised concerns about not using the correct cable type (believing that they should only be using copper cable).
- That Stuart Middleton showed the Claimant on 1 March, a February 2016 document printed from the NPG website confirming that both types of cable were approved.
- Paul Pickering heard the '*heated discussion'* amongst the men, left his office and walked to the store, picking up a range of NPG joint kits and walked back to the mess room, the report then provides as follows;

"*Paul threw the joint kits down on the glass table outside the mess room and said to Dominic there's your fucking joint kits" this made [the Claimant] more annoyed. Dave [Middleton] also tried to reassure [the Claimant] that the materials we had in our stores were all correct as he had carried out a lot of work in the NPG area and been subject to numerous audits by NPG auditors with no queries or complaints ever raised"*

33. The findings in the report in relation to the incident with Mr Chris Roe, are that Mr Roe was trying to explain to the Claimant which joint boxes to use on the NPG network but that the Claimant was shouting swearing and pointing whilst telling Chris Roe that he was wrong, at which point; "*Chris slammed down the cable on the table and said Dom, you're not fucking listening to me several times".*

Formal Grievance Hearing – 28 March 2017

34. The grievance hearing was conducted by Richard Jackson, Head of Operations, Infrastructure Services.

35. It is common between the parties that Mr Jackson met with the Claimant in an attempt to address the matter informally however the Claimant wanted a formal grievance process to be followed. The Claimant alleges in his witness statement that the timescales were not met for the dealing with a grievance however, he did not give evidence about what he understood the timescales to be and in what why they had not been adhered to and why therefore he considered this to a breach. We cannot therefore make any findings in relation to this allegation

36. A formal grievance hearing took place with the Claimant chaired by Richard Jackson, on 28 March 2017 (111 – 115

37. Richard Jackson concluded that the conversation Mr Pickering had overheard on 1 March was heated and that the Claimant had contributed to the situation on both 1 and 2 March in that there was "*equal evidence within some of the statements accusing you of getting angry and creating an intimidating environment with all parties accused of swearing at various points…"* (page 116). In the absence of the statements which were taken during the investigation process and relied upon at the hearing, it is difficult to make findings on the adequacy of the investigation or the reasonableness of the findings of Mr Jackson. However, it was alleged that Mr Pickering had found the Claimant aggressive and intimidating on the 1 March but that account of events as set out in Mr Shaw's summary report, is not, we find, consistent with the evidence we heard during this hearing. There is only one statement contained in the bundle from those taken by Mr Shaw during his investigation, it is the statement taken from Stuart Middleton and is dated 10 March 2017 (340). Within this statement, Mr Middleton does not refer to a "heated" discussion triggering Mr Pickering's behaviour, he describes the discussion before Mr Pickering came out of his office as follows;
"*As we were talking about this, Paul [Pickering] came downstairs and went to the stores".*

He refers to the discussion continuing and then to Mr Pickering coming across and;

" …t*hrew 3 to 4 joint boxes on the glass table outside next to [the Claimant] and said* " *Here's your f*cking bigger boxes*."

38. Mr Middleton does not refer in this statement to it being a heated situation, he used no adjectives which would indicate that the discussion was anything other than calm until the arrival of Mr Pickering. In his witness statement for the purposes of this tribunal, his evidence is that; "…*Mr Glavey was adamant this was wrong and the conversation got heated. At this point Paul Pickering, another supervisor walked in and slammed some of the cables down on a table and swore*." However, this description of a 'heated' discussion is not consistent with his description of the conversation between the men in his statement given at the time.

39. What is however the most compelling evidence we find is the oral evidence of Mr Pickering himself during these tribunal proceedings. During cross examination, when he described why he had reacted as he had, he referred to sitting upstairs and hearing what he described, not a heated discussion, but a 'drone'. His evidence was that what he heard;

" … *was just a constant drone*"

40. Mr Pickering expanded on his evidence to explain that it was;
" …just a load of blokes shouting, not shouting, ***cackling away,*** *listening to it for 20*

minutes, gets you down." [my stress]

41. Mr Pickering's evidence is not consistent with the report provided by Mr Shaw for the grievance hearing; that "*Paul could hear the **heated discussion** with no sign of this being resolved*" (105). We do not have a copy of the statement Mr Pickering gave to Mr Jackson at the time, however on a balance of probabilities we find, based on the evidence we heard from Mr Pickering at this hearing, the evidence of Mr Middleton at the time and the evidence of the Claimant along with the impact the incident had on the Claimant at the time, (which is not disputed) that the Claimant did not swear, or was behaving in an intimidating or aggressive manner prior to Mr Pickering become irritated and losing his temper.

42. It was Mr Pickering, senior in position to the Claimant, who reacted by swearing and throwing objects, which although not thrown at the Claimant, were thrown close enough to the Claimant to be reasonably seen by him an aggressive act. The swearing was according to Mr Shaw's report at the time, directed at the Claimant. Mr Pickering' s evidence in re-examination was that he could not recall whether the Claimant was the only person sat at the table when he *threw* the joints but that he was not throwing them at the Claimant and his frustration was with '*everybody'* and not just the Claimant, which would we find support the Claimant 's account that the Claimant was not behaving any differently to the others who were present, and that he was not acting aggressively towards Mr Pickering.

43. It was not disputed by Mr Jackson, when giving his evidence before this tribunal that this behaviour by Mr Pickering, was inappropriate.

44. The Claimant when cross examining Mr Pickering did not dispute Mr Pickering's comment that at the Depot the men commonly swear at each other, however the Claimant asked Mr Pickering whether the throwing of the joints of itself warranted an apology. We find that what the Claimant was most upset about was not so much the language used of itself but the language used in combination with the act of throwing the joint kits.

45. The report prepared by Pat Shaw for the purposes of the grievance investigation, states that the Claimant was swearing, shouting and pointing while Mr Roe was trying to talk to him and that it was in response to the Claimant's behaviour, that Mr Roe lost his temper. The Claimant denied this during the grievance and continued to maintain in his evidence before this hearing that this was not how had had behaved with Mr Roe either.

46. Mr Roe did not give evidence on behalf of the Respondent at this Tribunal. We do not have sight of the statement Mr Shaw took from Mr Roe and the other witnesses to review what was said about the Claimant's behaviour however, Mr Christian Carr during the later investigation in July 2018 is asked about this earlier event and his description is as follows (270);

"*I was there in the canteen when Chris Roe slammed the cable down."* He is asked by Mr Ellis how the Claimant reacted and he states;

*"To be honest [the Claimant] just turned round and said you can't talk to me like that. Thought he might have gone off more. Just for a safety question, I didn't see a problem with it. It got a bit irate and that's what happened and it got him [Claimant] down a bit, it's a bit dog eat dog and it's all ended up like this**."***

47. We find on the evidence available to us and on a balance of probabilities, that the account of the Claimant is to be preferred regarding the events of the 1 and 2 March 2018. We find on the evidence on a balance of probabilities, that because he continued to question whether the equipment was correct, Mr Pickering and Mr Roe lost their tempers with him, swore and threw the equipment. We do not find that on the evidence presented to this tribunal, that the events were as described by Mr Shaw in his report or that the behaviour of Mr Roe and Mr Pickering was in part due to their apparent assertion that they found the Claimant intimidating and/or that he was being aggressive himself.

48. It does not appear to be in dispute that swearing is commonplace within this working environment and Mr Jackson during his evidence before this tribunal referred to the "*all male culture*" in the Depot;

"*One of weaknesses at West Hallam- …all field guys at West Hallam … no other field arrangement was like that …all male – lot of banter."*

49. Mr Carr however, who it is not in dispute was present and witnessed this event directly, does not describe any aggressive behaviour by the Claimant but does refer to Mr Roe "*slamming the cable down*." The description is that of an aggressive act. Mr Carr does not dismiss the event as banter and we find that it was more serious than the usual type of exchanges within the Depot between the men at the depot.

50. The formal outcome of the grievance hearing is set out in the letter of 28 March 2017 (116 – 116a)

51. The Claimant does not allege that the investigation report provided by Pat Shaw did not accurately reflect what had been set out within the witness statements taken by Mr Shaw, rather the Claimant does not accept the probity of the evidence of those witnesses who described his behaviour as aggressive.

52. Mr Jackson found that given the Claimant 's relative inexperience and lack of familiarity with the NPG network, the situation was handled "*badly and more immediate action should have taken place".*

53. Mr Jackson partially upheld the grievance regarding the behaviours of Paul Pickering and Chris Roe in that he found that at times they were "*not acceptable*" but that there was no evidence of sustained bullying or intimidation. He also determined that there was evidence that the Claimant 's own behaviours were also unacceptable at times and contributed to the overall frustration and outcomes. His findings are set out in a letter dated 28th of March 2017.

Grievance recommendations

54. The Claimant complains not only of the "verbal abuse" by Mr Pickering and Mr Roe but that Mr Jackson "*just kicked out the grievance and tried to pin the blame on me*" (as per his witness statement dated 9 September 2019 setting out the amendment to the claim). The Claimant complains that Mr Jackson was attempting to blame him unfairly and use his size (the Claimant is or was a body builder) as a reason to suggest he may appear intimidating and thus contributed to the situation.

55. The Claimant we find had been experiencing recent problems with his mental health and indeed Mr Jackson made the observation during cross examination that he felt that the Claimant he met during the grievance process was not the same person he had met previously in that;

" …*you were a different person from the person I met, when I met you at the safety [tour], you were very happy go lucky enjoying work, when I saw you at West Hallam you were distressed state showing signs of anxiety – that is how the meeting ended – you were in a confused and stressed state"*

56. We find that on the evidence, the Claimant was left very anxious and upset by the incidents on the 1 and 2 March 2017. There appears to have been no regard by Mr Pickering or Mr Roe to the fact that the Claimant had only recently been absent due to stress. Although swearing is commonplace, we find this behaviour by Mr Pickering and Mr Roe toward the Claimant was outside the normal 'banter' for this workplace and caused the Claimant genuine upset.

57. We do not find on the evidence however, in the absence of sight of the statements given to Mr Shaw, that the findings by Mr Jackson were flawed. What we do find on the balance of probabilities, is that the evidence presented to Mr Jackson was not an accurate account of what had taken place in that we find that Mr Pickering and Mr Roe had attempted unfairly to transfer some responsibility and fault to the Claimant for losing their temper with him. The Claimant may have insisted on receiving further information or reassurance about the correct equipment and Mr Pickering and Mr Roe may have felt that he was being obstinate, however that does not justify the behaviours of Mr Pickering and Mr Roe. As Mr Carr remarked, the Claimant had just raised a 'safety question' and he did not see what was

wrong with it. The fact that Mr Middleton needed to check the NPG requirements and the Claimant had been told by a more experienced jointer that different equipment was required, satisfies us that the Claimant's concerns were legitimate.

58. It is concerning that members of the Respondent's management team would consider it acceptable to shout, swear and throw equipment in response to a fairly inexperienced jointer raising legitimate and genuine health and safety concerns. If the management on the ground are seen to react poorly to employees who question health and safety practice, the risk is obvious, namely that it encourages unsafe working practices. It is not only what such a reaction it communicates to the person raising the issue but to others witnessing the treatment.

59. We find on the oral evidence of Mr Jackson, that when he was referring to the Claimant 's size in the grievance hearing, he was making an observation based on the evidence presented to him, that his physique may be a factor to explain why he is perceived as intimidating in the context of what had been alleged by Mr Roe and Mr Pickering. We find that their evidence during the grievance was not a truthful and accurate account of what had taken place however there is no evidence to suggest that Mr Jackson would have known this at the time. Mr Jackson presented as a considered and thoughtful witness.

60. Mr Jackson proposed a number of actions which were as follows;

- Return to work interview to be chaired by Pat Shaw in association with Paul Pickering and Stuart Middleton
- Check to ensure the Claimant had all the required equipment to work safely as a jointer and for a jointing assessment audit to be arranged
- Pat Shaw to provide the opportunity for monthly one-to-one for a three-month period to ensure the Claimant has access to provide feedback on any concerns he may have
- The Claimant 's work to be restricted to WPD networks to allow time for the Claimant to return to work on a network he is more comfortable with an equally time to gain further experience and training (if needed) of other networks such as NPG

61. There was also a recommendation that the line managers of Paul Pickering and Chris Roe remind them of what appropriate behaviours are. There was no disciplinary action taken against Chris Roe or Paul Pickering.

62. The Claimant complains that Mr Jackson did not want to pursue the complaints through to a formal grievance and thereafter did not discipline Mr Pickering or Mr Roe because they were part of the management team. We find that on the evidence presented to him the decision by Mr Jackson not to take formal disciplinary action but to counsel the individuals about acceptable behaviour was not an unreasonable response in the context of his understanding of the culture at the Depot and his belief that the Claimant had himself been swearing and had contributed to the situation becoming heated (although on the evidence we find that this was not the case). We do not find in any event that the grievance was 'kicked out', it was partially upheld and sensible recommendations were made.

63. The Claimant 's evidence is that he did not sign the minutes of the grievance hearing, he accepts he received a copy. His evidence is that the minutes are not complete however he did not identify anything that was omitted from them.

Appeal

64. The Claimant was given the right to appeal the outcome of the grievance. It is not in dispute that Mr Pat Shaw met with the Claimant at his home to discuss Mr Jackson's findings. The undisputed evidence of the Claimant is that he was off sick at the time. It is common between the parties that during the course of that discussion the Claimant indicated that if he received an apology from Mr Pickering and Mr Roe that he would not appeal the outcome. The Claimant does not complain about the appeal process however we must make findings about what took place because it is relevant to the issue of whether or not the Claimant affirmed the contract of employment and waived the breach.

65. Mr Jackson arranged for letters of apology to be provided by Mr Pickering and Mr Roe to the Claimant (117 and 118). The Claimant did not appeal.

66. In his oral evidence before this tribunal however, Mr Pickering admitted to having been reluctant to give an apology because he felt he had done nothing wrong and commented that; "*we all swear at one another at work*." This is not relevant to the issue of affirmation because the Claimant was not aware of this at the time, it is however we find relevant evidence to assist this tribunal in drawing inferences in relation to certain events which would follow involving Mr Pickering.

67. It was clear from Mr Pickering's own evidence before this tribunal that he lacked any genuine remorse for the way he had behaved toward the Claimant which indicates to this tribunal a lack of insight into the inappropriateness of this conduct as a supervisor and the potential wider risks of responding in the way he did. The Claimant did not explore with the witnesses how the apology letters had come about and what had been said to them to persuade them to provide them in circumstances clearly where Mr Pickering at least, had been reluctant to give one.

68. In the Claimant's submissions at the end of the tribunal hearing he referred to receiving the apology letters and that this "*concluded"* the grievance in March. During cross-examination, the Claimant accepted that what he is now alleging, namely that he was unhappy about the outcome of the grievance process and that Mr Pickering and Mr Roe should have been disciplined, was not something which he raised at the time. The Claimant does not assert within his claim form or indeed did not assert during this hearing, that he was dissatisfied with the content of the letters of apology. His evidence was that he did not consider he would get anywhere with an appeal, that Mr Jackson would not discipline Mr Roe and Mr Pickering, which is what he had wanted and the least he had been prepared to accept was an apology.

Overtime Issue - NPG Network

69. One outcome of the grievance was that Mr Jackson, decided as set out in his grievance outcome letter (116) to remove the Claimant from the NPG network and move him to a network he was more comfortable with and time to "*going further experience and training (if needed) or other networks such as NPG" (*116a*).* Mr Jackson accepted in cross examination that this meant that the Claimant could not benefit from the NPG incentive scheme whereby if operatives replaced 10 lighting columns, they could claim for 15 and hence the Claimant missed out on this lucrative pay structure/incentive.

70. Mr Jackson (114), does not set out within the grievance letter the training the Claimant would need to receive before returning to the NPG work. Mr Jackson in his evidence during cross examination referred to this training as being "*on the job training*" rather than what he described as classroom training because there is "*no specific training to go on NPG network*". He accepted what was meant by training was not explained in detail to the Claimant, what further training he would need was not communicated to him, there were no clear objectives set or plan in place. The Claimant never returned to the NPG network and referred to this in his cross examination of Mr Jackson however, the Claimant did not set this out as a specific complaint in his claim and did not give evidence that he had asked to be returned to the NPG network or that he had enquired about training or otherwise raised any complaint about this not being progressed during his employment. We therefore do not consider this to be an issue for this tribunal

March 2017 – referral to Occupational Health

71. Due to the Claimant's latest period of absence, Mr Shaw arranged a referral to Occupational Health (OH).. The referral form is dated 14 March 2017 (106a-106b) and is completed by Pat Shaw. The form refers to the previous incidents of stress-related sickness absence and asks for advice on whether the Claimant is fit to carry out the full range of duties, likely return date, whether he is disabled under the Equality Act 2010 and advice on any other adjustments which may facilitate his return.

72. The occupational health report is dated 23 March 2017 (107 – 109). It refers to the Claimant having been away from work due to "*acute psychological symptoms*" and contains the

following comments;

"[The Claimant] attributes the current absence to anxiety symptoms triggered by work factors. Amongst other issues, Dominic raised concerns around the:

- *Poor working relationships with management*
- *Unaddressed health and safety issues which he states he raised to management*
- *The perception of being targeted my [by] management"*

And

- *"Dominic's condition does not meet the long-term criteria stipulated under the Equality Act 2010. However due to the recurring nature of this condition and the current treatment in place, the Equality Act 2010 may apply in this case."*

73. With regards to recommendations to support a timely return to work, the OH advisor, Mr Chikowore, comments as follows;

"1. [Claimant 's] account of events leading to the onset of the symptoms suggest a possible breakdown in the working relationships with his line management. I therefore make the recommendation for formal mediation to attempt to facilitate a good working relationship upon his return to work. The involvement of HR/ER and [the Claimant's] trade [Union] representative is strongly advised.

2. I recommend that management meets with [the Claimant] and work together to complete a stress risk assessment in order to facilitate the implementation of appropriate control strategies for the perceived workplace stressors. An action plan against each issue that has been raised is recommended."

74. There was however, no action on receipt of the report to carry out a formal mediation and HR was also not involved however, the Claimant does not complain about those omissions, what he complains about is a failure to carry out the stress risk assessment.

75. The Claimant complains that the failure to carry out a risk assessment is both conduct on which he relies in support of his claim for automatic and ordinary constructive unfair dismissal and alleges that the failure to implement the occupational health recommendations was a detriment on the grounds he had made one or more protected disclosures. The first alleged protected disclosure however was not made until October 2017, some 7 months after this OH report was received, by which time there had already been significant delay by Mr Shaw in implementing the recommendation for a stress risk assessment.

76. It is common between the parties that the stress risk assessment recommended in March 2017 was carried out by Mr Shaw but not until May 2018. The covering email attached to the stress risk assessment, is dated 31st of May 2018 (342). The risk assessment itself is undated.

77. When during cross examination Mr Shaw was asked why the assessment was carried out so late, his initial response was;

"*Don't think it was late".* He then went on to make the following comment during cross examination;
"*I was very busy and it took a while to get round to it. I accept I did not sit down and do a review but we spoke two or three times on the telephone and I saw you once a week to discuss a job and I would say "how are you doing", that sort of thing."*

78. When asked by the Tribunal what Mr Shaw discussed with the Claimant on those occasions when he said he had spoken with him, his response was; *"not particularly to discuss anything"*

79. Mr Shaw then went on to explain how he was based at Nottingham and would travel to the Depot on Fridays to issue paperwork to the supervisors. In the afternoon the field staff would return to the Depot and it was an opportunity to speak to them. Mr Shaw did not

allege that prior to Mary 2018, he took any time to speak with the Claimant about his mental health, about the completion of the risk stress assessment nor indeed to follow up on the one-to-one meetings as recommended by Mr Jackson. The way this was described by Mr Shaw was that this was a very casual ad hoc arrangement, speaking to the field staff as and when they returned to the Depot about day to day work matters. There was no suggestion that Mr Shaw took the Claimant to one side and discussed anything specific with him and certainly not pertaining to his health and what stressors he may be experiencing.

80. We find that Mr Shaw had the time to do the risk assessment because his own evidence is that he was present at the Depot on Friday afternoons and had time to talk to the field sales staff. We find that his response that he was very busy which is why he did not carry out the assessment, is not consistent with his evidence about the many opportunities he had to discuss the assessment with the Claimant. His explanation that he was too busy is not credible based on his own evidence and indeed counsel for the Respondent put it to the Claimant in cross examination that Mr Shaw was in *"regular contract*" with the Claimant "*several times a week*" albeit she accepted that she was not putting it to him that this contact concerned discussions about his health.

81. It was put to the Claimant in cross examination that this regular contact he had with Mr Shaw meant that he was able to discuss any issues he had Mr Shaw however we find that , a casual discussion about work is very different from a confidential meeting where time is dedicated to a discussion about someone's mental health and the stressors they are experiencing in the workplace. To suggest such casual discussions were a substitute for that type of meaningful engagement, we do not accept is a reasonable position for the Respondent to take.

82. It was conceded by the Claimant however that he also did not push for the risk assessment to be carried out, because as he put it in cross examination; *"I thought it was up to him as the manager"*. The Claimant accepted in cross examination that he was someone who would speak up if there was something he was not happy about; reference was made to the various occasions when he had done so including the grievance he had raised in 2017. The Claimant's evidence however during cross examination when it was put to him that if he had been bothered about a stress risk assessment he would have chased it up was; "No*, mental health – hard thing to get across- takes a brave person to act on it".*

83. Mr Shaw in his evidence before the tribunal explained, and it is not in dispute, that he had called someone in HR at the Respondent for advice on how to complete the risk assessment but not until over a year later in May 2018. Other than this there had been and continued to be, no involvement by HR, this is despite the fact that the Occupational Health assessment identified that the Claimant could be disabled as defined by the Equality Act 2010. There was scant regard paid by Mr Shaw to the Claimant's underlying health issues and to the recommendations of the OH report. It is unclear why Mr Shaw took the trouble to obtain the advice of OH when it was then roundly ignored and none of the recommendations to protect the welfare of the Claimant actioned. The fact that the Claimant did not remind Mr Shaw to carry out the risk assessment, does not we find, remove the obligation on the Respondent to follow the recommendations of the OH report

Request to come off Standby – August/September 2017

84. The Claimant complains that in the period after he raised the grievance in March 2017, up to around September 2017 his mental health was suffering and began to deteriorate. He refers in his witness statement to being; "*put on more than ever*" at work and assumes this was down to the incident in March and the fact he had raised a grievance. The Claimant however did not expand upon this allegation within his evidence or at the hearing and nor did he put it to any of the Respondents witnesses any specific allegation about how he alleges he was "*put on"* more at work.

85. From the date the letters of apology are provided in April 2017 there are no specific incidents the Claimant complains about until he makes a request to stop working standby 4 months later. He complains about how the request was dealt with and a failure from September 2017 to implement the further OH recommendations.

86. The Claimant wrote to Pat Shaw on 17 August 2017 (119 -120) making a written request to come off the standby rota; "*I …would like to make a request to come off call and for this to be my last week*." The request refers to the impact on his sleeping pattern and his mental well-being. The Claimant also complains about many occasions when he is not on-call but still required to attend. The Claimant refers to being forced to attend when not on call while other employees *"tend not to be disrupted*". The Claimant did not however provide any evidence to support the allegation that he was being treated differently to others in terms of the rota. Therefore we do not make findings that he was being treated differently.

87. The Claimant questions the contractual right to require him to work the standby rota and why only the 18 tonne HGV drivers are covered by the contractual requirement to participate in the Standby rota. The Claimant also raises a concern about lone working with no one checking he has returned from shift safely.

88. The letter from the Claimant ends with the following;"*And if you could reply in writing to all my comment I'v [sic] stated and also if you accept me coming off call I would appreciate it."*

89. Mr Shaw (121) responded by letter on 8 September 2017, some three weeks later. There was no explanation provided for why it took 3 weeks to reply however he was not cross examined on the delay.

90. In his letter Mr Shaw states that the existing arrangements have been reviewed and there is a business need for the Claimant and the existing 18 Tonne HGV qualified staff, to continue with the rota. Mr Shaw refers to the E. ON UK Field Agreement forming part of the Field Staff's contractual terms and conditions and that the agreement includes a requirement to be included in any operational standby rota when required. With regards to lone working procedures, Mr Shaw attached a copy of the lone working procedure located in the fields operation manual, however copy of this policy was not included within the bundle. The Claimant did not cross examine Mr Shaw regarding the lone working procedure and its application.

91. Despite the Claimant referring to his mental well-being in his letter as a reason for coming off the Standby rota and despite the previous OH report highlighting "*some acute psychological symptoms*" and the "*recurring nature this condition*", it is not in dispute that Mr Shaw did not take any steps to meet with the Claimant to discuss his request before rejecting it.

92. Mr Shaw wrote almost 3 weeks later rejecting the request, albeit informing the Claimant that he would make a further referral to OH. The Claimant then had a further period of sickness related absence from 20 September 2018.

Contract of Employment – Field Sales Agreement

93. The Claimant 's contract of employment (359) refers out to the Field Sales Agreement and provides as follows; **"***the E.ON UK field agreement forms part of your contract of employment and contains more details about your terms and conditions. This agreement is subject to change through collective bargaining arrangements and we have the right to amend the terms of your contract, at any time, through these arrangements. You can get a copy of this agreement from your line manager or human resources."*

94. Extracts from the Field Sales Agreement (Agreement) are included within the bundle. The section which deals with standby (364) provides as follows; *"2.4 there is a requirement for operational employees in specific business areas and occupational activities to participate in standby working arrangements on a contractual basis. These are defined by the appropriate consultative forum".*

95. The Agreement includes provisions which apply when where there are personal circumstances which mean that an employee cannot work standby. Those provisions are set out in paragraph 2.6 and state as follows; "*Where it is identified that Standby working is required, all employees will be expected to participate actively and effectively on a contractual basis in Standby working in their activity unless specific personal circumstances prevent them from doing so. These may include health and domestic*

circumstances.

If an employee believes that there are personal circumstances which mean they cannot work standby, they must discuss these with their immediate line manager who will consider the matter sympathetically. If the situation cannot be resolved at this stage, then the matter will be considered under the appropriate procedure (e.g. grievance procedure)"

96. We find on the evidence that the Agreement gave rise to a contractual obligation to work standby where it is; "required".

97. The Claimant's request was not to reduce standby but to come off the rota altogether. His complaint is about how his request was dealt with, he says it was dealt with unsympathetically.

98. The evidence of Mr Shaw during cross examination was that the Respondent's contract with Derbyshire County Council required a standby rota for the HGV lorry drivers at the Depot and that every 18 tonne HGV driver was required to take part in it. The Respondent kept eight drivers on the rota. The evidence of Mr Shaw regarding the business need for the rota was not disputed by the Claimant. The matters which were put by the Claimant to Mr Shaw in cross examination concerned the failure of Mr Shaw to meet with the Claimant before rejecting his request in writing. The evidence of Mr Shaw was that he wrote to the Claimant because he thought that the Claimant would prefer something in writing. Although Mr Shaw did not refer expressly in his evidence to the comment in the Claimant 's letter of the 17th August, the Claimant 's letter we note does specifically ask for a response in writing. It is not in dispute however that Mr Shaw did not invite the Claimant to meet with him to discuss his request before rejecting it or indeed invite him to discuss his decision to reject it.

The Contractual Status of the Field Sales Agreement

99. It is the Respondent's case that the Field Sales Agreement (Agreement) is a contractual document which sets out contractual obligations as between the parties.

100. The Agreement therefore sets out a contractual obligation on the Respondent to not only deal with applications to come off the standby rota for personal reasons "*sympathetically"* but provides that the personal circumstances which mean an employee cannot work Standby must be **discussed** with their immediate line manager.

101. The obligation to "*discuss*" must on any reasonable and objective interpretation involve some exchange, verbal or in writing. A letter making a request and a decision made on the face of that letter without any further attempt to explore the reasoning contained within it, is not what we find is in accordance with what was intended by the provisions of the Agreement which refers to discussion and a sympathetic treatment of requests.

102. The failure to have a "*discussion*" with the Claimant on receiving his request and the decision to simply refuse it in writing 3 weeks later with no attempt to discuss it first or indeed include an invitation at least in the letter to discuss it before deciding how to proceed, is we find a breach of the express terms of the Agreement to discuss the request before making a decision, and to deal with the request 'sympathetically'. In any event, absent any express contractual term around the need to discuss the request, 'sympathetically' would we find not require the request to necessarily be agreed but require sensitivity in how the request is managed.

103. It was put to the Claimant in cross examination that Mr Shaw would say that if he simply acceded to every request because peoples sleeping patterns are disturbed, everyone could ask to come off standby, to which the Claimant pointed out that he was not just referring to his sleep being disturbed but the impact on his mental wellbeing. In the event Mr Shaw when asked why he had not met with the Claimant said merely that he had "*checked the requirements of the contract and responded – thought you would want something in writing".*

104. We consider that given the circumstances, including the Claimant's health and the failure to implement the OH recommendations around a stress risk assessment, the way the

request was managed was inadequate and insensitive. Although the request was later agreed, the complaint relates to the initial handling of the request. The Claimant had history of psychological health issues and we find that Mr Shaw had shown a lack of sensitivity and concern towards him and his welfare in how he dealt with the request initially.

105. Mr Shaw did make a further referral to OH. He did not however suspend any decision until he had received their recommendation, the request was refused.

Occupational Health Referral – 19 October 2017

106. The telephone OH assessment did not take place until 19 October 2017, over 2 months from the date the Claimant had submitted the request to come off the Standby rota (124-126). The OH report reported that the Claimant is "*receiving ongoing support and treatment for symptoms of poor mental well-being from his GP*". The report referred to Standby impacting on his sleep quality and quantity and that his sleep is "*negatively impacted by the current standby rota which disturbs his sleep pattern for two weeks – which upsets his anxiety symptoms in particular and depression to lesser extent*."

