EMPLOYMENT TRIBUNALS

Claimant: Mr G Battison

Respondent: British Polythene Limited

Heard at: Liverpool **On:** 19 and 20 June 2019
19 December 2019

Before: Employment Judge Horne
Mr M Gelling
Mrs J E Williams

REPRESENTATION:

Claimant: Mr S Pinder, Solicitor
Respondent: Ms J Smeaton, Counsel

JUDGMENT having been sent to the parties on 21 January 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Complaints and issues

1. By a claim form presented on 28 September 2018, the claimant raised the following complaints:

   1.1. Unfair dismissal, contrary to section 94 of the Employment Rights Act 1996 ("ERA"); the dismissal was alleged to be unfair under sections 100 and 103A of ERA and section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA");

   1.2. Detriment on health and safety grounds, contrary to section 44 of ERA;

   1.3. Detriment on the ground of a protected disclosure, contrary to section 47B of ERA (often known as "whistleblowing detriment") and

   1.4. Trade union detriment, contrary to section 146 of TULRA.

2. In advance of the hearing, the parties helpfully prepared a written list of the issues that the tribunal would have to decide. It is reproduced here. With some

exceptions, the wording is unchanged from the original. The exceptional alterations are:

2.1. Minor typographical changes;

2.2. The deletion of matters that related purely to the evidence;

2.3. The deletion of issues that would only arise if the claim were well founded; and

2.4. The deletion or recasting of issues to reflect concessions subsequently made by the parties: see paragraph 4 below.

3. The issues were as follows:

"

Whistleblowing detriment

1. Did any of the following occur and, if so, did they amount to a disclosure of information:

1.1. On 21 February 2018, C reported health and safety issues to R arising out of being short staffed

1.2. From the time when the Claimant became a Health and Safety Representative (January 2017) he presented reports to the Respondent on a very regular basis, often it would be several times each week. The Claimant contends that he did this on behalf of himself and others, with reports being provided to the then safety manager, Paul Thompson and to the Claimant's manager, Mr Costello. The reports concerned various issues which might be small health and safety matters, but also more substantive issues, for example the fact of fire exists being blocked. The Claimant also made reports which were in the nature of suggestions to improve health and safety within the workplace…

1.3. In January 2018 the claimant informed his manager, Mr Costello, that he was in breach of health and safety in relation to how he dealt with an employee who had sustained a hand injury…

1.4. In about February 2018 the Claimant reported issues in relation to manual handling and unsafe lifting procedures to his manager, Mr Costello. The report concerned issues involving clamps on a machine involving lifting reels using heavy bars. The claimant was concerned about the health and safety impact of what was being done and the risk to others, bit Mr Costello simply told those involved to "do what you can'.

1.5. From about January 2018 the claimant reported problems about static on a machine to the Respondent and to the HSE, and this matter is also addressed within the further Particulars. Reports were made by the Claimant about static, but also he believes that a number of reports were made by individuals from other shifts as it was such a significant issue within the workplace. This matter continued from January 2018 until the Claimant was suspended from employment…

2. Did [the claimant] have a reasonable belief that the disclosure was in the public interest and tended to show that the health or safety of any individual has been, is being or is likely to be endangered and/or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject?
3. Was the disclosure made to [the respondent] as [the claimant's] employer (or another responsible person within the meaning of section 43C ERA 1996)?
4. Did [the claimant] suffer one or more of the following detriments because of one or a combination of any disclosures found to fall within section 43B ERA 1996:

4.1. In about January/February 2018 Mr Costello was abrupt and aggressive with the claimant and threatened him that 'things are going to go very bad for you'. …

4.2. In February 2018, the claimant was accused of having a negative attitude and called a "grass" by Mr Costello, and he recalls that this related to the report over the hand injury and heavy lifting issues.

4.3. On 21 February 2018, Mr Costello confronted [the claimant] and said, "It's a good job I can lip read as I know exactly what you're saying about me."

4.4. Soon after the claimant's suspension (during the disciplinary process) the claimant was told by Mr Mason that the respondent (and him) had trouble accessing the CCTV evidence relating to the incident which caused the claimant's injury at work. The claimant alleges that this was contrary to information provided to the claimant by other managers.

4.5. On 11 May 2018, Mr Costello told [the claimant], "We won't be there much longer if people report us to HSE about static".

4.6. On or about 11 May 2018, the claimant was subjected to a disciplinary procedure for pursuing what the respondent alleged was an improper personal injury claim.

<u>Health and safety detriment</u>

5. [deleted in the light of paragraph 4 below]
6. In respect of any of the alleged detriments at paragraph 4.1 to 4.6 that are found to have taken place, did [the respondent] subject to [the claimant] to those detriments on the ground that he had performed the functions of such representative [or] a member of such committee.
7. The functions performed by [the claimant] relied on in support of this claim are those set out in paragraphs 1.1 to 1.5 above.

<u>Trade union detriment</u>

8. In respect of any of the alleged detriments at paragraphs 4.1-4.6 above that are found to have taken place, did [the respondent] do

those acts for the sole or main purpose of preventing or deterring the claimant from taking part in the activities of an independent trade union at an appropriate time or penalising him for doing so.

9. The "activities" relied upon by [the claimant] in support of this claim are those set out in paragraphs 1.1 to 1.5 above.

Automatically unfair dismissal

10. Was the reason (or, if more than one, the principal reason) for [the claimant's] dismissal that he had made a protected disclosure as set out at paragraph 1 above (section 103A ERA)?

11. Alternatively, was the reason (or, if more than one, the principal reason) for [the claimant's] dismissal that being a member of a safety committee [the claimant] performed (or proposed to perform) any functions as such a member? The 'functions performed' relied upon by [the claimant] in support of this claim are those set out at paragraphs 1.1-1.5 above (section 100(1)(b) ERA).

12. Was the reason (or, if more than one, the principal reason) for [the claimant's] dismissal that he … had taken part in trade union activities at an appropriate time? The 'activities' relied upon by C in support of this claim are those set out at paragraphs 1.1-1.5 above (section 152 of TULRA).

Time limit

13. [In respect of any detrimental act done before 4 May 2018, was that act part of a series of similar acts which included at least one act that was done after 4 May 2018?] (these words replace the original in the light of the concession at paragraph 4.3.1 below.)