107. The Claimant expressed concern about the questions posed within the OH referral letter about whether the Claimant was fit to continue with his live cable jointing works and he complains that this was designed to try and remove him from his job. Given the health issues indicated by the Claimant, it would be sensible to check with OH that there are no concerns around his fitness to do all aspects of his work. We do not consider that this was an unreasonable request and there is no evidence to suggest that the intention behind it was to remove the Claimant from his job; either he was well enough and it was safe for him to do so, or it was not.

108. The OH report (124- 126) suggests that the Respondent "*may"* want to *"review*" the stress risk assessment suggested in the previous March 2017 report. No stress risk assessment however had been carried out and the Claimant complains about the further failure to implement the recommendations of this second report.

109. It was put to the Claimant under cross examination that OH had not said that the stress risk assessment "*must"* or "*should"* be reviewed but one "*may"* be done however, we find on a balance of probabilities that the OH advisor is suggesting this based on the (incorrect) assumption that there is in place a stress risk assessment already in place following the previous report, hence the reference to a "review".

110. By this stage however the Respondent had still not carried out any assessment. This latest report however still did not prompt the Respondent to carry out an assessment. This October 2017 OH report also suggests that it may be helpful to have "*a monthly review for the next 3 to 6 months to ensure that the workplace stressors are being managed as far as* possible". Mr Shaw failed to carry out those monthly reviews as recommended.

111. At some point subsequent to 19 October, the Claimant was taken off the Standby rota completely. We understand that this decision was communicated verbally by Pat Shaw after the OH recommendations were received.

112. The way the request to come off the standby rota was dealt with in terms of the rejection of it, predates the first alleged protected disclosure that the Claimant relies upon and therefore, cannot have been influenced by any alleged protected disclosure.

Alleged Protected Disclosures

113. It is common between the parties that on the 18 September 2017 the Claimant went on a 5-day course arranged by the Respondent and delivered by the Automotive Transport Training Limited on Hazard Awareness Training. The Claimant did not complete the course because of illness. The Claimant went absent on sick leave from 20 September 2017. He thus completed 2 days of a 5 day course.

114. The Claimant 's evidence is that he was told during the course that the Respondent by using the 18 tonne HGVs on new building sites and also using the vehicles to pick up stock up from other locations and transport it to sites, would be breaching the Tachogragh

Regulations. The Claimant's case is that he was told that the HGV would be treated as collection and delivery vehicle and in those circumstances and require a tachograph.

115. We accept the Claimant's account of what he was told on this on the course. There is no evidence to the contrary and his evidence has remained consistent throughout. Mr Ellis's evidence during cross examination was that during his investigation he considered checking what had been said on the course and, that he had spoken to HR but there was some issue about change of company; "*but didn't feel important enough to spend time*."

116. The Claimant's case is that he was concerned that he was being required by the Respondent to carry out driving work without a tachograph in circumstances which were not covered by either of the Exemptions. That he was therefore risking his own HGV licence (his '0' licence) and being required to carry out an illegal activity.

Alleged Disclosure 1:

117. It is common between the parties that the Infrastructure Services (IS) team have contracts to maintain and replace street lighting on behalf of local councils and distribution network operators (DNOs). The work requires electricians to disconnect and reconnect the street lights. Drivers are also required to collect the parts e.g. the lighting columns and take them to site to be installed. The lorries are fitted with a HIAB (a lifting device on the back of the lorry used to lift the lighting columns and put them into position and remove the old lighting columns which are being replaced). There are different size lorries which are used. We are concerned in this case with the rules which relate to vehicles over 3.5 tonnes and in particular the 7.5 tonne and 18 tonne vehicles.

118. The Claimant 's evidence confirmed in cross examination (with reference to what Mr Ellis recorded in his investigation report 305/306) is that on the course he was told that the following activities were covered by the Tachogragh Regulations and outside of the scope of the Exemptions;

- Where a vehicle is driven from its own depot, picking up stock from another depot and then going to a work site (as opposed to taking the stock from the home depot direct to site). That in those circumstances an 18-tonne vehicle becomes a collection vehicle and the driver requires a tachograph.
- Any work on new build/ construction sites when using a 7.5 or 18 tonne vehicle unless this is replacement of like for like i.e. replacing columns and not installing new ones.

First Alleged Protected Disclosure

119. Working on the VIA Contract (VIA East Midlands is owned by Nottinghamshire County Council and any reference to VIA is to the Nottingham County Council contract work, also known as the VIA Contract) required the Claimant to collect lighting columns in an HGV and take them to a site, rather than collect them from the Depot where they had been delivered and take the direct to site. Our understanding is that the Claimant believed that this did not fall within the scope of the Exemptions and thus he would require a tachograph to carry out this journey, because his vehicle had become a collection and delivery vehicle.

120. The Claimant states in this witness statement (paragraph 17) that in February 2018 he had been asked to conduct works on a HGV that; "*I had previously informed management in 2017 was deemed out of scope for this work and was breaking the law*." He goes on to set out what he had learnt on the course i.e. "that we were illegally *using the vehicle to pick stock up*" and he states in terms of who he told; "*I brought this up to Pat Shaw and my supervisor's attention again to remind them*". His evidence is clearly therefore that in October 2017 he had told Mr Shaw and a supervisor.

121. When Pat Shaw was asked by the tribunal about the allegation that the Claimant had raised this with him in October 2017, the evidence of Mr Pat Shaw was; *"Can't recall directly - contacting me about it – I do recall we made an agreement that he would not go on Notts CC work, - he may have spoken to supervisors or gentlemen in the office called Paul"* and further*; "Could have been Paul Pickering, Stuart Middleton or James Coup who works in the office"*

122. Mr Shaw however clarified to the tribunal during his evidence that he was aware of his complaint about the Tachograph Regulations at the time and that this was why the Claimant had been taken off the NCC work. He had been aware that the Claimant was concerned.

123. During the internal investigation carried out later in 2018 by Mr Ellis, at a meeting with the Claimant on 25 April 2018, his account of who he informed and when was as follows;(151)*; "I raised my concern on this with Paul Pickering (Line manager) following completion of the course and advised that I believed we were working out of TACHO. He advised we were not working out of TACHO and I was told to "get on with my job". Pat Shaw contacted me about this a few days later to discuss this issue and I let him know my concerns. He said he would look into it – he didn't get back to me."*

124. The Claimant was asked by the tribunal to clarify his evidence in terms of what he precisely he alleges he had said to Pat Shaw during the telephone call in October 2017 and his evidence was as follows; *"I have been on a course, the assessor says we cannot be picking up goods from another depot without going to another site, would it not be easier to get the lampposts delivered straight to our yards- that we can work without Tacho – we can't go outside of the exemption- he said "I'll look into it"* . The Claimant's evidence is not that Mr Shaw responded in a hostile manner or was in any way unpleasant or unreasonable when he raised this with him.

125. Stuart Middleton in his witness statement (paragraph 7) states that it was in early February 2018 that the Claimant had told him that he was not prepared to collect columns for installation from the Nottingham County Council Gamston depot for installation because he had "*some concerns regarding E.ONs practices in relation to using tachographs in vehicles".* Mr Middleton does not refer to having been previously told this by the Claimant in October 2017.

126. The evidence of Ms Brown (Ms Jackie Brown, the Respondent's Operations Support Coordinator whose duties include responsibility for ensuring complained with all external legislation) under cross examination was that the first time she became involved in this matter was when Mr Shaw called her on 8 February 2018. Her evidence was that Mr Shaw had contacted her "*before for his own clarify on what his operatives could and could not do"* however, she did not say that this was in the context of any concerns raised by the Claimant.

127. Ms Brown refers to her qualification and having covered hazard awareness training in her diploma but accepted that she could not comment on what the trainer may have said to the Claimant on the course he attended.

128. We find on a balance of probabilities that the Claimant had raised in October 2017 direct with Mr Shaw that he had been told that they were working outside "of TACHO" when they were collecting stock from another site/depot and then driving it to site for installation.

129. The Claimant 's evidence on this point is consistent with the evidence he gave during the internal investigation and before this tribunal. Mr Shaw could not recall any conversation but was clearly aware of the concerns and removed the Claimant from the contract. We find that it is more credible that Mr Shaw would have only taken this decision once he had spoken with the Claimant to understand his concerns. We accept the Claimant's evidence that Mr Shaw had told him he would '*look into it'.* Indeed, this is consistent with what Mr Shaw told this tribunal, when he was asked to clarify what he had done when the Claimant had raised the issue with him on 8 February 2018, he said that he had needed to check the rules because not being a lorry driver, he had never had an HGV licence and needed to check his understanding.

130. However, whether the Claimant raised this with Mr Shaw or his supervisor, and we find on balance it was the former, the Claimant had disclosed to the Respondent's management team information he had received from the course, he had explained why he believed it meant that the work he was being asked to carry out was outside of "TACHO" by which we find they would have understood he was referring to the Exemptions in the Tachograph Regulations, and indeed they do not assert otherwise, which would necessarily mean it was not a lawful activity.

Investigation into Claimant 's concerns

131. It is not the Respondent's case that any steps were taken after the Claimant raised his concerns in October 2017 to investigate those further or take any steps to satisfy and assure the Claimant that he would not be breaching the Tachograph Regulations. It appears that the solution of removing the Claimant satisfied Mr Shaw, who's undisputed evidence was that it did not cause him any difficulties because he had 9 other teams and he was able to swap the teams around. The Claimant does not allege that there was any action taken against him for not being prepared to do this work. The evidence of Mr Shaw was that he could not recall whether he took up this concern with anyone; his evidence was that he was not sure whether he did, that he may have spoken to Mrs Brown, however the undisputed evidence of the Claimant is that Mr Shaw did not revert back to him with any further information to address his concerns.

132. As the Claimant was not then required to drive in circumstances in which he believed he was breaching the Tachograph Regulations, he raised no further concerns at this stage.

133. Other than Mr Shaw continuing to fail to carry out a risk assessment, the Claimant does not make any complaints about Mr Shaw's behaviour towards him from the date he made the alleged protected disclosure to him.

Second and Third Alleged Protected Disclosures

134. It is not in dispute that the Claimant was asked again in February 2018 to drive an 18 tonne HGV to collect columns from the Gamston depot of NCC, and then drive them to the site, where the lighting columns would be installed. This was the same type of journey which the Claimant had refused to carry out in October.

135. The evidence of the Claimant during the internal investigation conducted by Luke Ellis, at a meeting on 21 June 2018 (208) is in summary that in February 2018, he was carrying out work on the Derby County Council Contract (DCC) which involved driving an HGV to deliver lighting columns from the Depot (where they had been delivered) to site (i.e. there was no requirement for him to collect the columns from one site and drive them on to another site where they were to be installed). The DCC work created no concerns for the Claimant. However, he then went annual leave and when he returned he was told that he was going to have to work on the VIA Contract.

136. The Claimant raised again his objection to collecting the columns before transporting them to site.

137. In his witness statement he alleges that in February 2018 *(para 17)* he was asked to do this again but that he had not had *"clarification from Pat or any further information".*

138. In his witness statement (paragraph 17 and 18) the Claimant alleges that he was told by Mr Pickering to "*just get it done"* and was subject to verbal abuse. When asked to clarify by the tribunal who he was alleging had said what, the Claimant's evidence was that Andrew Edwards mentioned to him about doing the collection with the HGV, the Claimant telephoned James Coup in the office and told him "*I can't do that work, I've told Pat 6 months ago why not".* He alleges when he got to the yard the supervisors had found out he was refusing to do it and that; "Stuart *or Paul said in office just "fucking get on with it" – after I said I cannot do it legally".*

139. In the notes of the first investigation interview Mr Ellis carried out with the Claimant (151 and 151/152) he stated that *; "Paul Pickering asked me why I couldn't just do the job and there was a lot of swearing. He said he had had enough of this and he was going to get Jackie involved. I went away and looked on Google to see what the rules on TACHO are myself, It does seem to be a grey area but what I perceived is that we are working out of TACHO. There is a VOSA helpline which I rang to query the issue (around 8 Feb) and they confirmed that I was right and we are working out of scope of TACHO."*

140. The Claimant complains about what he describes as verbal abuse as an act of detriment for making a protected disclosure, and that it was this treatment and response to his

concerns, that caused him to then make an external disclosure to the Driver and Vehicle Standards Agency (DVSA).

141. The parties are in agreement that DVSA are not a prescribed body and the Claimant relies on the disclosure being of an exceptionally serious nature and that it was reasonable for him to have contacted the DVSA.

142. Stuart Middleton in his statement (para 7) confirms that the Claimant was scheduled to go to the NCC Gamston depot to collect some columns for installation however, he informed him that he was not willing to complete this job because he "*had some concerns regarding E.ONs practices in relation to using tachographs in vehicle*s". Mr Middleton then confirms that he had relayed these concerns to Mr Shaw and to Mr Pickering. However, when the Claimant had the chance to put it to Mr Pickering and Mr Middleton that they had subjected him to verbal abuse, he did not do so. The Claimant cross examined Mr Pickering and Mr Middleton about what had happened back in March 2017 but at no point put it to them that they had been verbally abusive towards him in February 2018.

143. Further, we find that the Claimant's own evidence on what had been said to him was not consistent. In his own witness statement although he refers to verbal abuse he does not say who from or what was said, and refers to Mr Pickering saying; "*just get it done*". In his interview with Mr Ellis on 21 June 2018 he referred to Mr Pickering saying; "*your full of it*" and "*no, your wrong*" [sic]. When asked by this tribunal to clarify what he alleges was said to him, his oral evidence was that either Mr Middleton or Mr Pickering had said "*fucking get on with it*". However, the statement which sets out the amendment to the claim dated 30 September 2019 and filed with the tribunal on 1 October 2019 (paragraph 17) states that Mr Pickering said the Claimant was wrong and to "*just get it done*", with is consistent with his witness statement setting out his evidence in chief.

144. We cannot therefore make a finding as to what exactly was said however we do not find that the evidence supports the Claimant's allegation that he was subject to swearing and verbal abuse, which is what his complaint is.

145. The response the Claimant received resulted in him contacting DVSA and we draw an inference from that principal finding of fact and from our finding that Mr Pickering had reacted aggressively to the Claimant raising previous health and safety concerns in March 2017 and his lack of insight into his behaviour on that occasion, to make a finding that Mr Pickering would on a balance of probabilities, not have been receptive to the concerns the Claimant raised about the Tachograph Regulations and that he was likely to have instructed the Claimant to just get on with it or told him that he was wrong, or words to that effect however, we can make no further finding on this issue beyond that and do not find in the Claimant's favour on the evidence, that Mr Pickering or Mr Middleton were verbally abusive.

146. On the 28 March 2018 Mr Pickering would be interviewed by Mr Ellis, he refers to the Claimant having said "*we shouldn't be doing what we are doing with the lorries*" and that he himself *"was not sure so rang Jackie Brown". He is also recorded as saying to Mr Ellis; "Admitted we sail close to the wind but we are within the law."*

147. This comment would seem to imply that Mr Pickering believed that the Respondent is operating in terms of compliance with the Tachograph Regulations, in circumstances where it was close to breaching the Regulations or only just complying with them. Mr Pickering when asked to clarify what he meant by that comment by the tribunal, stated that he did not know the full facts and it was; "*just a figure of speech*". However, it is a comment which Mr Shaw would also make when interviewed by Mr Ellis and chimes with the comment by Ms Brown that it is a grey area

Contact with DVSA

148. It is not in dispute that the Claimant then made an enquiry direct with DVSA. The witnesses and documents refer to VOSA, The Vehicle and Operators Services Agency. VOSA was the agency which enforced the drivers' hours and licensing requirements and processed applications for licenses to operate lorries etc. However in 2014, VOSA merged with the Driving Standards Agency into a single agency; the Driver and Vehicle Standards Agency (DVSA). References are made to VOSA and DVSA when actually this should be to DVSA

– the references are used interchangeably in the evidence.

149. The Claimant could not recall when giving his evidence, the date he telephoned DVSA, he had stated that it was by telephone on the 13 February however, he accepted in cross examination that 'in principle' it must have been the 8 February 2018 and not the 13th February because he agreed that he met with Ms Brown on the 9 February 2018 and he told her during their conversation, he had already contacted DVSA by this stage. This is also consistent with what he said during the interview with Mr Ellis on the 25th April 2018 (151).

150. The Claimant during his evidence before this tribunal, at first referred to having sent an email on the 13 February to DVSA however no email was produced. He then stated that it was not an email but a call on the 13 February with an email response on the 21 February from Mr Wishart at the DVSA (171).

151. The Claimant had not set out within his witness statement what he had said on the call to DVSA. In cross examination however, his evidence was that on the call; "*I went over the rules of the exemptions and if I should be driving and some questions; should I be collecting and delivering stock if I go to site on an 18-tonne vehicle*?".

152. It was put to the Claimant in cross examination, that as he described the call, what he was doing was asking questions of DVSA, to which he replied that he was asking questions to see if he was working outside of the scope of the exemptions. It was then put to him that he was asking questions because he was not sure of the position and what he was doing was checking it with them, the Claimant however denied this stating that; *"No, I was 100% sure we were driving out of scope – but hammering on at me to drive it, I sought clarification."*

153. It was put to the Claimant again in cross examination that he was asking questions; eg do I have to drive in such and such scenario, to which the Claimant's evidence was; "*and to see if I was working out of scope*".

154. The Claimant 's evidence under cross examination was that he contacted DVSA because; "*I was getting nothing but verbal abuse"* and was fearful that if he was to drive this vehicle the company insurance could be affected, or his license and "*this could affect the public*".

155. Ms Palmer argues in her submission that it would seem more likely that the email response from DVSA would indicate a response to an email enquiry, it was not put to the Claimant however in cross examination that he had sent an email rather than made a call. From the evidence the Claimant gave under cross examination we find that it is more likely than not, that his initial contact with the DVSA involved him giving some information about what he was being asked to do, namely use an 18 tonne vehicle to collect stock from another depot/site and drive to site and checking his understanding of the Tachograph Regulations and whether he would be in scope of those Regulations.

Alleged Protected Disclosure: DVSA

156. It is not in dispute that the Claimant after speaking with DVSA, then spoke to Pat Shaw on 8 February 2018 by telephone. Mr Shaw's account of what was said to him on this occasion is as follows; "*It was first thing in the morning, he said he had been in contact with VOSA and posed questions or scenarios to try and understand whether or not we were legal or not – he felt we were not complying with their rules."*

157. Mr Shaw's evidence before this tribunal was that he felt that the Claimant was '*whistleblowing*' in contacting DVSA and that before the Claimant had contacted DVSA and; "I *wished we had had opportunity to check the rules*"

158. The Claimant 's own evidence is that by 8 February when he spoke with Pat Shaw he told him that he had already contacted DVSA and that he was waiting for their reply.

159. The Claimant does not allege that Mr Shaw was abusive towards him or that he was at all unpleasant toward him when he raised his concerns. He had previously found him other work to do in October 2017 and on this occasion in February 2018, Mr Shaw contacted Mrs

Brown for advice.

160. It is not in dispute that as Mr Shaw explained in his evidence before this tribunal, he contacted Ms Jackie Brown after speaking with the Claimant on the 8 February 2018, because he needed to; "*check his understanding of the Regulations".* Mr Shaw we find based on his own evidence, was clearly himself not sure of whether or not the Exemptions applied to the driving duties which the Claimant had been instructed to carry out and felt the need to check.

161. It is not in dispute that the Claimant then met with Ms Jackie Brown on 9 February 2018 at the Depot. Her undisputed evidence is that Mr Shaw had contacted her on 8 February 2018 to say that the Claimant had been querying the rules in relation to the collection of equipment on the way to site and the Tachograph Regulations and he wanted Ms Brown to speak with the Claimant. It was accepted by the Claimant in cross examination, that when the Claimant had objected to Mr Shaw about driving the 18 tonne HGV to carry out the Via work, Mr Shaw did not insist that he did it but found him other work to do.

Meeting with Ms Brown

162. Ms Brown's undisputed evidence in her witness statement, is that in 2014 because of some confusion around the Tachograph Exemptions, she distributed a document to all the field operatives, which provided that; *carrying material or equipment to be used by that person during his or her work provided that driving that vehicle does not consist of the driver's principal activity', the exemption applies*. The Claimant denied in cross examination having been given this document and indeed he had not been working at the depot in 2014. Ms Brown's evidence was that it was distributed to the operatives and also displayed in the lorries so that if their work was queried the operatives; " ..*would not have to explain the complicated exemptions themselves" [our stress]".* The Claimant admitted having been shown the card by Mr Carr but clearly after what he had been told on the course was concerned nonetheless that they were working outside of the Tachograph Regulations.

163. Nonetheless, Ms Brown's evidence as set out in her witness statement (para 6), is that prior to meeting the Claimant, "*In order to refresh my memory and understanding*" she reviewed the Government website on 'Drivers hours and tachographs in relation to goods vehicles' which deals with the exemptions. Ms Brown states that; "*upon review of this information, I was confident that my understanding of the exemptions and their applicability to E.ONs Field operatives was correct".*

164. It is not in dispute that Ms Brown printed off a copy of the Government guidance 8th February 2018, prior to meeting with the Claimant (130) and that she had brought this document with her to her meeting with the Claimant on 9 February 2018 and had shown it to him. The Claimant alleged that when showing it to him, Ms Brown had commented that is was a; "*grey area".*

165. It is accepted that the Claimant informed Ms Brown at this meeting that he had contacted VOSA (DVSA) to seek advice and that he had not to spoken to her before doing so.

166. Ms Brown's evidence was that she was; *"concerned by Mr Glavey's disclosure to VOSA because they regulate and police operator licenses ("0-licence")"*

167. Ms Brown explained to the tribunal, that an 0- licence is required to operate vehicles over 3.5 tonne and is required therefore for the day to day running of the Respondent's business and that DVSA have the power to issue improvement notices and /or immediate prohibition notices. She was concerned that the Claimant's actions in contacting DVSA could have what she described as '*severe consequences'* for the Respondent. Ms Brown explained that the DVSA have the power to stop drivers on the road and by severe consequences she was really referring to reputational damage.

168. In response to questions from the tribunal, Ms Brown when asked how she felt about the Claimant contacting DVSA, responded that she felt; "*Miffed*". Ms Brown explained how she had known the Claimant for quite a few years, and that she would have thought he would know that she is approachable and commented on the sanctions that could be imposed on the company. The Claimant expressed no concern about the approachability of Ms Brown

and does not complain about Ms Brown's conduct at all toward him.

169. Ms Brown accepts that she stated to the Claimant that the Tachograph Regulations can be '*grey*' in that; "*sometimes you can read the rules and they make sense but other times you may look to apply them and be more confused"* And that;"…*I also didn't want to debate with Mr Glavey as to who was right and who as wrong in their interpretation. Understanding and interpreting these rules is complicated and forms and integral part of my role"*

170. Mrs Brown explained to the tribunal that she felt the Claimant had been *"whistleblowing"* because it *"seemed a step too far to raise with the governing body".* Indeed subsequently when asked about this meeting by Mr Ellis, she stated in an email of the 24 April 2018 (149) that*; " I initially met with Dom on 9th Feb at West Hallam, he had already send [sic] his whistleblowing email at DVSA then".*

Exemptions

171. The two Exemptions which we are concerned with, which remove the requirement for drivers to record their hours using a tachograph are; the 'Toolbox' Exemption and the 'Road Maintenance' Exemption. We shall at this juncture, set out in summary what the Exemptions are.

172. The Tool Box Exemption, is set out in the EU Drivers Hours and Tachograph Rules for Goods and Vehicles (EC Regulation 561/2006) hereafter referred as at the 2006 Regulations. The 2006 Regulations were implemented in the UK by the Community Drivers Hours and Recording Equipment Regulations 2007 (2007 Regulations). In 2014 the EU updated the Tachograph Rules with EU Regulation 165/2014.

173. The EU wide exemptions are set out in Article 13 and national derogations provided for in Article 13.

Toolbox Exemption

174. The Toolbox Exemption includes the following exempted vehicles under The Schedule to the 2007 Regulations;
4*(1) Any vehicle which has a maximum permissible mass <u>not exceeding 7.5 tonnes</u> and is being used for carrying materials, equipment or machinery for the drivers use during the drivers work*

.(2) A vehicle does not fall within the description specified in this paragraph if –
(i)The vehicle is being used outside a 50-kilometre radius from the base of the undertaking; Or
(ii)Driving the vehicle constitutes the driver's main activity "

The EU Regulations were updated in 2014 and it is not in dispute that in respect of the Toolbox Exemption it extended the radius from base to 100 km from 50km.

Road Maintenance Derogation

175. The relevant part of the road maintenance derogation as referred to in these proceedings, is as follows;
"*Any vehicle which is being used in connection with-*
(b) road maintenance or control"

176. A considerable amount of time was spent by Ms Palmer cross examining the Claimant at length on his understanding of the two Exemptions and putting to him that his understanding was incorrect.

177. It was put to the Claimant in cross examination that with respect to the Toolbox Exemption, it does not state that it makes any difference to the application of the exemption if the driver collects the stock from another depot and then drives to site. The Claimant accepted that interpretation but explained that his understanding was that this Toolbox Exemption did not apply to the 18-tonne vehicles he was required to drive and that we find is correct. The

Toolbox Exemption clearly only applies to vehicles "not exceeding 7.5 tonnes".

178. With regards to the Road Maintenance Derogation, there is no reference to the weight of the vehicle in the Exemption, and the Claimant maintained his belief throughout this hearing that where the vehicle is over 7.5 tonne the Toolbox Exemption does not apply and the Road Maintenance Exemption would not cover a situation where the vehicle is not being driven straight to site but collects stock first from another site because it then becomes a delivery vehicle and is not being used in 'connection with road maintenance'. Ms Palmer put it to the Claimant that there is nothing within the Road Maintenance Derogation that refers to a situation where stock is collected from a third party depot and that is correct but for reasons which we set out in our discussion around the law, the interpretation of the Exemptions means that this is not as straightforward we find as Ms Palmer appeared to suggest to the Claimant in cross examination.

179. Ms Brown evidence is not that she left that meeting on 9 February 2018, having in her view fully explained the Exemptions to the Claimant such that she did not consider that he needed to pursue his enquires further with DVSA, rather her evidence is that she said she would look into his concerns further. The response of Ms Brown we find, indicates that she felt there was further investigation or clarification required or at least it would be helpful. Ms Brown even asked the Claimant to keep her updated once he had a response from DVSA.

180. The Claimant put it to Ms Brown in cross examination that what he was being required to do was drive 24 miles to collect stock for the week, driving from West Hallam to Bilsthorpe and he had been told by the trainer that where he was collecting even just one lighting column on the way to site in an 18 tonne vehicle, the Exemptions would not apply. Ms Brown in cross examination did not accept that interpretation on the basis that the vehicle in that scenario would be was carrying out work "*in connection with road maintenance".* It is the difference in interpretation we find is the crux of the issue in terms of the Claimant's reason for contacting DVSA and what he believed the legal position to be

Email to FTA : 14 February 2018

181. Ms Brown although her evidence before this tribunal was that she had been confident in her understanding, she did carry out further investigation after meeting the claimant in order to "*seek further clarification*" . Ms Brown personally contacted the Freight Transport Association (FTA) by email on the 14 February 2018 (132)
"May *I run a scenario passed you with a view to confirm tachograph exemption:*

Driving to site to maintain street lighting columns in a 7.5 T crane vehicle less than 100km radius away from base depot. Calling in on -route to collect a lantern or column that will be installed on site upon arrival ie replacing existing.

Our interpretation is 'vehicles in connection with road maintenance services which are engaged on a journey directly relating to the maintenance services. Therefore exempt"

Are we correct?"

182. Ms Brown in this scenario, appears to be conflating the two Exemptions into one scenario in that she appears to be referring to the Toolbox Exemption (vehicle of 7.5 tonne and not been driven more than 100km from base depot) and Road Maintenance exemption (in connection with road maintenance). Ms Brown during cross examination when asked by the Claimant why she did not mention 18 tonne vehicles, her response was that it did not matter and she could have mentioned any tonne vehicle over 3.5 tonne because they fall within Road Maintenance Exemption. Indeed when cross examining the Claimant on his understanding of the Exemptions, Ms Palmer took the Claimant to this email, the Claimant pointed out that the email only refers to 7.5 tonne vehicles to which Ms Palmer herself remarked; "*I don't know why she says 7.5 tonne but she asks about the maintenance exemption"*

183. Further, the example Ms Brown gave to the FTA was collecting the stock "on-route", the Claimant was expressing concern about making a separate journey to collect the stock from another depot, not as we understand it necessarily "on route" to the site.

184. The answer from the FTA is not particularly enlightening as it simply restates in general terms what the exemption is; "*Vehicles connected to road maintenance and control which*

includes maintaining street lighting are exempt from EU drivers hours rules and therefore subject to GB Domestic drivers hours rules"

185. The email from the FTA attached a briefing note. (43 and 44). The briefing note refers to the Road Maintenance exemption and states;

"*What constitutes a 'vehicle used in connection' with the relevant service has been the subject to a number of significant court rulings from the European Court of Justice and British Courts. Common themes have included*

- *The principle of a general service in the public interest*
- *A direct and close involvement in the exempt activity*
- *The limited and secondary nature of the transport activity*

Managers should consider the three conditions in turn and apply them to the operation in question. In terms of the public interest test this is often clearly met or not. If you have doubts about this, members should contact the member advice centre… Generally, however, it is the question of the vehicles direct involvement and the nature of the transport activity that can cause difficulty" [our stress]

186. The briefing note refers to a significant court ruling on this issue in the House of Lords case of Vehicle Inspectorate v Bruce Cook Road Planning Ltd and another. We refer to this case in the section of this Judgement dealing with the Law. Suffice to say, the legal position appears to be that whether the Road Maintenance Exemption applies in any particular case is very much dependant on the individual facts of the case including the length of the journey in question and when the equipment being transported will be used) and the law is not clear cut and would, we find, be particularly difficult to understand as a lay person.