14. [deleted in the light of paragraph 4.3.2 below]"

4. As we have already mentioned, the list of issues was clarified and refined as the hearing progressed. In particular:

4.1. Counsel for the respondent, in the course of her closing arguments, conceded that, on each of the five alleged occasions, the claimant had performed the functions described in section 44(1).

4.2. During his closing arguments, the claimant's solicitor confirmed that the claimant was relying on sections 146(1)(b) and section 152(1)(b) of TULRA, but not on paragraph (a) of either of those subsections.

4.3. The claimant's solicitor made two further concessions during the course of his closing arguments:

4.3.1. Subject to one important argument, he agreed that the claim had been presented after the expiry of the statutory time limit for any detrimental act that had been done before 4 May 2018. He argued that those earlier acts were part of a series of similar acts which included acts done after 4 May 2020. If that argument were accepted, the entire detriment claim would have been presented in time.

4.3.2. He told the tribunal that he was not seeking an extension of the time limit for the presentation of the claimant's detriment complaints.

Evidence

5. We considered documents in an agreed bundle which we marked "CR1". We also viewed 13 pieces of video footage recorded on 19 March 2018, to which we will return.

6. The claimant gave oral evidence on his own behalf and called Mr R as a witness. The respondent called Mr Mason, Mr Costello, Mrs Mohan and Mr Lumley. All these witnesses confirmed the truth of their written statements and answered questions. Owing to ill health, Mr R could not give evidence during the days initially allocated to the hearing. Despite the respondent's objection, the hearing was adjourned part-heard and reconvened so that Mr R could attend.

7. Our findings of fact make reference to a manager whom we call "Mr H". His involvement was peripheral to the main events giving rise to this claim, but he would have had some significant evidence to give. In particular, he would have been able to confirm or deny the account given by Mr R of what Mr H had allegedly told him about the claimant's dismissal. We did not think it was particularly suspicious that Mr H had not been called. There were already four witnesses for the respondent dealing with more central matters. We did, however, remind ourselves that Mr R's evidence was uncontradicted by any counter-narrative from Mr H. To the extent that Mr R's account was capable of belief, we accepted it.

Facts

8. The respondent has approximately 2000 employees in Great Britain, including 140 employees at its site in Bromborough, Wirral.

9. The claimant was employed by the respondent from early 2017 as an Extrusion Operator, based at the Bromborough site. He was part of a small team, or Cell, as it was known, supervised by a Cell Leader. All Cells were the responsibility of the Shift Manager, Mr D Costello.

10. Very early into his employment, the claimant was appointed as a health and safety representative.

11. Until the spring of 2018, the respondent's Health and Safety Manager was Mr T. It is common ground that Mr T encouraged workers to come forward and make suggestions for improvement of health and safety.

12. The respondent had an electronic reporting system by which workers could raise health and safety concerns. Access to the system was made available through a terminal on the shop floor. Any worker could use it and it was regularly used. We were shown printouts from the system covering the period from August 2017 to the date of the claimant's dismissal. During that period, by our reckoning, 99 separate health and concerns were raised on the system by a number of different employees.

13. The system provided fields for recording follow-up action in response to the concerns raised. Against the 99 concerns, the fields were routinely populated with entries showing what action had been taken.

14. One frequent user of the reporting system was the claimant. When he raised a concern, it was logged and followed up in the same way as for other employees.

15. It is the claimant's case that he was subjected to retaliatory action for raising health and safety concerns. Before addressing some of the specific incidents of which he complains, we record a preliminary finding that helps set the scene. Those colleagues of the claimant who also raised health and safety concerns on the computer system did not suffer any reprisals. There is no evidence of any action of this kind being taken against them. As a shop steward and health and safety representative, the claimant would have been well placed to find out about retaliatory measures against his colleagues if any existed. Had he learned of any management action of this kind going on, we are sure he would have told us about it.

16. Sometime in 2018, a shop steward, Kirk Phillips, was promoted to the role of Senior Health and Safety Coordinator. We find that this management action did not fit easily with a general culture of hostility towards trade union officials.

17. In December 2017, the claimant was approached by Mr Costello with a proposal. The claimant's Cell Leader was planning to have a knee replacement and Mr Costello was expecting him to be absent for some time. Mr Costello asked the claimant if he would act up as Cell Leader to cover his absence. By this time, the claimant had been a health and safety representative for many months and already raised health and safety concerns using the computer system. As it turned out, this arrangement never came to fruition. The Cell Leader remained at work and there was no need to cover for him. But the mere fact that Mr Costello offered the opportunity to the claimant in the first place suggests to us that Mr Costello was happy to see active health and safety representatives advancing within the business.

18. Towards the end of 2017 the claimant was appointed as a shop steward for the Unite union. He did not actually start to carry out shop steward activities until January 2018. He attended one management meeting, which took place early in 2018. Also present at the meeting was Mrs Mohan, who at that time was the respondent's Sales Director. The meeting was relatively uneventful. The claimant did not do anything at that meeting that would mark him out, either as a difficult trade union representative, or as any other kind of troublemaker.

19. This is a controversial finding, so here is our brief explanation of how we reached it:

    19.1. The meeting was minuted by both Mr Coyne and by management. Neither set of minutes were put before us.

    19.2. The claimant's oral evidence to us was that, at this meeting, he was "very, very vocal". We prefer Mrs Mohan's oral evidence that he was relatively quiet. Had the claimant thought that Mrs Mohan was likely to have perceived him as a nuisance, he would have objected to her involvement in the disciplinary meeting which took place a few months later.

20. In February 2018, the claimant complained about manual handling and the fact that a hoist could not safely pick up bars from the clamping gear.

21. On 21 February 2018 a colleague, Mr E, had an accident in which he cut his hand. He was given first aid, had his wound dressed, and went back to work. Unfortunately, as he worked, his wound re-opened.

22. The claimant engaged in a discussion with Mr Costello about what had happened to Mr E. He told Mr Costello that it had been a breach of health and safety to allow Mr E to return to his work. It is alleged by the claimant that, during the course of that discussion, Mr Costello said to him, "It's a good job I can lip-read," followed by, "I know exactly what you're saying to me". We find that Mr Costello did not make that remark, at any rate, not in the context of that discussion. That is not to say that we would necessarily reject the claimant's evidence that this comment was ever made by Mr Costello. Rather, we find that, if Mr Costello did make that remark, it was not in the context of the claimant making any particular complaint about health and safety on 21 February 2018. Had the claimant understood it to be in that context, we would have expected the claimant to have mentioned that specifically in the grievance that he raised three days later.

23. A further incident happened on 21 February 2018. The claimant complained to Mr Costello that one of the shifts was understaffed. Before raising that complaint, the claimant formed the belief that one of the shifts was down to three workers against the usual number of four. He asked Mr Costello to close down the Reclaim area, which would free up another worker to join the shift. That was the usual procedure for addressing short-term staff shortages. Mr Costello would have been prepared to take that step, but, during their conversation, the claimant revealed that he had not actually checked the staffing numbers for himself. We find, accepting Mr Costello's evidence, that the claimant spoke to him in an argumentative and aggressive manner. For his part, Mr Costello criticised the claimant for not checking his facts. The claimant walked away whilst Mr Costello was still trying to speak to him. Mr Costello shouted to the claimant to come back. There was nothing particularly alarming about Mr Costello shouting. The environment was noisy and, unless Mr Costello had raised his voice, the claimant would not have heard him. At some point during the exchange, Mr Costello said, "You're going to make life hard for yourself complaining about manning when you've not counted the numbers on shift". He did not say that the reason why the claimant's life was going to be made hard was because he had been acting as trade union representative. Nor was that Mr Costello's reason for saying what he said. Mr Costello's bone of contention at that time was not that the claimant was a trade union representative, or that he had been raising health and safety concerns. It was the manner in which the claimant had spoken to him and his failure to check his facts first.

24. On 24 February 2018 the claimant raised a written grievance. His grievance was investigated. The investigator's conclusion was that the grievance was not well-founded.

25. It is alleged that, at some point following the grievance letter being submitted, Mr Costello called the claimant a "grass" and said that he had a negative attitude. We find that Mr Costello did not say these things to the claimant at all. The claimant did not make any contemporaneous complaint that Mr Costello had made such a comment. Indeed, he did not tell anyone within the respondent's organisation about the comment until after his employment had ended. Nor did he mention the comment when he spoke to a more senior union official a few days after it was allegedly made. This is significant. Calling a shop steward a

"grass" is a serious matter; all the more so if that person has been highlighting perceived health and safety risks. The claimant must have known that his union would support him in the face of such obvious intimidation. Had Mr Costello made the alleged comment, we would have expected the claimant to seek such support.

26. At some point, we are not entirely sure when, the claimant made a report on the internal computer system about a build-up of static electricity on a machine. He reported that it was causing static shocks. The problem had already been identified, and the machine had been cordoned off, but the claimant raised a concern that individuals were still getting access to the machine. Thinking that the respondent had not taken sufficient action, the claimant made a similar report to the Health and Safety Executive (HSE). He believed that the contents of his report were substantially true. The HSE notified the respondent that it had received this information. The claimant's identity as the source of the disclosure was withheld.

27. The claimant was not the only employee to raise concerns about static electricity. We make this finding based on the claimant's positive assertion, which was unchallenged, that others made complaints of this kind. As a health and safety representative, the claimant would be well placed to know about such concerns having been raised.

28. We are now able to record our findings about what the claimant believed when he reported his health and safety concerns. Our findings relate to the issues he raised about the hoist, understaffing, Mr E's hand injury, static electricity, and other matters that he reported on the respondent's computer system.

    28.1. Each time he raised a concern, he believed that he was speaking up on behalf of colleagues as well as himself. He was motivated, we find, by a sense of promoting the greater good. He was not, for example, following any private grudge of his own or any desire to help a chosen few friends of his in the workplace. He believed that he was acting on behalf of the workforce generally.

    28.2. On each occasion, the claimant believed that the information he was disclosing tended to show that a person's health and safety was being put in danger.

29. On 19 March 2018, the claimant reported an accident. He said that he had gone up some stairs to a landing and fallen over some pipes that had been left on the mezzanine floor. He spoke to Mr Costello and showed him that he had grazed his shin and bruised his elbow. He completed an accident report. With the claimant's input, Mr Costello carried out a brief investigation which he recorded. When these procedures were completed, the claimant said he was ready to return straight to work, but Mr Costello encouraged him to take some time out. A few minutes later, the claimant decided that he would need to go to hospital.

30. Mr Costello signed the investigation report the same day. The pipes were removed from the floor. No further action was taken at that stage.

31. The next few weeks saw a significant change in personnel. Two fairly senior managers, who would usually have been responsible for health and safety, both left their employment. The Site Manager was made redundant. The Health and Safety Manager (Mr T) resigned in awkward circumstances. Another employee

of the respondent had suffered a serious injury. Mr T suffered a stress reaction to the incident and took a period of sick leave. At some point between March and May 2018 (we could not be certain about the date), he resigned voluntarily.

32. Another important event happened between March and May 2018. Again, we could not make a finding about the precise date. The respondent's insurers were notified that a personal injury claim was being brought on the claimant's behalf. The claim arose out of the accident that had been reported on 19 March 2018. The insurers needed to make a decision about whether to admit or deny liability. They asked the respondent to investigate and, as part of their investigation, to view any CCTV footage of the incident.

33. At the time of this request, the respondent's insurers were dealing with the respondent's Head Office. Mr Mason, the Human Resources Director, was asked to look into the matter. He was chosen because he had been placed in temporary charge of health and safety on site, following the departure of the Site Manager and Mr T. Until this time, Mr Mason had had no operational dealings with the claimant.

34. Mr Mason looked at the CCTV footage. Having done so, he thought that the circumstances of the accident were suspicious. The pipes were large and hard to miss. Shortly before he fell, the claimant could be seen passing the pipes several times. One on occasion he appeared to step deliberately over them, suggesting that he knew that they were there. Just before the accident, he went up the stairs, turned sharply and fell forward at some speed, in a different direction from the one in which his momentum appeared to be carrying him. There was no obvious contact between the claimant's lead leg and the pipes. One leg was left trailing behind the pipes. Immediately after the fall, he could be seen taking photographs. Mr Mason thought that the claimant could have deliberately thrown himself over the pipes with a view to bringing a claim. He thought that, in failing to take action earlier, the company had "made a hash" of the investigation and that it should be re-opened. The decision to re-open the investigation had nothing to do with any health and safety concerns that the claimant had raised, other than his assertion that his fall had been caused by the pipes on the floor.