FTA briefing note to the Claimant

187. It is not in dispute that Mrs Brown provided Mr Middleton with a copy of the briefing note from the FTA and the letter she had prepared back in August 2014, to be handed to the Claimant.

188. It is alleged by Mr Middleton when handing over these documents engaged in a discussion with the Claimant about the disclosure to the DVSA during which he commented that he takes his advice from Ms Brown and he alleges that the Claimant responded stating that Mr Middleton, Mr Pickering and Mr Coup could not comment as they were not HGV drivers, did not know what the law was and had not been on the course. Mr Middleton states that he told the Claimant;"*I think you're going to upset a lot of people, you're going to upset the lads you work with*…" to which Mr Middleton alleges that the Claimant made the comment that; "*it's all a game and I'm enjoying playing it*".

189. Mr Middleton would set out in writing what he alleges had been said during this conversation in a letter to Mr Shaw a week later on 23 February (133). He alleges in his witness statement that this conversation was overheard by Charlie Torry, an apprentice jointer who was in the next room. In the letter he wrote he referred to Mr Torry who was "*present during this conversation".*

190. When this allegation that he had said her was "*playing games*" was put to the Claimant in cross examination, he denied making this comment. The Claimant when it was put to him a second time then stated that he did not say it, "*not that I can recall*." Mr Torry sent an email to Pat Shaw on the 8 March 2018 stating that he had overheard the comment and was interviewed by Mr Ellis during the investigation, on 3 May 2018 where he is recorded as stating that he had heard the Claimant remark that "*it doesn't matter to me it's all a big game"* in response to Mr Middleton commenting; "*its making it a nightmare*" (166). During cross examination of the Claimant he was asked why Mr Middleton would make up this comment, his response was that he had "*no idea*" but that it "*may be because when Pat brought me into informal, caught out on Tippex, tripped up by bringing in another manager and this passed down."* As we understand it what the Claimant was saying was that because Mr Shaw had brought in a second manager at the meeting with him on 12 March it had become known to others that timesheets at the Depot were being amended. This allegation was not put to Mr Middleton nor to Mr Pickering but in any event, this allegation by Mr Middleton was made before the 'informal' meeting took place on the 12 March 2018 and therefore this cannot have been the reason behind Mr Middleton making this allegation.

191. When asked why Mr Torry would lie, the Claimant alleged it was because Mr Torry was "*trying to climb the ladder as fast as possible*". We have taken into consideration that Mr Torry who when Mr Ellis asked him about other matters, such as whether he had heard the Claimant say he would cause trouble with the Respondent's clients (ie the DNOs), had said "no". When asked whether he had witnessed the Claimant be aggressive, he referred to an incident but said that he viewed it as "*tough love"* and he had respected Claimant for how he had managed that particular situation. We therefore considered that his evidence appeared fairly evenly balanced.

192. We find on a balance of probabilities, that the Claimant did make this comment, whether from a genuine desire to cause difficulties or a reaction to the comment by Mr Middleton. We do find that this comment by the Claimant would have given the Respondent's Line Management concern about the Claimant's motive and that it was a provocative comment to have made.

Response from DVSA: 21 February 2018

193. The Claimant received a response from VOSA to his call on 8 February 2018 by email on the 21 February 2018 (page 171). The email which is from Malcolm Wishart at the DVSA asks the Claimant for further information to answer his question, the information required is whether the installing of the lampposts are on new roads or whether he is replacing old ones as part of an upgrading process which would fall under maintenance. He is also asked if the vehicle is an HIAB. This indicates the information the Claimant has already supplied including that he is delivering stock to site.

194. The Claimant responds by email, on 21 February 2018 (171) explaining that it is a; " *mixed bag of work we do, we maintain and replace like for like , but we also install extra lamp-posts on streets and do a great deal of new installations on new build estates ...and yes we have 7.5 and 18 ton HIAB mounted vehicles which carry the lampposts .But we have to go and pick up these lampposts from other depots on pre-planned emergency works , which is the part that I have concern with <u>whether or not I'm in scope or out of scope with tacho regs</u> " [our stress]*

195. Mr Wishart responds in an email of the same date as follows;

"When <u>carrying out maintenance and like for like replacements you are exempt</u>. However, any other work, including installing on new builds and roads are not exempt and you fall under EU drivers' hours rules. Have attached a guide, please look on page 16 under UK derogations, please show this to your manager. I hope they will take the appropriate action now…" [my stress*]*

196. What Mr Wishart does not comment on is the specific query the Claimant has raised about collecting the lampposts where they are to replace like for like and whether collection from another site is of itself an issue.

197. It is common between the parties that the Claimant forwarded this email from the DVSA onto Ms Brown. Ms Brown's evidence is that she then sent a letter to the Claimant, which was actually signed by Mr Shaw and dated 2 March 2018 (page 136) and which states;

"I can confirm that we are looking into this and will take it up both internally and externally as necessary to resolve and clarify the issue you have raised and at that time will advise you accordingly. In the meantime, we do not need you to undertake any further action in this matter"

198. The Claimant does not make any further contact with DVSA.

199. Ms Brown evidence is that she attended a monthly operations meeting on 28 March 2018 during which they discussed the concerns the Claimant had raised and; "*it was agreed that E.ONs interpretation of the exemptions was correct …This was on the basis of the confirmation I had received from the FTA … and as such all management were in agreement with E.ONs interpretation."* It is clear to us to us that it is the further enquiries Ms Brown has made to the FTA that had given her confidence that her interpretation was correct.

200. The Claimant applied to introduce on the fifth day of the hearing a letter from DVSA. The case had gone part heard and he had obtained this report since the last hearing days of in

November. which he had obtained since the last hearing. Although Ms Palmer initially objected to this being introduced late into evidence, she retracted her objection after further reflection and felt that it showed the "*error in the Claimant 's thinking*"

201. The questions the Claimant had put to DVSA are set out in an email dated 9 December 2019 are as follows (434), the email is headed "road maintenance exemption";

"Please *could I clarify exemptions for vehicles that are deemed road maintenance. If I could run two scenarios past you, so as a hgv driver I am not breaking any laws*

- *Driving to a site to maintain street lighting columns in a 7.5 T crane vehicle less than 100km radius away from base depot, but initially having to drive 24 miles away from the 0-licensed depot to load up from another depot with columns and lanterns for the week, before commencing work. My question is would this work be deemed collection and delivery as I'm not taking the stock straight from where the vehicle is kept? And should this work be carried out under tacho?*
- *My second question is the exact same as above but using a 18T crane vehicle as opposed to the 7.5T vehicle? Would this be or should be carried under Tacho?"*

202. The questions are responded to by a Mark Vickers Eng Tech MSOE MIRTE, Heavy Vehicle Technical Officer; his initial response (page 435) is to confirm that;

". *there have been a number of significant court rulings from the European Court of Justice and British Courts dealing with the exemption that you wish to use."* And "*Common themes have included a direct and close involvement in the exempt activity; the principle of a general service in the public interest and the limited and secondary nature of the transport activity .it is therefore our view that vehicles used in connection with sewerage, flood protection, water, gas and electricity services must be invoked in the maintenance of an existing service (rather than the construction of a new service) to claim the concession…*

" I would therefore suggest that you need to satisfy yourself that you are entitled to use this exemption, before operating this vehicle without a Tachograph .The penalties for incorrectly claiming this exemption would be severe" and "with regards to your second question vehicles over 3500kgs GVW are required to use Tachograph, so it does not matter if it is 7500 kgs or 18000kgs as they both fall under the same regulations"

203. The Claimant responds to explain that he has been on a course and he had been told that if working under the Road Maintenance Exemption the vehicle is classed as a toolbox, it can be used during the day to carry out your work but if he collected stock from another depot it would come under delivery and collection and then under the Regulations require a tachograph.

204. Mr Vickers replies pointing out that as he is not aware of the details of the driving routine he cannot give a 'robust answer' but makes what he refers to as two very important observations which includes the following;

*"*As you have stated that you are collecting stock from another location, that would appear to remove your entitlement to use the exemption. Secondly, if there is any period during any working day where a tachograph is required, *then you must make a Tachograph record of all other driving, so that you can fully account for both your driving and rest periods. Failure to do so would be an offence"*

205. Ms Palmer for the Respondent cross examined the Claimant on this letter from the DVSA and put it to him that this showed he was confusing the two Exemptions; the Road Maintenance Exemption and the Toolbox Exemption. Indeed he does refer to "toolbox" and "road maintenance" within the same query. However, he has clearly in his first email distinguished between a 7.5 Tonne (which would be "toolbox") and 18 tonne vehicles and thus it is clear to us that he understands that the rules apply differently depending on the weight of the vehicles. He has referred to toolbox in the follow up email which Mr Vickers may well therefore have understood to be referring to vehicles not exceeding 7.5 tonnes and thus it is only the Toolbox Exemption which may apply. However, the question first put by the Claimant is clear, although he has not expressly referred to the type of Exemptions, only the Road Maintenance Exemption however can apply to the second part of the question (the 18-tonne vehicle). The answer to the second part of the first questions is not definitive, and refers out to the 3 principles which need to be applied in each case. The letter the Claimant believes supports his understanding, we find that it does nothing more than reinforce that each case has to be decided on its own facts and is a matter of interpreting the Regulations and applying the applicable case law.

206. Counsel for the Respondent cross examined the Claimant at length on his understanding and his refusal to accept Ms Brown's interpretation of the Exemptions, and ultimately put it to the Claimant that Mr Vickers had not provided a definite legal opinion, that what he had provided was his opinion and that it would be for a court to decide the correct legal interpretation of the Road Maintenance Exemption.

207. What is clear to us however, through all the discussion and lengthy cross examination on this issue, is that it is not straight forward but we find that the Claimant had been told on a course that collecting stock from another depot with an 18-tonne vehicle would fall foul of the Road Maintenance Exemptions. The Respondent's own supervisors, managers and Operations Support Manager, consider this to be a "grey area" and needed to seek further advice in order to address the issues raised by the Claimant, and we are not convinced that even after doing so, they really understood the issue raised by the Claimant given the rather confusing email sent by Ms Brown to FTA.

Wrongdoing

208. The Claimant was asked to clarify for the tribunal what was the criminal offence he believed had been or was likely to be committed by the Respondent when he made the alleged disclosures, his evidence was that it was; "*breaking DVSA rules and road authorities*". The legal obligation was the obligation; *"to look after members of staff and the public*".

209. The Claimant was also asked to explain by the Tribunal (as this has not been addressed in his evidence presented to the Tribunal and is an issue which has to be determined by the Tribunal) why he considered the disclosure to DVSA was "*exceptionally serious*". His evidence was that it was the importance of not; "*overworking" the men"* and ensuring that the Tachograph Rules were not being *"dodged*". The Claimant did not allege that the drivers were in practice; driving long distances, driving when tired or exceeding the Tachograph Regulations.

210. The Claimant was also asked to explain by the Tribunal why he had considered his alleged disclosures to be in the public interest (another issue which has to be determined by the Tribunal but which had not been addressed in his evidence) ; his evidence was that if the driver is overworking and tired, there is the risk of hitting someone and with a lorry they are likely to be killed.

211. The Claimant was asked why he made the disclosure externally, his evidence was that he; "*was forced to due to the pressure*", he referred to having raised this back in October and then being "*forcibly told by Stuart and Paul"* to do the work; "*I had nowhere else to turn, I needed confirmation I was right to do this".*

212. The Claimant did not explain why he had not raised his concerns first with Ms Brown before contacting the DVSA or indeed checked back with Mr Shaw whether he had looked into this as he had agreed to do or taken any other steps to raise the issue internally including in accordance with the whistleblowing policy.

Anonymous Complaints

213. Within the bundle are screen shots of pages from the Respondent's intranet site of what we are told is its whistleblowing policy which is essentially extracts from an intranet site with details of a Whistle-blower email (375/377). The document provides that reports of suspected wrongdoing can be reported by the sending of an email to law firm Simmons and Simmons who will forward to the Respondent's Chief Compliance Officer without revealing the individual's identity. It also states that employees can report matters to their line managers or to their local compliance officer and that; "*E.ON will always ensure that employees will not suffer any disadvantages solely on the basis of a report made to the best of their knowledge and belief."*

214. There is then an email in the bundle of 9 March 2018 from an anonymous source (137a) which states;"*… We are now being made to feel fearful of working by being told by Dom we are not following rules regarding cable jointing or driving lorries etc*

We are constantly being told by him that we are putting our jobs at risk by driving lorries due to VOSA

rules but our managers tell as we find to carry on working"

There is then a further anonymous notification via the whistle-blower hotline on 12 March 2018 (137d) which complains about the Claimant reporting the Respondent for unsafe vehicles and overweight vehicles and "supposedly" reporting the respondent to WPD and other networks for not wearing PPA. It states;

a. "*He has supposedly* "reported the Respondent to VOSA for unsafe vehicles but that "*this cannot be true as all the vehicles are new 66 plates and there is a safe working load on them…".*
b. "*Supposedly*" reported the Respondent to WPD and other networks for not wearing PPE
c. He is causing "*bad feeling*" throughout the workforce, that he is causing "stress" and they are looking over their shoulder continually.
d. He is "*causing friction*" with networks like WPD and other networks.

215. The evidence of Mr Pickering when asked by the Tribunal about the atmosphere at the Depot around this time of these complaints, was that it was not *a "happy camp anymore" and "the atmosphere was different".* Mr Pickering was asked whether this had anything to do with the Tachograph issue to which his evidence was that*; "it had a part to play in it, yes".* The Respondent's case is that the Claimant was telling the men at the Depot that they were driving illegally which was causing ill feeling and concerns, The Claimant alleges that it was the supervisors who were creating the ill feeling amongst his colleagues and he denies having discuss the issue over the Tachograph Regulations with his colleagues.

216. Mr Pickering was asked whether colleagues were keeping their distance and his evidence was; *"Yes they were"* and when asked from whom*; "from each other, from Dom".*

Vandalism to company vehicle

217. The Claimant complains that he was subject to victimisation for having made the alleged protected disclosures.

218. It is not in dispute that the company vehicle which the Claimant drove was at some time after he made the alleged protected disclosures, and before the meeting on the 12 March 2018, vandalised. A photograph of the vandalism is contained in the bundle (page 41). The writing which is clearly etched into the paintwork of the van reads: "*bom is a wanka*". The Claimant is referred to as Dom at work.

219. We find on the evidence that the vehicle was vandalised in March not in April as the Claimant refers in his witness statement because he refers to it having been vandalised in the meeting on the 12 March. It is referred to again in the email exchange with Mr Shaw and the Claimant on 25 March 2018 and in an email from the Claimant to Mr Shaw on 23 March 2018 (page 431) where he refers to it being brought to the attention of Mr Shaw a few days before the meeting on the 12 March.

220. When Mr Shaw was asked about the vandalism to the van and who he had considered may have caused it during cross examination, he seemed to imply that the vandalism could have been by a member of the public; "*often people leave van open at side of the road, we didn't really know where it could have happened".* We considered this a remarkable suggestion given the words which were scratched into the paintwork on the inside door frame of the van.

221. When asked about the vandalism by the Tribunal, and asked to clarify who he thought the words were referring to, his evidence was that he thought it was a reference to the Claimant*; "as it was in the vehicle Dom drove, no one else with similar name"* and it*: "would have to be someone who knew Dominic".*

222. In cross examination Mr Shaw stated that in terms of what he did to investigate; "*I asked as many at West Hallam staff as we could*".

223. When asked by the Tribunal to clarify how many people he had spoken to, his evidence was; *"I asked probably a dozen people, just going round and asking as and when saw them*". Mr Middleton's undisputed evidence was that there were about 25 men working at the Depot

224. Mr Shaw's own evidence was not that he conducted any meetings with the men, hold any

meetings either individually or in teams to make it clear that the Respondent was taking this act of vandalism seriously. We as a tribunal, were struck by the apathy shown toward what was not only damage to company property, of itself a serious matter, but what must have appeared to Mr Shaw to indicate that the Claimant was being targeted in circumstances where there had been a deterioration in the working environment at the Depot and the Claimant was himself complaining of being victimised.

225. Mr Shaw was asked by the tribunal whether this type of damage to company vehicles had happened before. Mr Shaw commented that it had never happened before. He also commented that other people leave their private vehicles on the site.

226. Mr Shaw was asked whether he was aware as the Claimant raised at a subsequent investigation meeting with Mr Ellis on the 25th April 2018 (document 154) that 'twat' stickers had also been left on his clipboard. Mr Shaw's evidence was; "*not at all, no*". He had however been aware by the Claimant that he abusive stickers had been put on the wall of his room (140) because the notes of the 12th March meeting record the Claimant referring to this.

227. The evidence of Mr Middleton was that Claimant came to him about the vandalism and he photographed the van. He alleges that the Claimant laughed about it and said, "*it's just banter*", and because the words read "bon" instead of dom the Claimant had remarked that they could not even spell correctly. The Claimant during cross examination accepted that he had laughed at the time*; "I had to laugh or cry, it was another thing" but that it was "a sarcastic laugh – they could not even spell my name right."*

228. Mr Middleton's evidence is that the Claimant said that he was going to respray the van himself. The Claimant could not recall whether he had suggested he would do this or not. We find on the evidence, given the relative strength of the oral evidence on this point, that the Claimant did suggest he would respray the van himself and therefore it is not reasonable to criticise the Respondent for not doing it. In the event Mr Shaw arranged to have it resprayed during the Claimant's holiday.

229. Mr Middleton's evidence corroborates Mr Shaw's in that he stated that as far as he was aware there had never been an incident before of a company vehicle being graffitied at the depot and that there was some "*bad feeling*" amongst the men at the depot. Mr Middleton's undisputed evidence is that he had spoken to some of the operatives, about 15 out of the 25 work on the yard about the grafitti. In terms of how formal he approached those discussions he stated; "*not formal, I just spoke to them, everyone gets on with everyone, could speak to them as friends and colleagues."* This reference to the men being friends indicates the level of informality between the supervisors and the operatives and we infer from that level of informality (to the extent of sharing pornography at least amongst some of the men including Mr Pickering) that it is likely that Mr Pickering and Mr Middleton shared with the men their unfavourable view of the Claimant in contacting the DVSA and this would have played its part in the atmosphere at the Depot.

230. Mr Shaw had explained that CCTV had not been installed on the site after this act of vandalism because it was a large site and they were planning to move. Given the CTTV would only be required where the Claimant parked his vehicle, Mr Pickering was asked if there had been any discussion about putting in CCTV, to which he replied 'no'.

231. The Claimant accepted he laughed about the graffiti, however we do not consider that removes the obligation on the employer to take appropriate action to investigate and take measures to protect an employee who had made, what Mr Shaw and Ms Brown both considered to be whistleblowing disclosures, from what would appear to be acts of harassment or victimisation. We accept the Claimant's evidence that his response to the graffiti was sarcastic but that this did upset him. We accept his evidence that he felt he had to laugh or cry, and we have considered the environment in which he was working ie the 'all male' culture at the Depot and that at the meeting which would follow shortly on 12 March he raised the vandalism and how he felt victimised and bullied. We also take into account the Claimant's mental health issues and the impact which stress in the workplace had had on his health.

232. We find that the Claimant was being bullied by the vandalism to the van and the stickers

which had been left in his room, and that the Respondent failed to take adequate measures to support him and prevent these behaviours. The Respondent failed to take reasonable steps to protect the Claimant from unacceptable treatment in the workplace and indeed their response could well have been seen as condoning this conduct.

Investigation: 12 March 2018

233. The Claimant was called to an investigatory meeting on 12 March 2018 very shortly after the vandalism to his van. The meeting was Chaired by Pat Shaw. The letter inviting the Claimant to the bundle is another document not included within the bundle. The notes of the meeting do appear in the bundle (138 -142). This meeting had no connection to the matters contained in the anonymous complaints, it related to hours the Claimant had recorded for work undertaken on 6 February 2018.

234. It is not in dispute that the Claimant was informed that this was an informal meeting and indeed the minutes of the meeting are headed *'informal investigation'.* However, the Claimant complains that the way this meeting was conducted was not consistent with an informal investigation, in particular he complains that Mr Shaw had with him not only a note taker but another manager, Mr Shane Paul. The Claimant complains that the way he was dealt with during this meeting, amounts to detrimental treatment on the grounds that he had made one or more protected disclosures.

235. The Claimant had carried out work for a client of the Respondent, Balfour Beatty (BB), on 6 February 2018. It is common between the parties that operatives at the Depot are required to record their hours on a timesheet which is then checked and signed off by Paul Pickering. The time sheet completed by the Claimant on this occasion was signed by Mr Pickering.

236. The timesheet is included in the bundle (128). The relevant entry records a total of 11 hours. There are two columns showing the normal hours worked and overtime claimed. The time sheet shows in the normal hours column; 11 hours and in the overtime column; 3.5-hours of overtime, which of course does not equate to a total of 11 hours. The document however it is accepted, had been altered. Mr Shaw accepts in this meeting when asked, that he is aware that timesheets are sometimes altered by Mr Pickering. Mr Pickering in his evidence before this Tribunal, accepted that he would sometimes alter timesheets without informing the relevant operative that he had done so, he maintains that he only did so when the hours had been put in the wrong column, not to amend actual total hours claimed. The Claimant''s undisputed evidence during this meeting, is that he had not entered 11 plus 3.5 hours. We can see for ourselves what appears to be a figure of either 5 or 6 which has been struck out and a figure of 11 written over the top. Also, in the total column what appears to be a figure of 8.5 has been marked out and a figure of 11 written above it. The Claimant in the investigation meeting states that the hours recorded should have been 5 plus 3.5 giving a total of 8.5 hours. The undisputed evidence during this meeting of the Claimant is that on the day in question there was one new connection for which he states they would normally record and be paid 4 hours, and 3 transfers for which he states they would normally record 3 hours per transfer, a total of 13 hours. The Claimant is accompanied by a union representative, Ms Waudby who comments that if the Claimant is applying the hours set out in a document entitled Planned Times for Street Lighting Works , he has undercharged his time by 2 hours because he is cautious about the time he has recorded because he feels management are "*out to get him*".

237. The Claimant was working on this BB job with another operative, Mr Andrew Edwards. The Claimant 's undisputed evidence is that Mr Edwards had experience of doing BB work and it is not in dispute that Mr Edward's time sheet also showed total time recorded of 11 hours (normal hours worked of 7.5 plus 3.5 hours of overtime), a copy of his timesheet is included within the bundle (129). Mr Pickering had also altered Mr Edward's time sheet, he had used tippex so we cannot see what was written originally however the normal hours and total hours have been amended but the overtime figure is 3.5 hours, the same as the Claimant's.

238. The Claimant is informed by Mr Shaw in the meeting that the Respondent has received a complaint from BB, that they dispute the hours which have been charged for the time spent by the Claimant and Mr Edwards on the day in question (albeit they had not been aware of which operatives had been working that day and thus not named them in the 'complaint').

Mr Shaw in the meeting asserts that the transfer work the Claimant and Mr Edward's had been required to do on that day, would have taken no more than 1 to 1.5 hours to carry out. The issue however related as we understand it from the evidence, only to the amount of overtime charged ie the 3.5 hours which the Claimant accepted he had recorded.

239. The undisputed evidence of the Claimant is that he and Mr Edwards recorded the hours on this job by reference to a document headed; *"Planned Times for Street Lighting Works"* (Planned Timesheet) (page 42). We were referred to this document within the bundle. It sets out a number of hours against certain completed tasks. The number of hours varies depending on whether the client has their own operatives on site to carry out what is referred to as the 'civils' (i.e. preparing the groundwork, excavation and reinstatement work for the columns) or whether the civils are carried out by the Respondent's own operatives in addition to the electrical work the planned timesheet refers to a transfer of 5m-6m columns up to 1m "3 hours each man – 2 man team" under heading which refers to EO.N staff carrying out their own civils.

240. The evidence of Mr Shaw before this tribunal was that he was aware that that it was common practice for the operatives at the Depot to record what they did in blocks of time, rather than actual hours worked. He explained that work commonly involved 2 men teams who would disconnect cables, replace columns, reconnect the column and tarmac the hole and finish the job but that BB work was different, because the only work BB cannot do themselves is connect the lighting columns; BB staff will take out the columns and will do the work to the footpaths, the Respondent's operatives will disconnect the electrics in the columns and then wait for BB workers to dig out the column. The Respondent's operatives are therefore only doing 20/30 percent of the work they would normally do on a job.

241. Mr Shaw in his witness statement makes refers to the Claimant referring in the meeting to a culture of recording hours based on what tasks have been achieved as per The Planned Timesheet document rather than actual hours worked and Mr Shaw in his statement explains that; "*This is because, from a work planning perspective, experience has told us typically how long a particular task should take on 'average'. We have never closely monitored the start and finish times of the workers but when timesheets are checked, our supervisors would mainly focus on checking timesheets against the amount of work actually completed rather than the hours actually worked"*

242. It is not disputed by the Claimant, that Mr Shaw as alleged in his witness statement, (although not referenced in the notes of the meeting) explained to him in the meeting that the BB contract attracted different overtime rates because the Respondent's workers only carry out the jointing works for the columns and not the civils but that in any event, the Planned Timesheet document does not set out what hours are to be recorded, it is a document produced for work planning purposes only.

243. When Mr Shaw was asked by the tribunal whether he would have been aware that other men were using the Planned Timesheet to record their hours for BB work in the same way as the Claimant, his evidence was "*no, not unless it was brought to our attention*" however he stated that the; *"practice had to change, that was reason we did not pursue*"

244. Ms Waudby on checking the letter from BB refers to 'Kirsty' claiming 4 hours overtime for the Claimant and Mr Edwards when they have only recorded 3.5. The undisputed evidence of Mr Shaw is that 'Kirsty' is someone who works for him as an engineer. The notes do not record Mr Shaw explaining why Kirsty appears to have invoiced BB for 4 hours overtime for each of the men rather than the 3.5 hours they recorded. Mr Shaw was not however cross examined on this point and therefore we cannot make any findings at to the relevance of this.

245. Ms Waudby also questions the description of the letter from BB as a complaint. On asking for the letter and reviewing it in this meeting, Ms Waudby remarks that it is not a complaint but a query which as she understands it, appears to relate to only 1 hour of overtime for each of the two men.

246. A copy of the alleged letter of complaint was unfortunately yet another document not included within the bundle, however the minutes produced by the Respondent do not record Mr Shaw disagreeing with Ms Waudby's interpretation. During cross examination Mr Shaw

when it is put to him that the letter was not a complaint, stated that he could have used an; *"alternative word".* Given the comments by Ms Waudby which go unchallenged in the meeting and the concession by Mr Shaw that he could have used a different word to 'complaint' to describe the letter and the failure by the Respondent to include the document itself in the bundle from which we infer, in the absence of any explanation for its omission, that it was likely to support the Claimant's case that it was only a query, we find on the balance of probabilities that what BB was doing was merely querying the overtime charges rather than making a complaint.

247. Whether it is a query or a complaint is relevant because Ms Waudby also questions why Mr Shaw did not ask the Claimant about the hours recorded, rather than call him to an investigation meeting. Mr Shaw does not appear from the minutes to provide an explanation or even an answer to that question. Mr Waudby also makes the following observation; *"This is the first time that something like this has been brought to a formal meeting"*

248. Mr Shaw does not in the notes of the meeting dispute the above observation by Ms Waudby and there was no evidence produced by the Respondent to the tribunal to evidence occasions when an employee had been called to a meeting to address what we find is a query over an invoice rather than a formal complaint for what appears to be a relatively small sum of money.

249. Although this meeting is described as informal, Mr Shaw has with him a notetaker and another manager, we find on the evidence that this is not the Respondent's usual practice. Mr Paul himself is recorded as making the following comments that; *"this is the first time he has been brought in for something at this level".* Ms Waudby makes the observation that this; "*should normally have only been a chat"*.

250. During cross examination of Mr Shaw before this tribunal, when asked why during an informal investigation a second manager was present, his evidence was that Mr Paul was someone independent of the Depot and the established overtime regime and the hours of overtime which have been booked historically. This however does not explain why Mr Shaw felt it necessary to involve him at this investigatory stage. We do not find the explanation satisfactory. Mr Shaw was Chairing the meeting, it would be his independence which was important and he did not suggest that he would not have been the one who would have decided what follow up action if any would be taken. We are not satisfied that this explains why a second manager was brought in on this occasion for an 'informal' meeting.

251. We also take into consideration that Mr Shaw had omitted to explain to the Claimant prior to the meeting, that another manager would also be present. Mr Shaw in cross examination accepted that he had not done so and that it would have been courteous to have done but he offered no explanation for failing to have done so. The Claimant may well have attended without a union representative on the understanding that this was only an informal meeting.

252. Ms Waudby also refers to having been to informal meetings but this meeting; "*reeks of formal to me*". Ms Waudby asks Mr Paul and Mr Shaw why this is *"excessive*" and why had this been dealt with by having a word with the operatives when it is not a complaint but a query; however, the notes again record no response, not even a denial that the process was "excessive".

253. Mr Shaw's evidence before this tribunal was that he was aware that the operatives recorded their hours in blocks of time depending on the work completed, rather than hours spent but that this should not have been done for BB work however, they "*did not do a lot of BB work*" which is "*why the practice had to change*."

254. The evidence of Mr Pickering when asked by the tribunal about the Planned Timesheet and how widespread the practice was of operatives claiming more hours than they should, explained that; "*not everyone doing it all the time*". Mr Pickering was also asked how often he had to go back to an operative and tell them that they had claimed the wrong hours, his evidence was; "*not often*" and that in respect of the work for BB; "*most of the work warranted the overtime*".