35. Mr Mason tried to extract the CCTV footage from the system. The task was not easy. The footage could be viewed, but not copied or played in any other format. In the end, Mr Mason arranged for a colleague to use an iPad to take a video recording of the footage as it was displayed on screen. The iPad recording was taken on 10 May 2018.

36. This is a convenient opportunity for us to record our own impressions of the footage. The claimant's fall appeared to us to be suspicious. The claimant told us in evidence that he did not know that the pipes were there until he fell over them. That evidence appeared to us to be implausible and we did not accept it. We could not, however, go as far as to say that the accident was clearly staged.

37. On 10 May 2018 the claimant returned to work after approximately 3½ weeks of absence. Unfortunately, on arrival, he did not feel fit to work. He decided to go to hospital to be checked out. Mr Costello gave him a lift to hospital. On the journey they had a discussion about the issue of static electricity. Mr Costello mentioned that it had been reported to the HSE, along the lines of "we won't be there much longer if people report us to HSE about static". The claimant said nothing to indicate that he was the person to have reported the matter to HSE.

Other than raising the subject in the first place, Mr Costello did not hint that he knew that the claimant was the source of the report. The claimant believed, however, that Mr Costello had correctly guessed that the claimant was the source.

38. We have been able to make a positive finding about the reason why Mr Costello made this remark in the car. He was letting off steam because he thought that the problem with the static had already been addressed by the machine being cordoned off. He believed that the Health and Safety Executive were being brought in for a problem that, in his opinion, did not exist. He was not influenced to any material extent by any belief that it was the claimant himself who had reported the static issue to the Health and Safety Executive.

39. On the same day, 10 May, a colleague of the claimant's, Mr R, was dismissed for poor attendance. Once the decision was announced to him, he was escorted to his locker and out to the car park. The manager accompanying him was Mr H. As they walked, Mr H told Mr R that the dismissal had not been his decision, but that it had "come from above". Mr H also said that he had been told that the next to be dismissed would be "Graham, the union representative". There was only one union representative called Graham, and that was the claimant.

40. In his evidence to us, the claimant told us that Mr H had gone further. According to the claimant's evidence, Mr R told him that Mr H had said that "Graham" would be dismissed *because* he was the union representative. We reject the claimant's account of what was reported to him. It is inconsistent with Mr R's oral evidence to us. Moreover, had Mr H told Mr R in terms that the claimant's union status was the reason for his imminent dismissal, we would have expected two things to have happened. First, we would have expected Mr R to have mentioned Mr H's comment to his own trade union representative. It would have been in Mr R's interests to do so. An admission of a trade-union motivated dismissal would have encouraged the trade union representative to take both Mr R's and the claimant's cases seriously. The second thing we would have expected to happen would be for Mr R to have told the claimant that that was what Mr H had said. In turn, we would expect that the claimant himself would have mentioned it during his own disciplinary process or appeal. The claimant accepted that he had not mentioned this important piece of evidence on either occasion. He told us that, having been told in terms that he was going to be dismissed because he was a trade union representative, he chose to keep his powder dry, sitting on that important piece of evidence without mentioning it either at the disciplinary or appeal stage. We cannot accept the claimant's explanation.

41. What is undoubtedly true, however, is that by 10 May 2018 a decision had been taken to commence a formal disciplinary investigation and that, pending that investigation, the claimant should be suspended. The claimant was informed of his suspension by letter dated the same day. He was invited to an investigation meeting that was due to take place on 16 May 2018.

42. The investigation meeting on 16 May 2018 was chaired by Mr Mason. He put to the claimant the circumstances which he regarded as suspicious. He did not mention at that stage that his enquiries had been triggered by a referral from the insurance company.

43. The claimant asked Mr Mason about the delay in beginning the investigation. As part of his answer, Mr Mason said that there had been trouble accessing the

closed-circuit television footage. This explanation, with apologies for the electrical pun, led to Mr Mason and the claimant getting their wires crossed. The misunderstanding arose from the ambiguity in the word, "accessing". What Mr Mason meant was that had been able to view the CCTV, but he had not been able to extract it and send it to anyone. That was clearly correct. If he had been able to extract it easily he would not have gone to the lengths of filming the screen display using an iPad. The claimant, however, understood Mr Mason to be saying that he had had difficulties in *viewing* the footage. He had heard, correctly, from other sources, that Mr Mason had watched the footage without difficulty. That information was obviously inconsistent with Mr Mason's explanation as the claimant had understood it. The apparent inconsistency heightened the claimant's sense that management were out to get him. But Mr Mason was not trying to mislead the claimant. We are satisfied that his choice of words was not influenced in any way by the fact that the claimant had raised health and safety concerns.

44. As part of his investigation, Mr Mason arranged for another manager, Mr Rampling, to speak to Mr Costello about the claimant's fall. Mr Costello participated as a witness: he was not involved in the decision to commence the investigation.

45. On 18 May 2018, Mr Mason recommended disciplinary action.

46. We are now in a position to record our findings about the reason why the claimant was suspended, why the disciplinary investigation commenced, and why Mr Mason recommended disciplinary action. We find that the reason was that Mr Mason suspected that the claimant might have staged the accident on 19 March 2018. By the time of recommending action, his believed that the claimant had a disciplinary case to answer. He was not inventing a reason as a pretext for dismissing the claimant for a hidden reason. He was not influenced to any material extent by the fact that the claimant had been raising matters of health and safety.

47. In making this finding, we have taken account of two arguments put fairly and forcefully to us on the claimant's behalf:

    47.1. The first argument is based on the fact that Mr T did not challenge the claimant's account of the accident during the weeks that followed. In our view, any apparent acquiescence by Mr T is explained by the circumstances in which Mr T left his employment. He was unlikely to have been concentrating his attention on the genuineness or otherwise of the claimant's fall.

    47.2. The second argument is based on Mr Mason's explanation for the delay. As we have found, there was a simple misunderstanding here and does not cause us to believe that Mr Mason was trying to cover up any improper motivation.

48. Mrs Mohan took the responsibility of conducting the disciplinary meeting. At that time, she held a position of equal seniority to Mr Mason. The meeting took place on 4 June 2018. The claimant was accompanied by Mr Pat Coyne, a salaried trade union official. At no time during the meeting did the claimant or Mr Coyne suggest that Mrs Mohan might not be able to approach the disciplinary meeting impartially.