255. Further when asked later about withdrawing the Planned Timesheet from use Mr Pickering, explained that he understood it had been withdrawn; ".. *because it was only*

intended to be a guidance but the lads were sort of taking it for gospel – the time they could book".

256. We find on the balance of probabilities that there had been other occasions when operatives had recorded more hours than they should but that had been dealt on those occasions with Mr Pickering simply speaking to them and amending the time sheets. This may have been the first time it had come to Mr Shaw's attention because of the query from BB, but nonetheless we find that the response was unusually formal.

257. It Mr Pickering's evidence was that he spoke to Mr Shaw but he could not recall whether it was before or after the meeting on 12 March. Mr Shaw's evidence when he was asked to clarify whether he had spoken to Mr Pickering about the timesheets, stated that he "*could not remember if he had*". There is therefore no evidence that Mr Shaw took the step of checking with Mr Pickering, who supervises the men, who checks and signs off the timesheets, who knows what the normal practices are at the Depot, about this query from BB in advance of involving another manager and arranging a meeting, not even to ask him about the amendments he had made to the timesheets. This would seem a reasonable first step to have taken before arranging a meeting and involving another manager.

258. At the conclusion of the meeting, Mr Shaw states; "*a few things must be taken away from this meeting and completion of timesheets improved for all operatives going forward".*

259. Mr Shaw informs the Claimant that; "we *do not wish to peruse [sic] this any further, there are no more questions and we will charge Balfour's the 3.5 overtime for two operatives".*

260. We find on the evidence of the Claimant, Mr Shaw's own evidence, the evidence of Mr Pickering and the notes of the meeting, that there had been a practice of operatives recording hours based on the Planned Timesheet document. This is further supported by Mr Shaw's decision after the 12 March meeting, to withdraw this document from use and make sure staff are aware that time recorded is to be based on actual hours worked in the future. We also find on a balance of probabilities that the way this query about the invoice was managed was not how queries over hours are usually dealt with.

261. Further, we are not satisfied by the explanation from Mr Shaw in his evidence before this Tribunal why he felt he required a second manager to attend a meeting he had described as informal. We find that the way this meeting was conducted, namely the holding of a minuted meeting rather than an initial chat and the involvement of a second manager unreasonable in the context of what is normal practice.

262. Further, the Claimant also raised at this meeting feeling victimised and singled out, he refers not only to the vandalism on the company van but to "*on most days*" finding abusive stickers on the wall of his room" (140) and in the context of what was happening to the Claimant at work, to have conducted this meeting in an unusually excessively formal manner was particularly insensitive and harmful to the working relationship and his confidence and trust in the Respondent .

263. Mr Shaw asks no questions about the abusive stickers at this meeting. Indeed, Mr Shaw expresses no concern or interest at all. The Claimant is not asked if he wants to raise a grievance, there is no involvement or reference to HR, indeed the response of Mr Paul when these issues are raised is; "*We are not here to discuss anything other than the complaint Pat has to respond to regarding Balfour Beatty and the overtime…".* Mr Shaw says nothing. When cross examined on this Mr Shaw states; "*no intention of asking about anything else – cannot answer for Shane*" However he accepts he was Chairing the meeting and that "looking back" he accepts it was out of place for Mr Paul to have commented when the Claimant raised these concerns. Mr Shaw had no explanation for his failure to express any interest in dealing with those complaints about how the Claimant felt he was being treated.

264. The failure to deal with the concerns even if it was to return to them at the end of the meeting, address them in a separate meeting or refer the Claimant to HR or the grievance policy, the abject failure to show any interest or concern, we find amounts to a further failure to provide the Claimant with adequate support.

265. The Claimant's work partner was it is not disputed by the Claimant, subject to the same process and this is relevant we find to any inferences that it may be appropriate to draw in relation to causation.

Tippexing of Time sheets

266. We accept the evidence of Mr Pickering that he would amend and tippex timesheets on occasion without informing the operatives but that this did not normally affect the overall hours recorded. The Claimant did not allege that this led to any specific detriment other than on one specific occasion that we shall go on to deal with below. It was not put to Mr Pickering that he had only done this to the Claimant's timesheets or indeed that the reason had anything to do with the disclosures. While it may amount to a breach of trust and confidence to amend a timesheet without informing the employee, this will depend on the circumstances and the impact on the employee. We Mr Pickering's evidence that he only normally did so to ensure the hours were put in the correct column, this was not unique to the Claimant and the Claimant has not been able to identify any occasions when his hours were altered to reduce the payment he would receive, other than potentially on one occasion which we address below and which we find was not in any event a detriment.

Letter of the 13 March 2018

267. Mr Shaw then follows up the meeting with a letter dated 13 March 2018 (page 143).

268. Within this letter Mr Shaw confirms that no formal action will be taken, that it was an error to have used the Planned Timesheet, that the Planned Timesheet was never intended to be used for determining the hours to be claimed and that; "I *will also be ensuring that all staff are made aware that from Friday 16th March 2018 the Planned Times sheet will be withdrawn from use and that any overtime claimed will be reflected purely on the hours worked".*

269. Mr Shaw goes on to state that in the letter, despite saying at the end of the meeting on 12 March that he would not pursue the matter further, that he has taken the step of checking the Claimant 's vehicle tracker and as the Claimant was not at work for even the basic 37 hours he is going to deduct his overtime for that week. In the event it is accepted that the overtime was not deducted because Mr Shaw did not process this deduction in time with payroll.

270. The Claimant complains about his treatment during this investigation process including around the deduction of his overtime. We make no comment on whether the tracker evidence established that the Claimant had not worked the hours recorded, the tracker information was not contained in the bundle. There was no follow up meeting with the Claimant however, the Claimant did not cross examine Mr Shaw on the accuracy of the tracker information and we infer from this therefore that he does not dispute that he had worked less than 37 hours.

271. In cross examination when asked about the tracker, Mr Shaw's evidence was;*"We received a complaint from Balfour Beatty, our customer, we put together details of work before on basis of what claimed on timesheets, we were saying going to charge the additional standby time – happened in past – they said no grounds for additional time – looked at tracker"*

272. Mr Shaw accepted that this was not normal practice and that trackers are; "*only checked If something else prompted us to do so like a speeding fine – normally need a good reason"*

273. Mr Shaw was then asked by the tribunal whether the tracker had ever been checked for any other employee, for the purpose of checking the hours they had worked, to which he replied*; "not that I am aware of."*

274. The evidence of Mr Shaw that he had checked the tracker following a further refusal by BB to accept the standby time, was not disputed by the Claimant. Although the letter of the 13 March does not explain that the tracker had been checked because of further challenge by BB, we accept given the undisputed evidence of Mr Shaw that this was the reason. The Claimant did not put it to Mr Shaw that he did not have a 'good reason' in these

circumstances to check it. The tribunal were not taken to any policy regarding the use of the tracker and it was not alleged that this action was in breach of any such policy.

275. Although unusual to check the tracker, we do not find that the conduct in checking the tracker was a breach of an express term of the contract of employment and/or the tracker policy, in the absence of any evidence put forward by the Claimant that it was. Further, in the circumstances the Claimant did not suffer a detriment in that he did not dispute that he had not worked more than his base hours. It was also not put to Mr Shaw that he checked the tracker because the Claimant had made any of the alleged protected disclosures. We accept Mr Shaw's evidence that he checked the tracker because BB were still not willing to pay for the hours the Claimant and his colleague had recorded as time spent on the job and that he treated the Claimant and his colleague consistently.

Time sheets

276. In response to the investigation the Claimant contacts Mr Shaw by email on 25 March (145). Within this email the Claimant raises a number of complaints including that Mr Shaw had referred to checking the Claimant's time sheets for the last 12 months. In his reply email of the 25 March 2018 Mr Shaw (144) states that "*My reason for looking back at specifically your time sheets is to ensure that we are both satisfied that your own time sheets are correct and I will take any necessary action if discrepancies are found."*

277. The Claimant does not complain about Mr Shaw checking his timesheets, rather he complains in his claim about Mr Shaw not disclosing to him his timesheets for the full 12 months and that some time sheets had been altered without him knowing.

278. Mr Shaw in his statement (paragraph 58) with regards to alterations to the timesheets, refers to reviewing with the Claimant timesheets for colleagues he had worked with on three occasions, to show that although the timesheets appeared to be in different handwriting, the hours booked were the same.

279. The Claimant did not put it to Mr Shaw when cross examining him that he had the timesheets but had not disclosed them hence we accept the evidence of Mr Shaw that he disclosed the time sheets he could locate. We do not find that the failure to locate all the timesheets gave rise to any detriment. The Claimant identified only one alteration on the time sheets provided which he alleges was an unlawful deduction and we address below.

Unlawful Deduction

280. The Claimant 's evidence is that on receiving copies of some of his timesheets on 22 March 2018, he noticed an amendment to one of the timesheets (page 127). The Claimant had initially in cross examination stated that he had received the timesheets on the same date of the letter of 13 March, namely on the 23 March however under cross examination he confirmed that he had received the timesheets on 22 March. In his email of the 23 March 2018 (431) he refers to receiving them the day before. The Claimant alleges that the alteration to this timesheet amounts to an unlawful deduction. It relates to one entry on 10 January 2018. The Claimant had recorded 2 hours of overtime which had been, it is not disputed, changed to 1 hour. The column where the location/details are inserted states; "Stoke training day".

281. The Claimant 's evidence under cross examination is that this was a training day in Stoke, the Claimant had driven to the training day with his colleague Andrew Edwards. The Claimant accepted that his normal working hours were 7.5 per day (8am to 4pm with 30 minutes lunch break). It was put to the Claimant that the training day ran from 9am to 2.30 pm, however the Claimant could not recall when the training started or finished. If those times are correct that equates to 5 .5 hours of training. The Claimant accepted in cross examination that the time it would have taken him to drive from the Depot to where the training took place would have been an hour either way, which then equates to a total of 7.5 hours. The Claimant 's time sheet for that date shows an entry of 7.5 hours and overtime, which we understand relates to travel time, of 1 hour which had been adjusted from 2 hours claimed original by the Claimant.

282. It was put to the Claimant that Mr Edwards had recorded 1 and not 2 hours overtime

however the time sheet for Mr Edwards was not disclosed and the Claimant was unable to comment.

283. The Claimant 's evidence however was not that he had been told that he could claim all the travel time in addition to 7.5 hours even if the training did not last 7.5 hours. The Claimant could not recall how long the training took and gave no evidence about what he had been told about what could be claimed or indeed whether there was anything set down in writing such as a policy, which provided any guidance. The Claimant did not allege that others had claimed and been paid for 2 hours. We find that there was no basis other than the fact the Claimant had recorded it on his time sheet, for the Claimant maintaining it was payable.

284. The Respondent therefore does not accept that the further 1 hour was 'properly payable'. The Claimant does not contend that recording time on the timesheet alone means that it gives rise to a legitimate claim for payment.

285. The Claimant in cross examination accepted that he was paid monthly, and the payments for the January timesheets would have been paid on 24 January 2018. The Claimant did not dispute that the relevant time limit for issuing a claim would have been within 3 months from the date of payment i.e. by the 23 April 2018. The Claimant 's evidence is that he did not become aware of the alleged deduction until he received the timesheet with the letter of the 13 March from Mr Shaw which was not received until 23 March 2018. The Claimant's evidence is that he contacted his union for advice. The ACAS pre-conciliation certificate is dated 6 June 2018 (page 1). The claim itself was issued on the 30 July 2018.

286. The Claimant's explanation for not bringing the claim within time, is because he has; "*looking into it and getting in touch with union representative*".

287. The Claimant does not allege that this alleged deduction had anything to do with the alleged protected disclosures as he stated that; "*no, this was before the disclosure*."

Inconsistent Treatment – Overtime

288. The Claimant complains that following the meeting on 12 March 2018, he was unable to claim overtime in accordance with the Planned Timesheet but that other operatives continued to do so, thus he was treated inconsistently and that this had an impact on the overtime he could claim. He does not allege however that he actually worked any overtime for which he was unable to claim.

289. The Claimant received a letter from Mr Shaw dated 13 March 2018 (143). Mr Shaw writes that; *"I will also be ensuring all staff are made aware that from Friday the 16th of March 2018 the Planned Timesheets will be withdrawn from use and that any overtime claimed will be reflected purely on the hours worked."*

290. Mr Shaw evidence was that he personally went to site to see the electricians and explain that they could only record time in accordance with actual time spent on a job. Mr Shaw's evidence is that he could not recall speaking to the supervisors but that; "*I took it on myself*" to speak to the operatives.

291. Mr Pickering's evidence in cross examination was that after the issue with the Claimant and the query from BB, the matter was raised by Mr Shaw at a team briefing when the operatives were told that their time is 8am to 4pm and they must do what they can in that time, if they stay later they have to work the actual hours. He further stated that other than an LED contract with Derbyshire CC, the new rule applied to all the operatives.

292. During the investigation meeting held by Luke Ellis with Stuart Middleton on 16 July (272), he is asked if Mr Shaw spoke to him after he had met with the Claimant on 12 March 2018 and asked him as a supervisor to do things differently. Mr Middleton had replied; *"no*". When then asked by Mr Ellis whether "*some guys started booking differently now*", the response of Mr Middleton was; "*Not a massive difference but they might have booked 5 before and not booking 4. PP always dealt with. I would just sign off work coming in*". Mr Middleton is asked whether he is aware of the lads leaving early and he states that he has not heard of them taking a Friday off but "*might have heard them finishing at dinnertime but not heard of full day*".

293. Mr Pickering's oral evidence before this tribunal when asked to clarify whether in practice this new rule was enforced, was not convincing. He stated that when the Planned Timesheet was withdrawn there were less hours booked on the timesheets when he signed them off but he did not refer to any checks being put in place, he referred to there being a '*lot of trust'* in terms of what the men record on their timesheets. He did not indicate that the men were now claiming part hours i.e. hours and minutes which would indicate that they were more accurately recording their time, he referred to the hours claimed, '*looking reasonable'* but that he would not always know what had been done because the men could have been asked to do "*extra work by others*". When asked whether they would record hours not worked he stated; "*not to my knowledge, they shouldn't have*…"

294. There was no record of the team briefing held by Mr Shaw which is surprising given the importance of the issue, not least given how seriously Mr Shaw had dealt with the 12 March meeting with the Claimant concerning the query raised by Balfour Beatty. There was also no evidence that any memorandum or policy had been issued following up on the team meetings. The Claimant disputed that the team briefings even took place, however we find on a balance of probabilities that they did, based on the evidence of Mr Shaw, Mr Middleton and Mr Pickering.

295. Mr Middleton gave evidence that he was aware that there was some difference in how the men were booking their hours but that this was largely dealt with by Mr Pickering. Mr Pickering's evidence supported Mr Shaw's evidence in terms of what had been communicated to the men.

296. During the interview with Mr Ellis on 6 July 2018, Mr Shaw referred to the change in policy and that; "*it was explained that OT should be based on how long the working day really is- it's down to policing of that but they all know what is expected*".

297. We find however that that the operatives at the Depot did not follow the briefing from Mr Shaw and only charge for the hours they worked. We find that based on the evidence of the Claimant, Mr Middleton and Mr Pickering that the change in policy was not effectively checked or enforced by the supervisors and that there may have been some change, but that it was not materially different. We find that on balance of probabilities, in practice although not using the Planned Timesheet, the operatives had grown accustomed to what hours were acceptable to charge for certain jobs and continued to record their time largely on that basis. Indeed, Mr Pickering's own evidence is that he did not know what hours the men had done, there was a 'lot of trust' and he checked what work had been done when assessing whether the time looked reasonable.

298. We therefore find that the Claimant had a legitimate reason for feeling that after he had been subject to the investigation on the 12 March, issued with the letter of the 13 March and had his tracker checked, that the lack of enforcement in terms of how others operated was not consistent with what he had been told and how he had been treated and was unfair. We find on the evidence that there was a lack of clear direction from the senior management team and in practice we find that Mr Pickering found it difficult to check and enforce the recording of actual hours worked, indeed there was no evidence that he took any active measures to police it.

299. We do not find that on the evidence that the intention was to treat the Claimant differently, we find that the men were told not to use the Planned Timesheet but that in practice there was no appetite to enforce this and in therefore in practice there was no material change in how time was recorded. We note that in the meeting with Mr Ellis on 21 June 2018, the Claimant had referred to Mr Carr also being unhappy that he could not book overtime off the Planned Timesheet while others were (200).

300. As Mr Pickering said in his interview with Mr Ellis (250);**"…***we do need some clarity – I don't know whether I'm coming or going"*

301. The Claimant had brought to the attention of Mr Shaw in his email exchange of 7 June 2018 (176) the fact other men were not recording the actual hours worked, there is no evidence that Mr Shaw followed this up with Mr Pickering or at all. Mr Shaw rejected what the Claimant had said about the overtime claimed by those working on the LED contract

and repeated that timesheets should reflect the hours worked. We find that Mr Shaw took no steps to check that what he was saying to the Claimant was happening in practice. It is not surprising that the Claimant was frustrated by this. The failure by Mr Shaw to check that there was consistent enforcement of the new policy, was we find unfair to the Claimant.

302. We do not find on balance that this was intended to inflict financial harm on the Claimant or that he was being singled out because of any disclosures he had made but rather it was a failure to monitor and police the new policy, and a general lack of appetite to upset the workforce by the supervisors. We found on the evidence that despite what Mr Shaw was saying to the Claimant, the supervisors on the ground were turning a blind eye to what was being recorded as long as it looked 'reasonable' and Mr Shaw must we find have been content 'unofficially' with that situation given his failure to follow up the Claimant's concerns or generally check what was happening in practice.

303. We do not find however that the Claimant suffered any financial detriment. The Claimant did not present any evidence that he had worked overtime for which he had not been remunerated consistently with his colleagues, in fact his evidence was that after the 13th March he did not work an hour of overtime. He did not in his evidence however identify any occasion when he was prevented from doing overtime. The Claimant may have not been prepared to do overtime because he believed he would not have been remunerated fairly and consistency with his colleagues but he did not give evidence to this effect. Mr Pickering alleged that the Claimant had been given the chance to do overtime but had not taken it up.

Investigation March/April 2018

304. Mr Ellis is then appointed to investigate the emails which has been sent on 9th and 12th March 2018 via the whistleblowing hotline.

305. Mr Ellis refers in his witness statement to a document (302) within the bundle listing all the interviews and meetings he conducted. This document records that there were initial telephone discussions on 22 March 2018 with Mr Jackson (who dealt with the incident in 2017) and Paul Holl (302). There is no note of what was discussed during those calls.

306. The initial scope of the investigation and the reason it is initiated is, according to the evidence of Mr Ellis, the two whistleblowing complaints. Mr Ellis was given an opportunity before he took the oath and gave his evidence, to confirm if there were any changes he wanted to make to his statement. He identified one which related to paragraph 24 of his statement, he corrected a reference about the Claimant and his wife's sexuality, to just rumours about the Claimant's wife's sexuality. He confirmed there were no other changes. However, within his statement he refers to the whistleblowing reports and in relation to the first one dated 9 March 2018 (137a) he states (paragraph 8) that he was "concerned *that the report alleged that Mr Glavey had referred to the problems he was causing for E. ON as a game he was enjoying playing. Clearly I had wanted to get to the bottom of the rationale behind his behaviour and whether there was any truth in this allegation".* However, neither of the whistleblowing reports referred to the allegation about the Claimant having said he was 'playing a game'. The Claimant cross examined Mr Ellis on this and his evidence was that in fact this was not known to him until he interviewed Stuart Middleton. Therefore, either Mr Ellis was not aware of the allegation and although Mr Shaw was aware he had not escalated it or, Mr Ellis was not truthful in his evidence and what was in his witness statement was correct, in that he had been made aware of it and this had been a factor in the decision to commence the investigation. As the Claimant did not put either of these scenarios it to Mr Ellis that he had known about this allegation in advance, we must accept the evidence of Mr Ellis that he was not aware.

307. The scope of the investigation was therefore at this stage as set out in the report of Mr Ellis (305) limited to 4 areas; what was being said about the Tachograph rules relating to driving the Respondents lorries, the Claimant causing issues between the networks (the Respondent's customers), cable jointing rules and pressure and intimidation being applied by the Claimant.

Informal interviews – March and April 2018

308. Mr Ellis interviewed three members of the management team on 28th March 2018; Pat Shaw, Paul Pickering and Stuart Middleton. The notes from those two interviews were not originally included within the bundle, but were disclosed during the course of the hearing.

309. The interview with Pat Shaw (page 425a – c) was disclosed and a transcript produced. Within this interview Mr Shaw he states that with respect to the Claimant; "*He came down from Rochdale about 2.5 years ago (with) a much better attitude – same as all of the other guys*". and "*refers to the Claimant's personality changing at the end of 2016"* and "*At this point started to flag H & S issues*". He refers to the Claimant refusing to carry out some jobs and that this has been ongoing for the past 6 months. It is not in dispute however that the Claimant has not been subject to any disciplinary or performance management process in relation to this allegations that he has been refusing work.

310. Mr Shaw refers to an incident about 18 months ago, of the Claimant contacting HSE because of men getting into the skips. He refers to this being a defined process but that the man the Claimant had been working with may not have been doing it correctly. Mr Shaw appears to confirm that this happens if they have to retrieve sodium lamps from the skips but Mr Shaw refers to having communicated to the team that there was "*no need to climb into skips*", which would appear to indicate the concerns were genuine however the concern appears to be principally the involvement of the HS. However, this incident had been only known to Mr Shaw it had been address by him at the time.

311. In the initial interview with Stuart Middleton (425d – 425f) Mr Middleton raises a number of issues; he alleges that Claimant is 'finding little things' in the system and telling the lads they are not doing things correctly, that he Claimant has told the lads he has filmed them doing work. He also refers to the Claimant making the comment: "*it's all a game and I'm enjoying playing it".* He also alleges that the Claimant is sometimes not carrying out work; Mr Middleton refers to sometimes feeling this is due to the Claimant's confidence in what he has to do and that; "*sometimes its valid and but sometimes he should be able to do it*". He refers to this having gone on for "*a long time*".

312. Mr Middleton refers in his interview to feeling that the Claimant is "*micromanaging us and giving us the run around all the time"*. He confirms that he has taken no action, when the Claimant refuses to carry out a job, he finds it easier to send someone else instead. Mr Middleton also comments that he has not yet had any management training but that he is "*waiting for it to come through*".

313. There is reference in the interview to Mr Middleton being asked by Mr Ellis whether he believes that the Claimant is paranoid, to which Mr Middleton confirms that he believes that he is. Mr Middleton is also asked if there is evidence of the Claimant using drugs. Mr Middleton response is; "*no evidence*".

314. Mr Middleton identifies that there are some of the Claimant 's colleagues who have come forward to raise concerns about the Claimant and names them as Craig, Dave, Steve, Tony.

315. There are also notes of the interview with Mr Ellis and Mr Pickering (425 G – H). In his interview, in summary Mr Pickering raises the following issues;

a. He raises the incident with the cable joints in 2017 and Claimant being *"so argumentative*" with Mr Roe and that since then he has been "*gunning*" for the company.

b. He complains about how less productive the Claimant is and that he trying to get young lads not to do things due to "*spurious*" health and safety issues, however he is then recorded as saying "*sometimes correct but sometimes you could have found a way if you'd wanted to*". He refers to this having been ongoing for the last 21 months.

c. He refers to the disclosure to VOSA; his evidence is that: "*walked in one morning he said shouldn't be doing what we are doing with lorries. I wasn't sure so rang Jackie Brown. She came down to talk to him. Told him what he should be doing. Admitted we sail close to the wind but we are within the law*".

316. Mr Ellis then asks Mr Pickering how the Claimant is 'intimidating'. Mr Pickering refers to him being a 'big lad' and 'when he gets upset wonder what he's going to do". He accepts that he; "has not been physically aggressive". However, Mr Pickering states;"*They feel he is ruining thing for them. They just want to work and get on. He just wants to rock the boat.* ***Like the VOSA thing***." [my stress]

317. Mr Pickering also refers in this meeting to the Claimant contacting one of the Respondents customers WPD and telling them the Respondent lads are not "*doing job properly*." However, when he is asked if that is a fact, he states; "*just what I've heard*"

318. The criticisms of the Claimant are extensive but the general tenor of the comments from the supervisors and Mr Shaw is that they perceive the Claimant as causing problems, of "gunning" for the company.

319. Mr Pickering alleges that the Claimant had said to Mr Middleton; "*don't forget I know where you live"* which Mr Pickering says is; "*why we are struggling to get people to come forward*"

320. Mr Pickering also refers in this meeting to the Claimant showing videos or photos on his phone of his wife having sex. This is of course unrelated to the scope of the investigation and it is questionable why Mr Pickering would raise this. Had Mr Pickering had genuine concerns about this behaviour as the Claimant's supervisor he could and should have dealt with it.

321. Mr Ellis refers in his report to then interviewing informally in April 2018, a number of employees who wished to remain anonymous for "fear of retribution" by the Claimant (witness statement para 10). In his report (303) he refers to the Infrastructure Services management having suggested these individuals to be interviewed, it appears this was Stuart Middleton from the interview notes. Mr Ellis states in his report that these witnesses later felt more confident and were prepared to drop their anonymity and identifies them; Steve Wilkins, Craig Rolt, Dave Butler and Frank Telfer. All four were interviewed on 13th April 2018. Copies of the interviews with these men were not included within the bundle however the report (page 303) summarises what evidence was provided by these witnesses, it refers to these discussions having established the background to the case. The summary states how the Claimant had been considered a 'model employee' and had been a popular member of the team and a 'good team fit' but that 'however in late 2016 a problem arose'. Reference is then made to the issue with the joint boxes and the disagreement with Paul Pickering and then the disagreement with Chris Roe resulting in the grievance and letters of apology. The report refers to the opinion of several of the Claimant 's peers and managers, that the Claimant 's attitude changes following this incident and that he became "*a disruptive element*" within the team and that; "*This alleged disruption has apparently caused upset within some of his peers and has resulted in the whistleblowing reports having been raised".*

April 2018 – Jackie Brown

322. There is then an email exchange between Mr Ellis and Ms Brown on 23 April 2018 headed 'DG investigation**.** Ms Brown attaches copy of her email exchange with the Claimant and in her email of 24 April and confirms to Mr Ellis that the Claimant had raised the issue with VOSA before contacting her, she states (page 149);" *I initially met with Dom on 9th Feb at West Hallam, he had already send his while blowing email to DVLA at that time and he showed this to me during our meeting".*

323. Mr Ellis responds by email of the same date (page 148);

"So if I understand correctly Dom's email to DVLA was sent prior to any discussions with you about whether there was an issue with compliance i.e. Dom chose to go outside of the business rather than trying to settle this issue within E. ON first?

Investigation Meeting – Claimant 25 April 2018

324. The Claimant received a letter dated 19 April 2018 (page 438) which refers to allegations of misconduct; *"including intimidation of colleagues and other disruptive behaviour*". No further details are provided in the letter. He is invited to a meeting on the 25 April 2018.

325. During this meeting the Claimant explained his concerns with regards to the Tachograph Regulations which is the first issue raised by Mr Elliott. He explains about the background and the initial call with VOSA, he informs Mr Ellis that;"*I went away and looked on Google to see what the rules on TACHO are myself. It does seem to be a grey area but what I perceived is that we are working out of the scope of TACHO. There is a VOSA helpline which I rang to query the issue (around 8 February) and they confirmed that I was right and we are working out of scope of TACHO"*.

326. The Claimant in the meeting denies that he had discussed the tachograph issue with any of the other operatives. However, in the interview Mr Ellis carries out with his colleagues a number do refer to the Claimant mentioning this issue and we therefore find that the Claimant did mention to at least some of his colleagues that he believed they were driving in breach of the Tachograph Regulations, those colleagues includes; Charlie Torry (166), Steve Wilkins (160), Craig Rolt (156), Tony Grindley (167i), Ben Austin (165a), Will Cresswell (168).

327. The allegation by Mr Middleton and Mr Tory about the Claimant stating it is all a "*game and I'm enjoying playing it"* is put to him and Claimant denies saying this, stating that the allegations are made up.

328. The Claimant also raises that Mr Shaw was supposed to have had monthly catch ups with the Claimant to discuss his stress levels to see if he ok to go back on standby but that he has not had one meeting.

329. In terms of the contact with HSE over skips; the Claimant explains that this was over a year ago. That he contacted HSE to ask when is it legal to climb into a skip because the skips are too high and there is no means of unhooking the slings from the crane and therefore some men are climbing into the skips using slings which are not load tested. The Claimant refers to having reported this to Paul Pickering and Pat Shaw and emailed them prior to the contact with HSE.

330. The Claimant is also asked about having sexual videos on his phone and showing them to colleagues. The Claimant refers to this being a joke and of Mr Pickering sending him photos on WhatsApp of naked women.

331. When asked by Mr Ellis where this animosity toward him is coming from the Claimant explained that he believes it is coming from Paul Pickering who is telling people in the yard that the Claimant will get them sacked.

332. The Claimant also makes Mr Ellis aware that he is feeling *"drained* "by the animosity and feeling pushed out. He raises the vandalism to the company van and to the "*twat stickers*" being left on his clipboard on a number of occasions. Mr Ellis responds by asking the Claimant; "*whether [his] behaviours could be deemed to be aggressive" (154)*

Formal Interviews – May 2018

333. Mr Ellis then conducts another 21 formal interviews in May 2018.

334. By May 2018, we find that Mr Ellis had interviewed 16 of the Claimant's peers and 3 of the management/supervision team, based on the undisputed record he had kept and which appears in the bundle.

Intimidation

335. In terms of allegations of the Claimant being intimidating or aggressive towards his colleagues, of those interviewed in May, a significant majority deny that the Claimant is aggressive and on the whole their comments are positive.

336. Mr Bird a jointer describes the Claimant's behaviour thus (page 167g); "*Not physical. Verbally the same as everyone else. He is a good laugh but just has a loud voice. Not aggressively just banter"*

337. Mr Edwards a jointer (page 167e) describes him thus; "No. *We all have banter messing about not aggressive"*

338. Mr Easom, jointer (167c); "*No. Dom's not like that"*

339. Mr Gentle *(167a); "Certainly not been aggressive towards me*. *Can't think of an incident when he has been aggressive to anyone else"*

340. There are comments made by a small number of his colleagues about incidents of aggressive behaviour by the Claimant but these are all historic allegations.

341. Mr Wilkins refers (page 160) to an occasion (he doesn't say when it was) when the Claimant would not do the risk assessment on a job; "*he said you do it, it's your job*"

342. Mr Torry (page 166) recalled an occasion when he and a colleague had made a mistake and changed the wrong column and the Claimant; "*got a bit wound up. He got a bit aggressive*". He goes on to say that the Claimant left Mr Torry and his colleague rectify the work. Mr Torry describes this as "*tough love*" and that "*I actually respect him for that even though it pissed me off at the time".* Mr Torry states that he has not worked with the Claimant in the last 5 months, therefore it is not a recent incident.

343. Mr Cresswell (page 168) refers to the Claimant the previous summer shouting at site managers and him screaming and shouting at him when he was late.

344. Mr Rolt also mentions two incidents 18 month before (page 156) when the Claimant had collected a van which had not been cleaned and he alleges the Claimant was aggressive and shouted at him. The second allegation is that Claimant shouted at a contract manager from Imtech. Mr Rott states; "*I spoke to the supervisors at the time but not one really took it very serious because at that time he was really well thought of*".

345. Mr Ellis asks Mr Rott if there are any "*recent examples"* and his answer is "No".

346. In the meeting with Pat Shaw on 1 May 2018, Mr Shaw's evidence is that in terms of ever having witnessed the Claimant behaving aggressively he states; "*not really no*". He refers to the cable joint incident in 2017 but states that when he saw the Claimant he was not aggressive only fired up and *"stressed*".

347. The interviews conducted in May do not generally support the allegation that the Claimant is aggressive and what allegations there are, are not recent, some as long ago as 18 months.

Rumours

348. It is apparent from a number of those interviewed that there are a lot of rumours circulating. David Butler refers to hearing on the '*grapevine*' that the Claimant has said he would cause trouble for the Respondent with the networks.

349. Steve Wilkens when he is interviewed also refers to lot of second hand information including that the Claimant would cause trouble for the Respondent.

350. Terry Doncaster states that the Claimant has never spoken to him about driving outside of TACHO, he has only heard rumours. He has no experience of the Claimant's being aggressive but what he says when asked if he has any final comments to say is; "*Things that I know about that annoy me like going out to vosa – he didn't go through the chain of command*"

351. During these interviews when the men are also asked whether they had ever heard the Claimant state he would cause any kind of trouble for E. ON or E. ON employees with the DNOs, almost invariably they deny having heard this other than second hand or "hearsay". They are not asked by Mr Ellis to say who they have heard this from however, Craig Rolt (156) volunteers that he heard it: second or third hand from "*supervisors*".

Stress Risk Assessment

352. It is during this period, that Mr Shaw now conducts the stress risk assessment in May 2018

with the Claimant. This follows the meeting the Claimant had with Mr Ellis on the 25 April 2018 when the Claimant had complained about the failure to carry out stress risk assessment and the failure by Mr Shaw to conduct monthly catch up meetings with him.

353. The risk assessment includes columns which set out; the risks, possible solutions and what further actions are necessary and who will be responsible for the actions and the date for follow up or completion of the actions. The entries include the following;
422.1 "*Monitor work allocated and ensure this is suitable for skills/training*". The action is listed to be completed by Mr Pickering and Mr Middleton by 1 August 2018.

422.2 The psychological working environment column lists a number of factors and includes as a further necessary action; "*Conclude ongoing investigation by senior management*…". It's also refers "*ensuring investigations are concluded in a timely manner and that all staff are fairly treated regarding the booking of overtime.*" It also includes in the column for possible solutions; "*Ensure all staff are not the subject to verbal abuse, rumours or graffiti*" however there does not appear to be an accompanying action for this. The actions are to be carried out by Mr Shaw and the date given the 1 July 2018.

422.3 In the relationships column, it refers to the necessary action to; "*Bring to conclusion the ongoing investigation regarding character/behaviour (most employees have been interviewed)"* The action is allocated to Mr Shaw and the date is the 1 July 2018.

422.4 The final entry which deals with support includes in the action column; *"There has been insufficient support from manager (PS) following the advice given in a previous Occupation Health report, this advised regular 1: 1 to monitor mental health. The correct Return to Work progress has only been implemented over the past 6 months".*" The date referred to is 1 July 2018

354. The Claimant 's evidence before this tribunal was that at the time he carried out this risk assessment with Mr Shaw "*everyone at the yard had been dragged in to give evidence against me – my stress and anxiety going through the roof*"

Email 29 May 2018

355. Following the interviews on 1st and 3rd May 2018, Mr Ellis then emails Mr Shaw on 29 May 2018 (190) raising issues which extend the scope of the investigation beyond the issues raised by the whistleblowing complaints and this include the following;

- The Claimant 's competence in his work:
- How the Claimant had removed or installed columns and whether he has complied with standard working practices
- The allegation the Claimant has 'knocked back' work
- Notes of a meeting where the Claimant had expressed an interest in redundancy
- The incident where Mr Torry had referred to the Claimant leaving him to complete a job when he had fitted a column incorrectly and what the Claimant's responsibilities would have been

356. None of these issues relate directly to the concerns raised in the initial whistleblowing complaints and while it is legitimate to extend an investigation when other matters come to light, the issue of his competence at work is a performance issue which Mr Shaw as his line manager had been aware of for the past 6 months but not addressed. The issues about the practice around installing columns and leaving Mr Torry to complete installation of a column after Mr Torry had made a mistake, related to events which had happened at least 5 months before.

MEWP

357. In early June 2018 the Claimant was informed by Mr Middleton that he is required to carry out work on the MEWP (Mobile Elevating Work Platform). These are vans equipped with a hydraulic crane/arm with a railed platform at the end which is used for raising and lowering people, also commonly referred to as a cherry picker.

358. There is an email from the Claimant to Mr Shaw dated 6 June 2018 (173) where he raises

the following concerns which in summary are;

a. Although he holds a 'ticket' to operate the vehicle, he has never worked on a MEWP
b. That his contract role is jointer and this is a 'lesser role'
c. If there was no vehicle to use he would have to use his own vehicle; "*the fact that my works van was graffitied I would be worried of my [sic] own property being vandalised"*
d. He feels he is getting singled out again

359. There is within the bundle an exchange of WhatsApp or text messages between the Claimant and Mr Shaw, where the Claimant is complaining about being "*segregated from my colleagues*" to work on the MEWP. The Claimant complains that he has recently returned to work from sick leave and that it is lonely working on the MEWP, that this would cause him more anxiety, but that he has had "*no training in this*", and he is employed as a cable jointer. He also complains of the impact financially because he is likely to have to use his own personal car and diesel to get to and from the Depot. He also refers to not wanting to leave his personal car in such an "unfit yard", and that there are no washing facilities to get changed before getting into his own vehicle. The Claimant also raises that while he will be suffering financially by working on the MEWP and driving his own car to work, other operatives are still claiming more overtime than they are working.

360. Mr Shaw in his response (page 177) refers to the Claimant having a valid MEWP operator qualification, that the work is within his skill set but that he will require vehicle familiarisation with the specific make and model. The Claimant is informed that staff are expected to have the ability to get to their base location with their own transport and that there is a separate hard standing area to park their cars.

361. Mr Middleton's evidence before this hearing was that he had told the Claimant that he might have to come to work in his own car. With regards to the concern over his car being vandalised at the Depot, his evidence was that it would have been parked out of way of other operatives and he did not think it would be a problem. He did not say that he had discussed, considered or proposed any safeguards to protect his vehicle.

362. The Claimant put it to Mr Shaw in cross examination that this treatment could be seen as singling him out, Mr Shaw's explanation was that there had been a "*build-up of faulty lanterns*" on the LED contract" and there was a need for additional resource. The Claimant put it to Mr Shaw that he had never worked on faulty lanterns while at the Depot, only new installations. Mr Shaw did not know whether or not this was correct and thus we find that the Claimant had only worked on new installations. However Mr Shaw did not agree that the work was any more technical and was work he considered he could do. The Claimant did not appear to dispute that technically it was work he was capable of doing.

363. During cross examination, Mr Shaw accepted that he could see that the possible damage to the Claimant's own car would be a concern but referred to there having been no history at the Depot of vehicles being vandalised. In re-examination Mr Shaw stated that he could not recall concern over damage to the Claimant's car being raised with him at the time however, we find that, it is clearly referred to in an email exchange between Mr Shaw and the Claimant on the 6 June 2018 (173).

364. It is clear we find from the evidence of Mr Shaw and Mr Middleton, that they took no measures to reassure the Claimant that his personal property would be protected. The vandalism to his van, Mr Shaw and Mr Middleton were aware was likely to have been carried out by one of his colleagues at the Depot. Mr Shaw and Mr Middleton were aware of the tensions at the Depot. We find that the Respondent had not taken adequate steps to deal with the graffiti and the harassment the Claimant had been subjected to and we find that the Respondent did not provide him with adequate reassurance that his car would be safe.

365. Mr Shaw's evidence before the tribunal was that the MEWP work would have been temporary, for 5 or 6 weeks. Mr Shaw could not recall whether or not that had been explained to the Claimant however we note that Mr Shaw does refer to a "*temporary alteration the type of work allocated to you*" in the email of the 7 June.

366. The Claimant does not dispute that there was a back log of LED work and accepted during the investigation with Mr Ellis that he had been told on accepting the job that vehicles were allocated on the basis of need and that he may have to get to the Depot using his own vehicle.

367. That said, the timing of this decision to move the client onto the MEWP must be taken into consideration. There was no explanation from Mr Shaw about why the Claimant, who had never worked on a MEWP before, was now being asked to do it. Work which would require him to work alone and use his vehicle only a few weeks after having his company van vandalised. Mr Shaw did not explain why other men with experience of driving a MEWP were not available and in the circumstances we find the decision to move the Claimant on to the MEWP, absent any real explanation why it was necessary for him to do it, was unreasonable in that it must have been obvious to Mr Shaw that the Claimant would consider this to be a further attempt to single him out and isolate him. It was also insensitive not to provide him with reassurance around the safety of his car if he had to leave it at the Depot and to have discussed this with him and any concerns he may have not least Mr Shaw had only just completed a stress risk assessment with him and was aware he was feeling singled out .

368. In the event the Claimant was not required to carry out the MEWP work following his protests. Evidently Mr Shaw was able to make alternative arrangements. We do not find however that means that the decision to instruct him to do the MEWP work was not unreasonable and insensitive given the circumstances and the absence of any clear explanation why it was necessary to instruct the Claimant to do it..

June 2018 – further interviews

369. By June 2018 it was 3 months since the investigation first commenced and the majority of the Claimant s colleagues at the Depot had been interviewed and asked questions about the Claimant.

370. Mr Ellis then conducts further interviews in June. On 15 June 2018 he interviews Mr Rolt again (178). Mr Ellis in this interview refers to having had discussions with people about the Claimant not working safely "*historically*", he refers to having some evidence and; "I'm *looking for anything else you can give me or if you can corroborate what is already there*?"

371. No allegations have been raised by the Claimant's supervisors prior to this investigation about the Claimant not working safely. Mr Rolt's evidence is that the events he can comment on are going back about 18 months, he says that he cannot comment on how he now works and that the Claimant would not always have full PPE, and that ; "*probably as a group we didn't wear much as should have done but he would probably go one step beyond"*

372. Mr Ellis then questions Mr Rolt about information Mr Ellis has received that the Claimant would ram columns into the ground not knowing if the services were there. Mr Rolt refers to this happening but he mentions on a number of occasions that this was not isolated to the Claimant; "*probably seen more people than Dom".* Mr Rolt also explains that he should have been supervising the Claimant; "*my neck on the line as should have been supervising him*."

373. Mr Ellis then speaks with Mr Middleton again on the 15 June 2018 (183) and wants Mr Middleton to tell him more about a comment the Claimant is alleged to have had made some time ago to Mr Middleton; "I *know where people live, I've got mates*". Mr Middleton is a supervisor and does not state that he raised any complaint about this at the time, he says he cannot recall the exact words but "*just that got mates in Rochdale and all use to hang about*". Mr Middleton then refers to the Claimant saying a year ago that the Claimant had said *"I know where people live, I've got mates*", Mr Middleton says he thought it was just banter at the time. Mr Ellis nonetheless encourages him to try and remember why he said this and even suggests whether he might have been moaning about someone and finished off with "*I know where people live*".

374. The Claimant is not aware of the content of these interviews, he was not provided with a copy of the witness statements at the time, his complaints are about the how long the

investigation took, all the colleagues who were interviewed and from the interviews, the allegations that were being put to him. However, it is clear that the investigation was taking longer because the scope of it was being extended.

375. By June Mr Ellis had been investigating for 3 months, pursuing historic incidents, many of which were known to those in a supervisory or management capacity at the time of the incidents.

Claimant's complaints about the investigation

376. The Complaints about the investigation are the length of time it took and what the Claimant describes as the assassination of his character. The Claimant does not complain that the investigation was started in the first place. He was asked during cross examination and agreed, that the anonymous whistleblowing complaints were serious and that they had to be investigated. He complains about the length of time the investigation took, that so many people have been interviewed out of his colleagues and that the scope of the investigation was extended to include allegations about his conduct going back as far as 18 months.

377. The Claimant complains (in his witness statement) that; "*This dragged my mental illness into the gutter and made me ill. During the different meetings, my character was assassinated, my values were striped [sic] and I felt utterly useless to the lies and accusation against me".*

378. During cross examination the Claimant refuted that the report produced by Mr Ellis showed a full and fair investigation, he contended that the questions he put to the witnesses in the meetings were leading and that he was "*trying to bulk it - so outcome was I would be dismissed"* and "*how can I stay when everyone has been involved "*

ACAS – conciliation

379. On the 6 June 2018 the Claimant contacted ACAS.

21st June 2018: Interview with Claimant

380. It is now over 3 months since the investigation started and Mr Ellis carries out a further interview with the Claimant.

381. The Claimant starts by explaining to Mr Ellis that people from the Rochdale depot (where he use to work) have been talking about the last interview the Claimant had with Mr Ellis and "*other things going on*" (page 196). Mr Ellis asks about the "*early conciliation claim*" and that he understands it relates to *"victimisation*" and wants to understand it.

382. The Claimant refers to since the date of the incident with Paul Pickering and Chris Roe in 2017 he refers to being given "*rubbish work*", being set up to fail, being given the wrong vehicle to do the jobs he had been allocated and that his overtime had dropped. The Claimant also refers to rumours including that the Claimant and his wife had slept with the Union Representative and he alleges that allegation was started by Craig Rolt.

383. The Claimant also alleges that Mr Pickering and Mr Middleton have been telling the men at the Depot that the Claimant is "*getting everyone sacked*", he refers to this getting fed back to him by Andrew Edwards, Chris Carr and Richard Bird and that he has noticed; "*for a long time I walk into the yard and everyone goes silent- because of rumours I raised H and S concerns 18 months ago. It's a way to his me out, they're micro managing – I'm not allowed to book overtime the way the other lads do".*

384. The Claimant refers to sending Mr Ellis a response via Whatsapp to the allegation that he was "*throwing jobs back"* (196). It is not in dispute that the Claimant was receiving updates on the allegations from Mr Ellis.

385. The Claimant also refers to Craig Rolt spreading rumours about the Claimant and his wife. and their sex life. He does not implicate the management team in those specific rumours.

386. It is agreed that the Claimant will be put on paid suspension and that is confirmed in a letter

dated 22 June 2018 (page 213).

387. The Claimant in the notes at the end of this meeting refers to wanting" to get through it as hanging over me".

388. The majority of the Claimant's colleagues were of course also being called into interviews with Mr Ellis and being asked direct questions about the Claimant, including whether he was causing trouble with the DNO's, whether he was aggressive etc. This would we find have resulted in rumours and gossip about the Claimant and we accept the Claimant's undisputed evidence that rumours were being fed back to him by some of his colleagues and this was upsetting for him.

June 2018 Investigation meeting – with the Claimant

389. There is then a further meeting with the Claimant and at this meeting Mr Ellis raises further issues most of which are alleged to have taken place a year or more ago;

- concerns over how the Claimant does his job in terms of using the Hiab to take out and replace columns i.e. forcing the columns in – it is put to him that some of his colleagues have said it had done it *"in the past and regularly"*
- That the Claimant had brought in sexual videos of his wife about a year ago.
- That the Claimant does or has done steroids.
- Claimant being on site with no top on and not wearing PPE
- His aggressive behaviour towards an IMTECH manager about 18 months ago and alleged heated discussion with a site manager.

6th July – further interviews

390. Mr Ellis then conducts further interviews on 6 July with Pat Shaw, Paul Pickering and Christian Carr.

391. In the interview with Stuart Middleton conducted by Luke Ellis on 16 July (page 277) Mr Middleton is asked by Mr Ellis if he is aware of bad feeling and he states; "*Yes, there's going to be bad feeling – from his going* ***to VOSA*** *upsetting everyone – now in back of mind are we doing right thing though reassured them, it's in back of mind, that's human nature*"

392. When Mr Middleton is asked whether the Claimant 's colleagues at the depot feel threatened he states; (page 277) he replies; *"I don't think they feel threatened, just nervous and apprehensive with what's going to happen. It all started with the* ***VOSA thing****…*

*"***Disciplinary Policy – Breach**

393. Mr Ellis was asked by the Tribunal to clarify his position in relation to his decision to include in his investigation allegations which related to incidents which took place as long ago as 12 or even 18 months before the investigation, in the context of the disciplinary policy (page 402) which provides at paragraph D6.5.1 that ; "*where misconduct may have occurred, the matter should be investigated as thoroughly and quickly as possible. Unless unavoidable, the investigation should be completed within seven working days of the alleged misconduct"*

394. The evidence of Mr Ellis to this Tribunal was that he had taken advice from HR on how far back he should go in his investigations and that he was told not to investigate matters which had been closed off or dealt with.

395. Mr Ellis gave no evidence explaining why it had been *"unavoidable"* to conduct the investigations into the alleged incidents which had taken place many months previous, at the time.

396. Mr Ellis had raised with the Claimant at the meeting on the 25 April 2018 (page 154) the issue of people getting into skips and raising this with HSE rather than raising it with his line managers first. However, this was known to Pat Shaw, at the time and no action was taken and the matter had not been escalated. This had happened between 6 March 2017 and 16 March 2017 before the investigation started, according to Mr Shaw.

397. From allegations around PPE not worn over a year to 18 months ago, a few allegations of the Claimant losing his temper a year or so before, pornography on his phone a year before; these matters had not been investigated promptly and the decision to include them now in this investigation we find was unfair and not only a breach of natural justice, the delay making it much more difficult for the Claimant to respond to the allegations, the decision to investigate historic allegations which could have been investigated at the time was a breach of an express term of the Respondent's own discipline policy.

398. It was put to the Claimant and he accepted, that the various allegations of his aggressive behaviour were serious and he was not saying such allegations should be ignored but "*I expect it to come up at the time and discipline at the time"* he alleges they were fed back because; "*they didn't want me there*" because they had been told that he was going to bring the Company down.

Personal View of Mr Ellis

399. Mr Ellis, in his witness statement, in relation to his investigation states that; (paragraphs 25 and 25.1); "*Mr Glavey believed that he was carrying out illegal activity for E. ON on the basis of information he had allegedly received during a training course*…".

400. Mr Ellis confirmed in evidence that his personal view was however that after he had learnt from Ms Brown that she had spoken to the Claimant and given him information about the Tachograph Regulations, that the Claimant was trying to make trouble. The oral evidence of Mr Ellis before this Tribunal was; "*my personal view was that he was trying to make trouble - it was the statement from Stuart Middleton and Chris Torry, him saying it was all a game*". This is supported by the comments in his witness statement (paragraph 28) where he refers to being concerned that the Claimant was "*deliberately trying to undermine and make difficult the role of E.ONs s management by making such disclosures to VOSA*" and he goes on to refer to the comment about '*playing games'*.

Claim to the Employment Tribunal

401. The Claimant submitted a claim to the Employment Tribunal 30 July 2018. It refers to his employment continuing but alleges that he has been unfairly dismissed. The Claimant had not resigned by this stage.

402. The Claimant's evidence in cross examination was that on the 6 June when he contacted ACAS he was not looking to leave at that point, but felt this was "*only way to get help*". His evidence was that on the 6 July he was "*feeling pushed out*" but was not intending to bring a claim.

403. It was put to the Claimant that he resigned in September because he had to support the claim of unfair dismissal, he denied this and said it was "*because of the pressure, it had been one investigation going on after another- everyone in the yard was involved – I was a laughing stock – how could I ever go to work back at the yard after that.*"

Resignation

404. The Respondent submitted its defence to the claim in August and raised in hits defence that the Claimant could not bring a claim of constructive unfair dismissal because he was still employed. The Claimant resigned on 20 September 2018 (328)

405. By this date the Claimant was still on suspension. The investigation report had not been completed and would not be until sometime in October 2018. It was put to the Claimant by Ms Palmer in cross examination that one reason why the Claimant had resigned was to pursue Claims against the Respondent. The Claimant denied this was the reason. It was put to the Claimant that the other reason was because he knew what was being investigated. It was put to the Claimant that Mr Ellis was "*coming back and saying what do you say to this, so you knew what he was being told*", the Claimant confirmed that this was correct, that he did know. This is of course part of his complaint, that his character was being 'assassinated'.

406. The Claimant refers in his resignation letter to his 18 years of unblemished service and of being required to carry out work which would breach regulations, of being placed under investigation, subject to unfair informal investigations, being bullied by senior managers, isolated at work and complains of damage to his reputation and career prospects.

407. The grievance into his allegations raised on 21 June 2018 interview with Mr Ellis, was later investigated and the brief findings set out in a 5-page document. The undisputed evidence of the Claimant is that he was told his grievance was not upheld on 10 December 2018.The Claimant makes no complaint about the grievance itself.

The Legal Principles

408. Before reaching our conclusions in relation to the issues before us, we have had regard to the law which I am required to apply when considering the matters for consideration.

Disclosures qualifying for protection

409. Section 43A of Employment Rights Act 1996 (ERA) defines a 'protected disclosure' as a qualifying disclosure as defined by section 43B ERA which is made by a worker in accordance with any of sections 43C to 43H.

410. The opening words of section 43B of ERA provide that:

"(1*) In this Part 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 –*."

Section 43B then lists of six categories of wrongdoing. The categories relevant relied upon by the Claimant are those set out within section 43B(1)(a)(b) and (d);

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

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

(d) that the health and safety of any individual has been, is being or is likely to be endangered. person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject".

Disclosure of information: section 43B ERA

411. The disclosure must be of *information*. This requires for conveying of facts rather than the mere making of allegations: **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT.**

412. The word 'disclosure' does not require that the information was formerly unknown. Section 43L(3) provides that 'any reference in this Part (i.e. the provisions of Part IVA) to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention'.

413. The Respondent concedes that with respect to all 3 of the alleged protected disclosures, they were disclosures of *information.*

Reasonable belief

414. Section 43B (1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the *'reasonable belief'* of the worker:

- be made in the public interest, and

- tends to show one or more of the types of malpractice set out in (a) to (f) has been is being or is likely to take place.

Public Interest

415. The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making the disclosures; see Lord Justice Underhill's comments **Chesterton Global Ltd.v Nurmohamed [2018] ICR**

731 at paragraphs 27 to 30;

''28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured.

…

All that matters is that the Tribunal finds that one of the six relevant failures has occurred, is occurring, or is likely to occur and should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it…"

Reasonable belief in the wrongdoing

416. To qualify for protection the disclosure, the whistle-blower must also have had a reasonable belief that the information disclosed tended to show that the alleged wrongdoing had been/was being/was likely to be, committed. It is not relevant however whether or not it turned out to be wrong, the same principles as to reasonableness apply to the wrongdoing as to the public interest requirement.

417. As the EAT put it in ***Soh v Imperial College of Science, Technology and Medicine EAT 0350/14*****,** there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'. The EAT in Soh observed that there will be circumstances in which a worker passes on to an employer information provided by a third party that the worker is not in a position to assess. As long as the worker reasonably believes that the information tends to show a state of affairs identified in S.43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

418. The worker must reasonably believe that his or her disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely to occur*. The EAT considered the meaning of 'likely' in this context in ***Kraus v Penna plc and anor 2004 IRLR 260, EAT*****.** In the EAT's view, 'likely' should be construed as 'requiring more than a possibility, or a risk, 'the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is *probable or more probable than not* that the employer will fail to comply with the relevant legal obligation'.

419. When considering whether a worker has a reasonable belief, tribunals should take into account the worker's personality and individual circumstances. The focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. However, this is not to say that the test is entirely

subjective section 43B (1) requires a *reasonable* belief of the worker making the disclosure, not a genuine belief. This introduces a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT in ***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT*****,** which held that reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

Endangerment of health and safety

420. 'Health and safety' is a well understood phrase and so it will usually be obvious whether the subject matter of the disclosure has the potential to fall within Section 43B(1)(d).

Criminal offences

421. The Court of Appeal in ***Babula v Waltham Forest College 2007 ICR 1026, CA*** held that a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of any criminal offence or legal obligation on which the disclosure was based.

Identifying legal obligation

422. In ***Fincham v HM Prison Service EAT 0925/01*** **:** Mr Justice Elias observed that there must be 'some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the [worker] is relying'. However, in ***Bolton School v Evans 2006 IRLR 500, EAT*** held that, although the employee 'did not in terms identify any specific legal obligation' and no doubt 'would not have been able to recite chapter and verse', nonetheless it would have been obvious that his concern was that private information, and sensitive information about pupils, could get into the wrong hands. The EAT was therefore satisfied that it was appreciated that this could give rise to a potential legal liability.

The Tachograph Regulations

423. It is not necessary for us to determine whether the Respondent was or was not complying with the Tachograph Regulations. We have not been presented in any event with the necessary evidence to make any such determination. It is our understanding from the House of Lords decision to which Ms Pamler referred us (and which we address further below) that whether or not the Road Maintenance Exemption applies in any particular case is fact specific with factors such as whether the distance driven is classed as 'local' and what the equipment will be used for and when, are relevant factors and we were not presented with evidence in relation to all these factors. We are however concerned only with the issue of reasonable belief

424. Ms Palmer set out in her submissions, reference to the guidance on "vehicles used in connection with public services briefing note" produced by the Freight Transport Association briefing (page 43). The briefing note succinctly sets out the legal position and confirms that what constitutes a 'vehicle used in connection' with the relevant service has been the subject of a number of significant court rulings from the European Court of Justice and common themes have included:

- The principle of a general service in the public interest
- A direct and close involvement in the exempt activity and
- The limited and close involvement in the exempt activity.

425. Counsel refers to the opinion of **Lord Hope in the House of Lords decision in Vehicle Inspectorate v Bruce Cook Road Planing Ltd [1999] UKHL 34** and indeed the briefing note refers to this as one significant ruling on the issue of the interpretation of 'vehicles in connection with**'.** Lord Hope makes the following observations;

"It is plain that some limit must be set to the width of the expression "in connection with" in the context of highway maintenance if the derogation is not to defeat the purpose of the regulation. Highway maintenance and control is an activity which can be defined with reasonable precision by reference to the works which are taking place on site. While the works are going on vehicles which are being used for the purpose of **highway maintenance may travel some distance away from the site**, for example when they are removing rubble or other material from the highway to a place of disposal and returning empty from that place to the site. Their journeys to and from the site in the course of that work will be "in connection with" highway maintenance. *Other examples may be envisaged, such as where vehicles are being driven from a highway maintenance yard or depot in **the locality** so that they can be put to work, used or operated that same day in highway maintenance. Their transportation from the **local yard or depot** to the site of the works, and their return there at the end of the working day, will involve travel over short distances and for short periods. As in the example provided by the movement over **short distances** of empty refuse collection vehicles, the movement of such vehicles within these limits will be ancillary to, and thus "in connection with," their use in highway maintenance.*

*But there is a clear and obvious difference between the movement of such vehicles to and from the site in the course of the day's work there by that vehicle and the use of vehicles for transporting highway maintenance equipment **from one site to another prior to the commencement of the works**.* On the whole, vehicles which are to be used or have been used that same day in connection with highway maintenance and control do not travel far from the site where the work of highway maintenance is being carried out. ***But the transportation of equipment to or from the site may be over long distances. It may take place before the works have begun on site or after they have been completed there**. The purpose of using the vehicle which is being used to move the equipment is simply that of transportation. **Such use is indistinguishable from the business of transporting equipment by road hauliers who are in business as such and not as the providers of highway maintenance services.** It would be contrary to the principle that conditions of competition should be harmonised to permit the providers of highway maintenance services to dispense with the use of the tachograph when transporting equipment to or from the site while road hauliers who were providing the same service were obliged to make use of the tachograph*

Lord Clyde in his judgement commented on the fact specific nature of each situation;

"*A remote connection will not meet the requirement that the purpose of the Regulation must be secured. There must be a close connection. **But the language of remoteness or closeness is not of immense assistance, except as an indication that in some cases the eventual solution may rest upon an assessment of the particular facts***

*In the present case we are concerned solely with the carriage of a very substantial machine in the course of a journey of quite considerable length. At the time in question the vehicle was engaged solely in the operation of the carriage of the machine. The use of a vehicle to carry a substantial machine to a site with the intention that at that site it might be put to use for the purpose of road maintenance work seems to me at least as a matter of generality too remote a use to qualify as a use in connection with road maintenance. **But the matter is eventually one of fact and I find the factual basis on which the justices proceeded to be inadequate**. I am not persuaded that on the facts found they were entitled to draw the conclusion which they drew. The mere fact that the plant was being transported "to a site so that it could be operated" does not in my view establish a sufficiently close connection to admit the exception.*

426. Our understanding from the House of Lords decision is that the position is not as simple as the Respondent asserts, in that the fact that the Road Maintenance Exemption does not provide that collecting stock from another depot/site before taking the stock to site falls outside of the exemption, it must mean that the exemption applies. Even if what is being carried on the HGV is going to be used for road maintenance, that is not definitive. What must be considered is the extent to which the task of carrying the equipment has a sufficiently close connection with road maintenance or whether is indistinguishable from the work of road hauliers and that will depend on a number of factors length of journey etc). However, we also note that Lord Hope referred to a distinction between travelling to and from the site where the road maintenance is being carried out, and using the vehicle to transport equipment **from one site to another prior to the commencement of the works**. This would appear to us to give room for debate as to whether the journey the Claimant was being asked to do was potentially outside of the Road Maintenance Exemption but in any event, it is at least we accept a 'grey area'.