49. In advance of the meeting, the iPad version of the CCTV footage was provided to the claimant. The footage was played him during the meeting itself and Mrs Mohan asked him about it. The claimant countered by asking Mrs Mohan about the delay in starting the disciplinary investigation. In answer, Mrs Mohan gave substantially the same explanation as Mr Mason had done. (Again, we find that the reason for that explanation was a simple loose choice of words: the difficulty was in capturing the CCTV footage in a format that could be provided to the claimant, it was not a difficulty in initially viewing the CCTV footage.) The claimant alleged that Mr Costello had targeted him for raising health and safety concerns. He spoke mostly in general terms, but mentioned one specific comment that Mr Costello had allegedly made.

50. Having heard the claimant's explanation, Mrs Mohan carried out some further enquiries of her own. She visited the location of his fall. She also spoke to Mr Costello about the circumstances of the accident. She did not question him about his alleged retaliatory behaviour towards the claimant either in general terms or specifically about the alleged comment. In our view there is nothing particularly suspicious about Mrs Mohan's decision to limit the scope of her investigation in this way. Her task was to decide whether or not the claimant was guilty of misconduct and, if so, what the sanction should be.

51. Having completed her investigation, she decided that the claimant's employment should be terminated. To her eyes, the footage showed the claimant not just falling unnaturally, but "diving like a goalkeeper". In her opinion, the claimant's fall was pre-meditated and his accident claim was fraudulent. She could only conceive of one sanction, which was dismissal.

52. Mrs Mohan's decision was not motivated by the fact that the claimant had been doing trade union activities, or that he had been raising health and safety concerns. Her reason was that she believed the claimant had fraudulently staged an accident.

53. At a reconvened disciplinary meeting on 11 June 2018, the claimant was informed he was being dismissed for gross misconduct.

54. The claimant appealed against his dismissal. One of the grounds of his appeal was that he believed that the dismissal was retaliation for highlighting unsafe actions and hazards.

55. The appeal was assigned to the Managing Director, Mr Lumley. In preparation for an appeal meeting, he asked for a printout of all the health and safety concerns the claimant had raised. He discussed those concerns with the claimant in his appeal meeting. After the meeting he had a private conversation with Mr Phillips (the union representative who was promoted to Health and Safety Coordinator). He was satisfied that employees were being encouraged to raise health and safety concerns across the Group. He found that the decision to dismiss should stand and notified the claimant that his appeal was unsuccessful. His decision was not because of the claimant's trade union activities, or health and safety concerns, but because he, too, believed that the claimant had deliberately faked an accident.

Relevant law

Unfair dismissal

56. Section 94 of ERA provides that an employee has the right not to be unfairly dismissed by his employer. That right is subject to a number of provisions, which include section 108.

57. Section 108(1) of ERA excludes employees from the right in section 94 unless they have two years' continuous employment ending with the effective date of termination. But, by section 108(2), the exclusion does not apply where section 100(1) or 103A applies. Section 154 of TULRA similarly disapplies the exclusion where section 152 applies.

58. The effect of these provisions is that, where a dismissal is automatically unfair by operation of sections 100(1) or 103A of ERA, or section 152 of TULRA, the employee has the right not to be unfairly dismissed, even if he has not been continuously employed for two years.

59. Section 100(1) of ERA provides, relevantly,

> "(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
>
> …
>
> (*b*) being a representative of workers on matters of health and safety at work or member of a safety committee—
>
> …
>
> (ii) by reason of being acknowledged as such by the employer,
>
> the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee."

60. Section 103A of ERA provides, so far as is relevant:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

61. Section 152 of TULRA relevantly provides:

> "(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
>
> …
>
> (*b*) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, …"

62. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

63. As a general rule, the focus is on the reason of the decision-maker: *Orr v. Milton Keynes Council* [2011] EWCA Civ 62. That rule now has an important qualification in the light of the Supreme Court's decision in *Royal Mail v. Jhuti* [2019] UKSC 55. Where a person in the hierarchy of responsibility above the employee determines that he should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

64. Where the employee had less than two years' continuous employment, the onus is on the employee to prove that the sole or main reason for dismissal was the automatically-unfair reason: *Smith v. Hayle Town Council* [1978] ICR 996.

Protected disclosure

65. According to section 43A of ERA, a "protected disclosure" is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with, amongst other sections, sections 43C and 43F.

66. Section 43C provides that "a qualifying disclosure is made in accordance with this section if the worker makes the disclosure– (a) to his employer…"

67. A disclosure to a prescribed person is made in accordance with section 43F if two conditions are satisfied. The second of those two conditions is that the worker believes that the information and any allegation contained within it are substantially true. The HSE is one of the prescribed persons in the Schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014.

68. Section 43B relevantly provides:

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

69. There has been a considerable amount of case law on what amounts to "information" for the purpose of section 43B(1). There is no rigid distinction to be drawn between information on the one hand and "allegations" on the other. An allegation may contain information. The test is whether or not the disclosure contains *sufficient* information to comply with the subsection: *Kilraine v. London Borough of Wandsworth* [2018] EWCA Civ 1436.

70. Where the worker relies on section 43B(1)(b), the information must identify, albeit not in strict legal language, the breach of legal obligation on which the worker relies: *Fincham v. HM Prison Service* [2003] All ER (D) 211 per Elias J at paragraph 33.

71. The question of reasonable belief involves two stages. The first is subjective: did the worker actually believe that the information tended to show one of the relevant categories of wrongdoing? The second stage is objective: was that belief reasonable? That second question is to be judged according to what a reasonable person in the worker's position would believe: *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4.

72. The requirement of reasonable belief in the public interest was considered by the Court of Appeal in *Chesterton Global Ltd v Nurmohamed [*2017] EWCA Civ 979. Giving the lead judgment, Underhill LJ gave the following guidance on the tribunal's approach:

> 27. First… The tribunal… has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.
>
> 28. Second… 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.
>
> 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. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.[4]
>
> 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…
>
> 31. Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much

> value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression. …the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.

Detriment on the ground of protected disclosure

73. By section 47B(1) of ERA, "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by his employer on the ground that the worker has made a protected disclosure."

74. Section 47B(1A) of ERA also provides:

> "(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment….
>
> on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

75. We have interpreted the word "detriment" consistently with its meaning in the Equality Act 2010. Subjecting a person to a detriment means putting them under a disadvantage: *Ministry of Defence v. Jeremiah* [1980 ICR 13, CA, per Brandon LJ. A person is subjected to a detriment if he could reasonably understand that that he has been detrimentally treated. A detriment can occur even if it has no physical or economic consequence. An unjustified sense of grievance, however, is not a detriment: *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

76. Whether or not the employer's act (or deliberate failure to act) was done "on the ground that" the worker had made a protected disclosure involves looking at the motivation of the employer. Was the employer influenced to any material extent by the fact that the worker had made a protected disclosure? "Material", in this context, means "more than trivial". The authority for formulating the test in this way is *NHS Manchester v. Fecitt* [2011] EWCA Civ 1190, [2012] IRLR 64.

77. In deciding whether or not an act or failure was done on the proscribed ground, it is permissible for a tribunal to distinguish between the fact that the worker made the disclosure (on the one hand) and the manner in which the disclosure was made (on the other). For example, it would be open to a find that there was no breach of section 47B if the employer acted because the worker had made his disclosure in abusive language: *Panayiotou v. Chief Constable of Hampshire* [2014] ICR D23.

Health and safety detriment

78. Here is the relevant wording of section 44(1) of ERA:

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(b) being a representative of workers on matters of health and safety at work or member of a safety committee— …

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee…

Trade union detriment

79. So far as is relevant, section 146(1) of TULRA provides:

"

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

…

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so…"

80. "Penalising" means subjecting the worker to a disadvantage. There is no need for the worker to show that there was a positive punishment or financial penalty: *Carlson v. Post Office* [1981] ICR 343.

81. The "activities of an independent trade union" mean the activities of the union and not merely the activities of an employee who happens to be a union member. Where a union member was dismissed for organising a health and safety petition, it was open to the tribunal to find that the act of organising the petition was independent of his status as a union member: *Chant v. Aquaboats Ltd* [1978] ICR 643.

Protection from detriment – burden of proof

82. Section 48(1) or ERA enables an employee to present a complaint to an employment tribunal that the employer has breached section 44. Section 48(1A) allows a worker to present a complaint of breach of section 47B.

83. The relevant wording of section 48(2) of ERA is:

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

84. We take these provisions to mean:

84.1. that the employee or worker must prove that he made a protected disclosure or that he performed the functions described in section 44;

84.2. that the employee or worker must prove that he was subjected to a detriment by an act or deliberate failure; and

84.3. that it is then for the employer to prove that the act or failure was not motivated to any material extent by the proscribed reason.

85. Similarly, section 148(1) of TULRA provides that, in a complaint under section 146, "it shall be for the employer to show what was the sole or main purpose for

which he acted or failed to act". The worker must show that he has been subjected to a detriment by an act or failure. He must also raise what is known as a "*prima facie case"* (an apparently arguable case) that that the sole or main purpose of the act or failure was one of the purposes prescribed by section 146. If the worker crosses that relatively low hurdle, it is for the employer to prove that act or failure was not wholly or mainly for the proscribed purpose: *Serco Ltd v. Dahou* [2016] EWCA Civ 832.

Protection from detriment – identifying the decision-maker

86. When determining whether or not the employer acted for the prohibited purpose, the focus is on the mind of the decision-maker. In *Jet2.com Ltd v. Denby* UKEAT 0070/17, at paragraph 56, of HHJ Eady QC (as she then was), observed: "it would be wrong to fix an innocent decision taker with the tainted reasoning of others within an organisation".

87. Likewise, when examining the motivation of the employer under section 47B(1) of ERA, or of the colleague under section 47B(1A), the tribunal must identify the decision-maker in respect of each act or deliberate failure. Knowledge of a disclosure, or improper motivation, on the part of another person is irrelevant except in so far as it plays on the mind of the decision-maker. Where a claimant believes that another colleague has influenced the decision-maker with improper motivation, his remedy is to allege a breach of section 47B(1A) against the colleague for their part in influencing the decision. The employer will be vicariously liable for that breach under section 47B1B). Likewise, in a claim under section 47B(1A) against a colleague, the focus should be on *that colleague's* motivation; if the colleague was influenced by others, the worker should raise a separate complaint against those others. For authority for these propositions, see *Malik v Cenkos Securities plc* UKEAT/0100/17/RN, paras 85-93.

Protection from detriment - time limits

88. Section 48(3) of ERA provides, relevantly to this claim:

> (3) An employment tribunal shall not consider a complaint under this section unless it is presented—
>
> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them….

89. In *Arthur v London Eastern Railway* [2006] EWCA Civ 1358, the Court of Appeal clarified the meaning of "a series of similar acts". The phrase was designed to cover a case which cannot be characterised as an act extending over a period (by reference to a connecting rule, practice, scheme or policy) but where there is some link between the acts which makes it just and reasonable for them to be treated as in time and for the claimant to be able to rely on them. In order for the acts in the three-month period and those outside to be connected, the Court went back to the statutory wording that they must be part of a 'series' and acts which are 'similar' to one another. It held that a tribunal should hear evidence to determine whether acts or omissions form part of such a series and not rely on submissions alone. Potentially relevant considerations were described by the Court of Appeal as follows:

- it is necessary to look at all the circumstances surrounding the acts
- were they all committed by fellow employees?
- if not, what connection, if any, was there between the alleged perpetrators?
- were their actions organised or concerted in some way?
- why did they do what is alleged?
- it is not necessary that the acts alleged to be part of the series are physically similar to each other
- it may be that a series of apparently disparate acts could be shown to be part of a series or to be similar to one another in a relevant way by reason simply of them all being on the ground of a protected disclosure (Lloyd LJ disagreed on this point).

90. Section 147 of TULRA provides:

> An employment tribunal shall not consider a complaint under section 146 unless it is presented-
>
> (a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them…

91. In our view, phrase, "series of similar acts" should be interpreted in the same way in section 147 of TULRA as in section 48 of ERA.

Conclusions

Protected disclosures

92. We examined each alleged protected disclosure individually, but were able to address some of the issues collectively for all five disclosures together.

Information

93. The claimant made disclosures of information to the respondent on all five of the occasions. There was only one occasion where it was disputed that the claimant had disclosed information. The dispute related to the disclosure mentioned at paragraph 1.3 of the list of issues. We decided that particular dispute in the claimant's favour. The claimant disclosed sufficient information to comply with section 43B. In a conversation about Mr E's wound re-opening when he resumed work, the claimant said that it was a breach of health and safety to allow Mr E to return to his work. The claimant was disclosing information that it had been dangerous for Mr E to go back to work with a recent hand injury. That was enough to tend to show that a person's health and safety had been put in danger. It does not matter that the claimant was making an allegation at the same time.

Belief in the public interest

94. Paragraph 28.1 records our finding that the claimant believed on each occasion that he was disclosing the relevant information in the interests of the wider

workforce. In our view, such a belief is sufficient to amount to a belief that he was making the disclosure in the public interest. The health and safety of workers affects many sections of the public beside the workers themselves. It has an impact on the respondent's ability to run its business and deliver goods and services to its customers. Workplace injuries may affect the injured workers' ability to participate in society and the wider economy. Injuries may cause them to be entitled to taxpayer-funded benefits. For these reasons we would also regard the claimant's belief as reasonable.

Belief as to what the information tended to show

95. In each case, the claimant believed that the information he was disclosing tended to show that a person's health and safety was either being put in danger or had been put in danger. See our finding at paragraph 28.2 above. We take the view that the claimant's belief in this regard was reasonable on each occasion. We did not understand the respondent to make any positive submissions to the contrary.

96. All five disclosures were therefore qualifying disclosures within the meaning of section 43B of ERA.

Disclosure to employer

97. All the qualifying disclosures were made to the claimant's employer, either orally to Mr Costello or using the electronic reporting system. They were therefore made in accordance with section 43C and were protected under section 43A. the disclosure at paragraph 1.5 of the list of issues was protected via an additional route. The claimant made that disclosure not just to his employer, but to a prescribed person, namely the HSE. Although the list of issues did not encompass a disclosure made in accordance with section 43F, it is clear from paragraph 1.5 of the list of issues that that section was engaged. In our view it was reasonable for the claimant to believe (as we found that he did) that the information in his report to the HSE was substantially true. The Respondent did not suggest otherwise.

<u>Functions of health and safety representative</u>

98. When raising these health and safety concerns, the claimant was carrying out the functions of a health and safety representative and he was therefore protected under section 44(1)(b).

<u>Not trade union activities</u>

99. We find however that the claimant in raising these concerns was not carrying out trade union activities at an appropriate time. He never gave any indication when he was raising these concerns that he was doing in his capacity as trade union representative or shop steward as opposed to a health and safety representative or ordinary employee. He did not, for example, say that he was speaking on behalf of the members of his union. We find that he did not demonstrate a close enough connection with the trade union to indicate that he was doing it in his capacity as a trade union representative.

<u>Detriments – substantive issues</u>

100. We now examine the alleged detrimental acts and omissions. In this case we found it more straightforward to address each alleged detriment on its merits and assess the impact of the statutory time limit at the conclusion of that exercise. We take each detriment in turn:

Detriment 4.1 - "Things are going to go very bad for you"

101. On our findings, the detrimental remark was different to that which is alleged at paragraph 4.1 of the list of issues. Mr Costello said, "You're going to make life hard for yourself". Often it is unfair to determine the issues on a different factual basis to that which has been alleged. Not so in this case: there would be no disadvantage to the respondent if we were to proceed on the basis of the facts as we found them. The essential meaning of the detrimental comment remained the same; it was just the precise words that were different.

102. In our view, it was reasonable for the claimant to perceive Mr Costello's comment to be detrimental to him. It suggested, at the least, that he would meet with resistance and criticism from management.

103. When making the comment, Mr Costello was not influenced to any material extent by the fact that the claimant had made a protected disclosure or by the fact that he had carried out the functions of a health and safety representative. What motivated Mr Costello was the fact that the claimant made his complaint aggressively and without checking his facts first. See paragraph 23 above. We agree with Ms Smeaton's submission that this is a case in which the manner in which the claimant made his disclosure is properly separable from the disclosure itself.

104. Had we found that the claimant had been carrying out the activities of a trade union, we would have drawn the same distinction. Mr Costello's sole or main reason for making the comment was not to penalise or deter the claimant from raising health and safety concerns on behalf of the union; it was to criticise the claimant for the manner in which he raised those concerns.

Detriment 4.2 – "grass" and "negative attitude"

105. We can deal with the second detriment relatively briefly. The alleged detrimental act did not happen. We found in paragraph 25 that Mr Costello did not call the claimant a "grass" and did not say he had a negative attitude. This is not a case where we made findings about what Mr Costello actually did say on the same occasion; our finding is simply that Mr Costello did not make the alleged remarks.

Detriment 4.3 – "It's a good job I can lip-read"

106. The third alleged detriment is alleged to have occurred on 21 February 2020. As paragraph 22 records, we did not make a definite finding of fact as to whether Mr Costello had *ever* made the alleged remark to the claimant. What we were able to make a positive finding about was that the remark, if it was made, was not in the context of the claimant making any complaint about health and safety on 21 February 2018.

107. Assuming that Mr Costello did, at some time, make that comment, but in a different context, we would apply those assumed facts to the legal principles in the following way:

107.1. We would need to be persuaded that the comment could reasonably be perceived to have been detrimental to the claimant. An employee cannot reasonably complain if his manager lip-reads him saying something to which the manager takes objection and challenges him for it. There might be something about the context that would give the employee a justified sense

of grievance, but we have no evidence (other than that which we have rejected) about what the context was.

107.2. Mr Costello's remark was not on the ground that the claimant had made protected disclosures, exercised health and safety functions or carried out trade union activities. Mr Costello's mind was not significantly influenced by these improper considerations. The claimant has not even raised a reasonably arguable case that he was motivated in this way. Once the date and context of the remark are stripped away, there is nothing to link his comment to the proscribed grounds.

Detriment 4.4 – inconsistent explanation about CCTV footage

108. The claimant was not subjected to a detriment when Mr Mason gave his explanation for the delay. As we found in paragraph 43, the claimant misunderstood what Mr Mason meant when he said that he had had trouble "accessing" the CCTV footage. We do not think that that the claimant could reasonably have perceived Mr Mason's use of an ambiguous word to be detrimental to him. He saw an inconsistency where none existed.

109. We also addressed the remaining issues in case we are found to be wrong in our conclusion about whether or not there was a detriment. Again, the relevant finding of fact is at paragraph 43. The respondent proved to us that Mr Mason's explanation was not motivated at all the fact that the claimant had made any protected disclosures, or that he had carried out functions of a health and safety representative, or that he had been carrying out trade union activities.

Detriment 4.5 – the comment in the car

110. Mr Costello's comment in the car was capable of being reasonably perceived by the claimant as being to his detriment. The claimant had reported problems with static electricity to the HSE. He could not know for sure whether or not Mr Costello knew that the claimant was the source, but it was reasonable for the claimant to believe that Mr Costello had correctly guessed that it was him. From the claimant's point of view, Mr Costello's comment would reasonably come across as putting him under emotional pressure. It did not take much reading between the lines to interpret the comment as being, "stop reporting static to the HSE or we will go out of business".

111. Despite our conclusion that there was a detriment, this complaint still fails. This is because of our finding at paragraph 38. We made a positive finding about the reason for Mr Costello's comment. The respondent has proved that he was not motivated by any consideration that the claimant had made a protected disclosure, or that he had carried out health and safety functions or carried out trade union activities.

Detriment 4.6 – commencing a disciplinary procedure

112. It was undoubtedly detrimental to the claimant to have to go through a disciplinary process. But we are satisfied that the decision to put him through that process was not influenced by the fact that the claimant had made protected disclosures or done any of the other protected activities. The reason for starting the investigation was because Mr Mason suspected that the claimant had staged the accident and the reason for recommending disciplinary action was that Mr Mason believed he had a case to answer: see paragraph 46.

Detriments - jurisdiction

113. In view of our conclusions on the merits of the detriment complaints, it might be considered academic for us to be questioning our jurisdiction as well. Nevertheless, in case any of our substantive conclusions are found to have been wrong, we now address the statutory time limit.

114. The three detrimental acts referred to in paragraphs 4.1 to 4.3 of the list of issues are all alleged to have been done in February 2018. They need to be part of a series including something done on or 4 May 2018, or the tribunal cannot consider them.

115. Paragraphs 4.4 and 4.5 of that list refer to events on 11 and 16 May and 4 June 2018 – all occurring after the 4 May 2018 cut-off date.

116. Turning to paragraph 4.6, it is a moot point whether the "disciplinary procedure" was "commenced" on or after 4 May 2018. We did not make a factual finding as to when Mr Mason decided to start a disciplinary *investigation*. It had happened by 11 May 2018, but it may have been some time before. The decision to recommend disciplinary *action* was on 18 May 2018. For time limit purposes, we assume in the claimant's favour that the alleged detrimental act at paragraph 4.6 was done on or after 4 May 2018.

117. What we must now consider is whether or not the detrimental acts at paragraphs 4.1 to 4.3 were part of a series of similar acts which included one of detriments 4.4 to 4.6. There is a short answer to this point. None of the three later acts contravened section 44 or section 47B of ERA or section 146 of TULRA. There was no contravention of these sections after 4 May 2018, and therefore nothing that could be said to be part of a series that could incorporate the earlier alleged detriments. It follows that the claim in respect of paragraphs 4.1 to 4.3 was presented after the statutory time limit expired. Without an extension of time, which the claimant does not seek, the tribunal has no jurisdiction to consider these three detriments.

Unfair dismissal

118. When it comes to the complaint of unfair dismissal, our task is to decide whether or not the claimant has proved that the sole or principal reason for dismissal was one of the three alleged automatically-unfair reasons.

119. Before expressing our conclusion on that issue, we must first be clear about whose reason we must examine. In our view, it is the reason in the minds of Mrs Mohan and Mr Lumley. It was they who were deputed to carry out the functions of the employer in deciding whether or not to dismiss the claimant. We have made findings about both Mrs Mohan's and Mr Lumley's reasoning at paragraphs 51, 52 and 55. Both managers decided that the claimant should be dismissed for the reason that they believed that the claimant had staged an accident in order to bring a dishonest personal injury claim. It was not in any way because the claimant had made protected disclosures about health and safety, or carried out the functions of a health and safety representative, or carried out trade union activities.

120. This is not a case where anyone in the hierarchy of responsibility above the claimant, such as Mr Costello or Mr Mason, invented a reason for dismissal which was adopted by one of the decision-makers. We therefore regard Mr

Mason's motivation as irrelevant to the reason for dismissal. In case we are wrong about that, we would not have found that the sole or principal reason for Mr Mason's actions was anything other than his suspicion (and later his belief) that the claimant had staged the accident.

121. The claimant has failed to show that section 100 or 103A of ERA or section 152 of TULRA applies to the dismissal. For section 94 of ERA to protect him, he needed a qualifying period of continuous employment which he did not have. He therefore had no right not to be unfairly dismissed. This part of the claim also fails.

Disposal

122. The entire claim must therefore be dismissed.

Postscript

123. We have four things to add:

123.1. First, we would like to record our gratitude for the assistance given to us during the hearing by the claimant's solicitor and counsel for the respondent. Their list of issues and focused closing arguments made what could have been an unwieldy claim significantly more manageable.

123.2. Second, the employment judge apologises for the delay in sending these reasons to the parties. Working arrangements were severely disrupted during the early weeks of the COVID-19 emergency and the claimant's request for reasons was unfortunately overlooked.

123.3. Third, these reasons refer to some people by an initial rather than by name. Broadly speaking, we decided to anonymise those people who did not give evidence, but about whom this judgment may be seen as critical or to contain embarrassing detail. We also anonymised Mr R, who did give evidence, but only in answer to a witness order.

123.4. Finally, readers of these reasons, having hopefully understood why the claimant's claim did not succeed, may still be left wondering whether the claimant staged his accident or not. They might think that this important question has been left unanswered, and they would be right. We quite deliberately held back from making a finding about whether or not the accident was genuine. It was not necessary for us to make that finding in order to determine the issues in this case. If need be, that issue can be revisited on another day and in a different judicial forum.

Employment Judge Horne

2 July 2020

REASONS SENT TO THE PARTIES ON

7 July 2020

FOR THE TRIBUNAL OFFICE

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