Manner of Disclosure

Disclosure to employer

427. In relation to the first and second alleged protected disclosures, the Claimant relies upon Section 43C (1)(a) which provides that a qualifying disclosure that is made to the worker's employer will be a protected disclosure.

Exceptionally serious failures

428. With respect to the disclosure to DVSA, the Claimant relies upon section 43H ERA.

429. To be qualify for protection the following conditions must be met;

- the worker reasonably believes that the information disclosed, and any allegation contained in it, is substantially true — S.43H(1)(b)
- the worker does not make the disclosure for the purposes of personal gain — S.43H(1)(c)
- the relevant failure is of an *exceptionally serious nature* — S.43H(1)(d), and
- in all the circumstances of the case, it is reasonable for him or her to make the disclosure — S.43H(1)(e)

Meaning of 'exceptionally serious failure

430. There is no statutory guidance as to what is meant by an 'exceptionally serious failure'.

431. During the Parliamentary debates on the Public Interest Disclosure Bill Lord Haskel, observed on behalf of the Government: 'The intention is to provide as clear an indication as possible that the order of seriousness — if I may put it that way — is greater than that for other disclosures. The new section is meant to apply only in very rare cases. The purpose of inserting "exceptional" is to indicate that the case is indeed a rare case. Nobody wants individuals disclosing confidential information to other bodies unless the circumstances are exceptional. However, we all recognise that there will be concerns that are rare, but so grave that they need to be disclosed and dealt with as soon as possible. We believe that the current wording conveys that very clearly… [T]he best way to convey the order of seriousness under… S.43H is by referring to failures that are objectively judged to be exceptionally serious. There may be disclosures which are very serious, but hardly exceptional, and such disclosures would be protected under other provisions in the Bill' (Hansard (HL), 5 June 1998, cols 629–30)

432. *In* ***Bolkavac v DynCorp Aerospace Operations (UK) Ltd ET Case No.3102729/01*****:** B worked as a police monitor, under the control of the United Nations, in Bosnia. She became deeply concerned about the trafficking of women and girls for prostitution by organised criminal gangs and believed that police monitors and their superiors were not taking the problem seriously. As a result she sent a memo to about 50 people working for her employer and for the United Nations containing graphic details about the issue. She also implied in the memo that many of its recipients were habitués of brothels. B was subsequently dismissed and she claimed that her memo was a protected disclosure and she had been dismissed because of it. A tribunal upheld her claim. It ruled that B's concerns had to be set in the context of a grave humanitarian situation involving the exploitation and enslavement of women by criminals. The tribunal had no hesitation in finding that the failure of some elements of the UN administration to take an adequate grip on the situation and do something about it was of an exceptionally serious nature satisfying the requirements of S.43H.

Detriment under S.47B ERA

433. Section 47B(1) ERA provides that a worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his or her employer on the ground that the worker has made a protected disclosure.

434. There is no statutory definition of a detriment but it covers general unfavourable treatment. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR**; it is not necessary for there to be physical or economic consequences.

435. In addition, under S.47B(1A) a worker has the right not to be subjected to any detriment by

any act, or any deliberate failure to act, done by another worker of his or her employer in the course of that other worker's employment, or by an agent acting with the employer's authority, on the ground that the worker has made a protected disclosure.

Causation

436. Whether a claim alleges detriment by an employer contrary to section 47B(1) or by a worker or agent contrary to section 47B(1A), the approach to causation will be the same.

437. In a detriment claim it is for the employer to show the ground on which any act, or deliberate failure to act, was done: section 48 (2)

438. Once all the other necessary elements of a claim have been proved on the balance of probabilities by a claimant i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment, the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure

Drawing inferences.

439. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the detriment complained of, it may be appropriate for a tribunal to draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact.

440. The EAT summarised the proper approach to drawing inferences in a detriment claim in ***International Petroleum Ltd and ors v Osipov and ors EAT 0058/17*:**

- the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made

- by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences ***may*** be drawn against the employer (or worker or agent) — see *London Borough of Harrow v Knight 2003 IRLR 140, EAT*

- however, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

- If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default.

441. ***Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14*:** the EAT adopted the same approach as that taken by the Court of Appeal in *Kuzel v Roche Products Ltd 2008 ICR 799, CA*. The Court of Appeal in *Kuzel* held that, having rejected the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party. In *Ibekwe*, the EAT concluded that there were no grounds for interfering with the tribunal's unequivocal finding that there was no evidence that an unexplained 'managerial failure' to deal with an employee's grievance was on the ground that the grievance contained a protected disclosures.

Proving causal link between disclosure and detriment

442. The Court of Appeal in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*,** Elias LJ refused to accept that the causation test for detriment in S.47B should be aligned with that for unfair dismissal in S.103A. The latter provision states that an employee is deemed to have been unfairly dismissed where the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure. He accepted that it was anomalous that liability for unfair dismissal arises under S.103A only where the protected disclosure is the employer's ***sole***

or principal reason for dismissing the employee. But Elias LJ reasoned that this was simply the result of placing dismissal for making protected disclosures into the 'general run' of unfair dismissal law. In his view, S.47B will be infringed if the protected disclosure ***materially (in the sense of more than trivially) influences*** the employer's treatment of the whistleblower.

443. *Counsel for* the Respondent referred in her submission on the issue of causation to the authorities of **Bolton School v Evans [2007] IRLR 140**; IT teacher who hacked into the school computer system to demonstrate the insecurity and was disciplined. The Claimant 's claim of constructive unfair dismissal was rejected because he had been disciplined for the misconduct of hacking, not the act of whistleblowing. And the case of **Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500;** a case where it was held that a police officer's dismissal was because of his long- term sickness absence and his obsessive pursuit of complaints and therefore in no sense whatsoever connected with the public interest disclosures that he had made

No need for comparator.

444. While consideration of a comparator is not ruled out and may be of assistance in some cases, there is no requirement for a comparator in order to establish a S.47B claim.

Automatic Unfair Dismissal: section 103A Employment Rights Act 1996

445. The burden is on the Claimant to establish that the reason or principal reasons for dismissal was that he had made a protected disclosure.

446. If the employer reacts in a hostile, provocative or insensitive manner towards an employee who makes a protected disclosure, this can lead to claims that the employer has breached the fundamental term of trust and confidence that is implied into every contract of employment ***Clinton v After Care (North West) Ltd ET Case No.2100739/11***.

447. ***Pye v Community Integrated Care ET Case No.2401872/16***, was a case where the Claimant relied upon a number of incidents culminating in a final straw. On the tribunal's findings, only two of CIC's failings that contributed to the constructive dismissal were arguably motivated by the protected disclosure and the final straw was not one of them.

Constructive Unfair Dismissal – section 98 Employment Rights Act 1996

448. Section 95 (1) (c) of the Employment Rights Act 1996 provides that;

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …only if)
(b) the employee terminates the contract under which he is employed (with or without notice) in circumstance in which he is entitled to terminate it without notice by reason of the employer's conduct."

449. The parties to an employment relationship are subject to an implied obligation that they will not, without reasonable and proper cause, calculated or likely to seriously damage or destroy trust and confidence' between them — ***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL*.** This term is regarded as being so fundamental that any breach will be taken to have repudiated the employment contract. There are two questions to be asked when determining whether the term has, in fact, been breached; was there 'reasonable and proper cause' for the conduct and if not, was the conduct 'calculated or likely to destroy or seriously damage trust and confidence. A breach of this fundamental term will not occur simply because the employee (or employer) subjectively feels that such a breach has occurred, no matter how genuinely that view is held. The legal test entails looking at the circumstances *objectively*, from the perspective of a reasonable person in the claimant's (or respondent's) position.

450. **Omilaju v Waltham Forest London Borough Council 2005 ICR 481 CA** : in his judgment Dyson LJ summarised the general law of constructive dismissal as follows (p. 487 B-H)

(1) *The test for constructive dismissal is whether the employer's actions or conduct*

amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761

(2) It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1998] AC 20 , 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'

.(3) Any breach of the implied term of trust and confidence will amount to a repudiation of the contract - see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 , 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).

(4) The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at objectively , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).

(5) A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents.'

451. The last straw principle has been explained in a number of cases, perhaps most clearly in ***Lewis v Motorworld Garages Ltd [1986] ICR 157*** . Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence

452. In ***Wigan Borough Council v Davies 1979 ICR 411, EAT***, the EAT held that there was an implied term in an employee's contract that his employer would take such steps as were reasonable to support him in his duties without harassment or disruption from colleagues.

453. In ***Lim v Royal Wolverhampton Hospitals NHS Trust 2011 EWHC 2178, QBD*****,** the High Court held that even in the absence of an express term, 'it is no doubt an implied term of contracts of employment that disciplinary processes be conducted fairly and without undue delay'.

454. Employers are likely to be in breach of the implied term to provide a suitable working environment if they allow bullying at work, or fail to take adequate measures to prevent it. In ***Moores v Bude-Stratton Town Council 2001 ICR 271, EAT****,*

455. A breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer that cumulatively amount to a repudiation of the contract. The last straw does not, of itself, have to amount to a breach of contract, still less be a fundamental breach in its own right — ***Lewis v Motorworld Garages Ltd 1986 ICR 157, CA***. In that case the Court of Appeal stressed that it is immaterial that one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach and that the employee did not treat the breach as such by resigning.

456. In ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA*****,** the Court of Appeal clarified that an employee who claims unfair constructive dismissal based on a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act, the last straw, forms part of the series. The effect of the final act is to revive the employee's right to terminate his or her employment based on the totality of the employer's conduct.

457. ***Bisrat v Guarding UK Ltd ET Case No.2206074/16***: The employment tribunal concluded that B had resigned because his trust and confidence had been destroyed by a series of actions by G UK Ltd which largely flowed from and compounded each other. While not every one of these incidents constituted a breach of contract, many did, and some were repudiatory in their own right. The tribunal concluded that G UK Ltd had had no reasonable

or proper cause for its conduct and B's claim of unfair constructive dismissal was accordingly upheld.

458. The implied term of trust and confidence; the conduct the components of which are not individually repudiatory but which cumulatively constitutes a breach of that term as conduct which "crosses the *Malik* threshold".

459. Counsel has referred to **Buckland v Bournemouth University** [2010] IRLR 445. In **Buckland**; the Court of Appeal reaffirmed that the correct test of whether an employer has committed a fundamental breach is objective, it is not subject to the range of reasonable response, Lord Justice Sedley giving the leading judgement made however the following observation;*"28. It is nevertheless arguable, I would accept, that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement"*

Affirmation

460. Lord Justice Sedley in **Buckland** also addressed the issue of affirmation (and whether a breach can be cured);"*44. …a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends."*

461. The EAT in ***JV Strong and Co Ltd v Hamill EAT 1179/99*** ;"*15. Finally, when considering the issue of waiver, the very nature of the waiver will need to be considered. It is not only a question of seeing whether the facts give rise to either an express or implied waiver, but considering the terms of the waiver itself. Is it a once and for all waiver, or do the circumstances give rise to the implication of a conditional waiver, for instance a waiver subject to the condition that there would be no repeat of similar conduct or, as in this case, that the Appellants would not continue the lack of support. Finally, of course, any finding of waiver has to be identified and based on clear facts or inferences from established facts" JV Strong and Co Ltd V Hamill EAT 1179/99*

462. Ms Palmer referred in her submission to the case of C**hindove v Williams Morrisons Supermarket Plc [2014] UKEAT /0201/13.** And I will set out the paragraphs here which were set out Ms Palmers submissions as they are helpful in restating the position on delay and waiver;

Para 25: this may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principal is whether the employee has demonstrated that he has made the choice. It would do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation is discharging him from his obligations, have to do.

26. He may affirm a continuation of the contract in other ways double: by what he says, by what he does, by communications which showed that he intends the contract to continue. But the issue was essentially one of conduct are not of time. The reference time is because if, in the usual case, the employees at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context.

Causation

463. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in issue. This means that if there is an underlying (or ulterior) reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.

464. Where there are mixed motives, a tribunal must determine whether the employer's repudiatory breach was an *effective cause* of the resignation. However, the breach need not be 'the' effective cause.

465. Ms Palmer refers to the authority of ***Wright v North Ayrshire Council 2014 ICR 77, EAT*.**The summary provided as follows**; "***In order to determine a claim for constructive dismissal, a Tribunal had applied a test, referred to in Harvey , whether the contractual breach by the employer was "the effective cause" of an employee's resignation. It was now time to scotch any idea that this approach is correct if it implies ranking reasons which have all played a part in the resignation in a hierarchy so as to exclude all but the principal, main, predominant, cause from consideration. The definite article "the" is capable of being misleading. The search is not for one cause which predominates over others, or which would on its own be sufficient, but to ask (as Elias J put it in Abbey Cars v Ford) whether the repudiatory breach "played a part in the dismissal"*

Unlawful Deduction from Wages : section 13 ERA

466. Under section 13 (1) ERA, a worker has the right not to suffer unauthorised deductions. A deduction is defined in section 13 (3) as follows; '*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated … as a deduction made by the employer from the worker's wages on that occasion'*

467. The meaning of 'properly payable' arose for consideration by the Court of Appeal in ***New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA.*** In Lord Justice Morritt's view, the phrase 'properly payable' suggested that some legal — but not necessarily contractual — entitlement to the sum in question was required. This, he thought, was confirmed by S.27(1), which defines wages as 'any sums payable to the worker in connection with his employment … whether payable under his contract or otherwise'. He did not believe that the words 'or otherwise' extended the ambit of 'sums payable to the worker in connection with employment' beyond those to which the worker has some legal entitlement.

Submissions

468. Ms Palmer went through her written submissions orally. They were lengthy and I will not repeat them. We have read and considered them. Some of the key points raised were that Ms Palmer argues there was insufficient information to establish that the Claimant had made a disclosure in relation to the October 2017 disclosure to meet the public interest test. In respect of the disclosure to DVSA and the disclosure to the Respondent in February 2018, the Claimant did not have a reasonable belief that the Respondent was in/likely to be in breach of the Tachograph Regulations and further that the disclosure to DVSA does not meet the test of being of an exceptionally serious nature. It is argued that none of the alleged detriments are in fact detriments and with regards to the vandalism to the company vehicle, that the Respondent cannot be responsible for something that it has no control over. Ms Palmer submits that the Claimant was causing serious unrest among the workforce and that if anyone had breached trust and confidence it was him because he wanted to leave but wanted a pay- off so he set about behaving in the most disruptive way possible. I have addressed in the section dealing with legal principles the various case authorises Ms Palmer set out in her submissions.

469. The Claimant made his submissions orally. The Claimant set out again in summary the allegations and key facts. He referred to **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT** and an Employment Tribunal decision at first instance; **Mrs A Fletcher v Countrywide Estate Agents July 2017,** a case involving TUPE send constructive unfair dismissal, which I have read and considered. The Claimant at the end of his recap of the allegations, referred to being pushed out, of a failure by the Respondent to comply with its duty of care toward him and of a failure to support him to make sure the working environment was safe including a failure to carry out the risk assents despite knowing about his problems with depression. He referred to having his career ruined and the impact on his family life.

Conclusions/ Analysis

470. We are concerned with three alleged protected disclosures, we shall deal with each in turn and set out our analysis in respect of the extent to which each meets the requirements of section 43B ERA.

Alleged disclosure in October 2017: Disclosure 1

471. The Claimant alleges that he made a protected disclosure to his employer in October 2017 which in terms of wrongdoing concerned; a criminal offence, breach of a legal obligation and the health and safety (sections 43B (1) (a)(b) and(d)

Disclosure of Information: section 43B ERA

472. The Respondent concedes that the Claimant made a disclosure of *information.* It is necessary for this Tribunal however to determine what the information was which was disclosed. We find on the evidence that the Claimant had raised in October 2017 direct with the Respondent's management team and specifically we find on a balance of probabilities with Mr Shaw, that he believed following what he had been told by a trainer on the course he attended in September, that driving an 18 tonne lorry to collect columns from another site/depot and then drive from there on to a site for installation, required a tachograph and was outside of " scope" i.e. outside of the applicable Exemptions because it became a delivery and collection vehicle.

473. We find that this was not an itself an allegation but that the Claimant was conveying information and applying that to the circumstances of the work that he was being asked to carry out (and which he had carried out on previous occasions). Further, the Claimant had suggested to Mr Shaw what the Respondent needed to do to comply with the Tachograph Regulations i.e. that the columns should be delivered to the Depot first.

474. The Claimant's evidence is that he believes that what he was being asked to do would amount to a criminal activity, endanger the health and safety of any individual and a breach of legal obligation, namely a breach of the Tachograph Regulations and a legal obligation to protect the Respondent's drivers and the public, this was his evidence as to his belief at the time

Did the Claimant hold a reasonable belief?

475. A significant amount of time was spent by Ms Palmer cross examining the Claimant as to the reasonableness of his belief that the activities of the Respondent would amount to a breach of the Tachograph Regulations. The Claimant maintained his belief throughout the hearing, even obtaining the report from DVSA for the reconvened hearing which he understood supported his understanding of the Regulations (page 434). The Claimant appeared to us when giving his evidence, to be sincere in his belief regarding what he had been told on the course. What he had been told on the course was not disputed. Although Mr Ellis considered checking what had been said to the attendees on the course, he did not consider it necessary to do so.

476. If after making the disclosures, the Claimant was acting in bad faith by telling colleagues that they were driving illegally or whatever he meant by 'playing games', that is not relevant for the purposes of determining whether the disclosures amounted to protected disclosures at the time they were made, good faith no longer being a requirement of section 43B.

477. The disclosures In October 2017 and February 2018 to management and indeed the initial telephone enquiry to VOSA, predated the information supplied Ms Brown.

478. The Claimant does not argue before this Tribunal that he believed when he made the disclosures that the interpretation by the trainer on the course was necessarily right, he understood it was a grey area however we find that he held a reasonable belief when he made the disclosures that the information he had obtained from the course and passed on to the management of Respondent; *tended* to show that a criminal offence/breach of a legal obligation and a breach of health and safety of the public is likely to be endangered.

479. Mr Pickering referred to the Respondent '*sailing close to the wind'*, from which we infer he believed that the Respondent's implementation of the Tachograph Regulations was only just compliant. We also consider our own understanding from reading the authorities provided, and most notably the **decision in Vehicle Inspectorate v Bruce Cook Road Planing Ltd [1999] UKHL 34**

480. The Claimant is not a lawyer and cannot be expected to understand the intricacies of the law in this field however, it is clearly not straightforward and requires some skill to interpret and apply.

481. Mrs Brown herself felt she needed to make supplementary enquiries to ensure her interpretation that the Respondent's activities are compliant was correct.

482. We have little difficulty in finding that the Claimant held a genuine belief that the information he disclosed tended to show that the Respondent and indeed the Claimant, was likely to commit a criminal activity, namely a breach of the Tachograph Regulations and in doing so put the health and safety of the drivers and public at risk, and/or breach a legal obligation to protect the welfare of its staff including the Claimant and the public. Further, we have little difficulty in finding that this was objectively a reasonable belief.

Did the Claimant believe it was in the public interest?

483. The Claimant's evidence was that he believed that his disclosure was in the public interest because of the risk to the public of a driver who is "overworking" hitting someone and referred to the obvious risk of a fatal incident. We have little difficulty in finding that he considered that his disclosure was in the public interest purpose. It was without doubt and he accepted, also motivated by his very real concern that he may face personal criminal sanction and lose his 0 Licence but that does not mean because he had mixed motives his belief does not meet the necessary test.

484. Ms Palmer did not put it to the Claimant in cross examination that he did not have a reasonable belief that the disclosure was in the public interest. Her focus was on the reasonableness of his belief that there was likely to be a breach of the Tachograph Regulations.

Manner of disclosure

485. The Claimant made the disclosure to Mr Shaw, a member of the management team. Mr Shaw is the Claimant 's line manager. We note that the Whistleblowing policy expressly provides that disclosures can be made via line a manager. We find that the disclosure was therefore made in accordance with section 43 C (1) (a).

Alleged disclosure in February 2018 - DVSA: disclosure 2

486. The Claimant alleges that he made a disclosure to the DVSA in February 2018.

Disclosure of information

487. The Claimant 's evidence under cross examination was that he was asking questions and seeking clarify about the Tachograph Regulations. It is clear from the email reply of the 21 February that he had disclosed some information and we find what he provided was some information about the vehicle he was being asked to drive and the purpose of his journey and we find had, on his undisputed evidence, sought clarity on whether this journey would be within the Exemptions under the Tachograph Regulations. We do not find that he has disclosed any more information than this. In his email of 21 February 2018, the Claimant provides more information and states "*But we have to go and pick up these lampposts from other depots on pre-planned emergency works which is the part that I have concerns with whether or not I'm in scope or out of scope with Tacho Regs"* (171)

Reasonable Belief

488. We do not find however that the Claimant held a reasonable belief at the time he contacted DVSA in February 2018 that he was at that stage disclosing information which tended to show alleged wrongdoing by the Respondent, rather what he was doing was asking questions to check his understanding of the Tachograph Regulations. Indeed, Mr Wishart responds by stating; "*To be able to answer[d] your question could you clarify*…". Not only had the Claimant not provided sufficient information, this suggests that the Claimant was asking a question rather than revealing information tending to show a breach at this stage, as the Claimant stated in his evidence, he was checking his understanding. We do not accept that the Claimant himself believed the information tended to show a malpractice in terms of a legal obligation, criminal activity or health and safety at this stage and that in any event, it would not objectively be a reasonable belief that he was doing so based on the evidence available to us.

489. The Claimant replies by email of the 21 February 2018. It does not state; "I am concerned that we are working out of scope", it states "I have concern with whether or not I'm in scope or out of scope". It is an evenly balanced question which does not indicate that the Claimant believes that it is "likely" to be out of scope.

Manner of disclosure: section 43H ERA

490. In any event, we must consider the manner on which the Claimant made the disclosure and there are 4 limbs to satisfy and we take each in turn;

a. The worker reasonably believes that the information disclosed and any allegation contained in it, is substantially true;

The Claimant disclosed it is conceded by the Respondent, some information during the call with DVSA. The Respondent has not conceded what the information is. We find the information is no more than conveying some basic facts about the work he was being required to do (as we set out above) and he is additionally asking a question about the application of the Tachograph Regulations and the Exemptions. We find that the Claimant believed that what he had disclosed, was substantially true in terms of the information he gave about what he was being instructed to do.

b. Personal Gain;

It was not put to the Claimant in cross examination that he had contacted DVSA for personal gain and there is no evidence to indicate this.

c. Exceptionally Serious Nature;

We accept as does Ms Palmer, that the breach of the Tachograph Regulations is serious. Ms Palmer argues that while the Claimant is right to say that an abuse of the rules may allow drivers to drive tired and in turn they could fall asleep at the wheel which is clearly dangerous, however the Claimant did not give evidence, with respect to driving of the HGVs in the situations he was concerned with (collecting stock from third party sites) about the various journey times and the level of risk this may pose. The Claimant did not disclose and indeed does not allege in this hearing, that he is aware that drivers are driving while tired and in excess of what would otherwise be permitted under the Tachograph Regulations. We do not find that this disclosure would in any event, fall within the exceptional and rare category which section 43H is intended to apply to.

d. Was it reasonable in the circumstances to make the disclosure externally

We have considered that the Claimant had made a previous disclosure in October 2017 and that Mr Shaw had not been diligent in checking out the position and reverting back to the Claimant. Regardless of Mr Shaw's not recalling this having been raised directly with him at the time, he at least accepts that he knew about the concerns raised by the Claimant, hence he took him off the NPG work. What is concerning to us, is that Mr Shaw accepted that he was unsure of the Tachograph

Regulations and indeed remained unsure when the Claimant raised it again in February 2018, and yet he did not take steps to inform himself whether his direct reports were driving in breach of the Regulations.

Mrs Brown's evidence is that she was not aware of the Claimant 's concerns until February 2018. We also find that when the Claimant raised this in February 2018 he received an unsupportive response from Mr Pickering. However, making a disclosure about potential wrongdoing by your employer to an external agency is a serious issue. The 'whistleblowing' regulations encourage responsible whistleblowing. The Claimant gave no explanation for not having contacted Ms Brown for example, he had no complaints about Ms Brown and how she dealt with him. He contacted DVSA before he had even spoken to Mr Shaw again. The whistleblowing policy also provides for a confidential complaints process. The Claimant therefore had other options. While we are sympathetic to his concerns and frustration regarding Mr Shaw's lack of attention to his earlier disclosure and we find on a balance of probabilities would have been an unreceptive reaction from Mr Pickering to his concerns, we do not find given the other options available to him, that it was reasonable for him to at that stage to have made a disclosure to an external body.

491. We therefore do **not** find that the disclosure to DVSA was a protected disclosure under section 43B ERA.

492. References going forward in this Judgement to protected disclosures therefore do **not** include the disclosure to the DVSA

Alleged disclosure February 2018: to the Respondent – disclosure 3

493. The Claimant alleges that he made a third and final protected disclosure on 8 February 2018 to his employer.

Disclosure of Information: section 43B ERA

494. The Respondent concedes that the Claimant made a disclosure of information.

495. Mr Shaw accepts that the Claimant had a telephone discussion with him on the 8 February 2018. The Claimant's evidence in his statement is that he had informed Mr Shaw in October 2017 that collecting stock from another site was out of scope and "was breaking the law", and we accept his evidence that this is what he told him. Mr Shaw did not dispute that he had removed the Claimant from this work, this itself is an indication of how serious he understood the Claimant 's objections to be. To assert as Ms Palmer attempts to do in her submissions, that the Claimant was only asking questions is simply we find not credible. Mr Shaw's own evidence was that the Claimant was 'whistleblowing' when he contacted DVSA, and therefore he believed that the Claimant had done more than just ask questions regardless of our findings as to what was actually disclosed to the DVSA. Mr Shaw then asked Ms Brown to meet with the Claimant, his evidence was that he himself needed to check the Regulations.

496. The Claimant then met with Ms Brown and told her had contacted DVSA. Ms Palmer accepts in her written submission that "*it is clear enough that during these discussions the Claimant was asserting his belief that some of E. ON's practices were in breach of the tacho rules."*

497. We find that in terms of what was disclosed, it was that the Claimant believed that the practice of drivers collecting stock from another depot and driving it to site fell outside the Exemptions and was therefore because of what he had been told on the course previously, a breach of the Tachograph Regulations. This is supported by Ms Brown's evidence that she did not want to debate with the Claimant as to who was right and who was wrong in their interpretation of the Regulations

Did the Claimant hold a reasonable belief?

498. For the same reasons as we set out above in relation to disclosure 1, we find that the Claimant had a reasonable belief in the alleged wrongdoing, there had been nothing said to him by Mr Shaw since the disclosure in October 2017 which we find did or should have objectively, changed his belief.

499. Although it is argued by Ms Palmer that the information supplied by Ms Brown at the meeting with him on the 9 February 2018, about the application of the two Exemptions meant that he no longer held an objectively reasonable belief and he would not listen to her because he had been on a course for two days and thought 'he knew better', we do not accept those submissions.

500. Ms Brown, we find had commented to the Claimant that it was a 'grey area'. Ms Brown's own evidence was that she was not prepared at that meeting to engage in a debate with the Claimant about the correct interpretation, hence their discussion could not have been particularly detailed. Further, Ms Brown asked the Claimant to keep her informed when he had a response from DVSA. The natural assumption we find of any reasonable person in that situation would be that Ms Brown was interested in the reply because she felt herself that there was some doubt or room for alternative interpretation. Indeed, that she herself with all her experience, believed this is we find supported by the fact she made her own further enquiries seeking to support her understanding, when she contacted the FTA. The response she received and disclosed to the Claimant, did not specifically address his concerns about collecting from a third-party depot.

Did the Claimant believe it was in the public interest?

501. For the reasons outlined in relation to disclosure 1, we accept the Claimant 's evidence that he believed that his disclosure was in the public interest.

Manner of disclosure

502. The Claimant made the disclosure to Mr Shaw, a member of the management team and to Ms Brown, the transport manager. We find that the disclosure was therefore made in accordance with section 43 C (1) (a).

503. Ms Palmer argues that the Claimant's conduct in telling his colleagues they could lose their jobs raises an issue about the manner of disclosure however that does not detract from whether the disclosure to his employer was protected.

504. We shall now address the claims of alleged detriments arising from the protected disclosures, the claim of automatic unfair dismissal and then consider the claim of constructive unfair dismissal.

Detriments: section 47B ERA

505. We shall now deal with each of the claims of detrimental treatment.

January 2018: unauthorised deduction from wages

506. For the reasons set out below in which we address this claim separately, we do not find that the Claimant suffered an unlawful deduction from wages thus, we do not find that as a matter of fact or law, the Claimant suffered a detriment. We find that the Claimant had claimed two hours for overtime which we find on the evidence, he was not entitled to claim and thus it was not 'properly due.'

507. Further, this adjustment to his time sheet took place in January 2018, this was before the protected disclosure in February 2018. Although after the disclosure in October 2017, Mr Shaw had removed the Claimant from the NCC work and we do not find that there was anything material that had happened as between Mr Shaw and the Claimant until February 2018. Further, it was Mr Pickering who amended the timesheet and his evidence is that he would sometimes amend timesheets where they had been completed incorrectly, which we accept given the absence of any evidence that there had been further alterations to the Claimant's timesheets which reduced the overall hours he was claiming and to be paid for

(other than the one in relation to the unlawful deduction claim which we address separately but which we find relates to a payment which was not in any event properly payable). We do not find any evidence to support the claim that this was a detriment done on the ground that the Claimant had made one or more of the protected disclosures.

508. The evidence of Mr Pickering is that the Claimant was treated consistently with everyone else who attended the training day. The Claimant did not give any evidence to the contrary and did not put it to Mr Pickering that this was not true. This was not a detriment and we find that in any event it was not done because of the October 2017 protected disclosure. This claim therefore does not succeed.

February 2018: sworn at by Paul Pickering and Stuart Middleton

509. We are not able make findings in terms of what was said to the Claimant and thus we do not find that what was said amounted to a detriment. Further the Claimant does not allege that he was making a protected disclosure when he spoke to Mr Pickering, he relies on what he said to Mr Shaw after he had contacted DVSA.

12th March meeting with Mr Shaw:

510. We find that the way the investigation into this issue was carried out, was outside of the normal practice of holding an informal one to one discussion and we find that it unreasonable not to show support of concern or otherwise address the serious issues the Claimant raised in this meeting of feeling victimised and singled out. There was an abject failure to support him and show him any sympathy or concern. We find therefore that this amounted to a detriment.

511. By the date of this meeting, the Claimant had made the protected disclosure in October 2017 and February 2018 to Mr Shaw and Ms Brown and we have gone on to consider whether the way this meeting was conducted was materially influenced by those protected disclosures.

512. There is no direct evidence to connect the way the Claimant was treated in terms of the way this meeting was conducted with one or other of the protected disclosures.

513. We have considered whether it is appropriate to draw an inference in the absence of a satisfactory explanation that the way the meeting was conducted and the lack of support shown was on the grounds of, in the sense of being materially influenced by the protected disclosures. We do not consider however that there is evidence to support such an inference. The undisputed evidence of the Respondent is that the Claimant's colleague had been subject to the same treatment in terms of the investigation process. Further, we have taken into account that when the Claimant had objected to driving the 18-tonne vehicle on the NCC contract in October 2017, Mr Shaw had allocated him other work. The Claimant does not allege that Mr Shaw expressed any ill feeling or displayed any annoyance toward him at the time, he simply rearranged the teams. That was at least 4 months before this meeting had taken place. Other than the failure to follow up the OH risk assessment, the Claimant does not complain about Mr Shaw's behaviour towards him after October and before the March meeting. There was then the further protected disclosure in February 2018, when the Claimant had again made a disclosure to Mr Shaw. We have considered whether this alone or in combination with the disclosure in October 2017 materially influenced how Mr Shaw dealt with the Claimant during this meeting. The burden being on the Respondent to establish that the treatment was not for this reason. Mr Shaw in his evidence stated that he wished the Claimant had given the Respondent a chance to check the Regulations before he had contacted the DVSA (although of course Mr Shaw had been lax in not addressing this back in October 2017). Ms Brown referred in her evidence to being "miffed" that the Claimant had not raised this with her before raising it externally. She explained the significant implications she felt the raising the issues with DVSA may have on the business, a business which she was clearly proud of having made a material impact in terms of its compliance rating.

514. We have also taken into consideration that not only had the Claimant made an external disclosure to DVSA before the March meeting which we find had annoyed Mr Shaw (and Ms Brown) but that it had been reported back to Mr Shaw that the Claimant had made a

comment about 'playing games'.

515. We find that what upset Mr Shaw and indeed Ms Brown, was the decision by the Claimant to contact DVSA without first trying to resolve the matter further with the Respondent. On a balance of probabilities, it was this we find, aggravated by the comment the Claimant had made about 'playing games' which probably soured the relationship. Mr Shaw had not shown any ill feeling toward the Claimant when he expressed concern back in October about not driving the HGV and he expressed no frustration in his evidence before this Tribunal that the Claimant and raised this concern again (unlikely Mr Pickering), the only frustration he made plain was his frustration that the Claimant had bypassed him and contacted DVSA. Mr Shaw however, needs to accept that he was already aware of the Claimant's concerns and had not addressed them in the several months preceding this and had he done so, this situation may have been avoided.

516. There is a lack of evidence as to the reason behind the unusually excessive way the meeting was conducted however, there is nothing to suggest that this or any managerial failure to deal with his complaints had anything whatsoever to do with the protected disclosures. We find insufficient evidence to draw an inference that the treatment was on the ground of a protected disclosure. There is simply no evidence to find that causational link.

<u>March 2018 – offensive graffiti on his company vehicle.</u>

517. We have find on a balance of probabilities, that the vandalism took place at work and by one of the Claimant 's colleagues at the Depot. Although we find that the Claimant laughed initially when he showed the graffiti to Mr Middleton, we accept his evidence that he was nonetheless upset about it.

518. An employer is potentially liable under section 47 B(1B) for something done by one of its workers acting during his or her employment subject to the defence of having taken reasonable steps.

519. There was a deterioration in the working relationships at the Depot. Two of the Claimant's colleagues had made complaints about the Claimant through the whistleblowing confidential email. Comments from some of the men interviewed by Mr Ellis indicated their view that the working environment was not what it had been. Mr Torry referred to it as "*toxic*". Mr Pickering believed that the atmosphere had changed, it was not a "*happy ship"*.

520. Mr Middleton had himself warned the Claimant in respect of the DVSA disclosure that*; "I think you're going to upset a lot of people."*

521. We find that the disclosure to DVSA was a material factor in the deterioration of the working relationships at the Depot.

522. The Claimant alleges that this was a detriment because he made one or more protected disclosures. The evidence does not support a finding that the vandalism was influenced by the disclosure in October 2017, we do not find that there is any evidence that his colleagues at the Depot had been concerned let alone necessarily aware of what he had discussed with Mr Shaw in October 2017. There had been no vandalism to his vehicle in the several months from October 2017 to February 2018.

523. We do not find on the evidence that what the Claimant had said to Mr Shaw in October 2017 or to Mr Shaw and Ms Brown in February 2018, played any part in the vandalism. We do find that the vandalism was likely to have been influenced by the Claimant's actions in contacting the DVSA, the men being told they were driving illegally and perhaps what had been said to them by the supervisors including that the Claimant was 'playing games' and wanting to cause trouble for the company. The graffiti was not therefore we find on the grounds that the Claimant had made one or more of the protected disclosures, we do not consider they played any part in it.

524. I shall address how the Respondent dealt with the vandalism further in the section on constructive unfair dismissal.

From 13 March 2018: prevent from doing overtime

525. The Claimant's evidence is that he did not work an hour of overtime after the meeting on the 12 March 2018.The Claimant complains that although he had been subject to the meeting on the 12 March and issued the letter of the 13 March which set out that any overtime will be reflected purely on the hours worked, in practice his colleagues could claim more hours than they worked.

526. We find that this did happen in practice and that Mr Pickering was aware, but took the approach that he did not question the amount being claimed if it seemed 'reasonable'. There was no allegation by the Claimant that he had claimed overtime after the 13 March and that his claim had been rejected.

527. We find that after years of a practice where the men applied the Planned Timesheet as 'gospel', there continued to be a leniency in terms of how the new regime was applied. Mr Pickering did not consider he was able to identify easily what hours men had worked and worked based on 'trust'.

528. We find that in practice the supervisors took a rather relaxed approach to the instruction from Mr Shaw such that Mr Pickering assessed whether the work warranted the hours rather than police how many actual hours had been spent. We find on balance that this was because of the ingrained practice of recording time based on the nature of the job and while the Planned Timesheet may not have been officially the reference for what to charge as overtime, it remained the measure of what was reasonable.

529. This would understandably have felt unfair to the Claimant and we find it was unfair. The Claimant had been given a letter warning him in effect to only record the hours he worked, while in practice that was not enforced and resulted in inconsistency in how the men were to be remunerated.

530. We accept that Mr Shaw had communicated a change in the policy on how to record their time but we find that the supervisors in practice did not enforce it, not because of the protected disclosures, it is more likely that it was not policed because it was difficult in practice to do so and/or perhaps because it would have been unpopular to do it.

531. The Claimant was not the only one who felt that they were being treated differently and this we find more a matter of a failure to police and implement the policy then unfavourable treatment on the grounds of the protected disclosures. There is no direct evidence that this inconsistency was on the grounds that the Claimant had made a protected disclosure and we do not consider that it is appropriate to draw an inference that it was on the evidence.

March and April 2018: failure to implement OH recommendations

532. The OH health report dated March 2017 reported the Claimant having experienced *"acute psychological symptoms."* The report made important recommendations including the involvement of HR on his return to work and for a mediation to repair the working relationships with his line management. Neither of those recommendations were implemented. Although the involvement of HR was "strongly" advised, this did not happen until Mr Shaw sought their advice on how to complete the stress risk assessment with the Claimant, over a year later.

533. The explanation by Mr Shaw for not completing the assessment was wholly inadequate. Mr Shaw simply did not consider it important, his explanation we find that he did not have time was a nonsense. He simply did not prioritise it. He did not involve HR and he did not discuss it with the Claimant.

534. Ms Palmer put it to the Claimant that he had not chased up the stress risk assessment, he accepts he did not, however that does not remove the obligation on the Respondent to meet its obligations and to protect the welfare of its staff by implementing the recommendations of its own OH referral.

535. The March 2017 report and recommendations however, significantly predated the protected disclosures. By the date of the disclosure in October 2017, over 6 months had

passed without Mr Shaw taking any action. We infer from this period of inaction and Mr Shaw's unsatisfactory explanation for not acting, that Mr Shaw's failure was due to poor management practice rather than the protected disclosures.

536. The Claimant raised with Mr Shaw that standby was causing him difficulties with his mental health and Mr Shaw obtained a further report from OH in October 2017.Mr Shaw was not made aware that the Claimant was receiving ongoing support from his GP and treatment for poor mental wellbeing. It referred to anxiety but there was also reference to depression. The report suggested that the Respondent "*may*" find it helpful to have a monthly review for the next 3 to 6 months to ensure the workplace stressors are being managed; Mr Shaw had however not identified the workplace stressors by this stage because he had still taken no action arising from the earlier report.

537. Mr Shaw took no action in implementing the recommendations in this report other than removing the Claimant from the standby rota.

538. The stress risk assessment was not carried out until May 2018, after the disciplinary investigation had commenced and shortly before the Claimant was placed on paid suspension. We do not consider it a mere coincidence that the Claimant raised in his interview with Mr Ellis on the 25th April 2018 (151) that Mr Shaw had failed to conduct one to one monthly catch up meetings with him to discuss his stress levels. Suddenly after over a year, Mr Shaw met with the Claimant to conduct the stress risk assessment.

539. We find that the abject failure to implement the recommendations of the OH report was unreasonable and showed a lack of concern for the Claimant 's mental wellbeing. The fact that the Claimant did not complain earlier, does not prevent it from being a serious failure by the management to ensure that they provide him with adequate support and took reasonable measures to protect his welfare. There is no direct evidence that this failure was on the grounds of the protected disclosures and we do not consider, despite the lack of adequate explanation for this failure that an inference should be drawn. This failure was consistent with how Mr Shaw had dealt with the previous OH report, we find that Mr Shaw considered that ad hoc casual chats in the Depot was sufficient to support the Claimant. We find that the most likely explanation on a balance of probabilities was that Mr Shaw approached it has he had the last report, attaching little priority to following the recommendations in practice.

540. We do not find however that the failing was on the grounds of the protected disclosures.

Investigation by Mr Ellis From March 2018:

541. With regards the investigation carried out by Mr Ellis we find on the evidence, that the disciplinary investigation was prompted by the two anonymous whistleblowing complaints. The investigation did not commence we find on the evidence, because the Claimant had made either the protected disclosure to Mr Shaw in October 2017 or the subsequent disclosure to the management in February 2018. It was to a material extent we find however, influenced by the disclosure which the claimant made externally to DVSA. The anonymous complaint on 12 March 2018 specifically referred to the Claimant having reported the Respondent to VOSA.

542. The anonymous whistleblowing complaints also raised specific concerns that the Claimant was "supposedly" reporting the Respondent to DNOs and telling the men they are not following rules regarding the lorries and cable jointing. There are general comments about the Claimant creating bad feeling in the workforce but no specific reference to the disclosures to Pat Shaw in October 2017 or in February 2018.

543. The external disclosure to DVSA was not a protected disclosure for the purposes of section 43B ERA and therefore the decision to conduct an investigation even if materially influenced by that disclosure, could not amount to a detriment for the purposes of section 47B ERA.

544. Further, the claimant does not complain that Mr Ellis started an investigation. During cross examination when the Claimant was asked whether he accepted that the whistleblowing disclosures were serious and whether he accepted they had to be investigated, he agreed.

The Claimant complains about the length of time the investigation took, the number of his colleagues that had been interviewed as part of the investigation and extending the scope of the investigation so that it included allegations about incidents some of which had occurred over a year and a half before the investigation.

545. We do not find that the way the investigation was carried out in terms of its scope and length was materially influenced by the protected disclosures. We find that Mr Ellis included allegations which we find extended beyond the reasonable scope of his investigation because he had at some point, and given the reliance he places on the statement he received from Stuart Middleton about the 'playing games comment' this was most likely from the outset of the investigation, formed a personal view that the Claimant was a troublemaker. We do not find that this view was materially influenced by the protected disclosures. We therefore do not find in the Claimant's favour that this was a detriment under section 47B.

Subject to rumours/ accusations including about Claimant and Claimant 's wife's sexuality and quality of his work

546. We understand that the accusations about the Claimant work relates to the allegations investigated by Mr Ellis (for example the complaints about the Claimant's performance such as him having installed columns with a crane or accusations about him knocking back work by supervisors).

547. To the extent that the complaint is that these rumours were circulated and these matters raised by colleagues and supervisors because the Claimant had made the protected disclosures, we do not conclude that this is the case.

548. We find that the Claimant was increasingly seen as a difficult and wanting to cause problems for the Respondent, this may have been a view that the supervisors had held since the cable jointing incident in March 2017, reinforced in their minds by the Claimant continuing to raise issues, including for example with regards to men getting into the skips. However, we conclude that their perception of the Claimant and their opinion toward him hardened following the external disclosure to DVSA and his comments to some of his colleagues about the Tachograph Regulations. The Claimant had raised the same concerns in October 2017 to Mr Shaw about not wanting to drive the 18 tonne HGV and Mr Shaw had simply moved him onto other work, nothing material had happened since that date until the February disclosure to DVSA. We find no evidence and or do we consider an inference can be drawn, that these rumours and accusations had anything to do with the Claimant raising concerns about the tachograph back in October 2017 direct with Mr Shaw or raising the same issue again in February 2018 with Mr Shaw. What was different in February 2018 was that the Claimant contacted DVSA and the ill feeling this generated, creating as it was we find perceived, a potential threat to the men and the Respondent.

549. The Claimant complained about rumours about his wife's sexuality however the only evidence we heard around this issue, was the evidence that the Claimant and his wife were having a sexual relationship with the Union representative. This was the Claimant alleged, something mentioned by a colleague, Mr Rolt. There is no direct evidence that this was on the grounds of the protected disclosures and we do not consider that it would be appropriate to draw any inference that it was in any way because of that. We have taken into account the type of culture at the Depot including the sharing of pornography and the 'banter; between the men. We do not considerate it appropriate to infer that any comment that the Claimant and his wife were sleeping with his union representative was anything to do with him raising with Mr Shaw in October 2017 or in February 2018 but if this was malicious, this was more likely to be due to the complaint to DVSA and the issues around the men being told they were driving illegally. However, we also take into account that the Claimant shared pornography and issues around his and his wife's personal life may have been in part a consequence of material he shared at work.

550. We not find that these rumours or what was said about his work, was materially influenced, or in any way to do with, the discussions/ disclosures that the Claimant had made direct to Mr Shaw in October 2017 and February 2018. We find that these were more likely to have been influenced to some degree, by the disclosure to DVSA.

Automatic Unfair Dismissal: section 103A ERA.

551. The Claimant relies on the same alleged acts of detrimental treatment in support of his claim that the principal reason for his constructive unfair dismissal, was that he had made protected disclosures, he however pleads one additional detriment which he did not plead as a freestanding detriment claim under section 47B. This additional detriment claim relates to the instruction to drive the MEWP. The Claimant had raised this complaint in his amendment application. The Claimant did not apply to amend his claim to include the allegation around the MEWP as a separate detriment claim and confirmed at the outset of the hearing that he was content to proceed with the claims as pleaded.

MEWP

552. The Claimant was instructed to drive a MEWP. He had never driven a MEWP and although he had received training on how to work a MEWP in the past, it was accepted by Mr Shaw in cross examination that he would require training on the make and model of MEWP. The Claimant considered this a lesser role and it was not one he wanted to do. The Claimant's contract of employment refers to him as a '*cable jointer*' and the Claimant's evidence is that he was employed as a jointer not a MEWP driver. We were not taken to any contractual provision or job description which made it clear what the work of a jointer covers and whether this extends to driving a MEWP.

553. The Respondent's position is that this was work the Claimant could be required to do, that it was work which was shared amongst the men and was work the Claimant had the necessary skills for.

554. The Claimant complains that this would have resulted in a financial detriment, in that he would have to use his own vehicle and diesel to get to work and would not have the use of a company van. He also complained to Mr Shaw that this would segregate him from his colleagues, that this would be *"lonely*" and cause him more anxiety. Further, the Claimant complained about having to potentially bring his own car to work which was a concern given the previous vandalism. He also complained about a lack of shower facilities which would mean he would have to drive home in his work clothes.

555. Mr Shaw's evidence was that he simply required more men to carry out this type of work due to a backlog of work. The Claimant did not dispute that there was a backlog of work. However, we do not accept that we were being given the full story by Mr Shaw. The Claimant it is not in dispute, had in the 3.5 years he had worked at the Depot never once been asked to drive the MEWP. Mr Shaw did not explain why other more experienced and already trained men were not available. Coming as this instruction did in the middle of the disciplinary investigation and statements by the supervisors at the Depot that men were distancing themselves from the Claimant and that there was ill feeling toward him, we find that there was more to the decision to allocate the Claimant this work, work which it was not disputed would mean that he would be working alone.

556. It was work the Claimant had never done, it was work he clearly did not want to do and even if this was work which it may be argued was work he could be required to do within the express terms of the contract of employment or an implied obligation on him to be flexible, in the circumstances to separate him from his colleagues in the context of everything else that was going on, would understandably make him feel more isolated. Further, the Claimant had been subject to what we consider to be bullying and harassment in terms of the graffiti and the abusive stickers, to require him to come to work in his own vehicle without having put in place any measures to reassure him that his vehicle would be safe, was not only insensitive, but was a failure to support him and consider his welfare, including his mental health. Only a few weeks before this, after a delay of over a year, Mr Shaw had sat down with him and identified stressors in the work place, he was aware that the Claimant was feeling singled out and isolated, and without his agreement, he is then instructed to carry out a role where he would be working alone.

557. Had Mr Shaw's evidence been that he had allocated the MEWP work to the Claimant to remedy a dysfunctional situation at the Depot, at least temporarily during the investigation process, this may have provided a satisfactory explanation however, this was not his evidence.

558. The Claimant raised his objections and these were rejected by Mr Shaw in his email of the 7 June 2018 (176). In the event, the Claimant was not compelled to work on the MEWP and this was shortly followed by his decision to take paid suspension.

559. We find the instruction to work on the MEWP was a detriment in the circumstances however we do not find that it was on the grounds that the Claimant had made the protected disclosures nor do we consider that there is evidence to make an inference to that effect. We do not consider that raising the concerns with Mr Shaw in October 2017 and February 2018 led to any ill feeling, as we have already explained Mr Shaw's response was to provide the Claimant with other work to do, he did not act in any manner in response to those concerns which indicated that he was upset or annoyed by them. He did not allocate the Claimant to MEWP work back in October 2017 when he first objected to driving the HGV. What Mr Shaw was we find upset about was the external disclosure to DVSA, and we infer from the evidence and what we find to be the unsatisfactory explanation for requiring the Claimant to work on the MEWP when he had never done so before and in the particular circumstances, was to some degree which is more than trivial, motivated by the disclosure to the DVSA and the ill feeling this created.

560. We have addressed each of the acts of alleged detrimental treatment, and we have not found that any of the acts were done on the ground that the Claimant had made one or more of the two protected disclosures. Our findings would have been very different had the disclosures to DVSA been a protected disclosure because we find that this was a material influence in a number of the detriments the Claimant was subject to. However, based on our findings, the claim of automatic unfair dismissal does not succeed.

Constructive Unfair Dismissal: section 95 ERA

561. The Claimant 's case is that the Respondent's conduct resulted in a breach of the implied term of mutual trust and confidence entitling him to resign. We shall address the separate acts complained of, consider whether the individual acts themselves constitute a fundamental breach of any contractual term and/or whether they have the cumulative effect of undermining the trust and confidence inherent in every contract of employment.

1st March and 2nd March 2017: verbal abuse by Mr Pickering and Chris Roe

562. Mr Pickering and Mr Roe held supervisory and managerial positions, the impact of aggressive behaviour from them would therefore be more significant in terms of its impact on those in less senior positions, then the commensurate behaviour of peers. We find that their behaviour toward the Claimant on 1st and 2nd March 2017 was aggressive and rude. Mr Pickering by his own admission had behaved as he did because the men were "*droning on"* not because of a heated situation. Mr Pickering felt that Mr Middleton had provided the men and in particular the Claimant, with the information they needed and lost his patience and his temper. This was not an excuse for what we find was overly aggressive conduct, even in the context of the culture at the Depot. When considering the effect of this conduct on the Claimant, we are not concerned with considering the intentions of Mr Pickering or Mr Roe. We have however considered the circumstances when considering whether there was reasonable and proper cause for the way they behaved, we find there was none.

563. The Claimant had raised a health and safety concern. Had Mr Pickering or Mr Roe considered he had been given sufficient information and was being unreasonable in the manner in which he was continuing to pursue those concerns and in not carrying out the work, they could have taken appropriate steps including ultimately disciplinary action if necessary, that would have been the appropriate response, not aggression, swearing and throwing of objects.

564. We find that these two incidents genuinely upset the Claimant and we take that into account when objectively assessing the seriousness of the conduct. This was also a man who had been absent on sick leave with a stress related illness and this in our view is a relevant factor to take into account when assessing the impact of their conduct on the employment relationship, although not determinative of the question of breach. The Claimant then went absent again with "*acute psychological"* symptoms following the incident.

565. We find that the conduct of both Mr Pickering and Mr Roe was calculated or likely to seriously damage or destroy trust and confidence in the employment relationship, both separately and cumulatively as a course of conduct.

566. We have gone on to consider whether the Claimant permanently waived the breach by continuing to remain in employment for in excess of another circa 18 months or whether any waiver was conditional i.e. not a once and for all waiver but conditional on there being no repetition of the same conduct. We have considered whether the Claimant declined to make a choice about whether to resign such that this breach may be 'revived' if there is a further event which adds to the breach.

567. We have considered this carefully and taken into consideration that this event was something which the Claimant continued to refer to at intervals during his employment and that he appeared to perceive this as the trigger for a breakdown in his relationship with Mr Pickering. However, we have also taken into account that the Claimant was provided with the apologies, and although it is not possible to cure a breach we have taken into account on the question of whether there was an unequivocal waiver and affirmation of the contract, that the apologies were provided at the express request of the Claimant. The Claimant considered that this was the least he was willing to accept but that at the time, he was willing to accept the apologies to bring the matter to what he described himself as a 'close'. While it is not possible to rectify a breach which has occurred, where the wrongdoer has offered to make suitable amends, this is relevant to the issue of affirmation where those amends are put in place and the individual continues with the employment situation.

568. We find therefore that there was an unequivocal affirmation of this breach on receipt of the apologies. The Claimant did not appeal and did not complain about the content of the apologies.

The way the grievance was dealt with: March 2017

569. Although we do not have a copy of the statements provided by Mr Shaw to Mr Jackson during the grievance investigation, we infer from the comments made by Mr Shaw in his report and the findings of Mr Jackson, that the contents of the statements were not consistent with the evidence Mr Pickering gave to this tribunal in terms of his description of what had provoked his behaviour. What he told this tribunal aligned with the evidence of the Claimant as did also the statement obtained from Mr Middleton during the investigation. We find that Mr Pickering in his evidence to Mr Shaw, attempted to attribute, wrongly, blame to the Claimant for his own loss of temper, for the swearing and for the throwing of the equipment and we infer from what was said during the investigation and by Mr Jackson, that Mr Roe on a balance of probabilities, did the same.

570. Mr Jackson, we find, presented with the report and statements from Mr Shaw dealt with the grievance in a reasonable manner. We accept that the Claimant felt that he was protecting the management, and we understand why he would have that view given that we find on a balance of probabilities, that Mr Roe and Mr Pickering had mispresented what had taken place.

571. Mr Jackson, we found a credible witness, and we consider that, in the context of what he understood the situation to have been and the culture at the Depot, we do not find that it was unreasonable to attempt to deal with it by recommending that the supervisors were reminded of what acceptable management behaviour looked like. It was on the lenient side however it is not in dispute that the culture within the Depot was that bad language was used and Mr Jackson had taken this into account. In terms of referring to the Claimant's physique as a reason why he may be perceived as aggressive, Mr Jackson we accept from his evidence was trying to explain that the Claimant should perhaps be mindful of the impact that may have on others. We do not consider that Mr Jackson intended to be insulting nor do we find objectively that what he said was insulting. The Claimant clearly perceived that what Mr Jackson was attempting to do was transfer blame onto him for the aggressive conduct of Mr Pickering and Mr Roe and we have sympathy with that view however, Mr Jackson was making observations based on the evidence and description of events as presented to him.

572. Mr Jackson arranged for letters of apology to be provided as requested by the Claimant.

The Claimant raised no issue about what they contained or how promptly they were provided. The Claimant could have appealed but chose not to do so.

573. We do not consider that the way the grievance was dealt with was objectively viewed, calculated or likely to seriously damage or destroy trust and confidence and nor do we consider that it was otherwise dealt with unreasonably such as to contribute to such a breach.

March 2017: Failure to complete risk assessment

574. The recommendation of OH in the report of March 2017 was that management work with the Claimant to complete a stress risk assessment to facilitate implementation of appropriate control strategies for his perceived workplace stressors. That was not done until much until later in May of the following year. This is not a case of disability discrimination however the OH adviser had identified that due to the recurring nature of his condition and the current treatment in place, the Equality Act 2010 may apply. The Respondent was therefore put on notice that the Claimant may have a disability as defined by the Equality Act and took no steps for over a year to implement the recommendations in the report. This is not a case of disability discrimination and we make no finding as to whether the Claimant was disabled or not however but this should have indicated to Mr Shaw the seriousness of the Claimant's condition. The explanation for not implementing the recommendations is not credible and in any event, is not adequate. There was we find no reasonable and proper cause for the conduct, i.e. for the failure to carry out the stress risk assessment. We find that there was a failure to adequately support the Claimant by failing to carry out the stress risk assessment and identify with him the workplace stressors. Mr Shaw's contention that he would speak regularly to the Claimant in circumstances where we find this was nothing more than ad hoc discussions in the Depot about work, was not adequate support.

575. We find that there was no reasonable and proper cause for the employer's conduct.

576. While the Claimant's subjective reaction to this conduct is not determinative of the question of breach, it is a fact the tribunal is entitled to take into account in deciding objectively whether the conduct was likely to destroy trust and confidence. We take into account that. the Claimant did not during 2017 complain about the report not being carried out or ask Mr Shaw why he had not carried it out.

577. We find that the failure to conduct a stress risk assessment was serious, taking into account the circumstances, namely that the issues raised in the report all related to work, OH had referred to some to "*acute*" psychological symptoms and OH indicated that his condition may meet the definition of a disability. However, we do not find that it was sufficiently serious of itself, to amount to conduct calculated or likely to seriously damage or destroy trust and confidence but it is conduct which may contribute to such a breach.

578. In terms of whether the Claimant affirmed the contract, the report recommended the risk assessment was carried out to support a return to work. The stress risk assessment should therefore have been carried out at around the time the Claimant returned to work which we understand was not long after the report was prepared.

579. The Claimant would have expected the report to have been done in a timely manner to assist his return and therefore we consider that certainly after a period of a couple of months, when the report was not done, it would have been clear to the Claimant that it was not going to be done and that he affirmed the contract by continuing to work and by not raising a complaint about it. We have considered whether this was an unequivocal waiver. The Claimant was prepared not to treat it as a repudiation of the contract and although there was a further failure to support him when a further OH report was obtained, the Claimant in the intervening period of 7 months, was not complaining about the failure to have carried out the March 2017 risk assessment, taking into account his lack of protest and the length of time we find that he waived this breach by the time of the further breach in September 2017 but we do not find that this was unequivocal in that the Claimant was then subject to the same treatment in September which related to this earlier breach, in that the September report raised again the obligation to have carried out a risk assessment earlier in March (in that OH assumed we find that the March assessment had been carried

out) and advised follow up action which was also not then implemented, which we find revived the earlier breach in March.

September 2017: rejection of standby request/ failure to implement OH recommendations/ not asked how he was / lack of support.

580. The Claimant set out in writing his request to come off standby and the request raised issues with his mental health.

581. We have found that there was a failure to comply with the express terms of the Field Sales Agreement and conduct a '*discussion*' with the Claimant about the reasons to come off standby and a failure to deal with the request 'sympathetically'. In any event, regardless of any express contractual requirement around how to manage the request, we find that to have taken 3 weeks to respond and then to reject the request in circumstances where Mr Shaw was aware that the Claimant had problems with his mental health, without obtaining further information from the Claimant and discussing the impact on him, was not sympathetic. We find that the way the request was dealt with objectively, given the context and the reason behind the request, was blatantly uncaring and lacked sympathy.

582. There was we find no reasonable and proper cause for Mr Shaw's conduct; indeed, his explanation was simply that he thought the Claimant would want something in writing.

583. We consider that viewed objectively, given the circumstances including the Claimant's history of mental health issues and the failure by Mr Shaw himself to have put in place a stress risk assessment, this was not conduct which was sufficiently serious that it was calculated or likely to seriously damage or destroy trust and confidence but conduct which could contribute to such a breach.

584. In the event Mr Shaw obtained a report from OH in October 2017 and then informed the Claimant he did not have to remain on the standby rota. The Claimant did not raise any grievance or complaint at that time and remained in employment.

585. We do not find that the Claimant unlike the position with the behaviour of Mr Pickering and Mr Roe, had unequivocally waived the breach (which was not concerned with being on the rota but how his request was dealt with). The Claimant we find had merely declined to treat the contract as repudiated. We find that the lack of support and sympathy then continued with the failure to implement the OH report and that this amounted to a further similar breach which was part of a pattern of such conduct.

September 2017: failure to complete the risk assessment

586. The Claimant complains about the failure by Mr Shaw to then implement the OH report which was obtained in October, of a lack of support and not being asked how he was.

587. The evidence of Mr Shaw was that he would speak to the Claimant regularly which was not in dispute, his evidence however was that the extent of this was him saying" *how you doing, this sort of thing*". When was asked to clarify by the tribunal what he would discuss with the Claimant's response was; "*not particularly discuss anything*".

588. The OH report in October informed Mr Shaw that the Claimant was still receiving support and treatment for poor mental well-being. It recommended that the Respondent may want to review the stress risk assessment that it is suggested back in March 2017. The report also suggested it may be helpful to have monthly reviews for the next 3 to 6 months to ensure that workplace stress over being managed.

589. Mr Shaw took the same approach to this report as he had to the previous one in that he took no steps to action it. There was no reasonable or proper cause for this conduct either.

590. We find that the failure to carry out a stress risk assessment after being advised to review the earlier one, knowing that no such assessment had ever been carried was objectively so serious, we find that this was conduct of itself, calculated or likely to seriously damage or destroy trust and confidence.

591. It was clear from the reports that there were workplace stress factors and yet Mr Shaw failed to follow the recommendations and take adequate measures to identify what they were and thus what support the Claimant may require. These would have been reasonable steps to have taken to support the Claimant. This demonstrated a continuing lack of concern and care about the Claimant's health and his welfare at work.

592. The report recommended ongoing support over the next 3 to 6 months through regular reviews which would cover the period from October to the end of April 2018. Although the report stated that the monthly reviews would be 'helpful', we consider that given the failure to have carried out the risk assessment previously this made the failure to carry out the reviews with the Claimant more serious.

593. We find that the obligation in terms of the reviews continued until the end of April 2018. By 25 April 2018 the claimant was complaining to Mr Ellis of the failure by Mr Shaw to conduct the monthly meetings with him to discuss his stress levels, highlighting to Mr Ellis that not one meeting with him had been arranged. It was clear that he had not waived the breach.

594. Mr Shaw then met with the Claimant and carried out a risk assessment in May 2018 which includes an entry recording 'insufficient support' by Mr Shaw following the advice given in the previous OH report. The Claimant was clearly making his views known both in the investigation with Mr Ellis and during the assessment with Mr Shaw that he considered he had been given insufficient support. The Claimant was shortly thereafter placed on paid suspension in June. We find that the Claimant had failed to elect to treat the contract as repudiated on the grounds of this breach however we do not find that the Claimant waived the breach or if he did it was conditional, the risk assessment itself set out further actions that were required and actions points to support the Claimant that still had to be carried out. We do not find that the Claimant had permanently waived the breach where there was a series of incidents where the Claimant was not being supported and where he was being shown such blatant lack of support and sympathy and where further support was required and to be provided.

<u>February 2018: Asked to conduct work on an HGV that I had previously informed management was out of scope and told to get on with it.</u>

595. In the circumstances where the Claimant had raised a concern that it was illegal to drive the 18-tonne vehicle to collect stock and the Respondent had not reassured him that it was legal, we find that it was not a reasonable management instruction to instruct him to do this work.

596. We cannot make any finding on exactly what Mr Pickering or Mr Middleton said and we do not find on the evidence that they swore at the Claimant. However, we do find that Mr Pickering's response when the Claimant refused to do the work would not have been supportive hence the Claimant contacting DVSA to carry out his own checks. Had Mr Pickering been more receptive to his concerns the Claimant may not have felt the need to carry out his own investigations with DVSA and while we find that did not make it reasonable for him to make the external disclosures (when other avenues remained open to him) Mr Pickering may want to reflect on the consequences of how such issues are managed and how he deals with health and safety concerns raised with him in the future. Mr Pickering himself believed the Respondent was "*sailing close to the wind"* and that it was a "*grey area*".

597. There was no reasonable and proper cause for the conduct; the Respondent should have taken steps to reassure the Claimant about the legal position after he raised his concerns in October 2017 and certainly before instructing him to do this work again. We make no finding as to whether the instruction was lawful, it is a grey area and the Claimant's concerns were we find, legitimate. The issue here is the response he received and being instructed to do the work when his concerns had not been addressed.

598. However, while we find that this behaviour was unreasonable and a failure to provide reassurance in such circumstances we consider could amount to a breach of the implied term, the Claimant in the event was not forced to do the work and Mr Pickering sought advice from Ms Brown. In those circumstances, considered objectively, the impact of the Respondent's conduct was such that we do not find that it was conduct calculated or likely

to destroy trust and confidence although we do find that it was conduct which may contribute to such a breach.

Graffiti

599. After the Claimant had made the external disclosure to DVSA, his company van was vandalised. A message which was insulting and vulgar was etched into the paintwork on the inside door frame. We find it was a reference to the Claimant.

600. Mutual trust and confidence can be undermined if the employer fails to support the employee in the face of threats or hostility from fellow employees.

601. The fact that the Claimant had contacted the DVSA, and the awareness amongst his colleagues that he had done so, caused we find conflict and concern. Although Mr Shaw and Ms Brown understood that the Claimant had been 'whistleblowing; when he contacted DVSA, we find that the Respondent's management took no steps to protect him as a potential whistle-blower. There was no involvement of HR, no advice on how to manage the situation and the response when the Claimant began to become isolated and harassed, was inadequate. At no point was the Claimant advised to put in a grievance about his treatment, referred to the grievance policy, or even advised to speak with HR.

602. Mr Ellis admitted that his personal view was that the Claimant was trying to make trouble for the company. We find that the Claimant had said that he was 'playing games' and this would have understandably upset the management and some of the men at the Depot. However, regardless of any concern that the Claimant was causing problems and was intending to cause harm to the business, the Respondent while he remained their employee, was under a duty as part of the implied term of mutual trust and confidence to take adequate measures to prevent him from bullying and harassment at work.

603. The Respondent and Mr Shaw as the Claimant's line manager, failed to deal with the situation regarding the vandalism, and indeed the whole breakdown in the situation at the Depot, adequately. Simply arranging to respray the van and ad hoc casual mentions of the incident to the men at the Depot, which is what we find took place, did not communicate to the men at the Depot that this was a matter the Respondent was taking seriously.

604. The Respondent had clear reasons to believe that this was an act carried out by one of its employees, that such an act involved not only damage to company property but was likely to be harassment toward the Claimant. The Claimant had also informed Mr Shaw that he was being left abusive stickers in his room and while the Claimant does not expressly complain about that, it is relevant to the surrounding circumstances. We find that the Respondent failed to provide adequate support and take more affirmative action.

605. Given the evidence of Mr Pickering, Mr Shaw and Mr Middleton about the dissatisfaction and concerns of the men at the Depot, the distancing from the Claimant and poor morale and general working environment, we heard no evidence about what steps had been taken to improve the working relationships.

606. There was no proper or reasonable cause for the failure to take proper steps to support the Claimant.

607. We have taken into consideration that the Claimant had laughed, we find sarcastically about the words etched on his van however, he complained about the vandalism to Mr Shaw including during the meeting on the 12 March when he referred to it as victimisation. We find that the Respondent showed a distinct lack of concern and sympathy with the treatment he was receiving at work and it was therefore understandable that he was feeling 'pushed out'. In terms of the seriousness of the impact on the Claimant, he was known to have a history of problems with his mental health. The OH report had referred to depression and to ongoing support and treatment. We take that into account when considering the impact on the Claimant and objectively the seriousness of the breach.

608. Viewed objectively that the failure provide adequate support to the Claimant in the circumstances of the case, was conduct likely to destroy or seriously damage the relationship of confidence and trust.

609. We appreciate that it is a matter of months before he resigned after the graffiti on his car and that such a period of time would often indicate affirmation of the contract, however we find in this case that the Claimant's conduct did not indicate affirmation, he was making it clear that he felt he was being unsupported. He continued to complain about it and brought it up again with Mr Ellis during the investigation meeting with him in June. It was a matter which the Claimant would include within his claim form before he resigned to the tribunal in July 2018. It formed part of the ongoing complaints the Claimant was making that he felt he was being victimised and not supported. We shall address the period from the submitting of the claim form in July to his resignation in September below.

13 March 2018 meeting

610. Mr Shaw handled the issue over the overtime query and conducted this meeting an unusual formality, which we accept upset the Claimant. The Claimant raised serious complaints of being singled out, he raised the graffiti to his van and that abusive stickers left in his room. Mr Shaw expressed no concern and offered no support. In fact, Mr Paul made it clear that he and Mr Shaw were not prepared to discuss those issues of alleged victimisation, at the meeting. As Mr Shaw made no comment, it was reasonable for the Claimant to assume that Mr Shaw was in agreement with Mr Paul.

611. We find that the way the meeting was conducted was a detriment in that it was inconsistent with how other employees are treated and there was a lack of support and concern shown in respect of the victimisation complaints. There was we find, no reasonable and proper cause for the conduct. The explanation given by Mr Shaw at the hearing we find was not adequate.

612. We consider that the conduct, in the circumstances of the case, was on balance however not conduct likely to destroy or seriously damage the relationship of confidence and trust but we do find that it was conduct which could contribute to such a breach. This was conduct the Claimant would continue to complain about and raise with Mr Ellis at his meeting with him in June when explaining why he had contacted ACAS for support. We do not find that the Claimant's conduct by remaining employed was of itself sufficient to find that he had affirmed this breach in circumstances where he was continuing to complain about it, would raise with Mr Ellis in June and then his claim form to the tribunal in July, it certainly was not even if a waiver, unequivocal as a waiver such that in the circumstances it could not potentially be revived.

March 2018: Informal Meeting/ time sheets been tippexed/ not providing timesheets

613. The Claimant asked for copies of his time sheets for the last 12 months after realising in the 13 March meeting that his timesheets had been amended by Mr Pickering without him knowing. Mr Shaw produced most but not all of the timesheets. We accept the evidence of Mr Shaw that he could not locate the other timesheets.

614. The Claimant identified only one amendment which had actually resulted in an adjustment to the overall hours he was going to be paid for. However, we deal with this below because this is also the basis for the unlawful deduction from wages claim.

615. We do not find that the Claimant suffered unfavourable treatment nor that he suffered any prejudice. While we can understand why a supervisor amending timesheets without informing an employee may well give rise to concern and it would be sensible to let the employees know when this has happened (perhaps providing them with copies of the amended timesheet to prevent any suspicion or concern) we do not find any breach of the implied term and any conduct which would contribute to a breach of it.

March 2018: overtime docked/ treatment of overtime

616. Following the meeting on the 13 March Mr Shaw's undisputed evidence is that he put forward the Claimant's claim for overtime to Balfour Beatty but they refused to pay it. Mr Shaw did not revert to the Claimant but checked the tracker on his company van. This, it is also not disputed by the Claimant, showed that he had not in fact worked the basic hours and thus Mr Shaw informed the Claimant that he would not be paid any of the overtime he

had recorded that day.

617. The Claimant complains about his overtime being docked, however the Claimant does not allege a legitimate claim to that overtime. He does not argue before this Tribunal that he had a contractual right to the payment rather he complains about the inconsistency in his treatment. We therefore make no finding as to whether or not the Planned Timesheet gave rise to any contractual entitlement in terms of what hours could be claimed.

618. The Claimant does not dispute that he had not worked more than his basic hours.

619. Further, there we find that Claimant had now recorded his hours in accordance with the Planned Timesheet in any event, in that Balfour Beatty had carried out their own civils.

620. The Claimant does not distinguish in his complaint between what he says he should have been allowed to claim and what he did in fact claim. Further, although the Claimant was told that his overtime was to be docked, Mr Shaw missed the payroll and he received the full payment. He suffered no financial detriment.

621. We do have some concern that Mr Shaw checked the vehicle tracker when he admitted he had never done so before in a dispute over pay. Mr Shaw states that he did so on this occasion because Balfour Beatty was still challenging the hours worked. The Claimant did not challenge Mr Shaw on his adequacy of his explanation or the lawfulness of checking the tracker with reference to any policy. In the circumstances we find that checking the tracker and threatening to deduct the overtime not worked, when in the event it was paid, does not amount to conduct which is calculated or likely to seriously damage or destroy trust and confidence or conduct which contributed to a breach.

Overtime

622. Mr Shaw informed the operatives at the Depot that they could no longer record their time according to the Planned Timesheet and that it must be on hours worked. In practice this was not enforced. This led to an inconsistency in how the men at the Depot were being remunerated.

623. Th Claimant does not identify any specific financial detriment. The Claimant did not put it to the Respondent's witnesses that there were occasions when he should have been paid more for the hours he did work.

624. What we understand his complaint to be is that he was aware that his colleagues were being remunerated in excess of the actual hours work when he had been told not to charge him time on this basis. It understandable that this would have been the cause of considerable frustration for him regardless of him not identifying before this tribunal any particular financial detriment.

625. We do not find that he was the only one. We find that this came about because of a lack of enforcement by the supervisors who were not prepared to police it but continued to accept what hours had been recorded where this looked' reasonable'.

626. There is no evidence before this tribunal that Mr Shaw or the supervisors, took any steps to ensure that in practice there was a consistent policy such that the Claimant (although not alone) was not working under different terms. It was clear from Mr Shaw's interview notes with Mr Ellis that he was aware that the issue was one of 'policing' however, the Respondent failed to take adequate and reasonable measures to ensure consistent treatment.

627. There was no commercial reason behind this treatment. There was no proper or reasonable cause to remunerate the Claimant differently to the clear majority of the men at the Depot and we find that this was sufficiently serious to amount to conduct likely to destroy or seriously damage the relationship of confidence and trust.

628. This conduct continued until the Claimant was put on paid suspension in June 2018. The Respondent did not remedy the situation and had the Claimant returned to work, there was no evidence that he would have returned to a different situation. The Claimant complained

about this Mr Ellis in the investigation meeting with him in June 2018 and raised it in his claim before the employment tribunal on 30 July 2018. The Respondent was aware therefore that the Claimant was still protesting about this issue and would later go on to investigate this as part of a grievance (albeit he would not receive the outcome of that investigation until after his employment had terminated). We do not therefore find that the Claimant had waived the breach prior to his resignation.

MEWP

629. The Claimant's contract of employment refers to him as a jointer. We were not taken to any specific provision within the contract of employment by Ms Palmer to indicate that there was an express flexibility clause that allowed the Respondent to require the Claimant to drive and work a MEWP. That said the Claimant accepted that he had the required technical skills to do the work and had been trained to drive a MEWP. It was not in dispute that the Claimant would require some further training in terms of the specific make and model of MEWP. We do not find that to require the Claimant to drive a MEWP, even in the absence of an express contractual right to do so would have itself be an unreasonable. An employer can require an employee to carry out different contractual duties on a temporary basis where urgent business contingency dictate even where there is no express contractual right to do so. Such action can be justified where this is a rational and reasonable solution.

630. Even if there was a contractual right, whether by an implied term or express, the Respondent was still required to conduct itself in accordance with the implied duty of trust and confidence in how that was exercised.

631. It is relevant to consider the specific circumstances of this case; at this point in time in June 2018, the Claimant was complaining about being singled out and he was subject to a serious disciplinary investigation which had involved the majority. of his colleagues at the Depot being asked questions about his conduct and his performance. Mr Shaw and the Claimant supervisors were aware that there were difficulties in the working relationships at the Depot, that the men were distancing themselves from the Claimant and that there was ill feeling.

632. We take into account that the Claimant had never been asked to work on MEWP and doing this work would mean isolating him from his colleagues.

633. We also take into account that the Claimant was probably going to have to use his own personal vehicle to get work in circumstances where his vehicle had been vandalised at the Depot. We also take into account the inadequate measures which had been taken to deal with the vandalism and the lack of reassurance he was given about bringing his car to work.

634. In those circumstances we consider that the instruction to work on the MEWP was unreasonable in particular due to the lack of reassurance about the Claimant's car which we find gave him legitimate cause for concern. Mr Shaw's evidence was that he could not recall him raising this concern but it is clearly evidenced in the documents. Given the evidence that the Claimant was already feeling isolated and unwelcome, we find that the way this change in his duties, albeit only temporary was managed, was also insensitive.

635. Ultimately the Claimant did not work on the MEWP and he shortly thereafter went on paid suspension.

636. We find that there was no reasonable and proper cause for the employer's conduct, in that Mr Shaw did not explain why it had to be the Claimant who would work on the MEWP, and indeed we find that there must have been other alternatives because he was not in the event required to do the work.

637. While the Claimant's subjective reaction to this conduct is not determinative of the question of breach, we accept his undisputed evidence that this upset him and we find would have been a cause for concern.

638. We find that in the circumstances objectively viewed, the conduct in the circumstances

although serious was not however sufficiently serious to amount to conduct calculated or likely to seriously damage or destroy trust and confidence in that he was not ultimately required to work on the MEWP. We do find however that it is conduct which did contribute to a breakdown in trust and confidence.

Investigation by Mr Ellis

639. The Claimant does not dispute that it was reasonable for Mr Ellis to conduct an investigation following the anonymous whistleblowing complaints. The Claimant complains however about how long it took, how many of his colleagues were involved and the scope of the investigation.

640. The anonymous whistleblowing complaints raised specific issues, along with a general concern that the Claimant was making his colleagues feel stressed because of his approach to health and safety issues. It would transpire that a lot of what was being said was rumour and information passed on second or third hand, including for example, that the Claimant was causing problems with the DNOs.

641. Mr Ellis started the investigation in March, he was still re-interviewing witnesses in July, 4 months later. His report would not be prepared until 7 months after his investigation started, in October 2018.

642. Mr Ellis, we find unreasonably extended the scope of the investigation, thus needing to interview witnesses which in turn made the investigation more protracted.

643. This conduct was without reasonable and proper cause, it was we find materially in breach of Respondent's own disciplinary policy.

644. Mr Ellis began to extend the scope to of the investigation to involve allegations of conduct going back over 18 months. He included allegations which related to incidents the Claimant's line manager and/or his supervisors and/ or others in supervisory positions while he was training, had been aware of. Either these issues had not been escalated or when they had, no action had been taken, probably we find because the Claimant was popular and very well thought of at that time. There was no justification for resurrecting historic incidents including from as long ago as 18 months prior to the investigation.

645. It is not in dispute that Mr Ellis was keeping the Claimant informed as new allegations were raised. The Claimant felt that it was no longer tenable for him to return, that is character was being in his words "*assassinated"*.

646. We have little difficulty in finding that the way the investigation was conducted, in that Mr Ellis began investigating historic allegations in breach of the Respondent's own disciplinary policy was sufficiently serious of itself to amount to conduct which was calculated or likely to seriously damage or destroy trust and confidence. There were legitimate issues to be investigated but it was fundamentally unfair to cast the net wider to include incidents which were historic and in many cases, management or those in a supervisor's capacity had been aware of and either decided not to take action or had dealt with. It is understandable that the Claimant felt that his character was being 'pushed out'.

Causation

647. It is necessary for us to identify what was an effective cause, not *the* effective cause, of the dismissal in a claim of constructive unfair dismissal.

648. Ms Palmer in her written submissions argues that the burden is on the Respondent to show that the reason or principal reason for dismissal was a potentially fair reason and she argues that it was the alleged misconduct which the Respondent was investigating. However, at the outset of the hearing the issues were agreed by Ms Palmer and that the dismissal was potentially a fair dismissal on the grounds of misconduct was not an issue identified. Further, the Respondent (as recorded expressly in the issues) had not submitted an amended response following the amendment by the Claimant in connection with the constructive unfair dismissal claim. There was no application made during the hearing to

amend the response. The response denies the claim of constructive unfair dismissal but does not plead that it had a fair reason to dismiss. For the avoidance of doubt, we would not have found this in any event. The Respondent did not conclude the disciplinary process. Indeed, Ms Palmer in her written submissions argues that with regards to the Claimant's mental health and the admission that Mr Ellis had not considered this in his recommendations; "*Had the Claimant stuck around to face disciplinary proceeds, it would have been appropriate for the Respondent to consider his mental health then if he raised it, or possibly in any event, a referral to OH may have been in order*." It is therefore not clear what the outcomes of those further enquiries would have been. We accept that the Claimant had a history of problems with mental health.

649. We accept that there were issues around the manner of disclosure to the DVSA, which was a serious issue and may have warranted some form of disciplinary action. The whistleblowing legislation exists to protect *responsible* whistleblowing and regardless of the Claimant's concerns, (which we find were in part a result of how poorly Mr Pickering had dealt with the Health and Safety issues the Claimant had raised back in March 2017 and Mr Shaw's failure to deal with his concerns back in October 2017), that did not give the Claimant licence to raise issues externally we find, in the circumstances. There were other steps he could have taken to raise it with his employer, by which we mean Mr Shaw or Ms Brown or indeed via the whistleblowing process.

650. We heard no evidence from whichever member of the management team would have been tasked with the disciplinary proceedings about what action they were likely to have taken based on the report prepared by Mr Ellis. This argument therefore that the dismissal was fair on grounds of conduct would not have succeeded in any event**.**

651. In terms of what an effective cause was, we have considered the letter of resignation, which clearly identifies the conduct of the Respondent as the reason for his decision to resign.

652. It was not put to the Claimant in cross examination that he left because he had for example found other work.

653. The Claimant may well have had concerns that the disciplinary process may lead to his dismissal because the essence of his claim was that he was being '*pushed out'.* It was not put to the Claimant that he resigned because he knew that there were fair reasons to dismiss. We find that an effective cause of his decision to leave in any event, was because of the breach of the implied term of trust and confidence, because of the investigation and how it was being conducted and how long it was taking and the earlier breaches. Although we find some of the conduct complained of was not blameworthy and formed no part of the breach of the implied term, or had been unequivocally waived, we find that the breach in connection with the investigation was of itself fundamental and a breach of the implied term but also, the other conduct which would contribute to a breach (as identified above) would give rise cumulatively to a breach of trust and confidence.

654. We have no difficulty in finding that the Claimant resigned and an effective cause, was the conduct which we find gave rise to a breach of the implied term of trust and confidence.

Affirmation

655. We have reminded ourselves that the matter is not one of time in isolation. The principle is whether the employee demonstrated that he has made the choice to remain employed.

656. Ms Palmer argues that the Claimant 'set his course' on the 6 June 2018 when he started the ACAS early conciliation process and did not resign in response to anything that happened after that date. We do not find in favour of that argument. The Claimant's evidence was that he contacted ACAS 'to help' on 6 June. He then attended a meeting with Mr Ellis on the 21 June when he explained to him that he wanted to "get through it" i.e. the investigation. His evidence is that he was upset by how long the process was taking. In the stress risk assessment with Mr Shaw we were taken to, it refers to an action point being the conclusion of the investigation by 1 July. As Ms Palmer refers in her submissions, the Claimant was put on paid suspension on 26 June 2018 because he had said he was finding the process stressful. We do not accept therefore Ms Palmer's submissions that the Claimant had set his course of action on 6 June. On 21 June the Claimant had raised in

this meeting with Mr Ellis the various events since the incident with Mr Pickering and Mr Roe, that it was clear he remained aggrieved about.

657. We find that the way the investigation had been dealt with was of itself a breach of the implied term of mutual trust and confidence, that without reasonable and proper cause the Respondent conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. Even if that were not the case, we would in any have concluded that the investigation and how it was conducted amounted to a 'final straw' entitling the Claimant to resign and claim constructive unfair dismissal. We consider that the conduct we have addressed above in our analysis, forms part of a course of conduct, amounting to a lack of support and inconsistent and generally unfavourable treatment, which cumulatively amounted to a breach of the implied term. That conduct we find includes the events set out above in respect of those events/conduct which we find amount to a breach in their own right or conduct which was not unequivocally waived and contributed to the breach. For the avoidance of doubt, with respect to the breaches that we find were waived but not permanently/ unequivocally waived, we find those breaches were revived by the conduct in relation to the investigation.

658. We have considered the conduct which we find formed part of the breach of the implied term (or of itself a breach of the implied term) in terms of the nature of the conduct and find that they are similar nature, in that they are arise from inconsistent treatment, a lack of support and/or unsympathetic behaviour. We have also considered that the conduct formed a pattern of such behaviour over the period from the failure to implement the risk assessment when advised to do so in March 2017 up to the date the Claimant resigned when the investigation was still ongoing. The way the investigation took place in effect 'resuscitated' the past breaches which were not permanently/ unequivocally waived.

659. The Claimant contacted ACAS in June and at a meeting with Mr Ellis on 21 June raised a number complaint in relation to the conduct he had been subjected to such that this would be treated as a grievance, albeit only two issues would be investigated; the inconsistent treatment of overtime and the work he was being given to do. His complaints however were far wider ranging and he complained of all the matters which form part of his complaint of constructive unfair dismissal, dating back to the conduct of Mr Pickering and Mr Roe in March 2017.

660. The Claimant then issued his claim in the employment tribunal on 30 July 2018 which included a claim of constructive unfair dismissal, although he had not resigned by that stage. The investigation was still ongoing.

661. The response was filed on 19 September 2018 with a covering email copying in the Claimant, pointing out that he could not bring a claim of unfair dismissal because he had not resigned and pointing out that the investigation was ongoing and that it would be desirable for this to be completed first.

662. The Claimant resigned on 20 September 2020. He complained in his resignation letter of in part, the fact that the investigation was still ongoing. The report according to Mr Ellis was finalised on 12 October 2018, some 7 months after the investigation had started.

663. The Claimant was not aware of what would be included in the report. He did not see this before he resigned. In the pleadings, namely his statement taken as an amendment to add the constructive unfair dismissal claim submitted on the 1 October refers to "*I was forced to hand in my notice due to the constant harassment, lies and victimisation. I remain very distressed/ depressed and felt that staying and being involved in anymore unjustified investigations to which there was never any outcome would only exacerbate things further."*

664. It was clear to the Respondent therefore after the claim had been issued on 30 July 2018 that the Claimant was not affirming the breach. The Claimant did not return to work, he remained suspended, and at least part of his complaint to the tribunal was that the investigation had already been ongoing by that time for 3 months and he alleged there was a 'witch-hunt". We find that in the circumstances the Claimant's conduct by remaining in employment to the 20 September, did not amount to affirmation. The Respondent took no action after the claim was issued on 30 July to reassure the Claimant about what was being investigated. It was evident we find to the Respondent that the Claimant had not affirmed

the breach of the implied term.

665. In the circumstances we find that the complaint of constructive unfair dismissal is well founded and succeeds.

666. We make this final observation; the whistleblowing legislation protects responsible whistleblowing and we do not accept that the external disclosure in this case was protected. The Claimant should have attempted to address his concerns again internally, there were other alternatives. We find that the bullish attitude of Mr Pickering when Health and Safety matters had been raised with him, specifically in March 2017, does not support a culture where employees feel able to challenge what they see as unsafe practice. We accept that the Claimant was perceived as difficult and intransigent, however there are proper ways to address that behaviour, what is not appropriate is to form a view that an employee is a troublemaker and extend an investigation to resurrect historic incidents to support a case for disciplinary action. It was quite frankly unnecessary and we find damaged irreparably the working relationship. Had the findings been that the Claimant was obsessively or otherwise unreasonable pursing health and safety issues, that could and should have been addressed in in a reasonable way and in accordance with the Respondent's own disciplinary policy.

Wrongful dismissal

667. Ms Palmer refers in his submissions to wrongful dismissal however the Claimant did not bring a separate claim of wrongful dismissal. That was not included in the pleadings or list of agreed issues.

January 2018: unauthorised deduction from wages

668. We find that the Claimant had claimed two hours for overtime which we find on the evidence, he was not entitled to claim and thus it was not 'properly due.' The Claimant did not contend that there was any contractual right to the one hour of overtime which had not been paid. He did not argue that there was any contractual entitlement whether based on custom or practice or otherwise. The Claimant was unhappy that he had not been told that his timesheet had been amended however, he can only bring a claim under section 23 in connection with wages where they are properly due and we find no evidence that they were.

669. We further find that the claim could have in any event have been brought in time. The Claimant had a month from learning of the deduction to bring the claim and offered no explanation other than he was waiting for his Union representative to come back. We do not find that there are grounds to extent time under section 23 (4) ERA.

Remedy

670. The case will be listed for a hearing to determine remedy.

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Employment Judge Broughton

Date: 27 April 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE