EMPLOYMENT TRIBUNALS

Claimant: Mr W Robertson

Respondent: Cape Industrial Services Limited

HELD AT: **Sheffield by CVP** **ON:** **2, 3 and 4 November 2020**
23, 24, 25 and 26 November 2020
In Chambers 1 December 2020

BEFORE: **Employment Judge Little**
Mr M D Firkin
Mr D Pugh

REPRESENTATION:

Claimant: Mr J Duffy of Counsel (instructed by DLG Legal Services)
Respondent: Mr R Quickfall of Counsel (instructed by Gateley Legal)

RESERVED JUDGMENT

The claim fails and is dismissed

REASONS

1. **The complaints**

Mr Robertson presented his claim to the Tribunal on 7 January 2020. At that stage he was represented by Simpsons Solicitors. The complaints brought were detriment on the ground that a protected disclosure had been made; unauthorised deduction from wages and in respect of holiday pay allegedly due.

Subsequently the claimant withdrew the latter two complaints. The complaint in respect of unlawful deductions was dismissed on withdrawal on 18 May 2020 and the holiday pay complaint was dismissed on withdrawal on 12 June 2020.

Accordingly the only complaint proceeding and for determination by us is the complaint brought under the Employment Rights Act 1996 section 47B of detriment on the ground that a protected disclosure was made.

2. **The issues**

These were agreed at a preliminary hearing for case management conducted by Employment Judge Rogerson on 18 May 2020. Prior to that hearing Simpsons solicitors had ceased to act for the claimant and so he was in person at the time of the preliminary hearing. In anticipation of that hearing a list of issues had been prepared and in an email of 15 May 2020 to the Tribunal the respondent's solicitor said that that list had been agreed with the claimant.

During the course of the preliminary hearing the respondent's solicitor explained to the Judge that in the interests of narrowing the areas of dispute, the respondent conceded that the claimant had made the qualifying protected disclosures he relied upon. The list of issues summarises what those disclosures were. In summary they were the claimant's concerns about the safety of scaffolding, in terms of its preparation, erection and use.

The list of issues went on, in paragraph 4, to list the detriments which the claimant alleged had occurred on the ground that he had made those disclosures. There were some 17 alleged detriments relating to the period form 5 June 2019 to 9 December 2019.

At the beginning of our hearing the claimant withdrew the allegation in respect of one alleged detriment (failure to increase his pay after a transfer between sites). Further Mr Quickfall observed that in relation to another alleged detriment (removal of a morning break) the claimant had not made reference to that in his witness statement and so the respondent was unsure whether that detriment was still being pursued. Mr Duffy was able to confirm that it was but acknowledged it had not been dealt with in the claimant's witness statement. In those circumstances we permitted Mr Duffy to ask the claimant supplementary questions about that issue and we also permitted Mr Quickfall to ask his relevant witnesses' supplementary questions to deal with that matter.

Further we should add that shortly after the claimant's current solicitors were appointed, they made an application on 2 July 2020 to amend the claim by the addition of further alleged detriments. That application was refused (on paper) by Employment Judge Jones on 20 July 2020.

The issues which we have to determine can therefore be summarised as follows:

2.1. Was the detriment complaint, or any part of it, presented outside the period permitted by Employment Rights Act 1996 section 48(3) – that is 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?

2.2. Were there acts or failures which form part of a series of similar acts or failures where the last of them was in time?

2.3. If any part of the complaint was presented out of time, was it reasonably practicable for it to have been presented in time and should the Tribunal extend the time for presentation if the actual date was reasonable?

2.4 Did any or all of the alleged detriments occur? Those are the 16 alleged detriments set out in paragraph 4 of the list of issues (other than that at paragraph 4.5.5 within that list.)

Mr Duffy said that the most significant alleged detriment was the claimant's transfer from the Greenergy site to the Lindsey Oil Refinery site.

2.5 In respect of such detriments as are found to have been done, were they done on the ground that the claimant had made protected disclosures? Pursuant to section 48(2) of the 1996 Act, it is for the respondent to show the ground on which any act or deliberate failure to act was done.

3. **The evidence**

The claimant has given evidence but called no other witnesses. The respondent's evidence has been given by Mr D Ackroyd, portfolio manager (regional manager); Ms D Mulvihill, HR business partner; Mr W Spicer, HR partner; Mr J Walton, site manager Novartis site; Mr N Critchley, health and safety manager at Lindsey Oil Refinery site; Mr A J Whitley, scaffold planner, Lindsey Oil Refinery site and Mr W T Wells, scaffolder, Lindsey Oil Refinery site.

4. **Documents**

The Tribunal have had before them an agreed bundle which initially comprised 441 pages. However an additional page was added (442), this being a document put in on the first day by the respondent - NAECI pay grades.

5. **Time allocation and CVP difficulties**

The claim had been listed for a four day hearing at the preliminary hearing on 18 May 2020. We assume that that was based upon a time estimate provided by the parties, or at least by the respondent who at that hearing was the only represented party. Unfortunately, due to CVP problems which cut short some days, lost one day and due to the weight of the case, it has required seven hearing days and a further day in chambers.

6. **The Tribunal's findings of fact**

6.1. The claimant's employment began on 19 March 2010. His contract of employment (particulars of employment) is at pages 93 to 96 in the bundle.

6.2. Within that contract the claimant's job title is described as scaffolder. Paragraph 3 of the contract deals with place at work and is in these terms:

"*Your area office is Elsham. You shall in the performance of your duties travel to such place or places as the Company from time to time directs. Wherever possible the Company will give not less than 7 days' notice of any requirement that you work outside the United Kingdom".*

6.3. The contract goes on to provide that the claimant will be paid on an hourly basis, although in practical terms we understand that the claimant was paid weekly.

6.4. The claimant's employer is named within the contract simply as Cape.

6.5. As far as we are aware, the claimant was never issued with a revised contract of employment, although one of the alleged detriments is that the respondent tried to obtain the claimant's signature to a new contract of employment on or about 10 September 2019 with a different employer, Hertel who are in fact a sister company with the respondent in the Altrad Group.

6.6. The claimant contends that on 31 December 2010 his job title and role was changed to what he describes as scaffold charge hand (supervisor) and that his rate of pay under the grades set by the National Joint Council for the Engineering Construction Industry (NAECI) moved to grade 6, which the claimant describes as a supervisor grade.

6.7. The respondent's case is that at the material time the claimant's job title was charge hand/lead hand scaffolder. They point out that the NAECI grades do not apply to supervisors because supervisors are monthly paid. The extract from the NAECI core terms and conditions document at page 442 indicates that grade 6 applies to skilled working charge hands.

6.8. Taking into account what the claimant says in paragraph 2 of his witness statement, but also taking into account the respondent's evidence on this point we find that whilst the claimant was on grade 6, he could not have been a supervisor because that grade and the core terms and conditions do not apply to supervisors. Whilst it was probably the case that whilst on the Greenergy site the claimant was on occasions treated as a supervisor and certainly would deputise for the supervisor, Stuart Garrod, that does not mean that he was in fact a supervisor. We observe that these uncertainties which we have had to resolve, would not have arisen if the respondent had issued the appropriate variations to the claimant's contract of employment to reflect his promotion, initially to advanced scaffolder and subsequently to charge hand/lead hand scaffolder.

6.9. The respondent is concerned with the provision of industrial services to the oil, gas, energy and petrochemical sectors. It has various clients within the Humberside region and as we understand it, it has a permanent presence on those sites. Among the Humberside area sites are Greenergy which is at Immingham, Lindsey Oil Refinery, which is nearby, in Immingham and Novartis in Grimsby, where the claimant lives.

6.10. A former competing company, Hertel UK Limited is now a sister company of the respondent being within the Altrad Group.

6.11. The claimant began to work at the Greenergy site on 23 November 2010. He continued to work exclusively at that site until 5 June 2019 when he was moved to the Lindsey Oil Refinery. The claimant remains in the employment of the respondent but began what would be a long term sickness absence on 9 December 2019. Although it occurred after the date when the claim was presented, and so is not something with which we are directly concerned, we understand that the claimant indicated to his employer mid-April 2020 that he was fit to return to

work, but we understand he has not done so because at around that time, or possibly the following month, he was put on furlough.

6.12. As noted above, the claimant made various disclosures in 2018 and 2019 about such matters as the allegedly poor standard of scaffolding that had been erected, scaffolding being used before it had been tagged, alleged instructions from line managers not to put handrails on scaffold and permitting employees to work on scaffolding which was greasy.

6.13. On 20 March 2019 the claimant sent an email to the group HR department and a copy is on page 134. In it the claimant says that he had previously raised issues with a Colin Braithwaite, who was the respondent's site manager at Greenergy and therefore the line manager of Mr Garrod, who in turn, as supervisor, was the claimant's line manager. The claimant records that Mr Braithwaite had dismissed issues which the claimant was raising with him on the grounds that there was simply a clash of personalities, apparently between the claimant and Mr Garrod. The claimant was raising concerns about what he described as health and safety, mismanagement and line manager conduct. The claimant said that he had raised matters with Mr Garrod but had been told that he could be taken off site. The claimant said that he felt totally bullied, intimidated, demoralised and demotivated.

6.14. A grievance hearing took place on 4 April 2019 chaired by Mr D Ackroyd, described as site manager (although we understand him to be the regional manager). For that matter the claimant's position is described as supervisor. The minutes are at pages 137 to 143. The claimant explained that he felt bullied, demoralised and completely let down by the company. He believed that he had a duty to report health and safety conditions which he believed might cause harm or damage and he tried to do that on a daily basis. The claimant also complained about Mr Garrod's behaviour towards him and said he was spoken down to. The claimant accused him of being controlling and micromanaging. The claimant contends that the grievance meeting was cut short. The record of the meeting shows that it lasted for one hour 39 minutes. Mr Ackroyd's evidence was that the meeting had been allocated two hours in his diary and he recalls that the meeting went on longer than he had anticipated. He accepts that he had to end the meeting by informing the claimant that he had another appointment (did not just 'walk out') but by that stage Mr Ackroyd believed that all the issues had been covered and that the claimant was beginning to repeat himself, a view which he believed the union representative ,Mr Clarkson, shared. The claimant appears to have assumed that there would be a further or reconvened meeting, but Mr Ackroyd denies that that was said. The minutes do not suggest that there would be another meeting. On page 143 Mr Ackroyd is recorded as saying that he needed to address several issues and allegations which had been raised that day.

6.15. Because the claimant felt that he had more to say, later on 4 April 2019 he prepared or compiled a 13 page document (pages 144 to 156) which he submitted to Mr Ackroyd. It seems to be a compilation document as

it sets out various apparently contemporaneous entries which the claimant may have made in a diary or similar journal.

6.16. The claimant's concerns about how the 4 April 2019 grievance hearing was conducted, specifically the failure to reconvene and the alleged failure to properly thereafter investigate the health and safety issues raised comprise the **first alleged detriment**.

6.17. On 10 April 2019 Mr Ackroyd interviewed Mr Garrod, Mr Maver, who was a scaffolder and Mr Denton who was a lagger and also Mr Garrod's stepfather. The interview notes are at pages 158, 162 and 165. Those three, together with the claimant comprised the Cape presence at Greenergy at that time.

6.18. On 28 April 2019 Mr Ackroyd prepared a letter to the claimant which set out the outcome of the grievance. However this was not provided to the claimant until 8 May 2019. A copy is in the bundle at pages 177 to 179. Mr Ackroyd had categorised the grievance as having three strands, health and safety concerns; mismanagement at Greenergy and the conduct of Mr Garrod.

6.19. On the health and safety aspect, Mr Ackroyd had concluded that the Greenergy contract had what he described as a complimentary health and safety record and there were little to no health and safety issues. Mr Ackroyd noted that the claimant had raised issues about his health having been affected by the issues that he had raised on site and Mr Ackroyd suggested that the claimant should be referred to the respondent's occupational health provider.

6.20. The mismanagement issues which the claimant had raised were about the absence reporting procedure as applied at Greenergy. Mr Ackroyd had not found anything untoward.

6.21. With regard to the alleged conduct of Mr Garrod, on being interviewed, Mr Garrod had accepted that on 12 March 2019 he had sworn at the claimant because he had not been satisfied with work which the claimant had done on the previous day. Mr Ackroyd noted that the use of such language was common place in the work environment but the respondent did not deem it acceptable to use what Mr Ackroyd referred to as profanity language in the workplace. He had therefore given a recommendation to Mr Garrod that in future he should be mindful of the use of such language in the workplace. Mr Ackroyd had found no evidence of any other issues regarding Mr Garrod's conduct towards the claimant. Mr Ackroyd went on to write that *"I would like to offer you the opportunity to transfer to a different contract within the Humberside area. The company is able to accommodate you at either Keadby Power Station or Lindsey Oil Refinery*". The claimant was invited to contact HR within five days of receipt of the letter if he wished to discuss either of those options. In his witness statement (paragraphs 23 and 24) Mr Ackroyd explains that the reason for giving the claimant that option was that he felt that the working relationship between the claimant and Mr Garrod was far from ideal and that this was affecting the claimant's health and home life. In those circumstances he thought that the claimant might be quite receptive to moving to another site. A further reason was that Mr Ackroyd had learnt that the claimant knew

some of the people who worked at the Lindsey Oil Refinery, including Mr Whitley and Mr Wells from whom we have heard and also the claimant's brother-in-law Mr Montgomery, from whom we have not heard.

6.22. On 10 May 2019 the claimant appealed the grievance outcome. This six page letter is at pages 180 to 185 in the bundle. The claimant did not comment on the offer of a move to another site.

6.23. The grievance appeal hearing took place on 3 June 2019 and was before Mr J Leonard, a senior operations manager. The minutes are at pages 191 to 207.

6.24. On the following day, 4 June 2019 at approximately 1.00pm the claimant was informed that he would be moving to the Lindsey Oil Refinery. This information was given to the claimant by Mr Garrod who told the claimant that he had received a phone call from Mr Ackroyd who had told him that the respondent was short of men at the Lindsey Oil Refinery. On making further enquiries with the assistance of his GMB representative the claimant was told that this move was purely operational to assist with a shut down at the oil refinery and that the claimant would be returning to Greenergy once that work had been undertaken. This is the **second alleged detriment**.

6.25. Mr Ackroyd's evidence is that the reason for this move was two-fold. Because for much of 2019 the oil refinery site was on a shutdown, there was significantly more work for the respondent to undertake and so additional labour was required. Usually there would have been 65 to 70 employees of the respondent at the refinery but in 2019 the head count was up to 120 people. Employees were therefore brought in from other sites. Further, in June 2019 Mr Ackroyd needed an advanced scaffolder for the oil refinery and so the claimant was considered by Mr Ackroyd to be the ideal person to be moved. A secondary reason for the move, according to Mr Ackroyd, was his concern about the claimant's well-being if he remained at the Greenergy site. Mr Ackroyd's intention was that the move would not affect the claimant's pay, role, or responsibilities.

6.26. The claimant's first day at Lindsey Oil Refinery was 5 June 2019. On the same day the claimant sent an email to Mr Leonard and Mr Spicer of HR complaining that "*The first person I spoke to* (at the refinery*) said "I've heard you've been a naughty boy*". That email is at page 209. This is **alleged detriment four**. The claimant alleges that the person who made that remark was Mr Whitley. He also alleges that on the same day Mr Wells informed the claimant that he had been put off site *"so that he couldn't mix with the men*". We understand that 'off site' in this context meant in a remote part of the Lindsey Oil Refinery site. Both comments comprise the alleged fourth detriment.

6.27. Mr Whitley's evidence was that he had known the claimant for in the region of 25 to 30 years. He denies that he made any reference to the claimant being a naughty boy either on 5 June 2019 or at all. He was unaware that the claimant had 'a claim against the company'. On the Employment Judges' enquiry, Mr Whitley confirmed that he had been

unaware that the claimant was a whistle-blower and had only learnt that during these proceedings. There were no rumours about him.

6.28. Mr Wells' evidence was that he too had known the claimant for a long time, approximately 30 years and that he considered him a good friend. Mr Wells could not remember for certain whether he had made the alleged comment (off site), but he did not think he had. He candidly accepted during cross examination that the claimant's recollection might be better than his. Mr Wells does recollect that when he learnt of what he describes as 'the dispute' which the claimant had had at Greenergy, he said to him "What have you done Waz? (Waz being the claimant's nickname). He says that that was said for a laugh and that the claimant would not tell him what the 'dispute' was.

6.29. On 19 June 2019 and after a further investigation conducted by Mr Spicer, Mr Leonard wrote to the claimant setting out his decision. It is a very detailed letter which begins on page 259 and runs to 11 pages. In relation to health and safety matters Mr Leonard believed that none of the matters which the claimant had raised were reportable externally but should have been recorded on a hazard observation form. It was noted that the claimant had the power to stop work being undertaken if he felt that there were dangerous circumstances, such as the scaffold being greasy. It was Mr Leonard's belief that site practices at Greenergy were good and in line with company practice.

6.30. In relation to the alleged conduct of Mr Garrod on the issue of employees being paid when absent from work, he believed that Mr Garrod's management and conduct had been appropriate. In terms of Mr Garrod's behaviour towards the claimant, Mr Leonard had not found any evidence to support the allegation that Mr Garrod created a demoralising and demotivating culture. Mr Leonard apologised to the claimant for the failure in the first stage of the grievance process to investigate some of the points which the claimant had raised.

6.31. Nothing further of significance to this case happened in the following three months, save for the claimant's allegation that on 10 July 2019 Mr Ackroyd had told him that he could go back to Greenergy "but what if the same thing happens again?" This is **alleged detriment five**. Mr Ackroyd does not deal with this specifically in his witness statement although in paragraph 38 he does refer to a conversation with the claimant in July 2019 about the claimant requesting a return to Greenergy, to which Mr Ackroyd says his response was that the claimant would continue to work at the oil refinery site for the duration of the shutdown, but thereafter he could return to Greenergy, if there was work there for him to do. In answer to supplementary questions which we permitted Mr Quickfall to ask, Mr Ackroyd said that he had made that comment and had also asked the claimant why he would want to go back to somewhere that was making him ill. During cross examination he said that when he referred to 'the same thing' he meant the claimant getting unwell, not him making further protected disclosures.

6.32. The claimant contends that on 10 and 11 September 2019 he was subjected to four further detriments. These are **alleged detriments five, six, seven, eight and ten.**

6.33. The first of those matters, **alleged detriment 10,** is what the claimant describes as being asked to sign a form which, whilst being headed 'Personal Details Form', the claimant contends was in effect a new contract of employment, whereby his role was changed to advanced scaffolder, the employment status changed to fixed term temporary and that his terms and conditions were being transferred to Hertel.

6.34. The document in question is at pages 274C to 274K. The first page, headed 'Personal Details Form' also has at the top, in manuscript, "Transferred from Cape". The job title is given as 'Advanced Scaff' and the contract type as 'Fixed Term Temp'. The next page, 274D is headed 'HMRC Requirements' and begins - "*As a new employee you need to provide information required below before your first pay day so that we can inform HMRC about you and ensure that the correct tax code is applied*". The next six pages are headed 'Health Declaration' and then 'Night Workers Health Declaration'. On the last page (274K) there is a box for signature by the employee which has the following text within it:

"I hereby confirm that my employment with Hertel (UK) Limited is subject and regulated by these terms and conditions. I also confirm that I have received a copy of the Hertel site safety booklet."

It is unclear however what the "terms and conditions" are. None of the nine pages appear to contain any terms and conditions. Whilst on page 274K below the box with the text referred to and the signature requirement there is a heading "Standard Terms and Conditions of Employment". that appears to be just a reference to an opt out under the Working Time Regulations.

6.35. The claimant, whose wife we were told also works for the respondent in an HR capacity, nevertheless believed that what he was being asked to sign was a contractual document which had the effect of changing his terms and conditions and demoting him.

6.36. Mr Ackroyd's evidence is that this form was given to the claimant in order to move him from the Cape payroll to the Hertel payroll, but that this was not a permanent change nor was it a change to his contract or a transfer of his employment. Mr Ackroyd believed that as the claimant had by that stage been working at the refinery site for approximately three months and would probably remain there for the rest of the year, it made sense, as the refinery was a Hertel site not a Cape site for the claimant to be transferred administratively from the Cape payroll to the Hertel payroll. Mr Ackroyd was proposing to do the same thing with other Cape employees who were or were going to be moved to the refinery site. The second reason was that Mr Ackroyd believed that being on the Hertel payroll would give the claimant eligibility to a Christmas bonus. Mr Ackroyd says that the claimant was not alone in being given payroll transfer forms to sign. Mr Ackroyd accepts that there were a number of errors on the form and he accepts that the claimant would have been unhappy about that. He says that there were genuine errors made by Emma Doyley the payroll administrator. Further Mr Ackroyd says that the claimant was not the only person who received those forms with similar errors entered on to them. As an example of this there are anonymised copies of forms given to two other

employees (at 274A and 274B) where apparently their contract types have also been incorrectly recorded.

6.37. It was during the course of a discussion between the claimant and Mr Ackroyd on 10 September 2019, when the claimant came into Mr Ackroyd's office somewhat upset and indicating that he was refusing to sign the form that the three other alleged detriments occurred. These are Mr Ackroyd allegedly telling the claimant that he did not know he was a supervisor and thought he was a tractor driver; Mr Ackroyd allegedly saying to the claimant 'What do you want me to do, demote one of my supervisors? and saying to the claimant that he 'could either be happy here or' … gesturing - as in leave (collectively **alleged detriment six).** Further, during the same conversation Mr Ackroyd allegedly turning to other supervisors in the open plan office and asking "Do your contracts state where you work or can you be put anywhere?" (**detriment seven**). Finally Mr Ackroyd allegedly telling the claimant that he had seen a communication from Greenergy to the effect that they did not want the claimant back on their site, offering to show the claimant that email but then failing to do so (**detriment eight**).

6.38. Mr Ackroyd accepts that he did make the alleged enquiry to the other supervisors, but says he did this to try to make the point to the claimant that no one's contract of employment states that they had a specific place of work and that everyone could be moved about. The claimant alleges that the question was posed in an intimidating and embarrassing way. Mr Ackroyd denies that he said he did not know the claimant was a supervisor (although of course the respondent contends that the claimant was not a supervisor). He also denies the 'tractor driver' in the context the claimant suggests and also the 'What you want me to do?' and 'you can either be happy here or' comments. Mr Ackroyd points out (paragraph 54 of his witness statement) that the claimant had come into the office angry and during the conversation was irate and quite emotional if not openly hostile towards Mr Ackroyd and that in those circumstances Mr Ackroyd would not have said anything which might have had the effect of provoking the claimant or inflaming the situation. With regard to the reference to the claimant 'just being a tractor driver', Mr Ackroyd obviously knew that the claimant was a scaffolder and he said that his additional skill of having a tractor licence would have made him particularly useful at the dismantling stage of the work at Lindsey Oil Refinery, once the shutdown was over.

6.39. Mr Ackroyd also denies saying that he had seen a letter from Greenergy indicating that they did not want the claimant back. He says that there was no such letter in existence. He says that he would have said to the claimant that ultimately it was the client's decision, if they needed a further scaffolder on site, but at that time they did not, whereas the claimant was required at the oil refinery.

6.40. It is common ground that at a subsequent meeting, probably on 11 September 2019, Mr Ackroyd told the claimant that he could rip up the nine page Personal Details Form and put it in the bin, unsigned.

6.41. Subsequently on 11 September 2019 the claimant prepared a further grievance letter and a copy appears at pages 275 to 277 in the bundle. Although that document gives a brief synopsis of the claimant's

concerns since 4 June 2019, the thrust of the grievance was that the claimant had on 10 September 2019 been required to sign the 'payroll transfer form' (Personal Details Form) which the claimant believed had the effect of transferring him to Hertel, demoting him to an advanced scaffolder, reducing his pay and putting him on a fixed temporary contract. The claimant did not however make any reference to the alleged comments made by Mr Ackroyd during the 10 September conversation (in other words those other detriments now alleged).

6.42. On 17 September 2019 the claimant was told that another site, Novartis, required an advanced scaffolder to provide two weeks' holiday cover and so he was to report there the next day. The claimant alleges that he was then told by Mr Walton, the site manager at Novartis, that he had not asked for the claimant but rather he had been told to take him. This is **alleged detriment nine**.

6.43. Further the claimant alleges that on 18 September 2019 Mr Walton told him that he was going to be paid as a basic scaffolder whilst working at Novartis. This is **alleged detriment twelve**.

6.44. Mr Walton's evidence was that in September 2019 he did need a scaffolder to provide holiday cover and so he asked his line manager, Mr Ackroyd, if he could be provided with a scaffolder from elsewhere in the region. Subsequently Mr Ackroyd told Mr Walton that he would be sending the claimant. Mr Walton had also known the claimant for many years, possibly forty years, and he had also known the claimant's father. He told us that he was quite happy to have the claimant on site. However he says that in his first conversation with the claimant on 18 September 2019 the claimant informed him that he had raised a grievance against the company and he went on to explain the details. Mr Walton denies making any comment to the effect that he did not ask for the claimant but rather was told to take him. He says he had no reason to make such a statement. All he wanted was a scaffolder and when Mr Ackroyd provided the claimant Mr Walton was perfectly happy to have him on site because of his prior and lengthy knowledge of him. In terms of the pay issue Mr Walton told us that he did not know that the claimant's job description was charge hand scaffolder or that he would be paid at a higher rate than the basic scaffolder that he actually required. It was for that reason that he instructed Ms Ellerby, the Novartis site administrator, to put the claimant on a basic scaffolder rate. Mr Walton denies that the claimant was told on either 17 or 18 September that he would only be paid at the basic scaffolder rate and says that this only came to light when the claimant received his first pay, after having worked at Novartis for some two weeks. On that occasion, probably around 27 September 2019, the claimant had come to Mr Walton's office to question the rate of pay. It was at this stage that Mr Walton says that he told the claimant that he was being paid at the basic scaffolder rate and in response the claimant said that he was a supervisor and so should have been paid the same as what he had been paid at Lindsey Oil Refinery. Whilst Mr Walton said that he told the claimant he did not know he was a supervisor, he nevertheless apologised for the error and told the claimant that he would be put on

his usual rate of pay and would receive a backdated payment for the shortfall. This is what happened.

6.45. The claimant's period of working at Novartis, which seems to have been approximately two months in the event, is relevant to a further alleged detriment. That is **alleged detriment thirteen** which is the alleged loss of overtime which the claimant says he would otherwise have worked if he had continued at the Greenergy site. The respondent's case is that the claimant was offered and undertook considerable overtime whilst working at the Lindsey Oil Refinery. That was because the shutdown situation meant that there was a lot of work to be done. The respondent has produced a document at page 438 in the bundle which records the overtime which the claimant worked during the period 4 March 2019 to 16 December 2019.

6.46. Mr Walton's evidence about overtime (paragraph 12 of his witness statement) is that there was overtime available at Novartis and this was offered to the claimant but he refused it.

6.47. The claimant's time at Novartis is also relevant to a further alleged detriment, which concerns the renewal of the claimant's Safety Passport. This is **alleged detriment fifteen**. This alleged detriment crystalized when, in November 2019, the claimant returned to Lindsey Oil Refinery (see paragraph 6.54 below). Mr Walton's evidence is that whilst at Novartis the claimant had been booked on to his safety passport refresher training by Ms Ellerby the Novartis site administrator. The claimant actually attended the training on 26 November 2019, which was a couple of weeks after his return to Lindsey Oil Refinery.

6.48. On 28 October 2019 the claimant sent an email (from his wife's email account) to Mr P Somers, who is the respondent's CEO. A copy of that email is at pages 292 to 293. The claimant summarised the matters that he had previously disclosed in terms of health and safety and also what the email now referred to as financial fraud, misleading or deceptive conduct, false accounting and negligent practices. The claimant referred to attempts to break him mentally by retaliation and that he, his wife and three children were being put through hell as a consequence of whistleblowing. His email did not seek any particular action from the CEO, but concluded with various rhetorical questions "Where are the values, respect conviviality, courage, solidarity, humility? Where is the transparency, integrity and honesty?"

6.49. On the following day, 29 October 2019 there was a meeting in respect of the claimant's second grievance. The record of that meeting is at pages 294 to 305. The respondent now seeks to categorise this meeting as being one for fact finding only, although the record itself describes it as a grievance hearing. The claimant brought to that hearing a very lengthy document which is in the bundle at pages 307 to 317. Apparently he read this out, or at least referred to it during the course of the grievance hearing. The hearing was before Mr A Hindson assisted by Ms Emma Edson of HR. The hearing gives rise to **alleged detriment 11,** which is in two parts. The first is that there had allegedly been a seven week delay between the grievance being submitted and the hearing. The claimant believed that this was in breach of the

respondent's grievance procedure. Secondly the claimant contends that it was inappropriate for the hearing to be conducted by Mr Hindson and Ms Edson, as he describes them as being subordinates of Mr Ackroyd and Mr Spicer, who were referred to in the grievance.

6.50. With regard to the issue of delay, the respondent points out that its grievance procedure (page 112) only provides that a hearing will be arranged within five working days of receipt of the original grievance where that is practicable. They say it was not practicable in this case because of the detail and length of the grievance. In any event, the respondent had acknowledged the claimant's grievance in a Ms Metcalfe's letter of 27 September 2019 (page 278). Further the delay or period of time between the grievance being received (which the respondent says was in fact 15 September despite the grievance being dated 11 September) was six weeks, rather than seven.

6.51. With regard to the 'subordinate' issue, Ms Mulvihill accepted in her evidence before us that, with the benefit of hindsight and looking at the claimant's case overall, it would have been more appropriate for someone more senior than Mr Hindson and Ms Edson to have dealt with that second grievance (see paragraph 8 of her witness statement).

6.52. In any event, further progress of the claimant's second grievance as presented on 15 September was overtaken by and subsumed within steps which resulted from the claimant's email of 28 October to Mr Somers. The first response to that was made on 30 October 2019 by Alex Spence who is Altrad's UK HR director. A copy of his email of that date to the claimant is at page 318. He notes that the claimant's email raised a number of very serious issues and he said that the company took any whistleblowing concerns seriously. The claimant was notified that he would shortly be invited to a meeting to discuss the issues and in the meantime was asked to provide certain letters and emails that he had referred to.

6.53. In the event Ms Mulvihill was appointed to carry out an independent review into how the claimant's earlier grievances had been dealt with. That appointment was on 11 November 2019. Ultimately it would result in the report (undated) which Ms Mulvihill prepared/completed in December 2019. A copy is at page 120 and it is titled "Independent Review of Warwick Robertson File - HR Investigation Report". Ms Mulvihill comments that the case file that she had considered ran to over 280 pages and she had spent some 32 hours, over seven days, reviewing matters. Despite this, the report is fairly brief, running to three pages. Ms Mulvihill observed that the first grievance investigation had not been adequately investigated and she felt that the HR advisor dealing with that had been insufficiently experienced. However the grievance documentation as submitted by the claimant was often difficult to follow as it was not always set out in chronological order. Within the summary of findings Ms Mulvihill states that the grievance appeal outcome letter prepared by Mr Leonard had adequately addressed all the points which were raised in that hearing. Further all health and safety matters raised had been deemed as housekeeping issues apart from two. These two, which had been deemed as potential safe system of work breaches, would be reviewed for further

investigation by the group health and safety director. Ms Mulvihill's brief recommendations were that the matters raised against the behaviour of the supervisor (Mr Garrod) should be addressed directly with the supervisor and expected behaviours outlined where deemed necessary. It was suggested that site supervision and management should attend the supervisor/management development programme and that the company's grievance procedure should be reissued to the site supervision and management.

6.54. On 11 November 2019 the claimant was moved from Novartis back to the Lindsey Oil Refinery. On arriving at the gatehouse on that day the claimant was told that he was not allowed on site because his safety passport had expired and proof that he had been booked on a refresher course was required. Mr Critchley, the respondent's health and safety manager at Lindsey Oil Refinery, attended to try to resolve this issue. The claimant contends that this state of affairs arose because on or about 18 or 19 October 2019 he had been removed from the list of employees to receive refresher training by Mr Critchley, with the result that the claimant's safety passport had not been renewed at around the same date. These are **alleged detriments fifteen and sixteen**. Mr Critchley's evidence is that once he received a notification that an employee was being transferred to the Lindsey Oil Refinery he adds that person to his training matrix. He says that when a safety passport expires there is a three month period of grace for the employee to complete refresher training. He recollects that the claimant's safety passport was due to expire on 17 October 2019, with the result that the claimant would have to complete refresher training no later than 17 January 2020. Further Mr Critchley says that when the claimant left the oil refinery site to go to Novartis he removed the claimant from his training matrix. As we have noted earlier (paragraph 6.47), this was picked up whilst the claimant was at Novartis and the administrator there booked the claimant on to the appropriate course. In the event the claimant undertook that refresher training on 26 November 2019 (see page 430). Mr Critchley does not within his witness statement refer to any conversations that he had or meetings with the claimant at or around the gatehouse on 11 November 2019. However it would appear that the reason for the claimant not being allowed back on the oil refinery site immediately on 11 November was that according to the records held by Mr Critchley, the claimant did not appear to have been booked on to a refresher course, whereas, it would transpire that he had been, through the actions of the administrator at Novartis. Once this matter had been resolved the claimant was allowed back on site after approximately a two hour wait which he spent either in his van or in a cabin.

6.55. On 6 December 2019 Mr Spence wrote to the claimant (see page 335). The subject matter was "Grievance Investigation". Mr Spence notified the claimant that what was described as an independent review (that is to say the one conducted by Ms Mulvihill) had been concluded. The claimant was not provided with a copy of that report, but the fairly brief letter from Mr Spence sought to summarise the in itself brief report that Ms Mulvihill had prepared.

6.56. On 9 December 2019 the claimant went on sick leave. The fit note is at page 390 and the condition which resulted in the claimant being certified unfit for work is given as adjustment disorder.

6.57. For the sake of completeness, the only two detriments that we have not identified as part of the chronology above are **alleged detriment 3,** which is the continued refusal to allow the claimant to return to the Greenergy site (and so is an adjunct to detriment two). The other not specifically referred to is **alleged detriment fourteen**. That is that the claimant was not permitted to take a morning break whilst working at the Lindsey Oil Refinery. Morning break for these purposes probably means a break away from the immediate vicinity of work, that is to say in the mess room, as opposed to in a van near the actual location of the work. The claimant had morning breaks (in the mess room) throughout his time at Greenergy and he also accepts that he had them during the period of time that he was at the Novartis site. The respondent's case is that generally the right to this type of morning break had, with agreement of the union, been "bought out" at most sites and that included the Lindsey Oil Refinery site, but apparently not the other two sites.

6.58. As we have noted, the claimant presented his claim to the Tribunal on 7 January 2020. As we have pointed out to the parties, the latter part of the claimant's witness statement, paragraphs 54 to 67 deal exclusively with matters which allegedly occurred after presentation of the claim form. That is with the exception of paragraph 65 which deals with the overtime detriment. By the same token Ms Mulvihill's witness statement also deals at length with matters arising since the presentation of the claim form. That is paragraphs 36 to 69 and so covering some eight pages of her 14 page witness statement. As we have pointed out to the parties and as they readily accept, nothing in the witness statements which deals with post presentation matters is relevant to the complaints which are before us.

7. **The parties' submissions**

7.1. <u>The claimant's submissions</u>

Mr Duffy noted that Mr Ackroyd had said that the claimant's protected disclosures were in his mind at the time of the grievance hearing. The claimant believed that his disclosures had been made in the public interest and so any suggestion that the claimant had made those disclosures as a vengeful act against Mr Garrod should be discounted. We note that in fact the respondent has conceded that the protected disclosures were made and has not challenged the claimant's motive.

Mr Duffy then took us through the detriments. In relation to the first detriment, the grievance, the respondent had accepted that it had not investigated this thoroughly enough.

With regard to the move to Lindsey Oil Refinery (detriment 2), even if it was the practice within the industry for scaffolders to be moved between sites this could still be detrimental. The claimant contended that the published Secondment Policy (page 97) applied to him but had been disregarded. However Mr Duffy acknowledged that any alleged breach of this policy was not in itself a relevant alleged detriment within

this claim. In any event the claimant had not hitherto been moved for some eight and a half years.

In terms of the claimant's role and responsibilities and the alleged detriment that these were taken from him, it was necessary to look at the reality. This was that the claimant had been a working supervisor, as opposed to Mr Garrod's role as a supervisor based in the office. Mr Duffy then went on to refer us to the various examples of either the claimant or others referring to the claimant as a supervisor. Moreover the claimant wore a hat with 'Supervisor' written on it. The claimant had had a supervisory role at Greenergy even if he only supervised one person, Mr Maver. However Mr Ackroyd had not regarded the claimant' role as having a supervisory content and instead just regarded him as an advanced scaffolder. The claimant had not been able to carry out supervisory duties when at the oil refinery.

The claimant had then not been allowed to return to Greenergy, despite requesting this.

With regard to the various alleged comments which the claimant contended were detriments, we were asked to prefer the claimant's account as recorded in apparently contemporaneous notes that he had made, as opposed to the later recollections of Mr Whitley and Mr Wells.

With regard to the allegation that Mr Ackroyd had told or inferred to the claimant that there had been an email from Greenergy stating that they did not want the claimant back, the fact that the claimant chose to make a subject access request about that suggested that Mr Ackroyd had made or inferred that state of affairs.

With regard to the alleged comments by Mr Walton, in his witness statement he said that he had only needed a basic scaffolder although when being cross-examined he had altered that to the need being for an advanced scaffolder.

With regard to the detriment of the alleged "new contract" – the personal details form – this was the type of pack which would be given to a new employee so as to generate a contract of employment. Mr Duffy acknowledged that it was unclear what effect the documentation would have had if the claimant had signed it.

On the issue of morning breaks, if that had been bought out at the oil refinery then it followed that there would not be morning breaks at all.

In terms of *causation*, Mr Duffy referred us to the case of **Fecitt v NHS Manchester** [2012] ICR 372.

Mr Duffy said that he intended to address us on what he regarded as the strongest parts of Mr Robertson's case in terms of causation.

First there was the transfer to Lindsey Oil Refinery. In the claimant's first grievance (page 134) the claimant had referred to getting told that he could be taken off site and he alleged that that was for raising concerns and challenging unsafe practices and mismanagement. Mr Duffy contended that Mr Ackroyd had sought to exaggerate the clash of personalities between the claimant and Mr Garrod. He suggested that the disclosures had influenced Mr Ackroyd's thought processes.

(We should add that subsequently there was a debate between counsel on whether or not unconscious bias applied in this area of law – the claimant relying upon the authority of **Harrow London Borough v Knight** [2003] IRLR 140 to the effect that it did and Mr Quickfall initially doubting this. However, as will be noted below, Mr Quickfall's final submission on this point was that the claimant had not run his case on the basis that his disclosures had been an unconscious underlying factor in relation to the alleged detriments. Instead the claimant was contending that the detriments were deliberate retaliation for the disclosures.)

Mr Duffy went on to state that Mr Ackroyd had made no contact with the claimant or with human resources prior to issuing the grievance outcome and then deciding upon the move to Lindsey Oil Refinery. However on 3 or 4 June Mr Ackroyd had spoken to Mr Spicer of HR. There had been no need for this to be done in order to sanction the claimant's move and so Mr Ackroyd must have been aware, it was submitted, of the grievance appeal. His intention then had been to take the claimant out of the equation. Mr Ackroyd had used operational reasons as an excuse for moving the claimant. It was accepted that there was the shut down at the oil refinery, but Mr Ackroyd could have moved anyone. Moving the claimant was a clear reprisal for the disclosures.

Mr Ackroyd had then given the claimant an assurance that he could subsequently move back to Greenergy. However subsequently on 10 July 2019 Mr Ackroyd had suggested that the claimant could not go back to Greenergy 'in case the same thing happened again'. It was the claimant's case that that meant making further protected disclosures.

The next strong part of the claimant's case were the exchanges between the claimant and Mr Ackroyd on 10 and 11 September 2019. Mr Duffy contended that the attempt to get the claimant to sign an allegedly new contract was totally because of the disclosures.

The alleged comment that the claimant was just a tractor driver supported the contention that the claimant had suffered a demotion on transfer to the oil refinery. Mr Ackroyd had then made provocative statements to the claimant to the effect that he could leave and pretending that Greenergy did not want the claimant back. This had been designed to undermine and embarrass the claimant.

Mr Duffy contended that there had been a series of detriments and so no part of the claim was out of time. If Mr Ackroyd had been truly concerned about the claimant's health he could have suggested that there was some mediation between the claimant and Mr Garrod.

We were invited to conclude that the manner in which Mr Ackroyd had given evidence to us showed a lack of empathy. Mr Ackroyd's reasoning had not been credible.

7.2 <u>The Respondent's submissions</u>

Mr Quickfall addressed us first on time limits, directing us to the Employment Rights Act 1996, section 48(3). He reminded us that at a preliminary hearing on 18 May 2020 Employment Judge Rogerson had

indicated that any detriments occurring prior to 8 August 2019 were potentially out of time. Other than that it had been agreed that any time issue would be left for determination at the final hearing. Whilst the claimant had at the earlier hearing been directed to provide his explanation for the delay in bringing the claim, when preparing his witness statement, he had failed to do that. There had been no evidence therefore from the claimant or, to any extent, submissions from Mr Duffy.

In any event it was necessary for the Tribunal to consider whether there had been a series of acts or failures so as to connect potentially out of time matters to matters which clearly were within time. We were referred to the case of **Arthur v London Eastern Railway Limited** [2007] ICR 193 and in particular to paragraph 35 of the Judgment. We were also referred to the case of **Royal Mail Group Limited v Jhuti**. In that case the Employment Appeal Tribunal had held that since Ms Jhuti had failed to prove that there were any actionable detrimental acts that post-dated the relevant cut-off date that meant that there were no ongoing similar acts or failures to act that could form part of a series for the purposes of enlarging time under section 48(3)(a). On the chronology of Mr Robertson's case that meant assessing whether there had been any actionable detrimental acts from 10 September 2019 onwards.

We were also referred to the Court of Appeal decision in **Flynn v Warrior Square Recoveries Limited** where that court noted that the EAT, whose decision it was considering, had found that the Employment Tribunal had confused a continuing detriment with a continuing cause and the Court of Appeal underlined that focussing on detriment rather than on act or deliberate failure to act would also be an error of law.

Mr Quickfall then turned to the issue of *causation* which he described as the key battle ground in this case. He reminded us of the test set out in **Fecitt** where the standard of proof required by section 47B was that that section would be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle blower. The question was therefore what was in the mind of the person committing the act. It was not a "but for" test. Instead it was necessary to enquire into the reasons why the employer acted as it did.

In Mr Robertson's case, as a result of the protected disclosures the relationship between the claimant and Mr Garrod had been damaged. The claimant had raised a grievance with three pages of criticism of Mr Garrod, including the allegation that during the course of an altercation, Mr Garrod had been shouting at the claimant to such an extent that he had accidentally spat on him. The reality was that the working relationship at Greenergy was making the claimant ill. The problem was intensified because Greenergy was the respondent's smallest site, with only four employees being based at that client. Because it was a small team a good relationship and efficient running was important. The claimant had in his 25 March 2019 grievance stated that he felt that trust had been broken. In those circumstances it was

proper for the respondent to move the claimant. Mr Quickfall believed that if the claimant had resigned and claimed constructive dismissal it would be likely that he would have succeeded, if the respondent had done nothing in those circumstances.

We were also referred to the case of **Chatterjee v Newcastle-upon-Tyne Hospitals NHS Trust** UK EAT/0047/19/BA and to the discussion of burden of proof as set out in paragraphs 30 to 35 of that Judgment. Mr Quickfall summarised that as being that the claimant had to prove that the act or failure to act had happened and that the act or failure was a detriment. Whilst it was relevant that the claimant believed it was a detriment, that belief was not conclusive. The claimant then had to show a prima facie case as to whether it looked as though the protected disclosure was the ground for the act.

When discussing the *detriments* Mr Quickfall began with the events of 10 September 2019 on the basis that if the respondent was not liable for that matter, nothing which occurred before it could be connected from a jurisdictional point of view.

Mr Quickfall accepted that it was not easy to resolve the disputed conversations between the claimant and Mr Ackroyd. It was necessary for the Tribunal to look at matters in the round. There was some confusion as to what had been said or done on the 10 September and what had been said or done on 11 September. Mr Ackroyd knew that the claimant was not a supervisor in the way that he, Ackroyd, understood that term. Mr Ackroyd's evidence had been that the fact that the claimant was both a scaffolder and could drive a tractor was a good combination. The claimant was using the title supervisor in the wrong way. He was a Grade 6 employee who had supervisory duties but that did not make him a supervisor as such.

It was important for the Tribunal to bear in mind the context of the exchange between the claimant and Mr Ackroyd on 10 September. The claimant was standing in the doorway to Mr Ackroyd's office waving the "contract" and, as Mr Quickfall put it, laying the law down. In response Mr Ackroyd was putting the claimant right. That was not because of the protected disclosures which the claimant had made several months previously. The issue on 10 September was whether the claimant was to be transferred to the Hertel pay system, not health and safety issues which had been raised at Greenergy.

There had been what, to slightly paraphrase him, Mr Ackroyd has referred to as three months of happiness for the claimant at the oil refinery prior to that. That had led Mr Ackroyd to believe that he had solved the problem of the claimant's relationship with his supervisor at Greenergy. Mr Ackroyd accepted that he had made the alleged comment to the others in the open plan office about what their contracts of employment said. Mr Ackroyd had simply been pointing out that the claimant was not the only person who could be moved. All those employees had mobility clauses. There was therefore no detriment. With regard to the allegation that the claimant was told Greenergy did not want him back, Mr Ackroyd was just making the point that it was not in his gift simply to transfer the claimant if the client had no requirement for an additional scaffolder.

With regard to the claimant's belief that he was being given a new contract of employment, it was not so and the point of the documentation was purely to effect an administrative payroll transfer. It could not possibly have been because of protected disclosures. The reason was to relieve the administrative burden whereby manual entries had to be made because the claimant was on the Cape iTrent system as opposed to the Hertel iTrent system. Mr Quickfall accepted that the only really relevant page for this exercise would have been 274C and so it was not helpful that other pages were included although they did not affect the claimant's existing contract of employment.

In any event there could be no detriment because Mr Ackroyd had told the claimant that he could simply bin the offending document. Instead the claimant and his union representative chose to prepare a formal paper advising the respondent that the claimant was not accepting "the contract/terms and conditions" that had been handed to him on 10 September (the text being set out within the claimant's second grievance at page 276). Moreover there could be no detriment as there was in fact a benefit to the claimant because Mr Ackroyd was trying to get him on the Christmas bonus for those working at the oil refinery.

With regard to the alleged comments of Mr Walton when the claimant was temporarily transferred to Novartis, Mr Walton was happy for the claimant to be there as he knew him and there was no need for the claimant to be inducted as he had provided holiday cover there previously. It followed that the idea that Mr Walton had made detrimental comments was fanciful. However, even if he had, that could not have been because of protected disclosures as at the material time Mr Walton was unaware that the claimant had made protected disclosures.

With regard to the delay and the level of person commissioned to undertake the investigation of the second grievance, Mr Quickfall accepted that these were arguably detriments. However the reason was not the protected disclosures but instead the fact that Miss Edson was recently appointed, needed to be inducted by visiting various sites and had a large redundancy exercise to deal with because of the Whitby contract. Some of the delay had been caused by the unavailability of the union. Mr Hindson had been appointed on the basis that he had not had any previous dealings and although this may have been ill advised having regard to the hierarchy, that was nothing to do with the protected disclosures.

With regard to the pay issue whilst the claimant was at Novartis that was simply a mistake by the administrator and there was no evidence that she even knew of the claimant's disclosures.

In relation to overtime, the claimant had undertaken a considerable amount in his first period at the oil refinery and whilst he may not have undertaken very much overtime at Novartis he had been offered it. In the latter period at the oil refinery there was less overtime to be done because the overtime budget had been exhausted by the prolonged shutdown.

The question of morning breaks was simply down to local agreements not retaliation because of disclosures. In any event the claimant was still getting breaks at the other two sites, with it being a full break at Novartis.

With regard to the slight delay in the claimant being permitted to re-enter the oil refinery because of the safety passport issue, that had been no more than a two hour delay and in any event was not because of the protected disclosures but instead because of the way in which the system worked.

At this stage in the submissions the Tribunal indicated to Mr Quickfall that we were not intending to retire and determine the time point there and then and so in those circumstances we did require his submissions on the detriments which were potentially out of time.

Mr Quickfall said that in general terms the respondent and Mr Ackroyd were sensitive to health and safety being observed and so Mr Ackroyd's reaction had been to take those matters seriously rather than to punish the claimant. Mr Ackroyd had been appalled by the reference to step ladders being used on scaffolding. The claimant's concerns had not been brushed under the carpet. The meeting had not been cut short. In the subsequent investigation Mr Ackroyd had spoken to all the relevant people, although Mr Maver had indicated that he did not want to participate. Whilst the claimant might not have liked the grievance outcome, it was a decision which Mr Ackroyd was entitled to reach and it had nothing to do with the protected disclosure.

With regard to the transfer to the oil refinery, the claimant had not been a supervisor and could not be one simply by wearing a supervisor's hat and referring himself as a supervisor.

The claimant's job role had not been diminished or altered at the oil refinery. The reality on the ground was that there was fluid use of Grade 6 skilled working charge hands, which is what the claimant was. On a given day that person's charge hand duties might not be required but that did not equate to a demotion. They would still be paid at the Grade 6 rate. In any event the claimant had done some supervisory duties at the oil refinery, for instance when Mr Wells was not there or when working out of the tank farm where he had supervised one other person. At Greenergy the claimant had not been undertaking supervisory duties all the time as he also did scaffolding work.

There was a twofold reason for the claimant being moved from Greenergy. Firstly his own welfare and secondly operational reasons. The same applied to his non-return to Greenergy for the duration of the shutdown at the oil refinery. It was not revenge. The shutdown had gone on for longer than anticipated.

With regard to the alleged comments by Mr Whitley, it was clear that he was unaware of any protected disclosure and it was only later that the rumour mill started. Mr Wells was a friend of the claimant's and had explained that whilst the claimant was working "offsite" that did not mean that the claimant was not mixing with the other men.

With regard to the 'what if the same thing happened again' comment by Mr Ackroyd it was clear that he meant the claimant getting ill again.

*We have already alluded to the discussion before us between counsel as to the effect of the **Knight** case and we note that Mr Duffy conceded that the claimant's case had in any event been put on the basis that the alleged detriments resulted in conscious decisions by Mr Ackroyd and others.*

8. **The relevant law**

The Employment Rights Act 1996 gives protection to whistle blowers by the provision in section 47B which is in these terms:

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

Section 48(2) of the same Act provides that on such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done.

Guidance on the causation question was provided in the **Fecitt** case to which we have been referred where the Court of Appeal agreed that liability arose if the protected disclosure was a material factor in the employer's decision to subject the claimant to a detrimental act.

The correct application of the burden of proof test is explained in the Employment Appeal Tribunal's Judgment in the case of **Chatterjee**, to which we have also been referred. There the salient propositions were described as:

*"*Firstly, it will not necessarily follow, from findings that a complainant has made a protected disclosure and that they have been subjected to a detriment, alone, that these must by themselves lead to a shifting of the burden under section 48(2). The Tribunal needs to be satisfied that there is a sufficient prima facie case, such that the conduct calls for an explanation. Secondly, if the burden does shift in that way, it will fall to the employer to advance an explanation, but, if the Tribunal is not persuaded of its particular explanation, that does not mean that it must necessarily or automatically lose. If the Tribunal is not persuaded of the employer's explanation, that *may* lead the Tribunal to draw an inference against it, that the conduct was on the ground of the protected disclosure. But in a given case the Tribunal may still feel able to draw inferences, from *all* of the facts found, that there was an innocent explanation for the conduct (though not the one advanced by the employer) and that the protected disclosure was not a material influence on the conduct in the requisite sense."

9. **The Tribunal's conclusions**

9.1. <u>The jurisdictional issue – time</u>

Whilst recognising that there is this issue, we have chosen to take the approach of initially assessing the whole of the claim on its merits on the basis that, subject to our findings and conclusions there, we can re-visit the time issue should that be necessary. In the event, because of our conclusions below that proved not to be necessary.

9.2. The detriments

9.2.1. *Detriment 1 – the grievance hearing on 4 April 2019 and subsequent grievance process*

We conclude that there was no detriment in respect of Mr Ackroyd's conduct of the grievance hearing itself. We find that there could have been no reasonable expectation on the claimant's part that the grievance hearing was going to be reconvened. There is no suggestion from the minutes that the grievance hearing was being adjourned to another day. Instead Mr Ackroyd is recorded as saying that he needed to address several issues and the allegations which had been raised. The meeting had lasted one hour 39 minutes and whilst two hours may have been allocated by Mr Ackroyd, that does not mean that the meeting had necessarily to go on for two hours. We are mindful of Mr Ackroyd's evidence that the claimant had begun to repeat himself and that even his union representative was reminding the claimant that a particular issue had been covered. Mr Ackroyd candidly accepts that he did have another meeting to go to, but when closing the meeting we are satisfied that he had all the information he required.

We note that the claimant, apparently on the same day but after the meeting, submitted the 13 page document which begins at page 144. In it the claimant refers in the opening paragraph to the meeting having been cut short and that the purpose of the document is to set out the matters which had been covered "and also ones which I was unable to discuss due to the grievance hearing being cut short." Whilst that shows that the claimant's immediate response was to believe that the meeting had been cut short, that of itself does not mean that it had been unfairly cut short as opposed to having been properly managed by Mr Ackroyd. In any event, even if there were matters which the claimant had been unable to express at the meeting he was now, by reason of the lengthy and detailed document subsequently provided to Mr Ackroyd, filling in any gaps.

In terms of Mr Ackroyd's subsequent investigation and the outcome notified to the claimant in Mr Ackroyd's letter of 28 April 2019 (page 177), we find that Mr Ackroyd had used his best endeavours to investigate the health and safety issues which the claimant had raised – and also other two topics of the claimant's grievance, alleged mismanagement by Mr Garrod and alleged misconduct by Mr Garrod.

Not least, Mr Ackroyd sought the opinion of Mr Teanby, the regional safety officer, as to whether he considered that there were any particular health and safety problems at the Greenergy site. As noted in paragraph 17 of Mr Ackroyd's witness statement, Mr Teanby told him that he was already aware of the health and safety issues which the claimant had raised, had looked into those matters when visiting the Greenergy site and that most of the issues raised were minor failings "which were quite easy to sort". Mr Ackroyd goes on to state that he trusted Mr Teanby's judgment.

We note that as this alleged detriment has been defined in the agreed list of issues, there is no criticism of the decision of Mr Leonard in the grievance appeal part of the process. During that process the health and safety complaints were revisited, as set out in Mr Leonard's 11 page grievance appeal outcome letter (beginning at page 259). We note that subsequently when this grievance was being reviewed by Ms Mulvihill that she concluded that the first grievance investigation had not been as she put it, adequately investigated and that the HR advisor (Hayley Christie) appeared inexperienced in such investigations. However we take into account that this, to an extent, is a senior HR professional critiquing the work of a junior HR advisor and that the claimant's grievance had been directed at three main areas of which health and safety was one.

In so far as Mr Ackroyd may not have adequately investigated all aspects of the grievance, we cannot see how that could have been on the ground that the claimant had made his protected disclosures. Instead, any shortcomings would appear to result from inadequate HR advice.

9.2.2. *Detriment 2 – the decision to transfer the claimant to Lindsey Oil Refinery and job roles and responsibilities being taken from the claimant upon such move*

The alleged detriment is therefore in two parts. With regard to the move, we accept that this was a detriment because the claimant was well established at the Greenergy site having been there for some eight and a half years. He apparently liked his colleagues who worked there and the client. Clearly however he did not like his line manager Mr Garrod who, in his grievance he had accused of bullying, intimidation and that Mr Garrod had demoralised and demotivated him.

We also conclude that this is an area where the respondent is required to give an explanation for its actions. That is because despite the presence of the mobility clause in the contract of employment (a matter which we will return to) that had not been exercised in the preceding eight and a half years.

The explanation which is put forward by Mr Ackroyd is two-fold. First, and we find that this was the dominant reason, Mr Ackroyd had concluded that the working relationship between the claimant and Mr Garrod had been severely impaired and was probably incapable of being improved. Secondly there was the operational need for more personnel at Lindsey Oil Refinery to carry out the shutdown work.

We are mindful that in his 20 March 2019 grievance (page 134) the claimant refers to "keep getting told that I could be taken off site", although this is in the context of the claimant himself acknowledging that he had for the previous two years "raised/challenged things with SG (Stuart Garrod – site supervisor)".

We are also mindful that in Mr Ackroyd's grievance outcome letter he offers the claimant the opportunity to transfer to a different contract within the Humberside area. This, we find, shows that Mr Ackroyd had this solution in mind prior to any alleged knowledge of the subsequent grievance appeal by the claimant.

We find that Mr Ackroyd had a genuine concern for the claimant's well-being and was also mindful of the respondent's duty of care towards him. We were impressed by Mr Ackroyd's evidence during the course of cross-examination. He told us that Mr Robertson had more than once broken down during the grievance hearing and had told Mr Ackroyd that he could not eat and that his home life had been destroyed. He referred to the claimant burying his face in his hands twice during the course of the meeting prompting his union representative, Mr Clarkson, to say "Steady brother". Mr Ackroyd's view was that the claimant and Mr Garrod were constantly bickering. He accepted that perhaps in hindsight he could have suggested mediation but ultimately he had concluded that there was an unhealthy relationship and that the answer was to move the claimant. He felt that he had no choice and his only regret was not moving the claimant at once.

That brings us to the question of the timing of the move. The claimant was informed that he would be moving to Lindsey Oil Refinery the day after Mr Leonard had conducted the grievance appeal hearing (3 June 2019). There had been a telephone conversation between Mr Ackroyd and Mr Spicer, the HR advisor to Mr Leonard, at around this time. We have noted however that the possibility of the claimant moving from Greenergy had been in Mr Ackroyd's mind since he made the offer of a transfer in the grievance outcome letter of 28 April 2019. It follows that the instruction that the claimant should move had not come out of the blue and this supports our conclusion that the proximity between the grievance appeal hearing and the instruction was coincidental.

In terms of the contact between Mr Ackroyd and Mr Spicer, Mr Spicer acknowledges that he did have a conversation with Mr Ackroyd around about 4 June 2019 but that the subject matter of that discussion was Mr Ackroyd running past Mr Spicer his proposal to move the claimant having regard to his well-being and the operational needs at the oil refinery (see paragraph 24 of his witness statement). During cross-examination Mr Spicer said that Mr Ackroyd would not have been informed of the date of the grievance appeal and that it was pure coincidence that he had rung on or about 4 June. He had certainly not learned of the appeal from Mr Spicer. He acknowledged that he would not usually be consulted about a move of an employee from one site to another, but he might be if personal circumstances were involved and that was the case here.

Mr Ackroyd explains his reason for contacting Mr Spicer in paragraph 35 of his witness statement and confirms that he was not aware of the grievance appeal. During cross-examination Mr Ackroyd again confirmed that he did not know that Mr Spicer was

dealing with a grievance appeal and said that his only concern was to get enough men for the shutdown work at the oil refinery.

On balance we are satisfied that Mr Ackroyd had a legitimate reason for seeking HR advice from Mr Spicer and he was doing no more than running past Mr Spicer something which he had more or less decided to do in any event. We are therefore satisfied that the respondent has shown an innocent reason for the claimant being moved.

Before leaving this topic we need to say something about the Secondment, Assignment and Relocation Procedure document which begins at page 97. As we have noted, it had not been part of the claimant's case that there was an additional detriment whereby the respondent had not followed this procedure. Before us there has been a debate as to whether that procedure could apply to the claimant as a Grade 6 skilled working charge hand. The respondent's case is that the procedure only applies to salaried or monthly paid employees and further that it only applies in circumstances where the secondment would be likely to require the employee to relocate – that is to move house. Clearly in any event that was not the case here as both the oil refinery and Novartis site were in close proximity to the Greenergy site and the claimant's home. The application of this procedure was never raised during the part of the claimant's employment that we are dealing with. We are also mindful that Ms Mulvihill was puzzled as to how the claimant could have come into possession of this policy or procedure, because it was not on any public platform and it was only accessible she said to salaried employees who would have a computer.

We note that the procedure simply refers to "employees" rather than, for instance, "salaried employees". Nevertheless we also note that the claimant had a mobility clause in his contract which, on the face of it did not require the respondent to consult the claimant or even give him any particular notice unless the requirement was to work outside the UK. Ms Mulvihill explained that it would be a logistical nightmare if the formal secondment policy had to be applied to hourly paid employees, the category within which the claimant came.

In so far as it could be relevant to this part of the claimant's case, we conclude that the secondment policy did not apply to the claimant.

<u>Detriment 2 – part 2 Was the claimant's job role and responsibilities altered or diminished on transfer?</u>

This begs the question of what the claimant's job role and responsibilities were at Greenergy prior to the transfer. The claimant accepts that he was Grade 6, but he describes that as a supervisor grade and gives examples in paragraph 2 of his witness statement as to why he believes that his role was expanded to be supervisor. That includes the claimant being described as supervisor in annual performance reviews and even in the minutes

of the 4 April 2019 grievance meeting. The claimant also refers to being paid as a supervisor and that he wore a supervisor's hat at Greenergy.

The respondent says that the claimant was a charge hand/lead hand scaffolder and that as a scaffolder the categorisation was advanced scaffolder. The respondent has introduced the extract from the NAECI Core Terms and Conditions (page 442) where a Grade 6 employee is described as a skilled working charge hand who was required in addition to their craft (advanced scaffolder) to undertake supervisory duties for the employer. Further the respondent says that any references to the claimant as a supervisor in non-contractual documents is not conclusive, particularly if that resulted from how the claimant described himself – for instance when attending the grievance meeting.

The respondent accepts that, in line with the Grade 6 definition, the claimant did have some supervisory duties but that in itself did not make him a supervisor.

We find that Mr Garrod was a supervisor. Indeed he held that role after a competition in which the claimant had unsuccessfully applied to be supervisor we were told. Mr Garrod was not a Grade 6 employee. He was not hourly paid but instead salaried. Unlike the claimant he did not have a hands on role. He was essentially office based. Therefore Mr Garrod was a supervisor. The claimant was not, although his role had some supervisory duties, as and when required.

On his transfer to Lindsey Oil Refinery the claimant remained a Grade 6 employee. Save for the error of brief duration whilst he was at Novartis he was paid throughout at Grade 6. Mr Ackroyd has helpfully explained how scaffolding teams are made up in such a way that two Grade 6 charge hands could be part of one team, with the result that, at most, only one of them would be exercising any supervisory function on a particular job.

Whilst to an extent it may be that at Greenergy the claimant had been a big fish in a small pool and the converse applied at the oil refinery, the reality was that the claimant had minimal supervisory duties over others at Greenergy – in fact only over one other, Mr Maver. When at the oil refinery he sometimes had supervisory duties in respect of one other employee and on other occasions no such supervisory duties. However we conclude that any difference was trifling and the claimant was certainly not demoted as he has suggested. In these circumstances we find that there was no detriment.

9.2.3. *Detriment 3 – refusal to allow the claimant to return to Greenergy contrary to assurances by HR and Mr Ackroyd*

As we have found that moving from Greenergy was a detriment, we are prepared to accept logically that not being allowed to move back to Greenergy would also be a detriment.

However we consider that the claimant is in difficulty in establishing a prima facie case that the reason for his non-return – at least within the timescale we are dealing with – was on the ground that he had made the protected disclosures. The reasons for the claimant's move on 4 June continued to apply during this period. The claimant along with many others who had been brought in from other sites was still required to undertake work during the oil refinery shutdown and the claimant's poor relationship with Mr Garrod had not changed.

In so far as the respondent is required to give an explanation we remain satisfied that the reason for the claimant being retained at the oil refinery (and for a period at Novartis) were those same innocent reasons which had caused the transfer in the first place. We have also noted that Mr Ackroyd's evidence was very clear and firm to the effect that he made the decision about who worked where. As to any assurances given, we find that at the most the claimant was told that he would be required at Lindsey Oil Refinery until the shutdown work and the dismantling work was completed. In the event the commencement of the claimant's sick leave in December 2019 pre-dated the conclusion of the shutdown work.

9.2.4. *Detriment 5 – on 10 July 2019 Mr Ackroyd telling the claimant that he could go back to Greenergy "but what if the same thing happens again?"*

It is convenient to deal with this alleged detriment out of sequence because of the overlap with the alleged detriment we have just dealt with. We prefer Mr Ackroyd's explanation that by "the same thing" he meant the continuation of the poor relationship between the claimant and Mr Garrod being likely to result in another standoff. The suggestion that Mr Ackroyd would be so crass as to say 'you can't go back because you might make another protected disclosure' has no currency other than to provide wholly insufficient support for this part of the claimant's case.

9.2.5. *Detriment 4 – Mr Whitley's alleged "naughty boy" comment and Mr Wells' alleged "couldn't mix with the men" comment*

We accept that if these comments had been made they could be regarded as detriments. However the burden is on the claimant to establish on the balance of probabilities that these things were said.

Mr Whitley denies that he made the 'naughty boy' comment. In cross-examination he told us that he was unaware that the claimant had, as he put it, made a claim against the company, so why would he ask the claimant if he had been a naughty boy? We note that when the claimant wrote to Mr Leonard on 5 June 2019 (page 209) he said that the 'first person' he spoke to said "I've heard you have been a naughty boy" and by the time of the hearing of the claimant's second grievance in October 2019 that first person was named as Mr Whitley (see page 301). The claimant added on that occasion that Mr Critchley seemed to be aware of the situation.

We accept that what the claimant recorded at the time (in his 5 June email) suggests that somebody made the 'naughty boy' comment, but not necessarily Mr Whitley, although there must remain some doubt as Mr Whitley was adamant that he had said nothing like that.

In answer to the Employment Judge's question, Mr Whitley said that he had no knowledge that the claimant was coming to the site until he saw him there and he had no knowledge that the claimant was a whistle blower. There were no rumours.

In conclusion we find that Mr Whitley is more likely than not to have made the comment. However it could not be on the ground that the claimant had made protected disclosures because Mr Whitley was clearly unaware that he had.

As to Mr Wells' "couldn't mix with the men" comment, although in his witness statement Mr Wells said that he could not remember making that comment, he also acknowledged that it was quite a time ago. However, fairly, in cross-examination, he explained that he was not saying that the claimant had made that up and that he had known him for years. Equally fairly, Mr Wells in his witness statement volunteers that at some stage he did say "What have you done Waz?", although this is not precisely what the claimant is complaining about. It seems that that comment could have been made at a later date than the particular 'off site' comment we are dealing with.

However again the problem for the claimant's case is causation and Mr Wells' lack of knowledge that the claimant was a whistle blower. During the course of cross-examination Mr Wells explained that when he made the 'what have you done' comment (whenever that was), the claimant would not tell him what the dispute was or where it had arisen. In these circumstances we conclude that whatever Mr Wells said to the claimant could not have been on the ground that the claimant had made protected disclosures.

9.2.6. *Detriments 6, 7 and 8*

It is convenient to deal with these together as they are all alleged comments by Mr Ackroyd to the claimant during the course of an exchange between the two on 10 September 2019. That exchange was initiated by the claimant seeking out Mr Ackroyd in his office, in circumstances where the claimant was somewhat irate about the documentation which he had been required to complete and sign – the purported new contract which we deal with below as detriment 10. We accept Mr Ackroyd's evidence about the context for the comments which he either accepts he made or it is alleged he made. He refers to the claimant standing in the doorway to his office, confrontational and angry and waving the documents at Mr Ackroyd whilst telling him that he, the claimant was a Cape employee.

Detriment 6 “I didn’t know you were a supervisor. I thought you were just a tractor driver” and “What do you want me to do, demote one of my supervisors?” and “You can either be happy here or …”

Mr Ackroyd denies that he said any of these things and points out that as the claimant was angry about the documents he had been given, if he had said anything like that it would have only inflamed the situation. However during cross-examination Mr Ackroyd said he had told the claimant that he was a scaffolder and he could drive a tractor. He also changed his evidence by accepting that he had made the reference to demoting one of his supervisors and further that he did tell the claimant that if he was unhappy he could leave. We therefore have some concern that Mr Ackroyd has contradicted himself. Nevertheless he does not accept that he told the claimant that he was just a tractor driver.

We find that it is very unlikely that he would have said that because obviously he knew that the claimant was primarily a scaffolder but was aware that he had the additional helpful skill of also being a person with a licence to drive a tractor. That he told us would be particularly useful when they got to the stage of dismantling the scaffolding and carting it away at the end of the shutdown process.

Whilst Mr Ackroyd’s credibility is somewhat reduced and we accept that what he now admits to saying could be regarded as detrimental, we do not find that the comments were made on the ground that the claimant had made disclosures. The comments were made in the context of the claimant behaving angrily. In so far as Mr Ackroyd was saying that the claimant was not a supervisor, we find that the reason for that was because Mr Ackroyd was stating a fact, the claimant was not employed as a supervisor.

Mr Ackroyd’s apparent sarcasm was, we find, the result of the somewhat aggressive approach by the claimant. The reason for the ‘if you’re not happy’ comment was, we find, Mr Ackroyd’s frustration at the claimant’s unhappiness which was being expressed on 10 September in contrast to what Mr Ackroyd believed had been the previous three months during which it appeared that the claimant was happy. Shortly before the impromptu meeting on 10 September the claimant and Mr Ackroyd had been discussing the holiday from which the claimant had just returned and which Mr Ackroyd understood had done the claimant good. As Mr Ackroyd said to us, he believed that the claimant was now on a good site with good people.

Accordingly whilst this exchange could perhaps have been dealt with somewhat more sympathetically or tactfully from Mr Ackroyd’s point of view, we reject the suggestion that it was because of the disclosures.

Detriment 7 – the shouted enquiry to the other supervisors “Do your contracts state where you can work or can you be put anywhere?”

Mr Ackroyd had consistently accepted that he did say this to the others and did so to make the point to the claimant that no employees' contract stated that they had a particular place of work and that no employee had the right to state that they had a particular permanent place of work.

Whilst the context of this exchange must again be taken into account there was obviously again an element of sarcasm in Mr Ackroyd's enquiry and to that extent we accept that there was a detriment. Then again had the claimant not been haranguing Mr Ackroyd at his open office door the opportunity for Mr Ackroyd to make this shouted enquiry would have perhaps not existed.

We also find that it is clear that this debate arose out of the claimant's concern that the effect of the documents he was being required to sign would be to alter what the claimant perceived to be his right to be based at Greenergy and to return there after his current assignment. We therefore accept Mr Ackroyd's explanation for why these comments were made and find that they were not made on the ground that the claimant had made protected disclosures.

Detriment 8 – Mr Ackroyd allegedly telling the claimant that he had seen a communication from Greenergy to the effect that they did not want the claimant back on their site

Mr Ackroyd denies that that is precisely what he said. He certainly denies that Greenergy had specifically indicated that they did not want the claimant back. We accept that *if* the claimant had been told that it would be a detriment.

On the balance of probabilities we find that what the claimant was actually told was that Greenergy had no need for an extra scaffolder (Mr Storr having at least temporarily replaced the claimant at Greenergy) and that client need informed the respondent's decision about who to place where. The claimant further contends that there was an element of theatre involved in that Mr Ackroyd went through the motions of looking for the alleged communication from Greenergy on his computer and essentially the claimant's case here is that Mr Ackroyd did this to wind him up. We accept that the claimant may have got the impression that there was a communication from Greenergy – although the respondent has consistently denied this to be the case – and that it was for that reason that the claimant made his subject access request. However we take into account that the claimant's recollection or understanding of what Mr Ackroyd told him during this exchange is likely to have been coloured by the claimant's angry state of mind. As we find and record below, the claimant had got very much the wrong end of the stick with regard to the purported new contract of employment and we think that it is just as likely that he got the wrong end of the stick with regard to what Mr Ackroyd told him of the needs of Greenergy.

9.2.7. *Detriment 10 – on 10 September 2019 being told to sign a new contract "terms of conditions", transferring the claimant, demoting him and reducing his rate of pay and contractual status*

It is convenient to deal with this detriment out of numerical order so as to deal with matters as chronologically as possible. As we have noted, it was the claimant's receipt of this documentation which led to the exchange on 10 September which we have just been dealing with.

We find that *if* the claimant had actually been required to sign a new contract of employment that had all those effects then that would have been a detriment. However we find that whilst the documentation he was presented with had some errors and superfluity, it was not a document which, if signed, would actually have had any of the effects which the claimant contends. We accept that the catalyst for the claimant being issued with this documentation (which begins at page 274C) was to move the claimant from the Cape iTrent payroll to the Hertel iTrent payroll – at least for the remainder of the claimant's time at the oil refinery, which was a Hertel site (the Greenergy site being Cape). We accept Mr Ackroyd's explanation that this was proposed for administrative convenience but in addition would actually benefit the claimant because he would be eligible for any Christmas bonus at the oil refinery in those circumstances.

It is unfortunate that the first part of page 274C was "populated" by an administrator who was probably guessing certain of the information, with the result that the claimant was simply described as an advanced scaffolder and that incorrectly his contract type was described as 'fixed term temp'. However it is clear that similar mistakes were made for the same reason for two other anonymised employees whose forms are at pages 274A and 274B. We accept also that the only document which the claimant really needed to complete was 274C and so it was unfortunate that he was also provided with eight other pages which were primarily designed to get information from new employees which obviously the claimant was not. The numerous pages seeking information for a health declaration were largely superfluous, as Ms Mulvihill accepted when giving evidence before us. We also agree that the part where the claimant was required to sign on page 274K which made reference to "my employment with Hertel (UK) Limited is subject and regulated by these terms and conditions" would understandably have been troubling to the claimant. However he might reasonably have realised, for it is the case, that in the preceding pages there was nothing which can sensibly be regarded as terms and conditions of employment. The exercise was simply to obtain information in forms primarily designed for the induction of a new employee. Whilst we appreciate that the claimant is a lay person, we were told that his wife works in HR indeed for the respondent, although the claimant probably had not had the opportunity to discuss this documentation with his wife

on 10 September as it appears that his encounter with Mr Ackroyd was shortly after his receipt of the documentation.

It might have been better if Mr Ackroyd had asked one of the respondent's HR advisors to explain to the claimant the reason for the documentation being provided. We have not seen any covering letter or email which might have accompanied this documentation if there was such.

However, far from being told to sign this documentation, Mr Ackroyd's response to diffuse the situation was to tell the claimant that he could tear up the document and throw it in the bin. As far as we are aware, there were no further requests for the claimant to complete and sign any such documentation. Rather than taking Mr Ackroyd's advice it is clear that the claimant decided to take the documentation away and apparently get advice from his trade union resulting his document of 11 September in which the claimant stated "I hereby advise that I am NOT accepting the contract/terms and conditions that was handed to me on 10.09.2019 (which was given to me without consultation, discussion, notice or representation)" p276

In conclusion, the provision of all nine pages to the claimant was clumsy and unnecessary and perhaps he should have been given an explanation first but we find that there was in fact no detriment because the claimant was not being required to sign a new contract or new terms and conditions. His mistaken belief even after union advice that he was cannot amount to a detriment bearing in mind that the EHRC Code describes a detriment as anything which the individual concerned might *reasonably* consider changed their position for the worse or put them at a disadvantage. Therefore there is an objective element.

9.2.8. *Detriments 9 and 12 – Mr Walton (Novartis site manager) allegedly telling the claimant that he had not asked for him but was told to take him and allegedly telling the claimant that he was going to be paid as a basic scaffolder whilst at Novartis*

Again it is convenient to deal with these two detriments together as they are said to have occurred on consecutive days, 17 and 18 September 2019.

"Told to take you"

Mr Walton denies that he said this. He explains in paragraph 6 of his witness statement that he had no reason to make such a statement. All he needed was a scaffolder and, as it turned out, Mr Ackroyd provided the claimant. Mr Walton was happy that that was the case. He had known the claimant for many years and his father before him and was therefore perfectly happy to have him on site although he had not actually chosen him. In cross-examination Mr Walton accepted that what he actually needed was an advanced scaffolder and that is what the claimant was. He described the allegation that he had been told to take the claimant against his will as nonsense.

Although we have not been referred to it, as the claimant appears to have been in the habit of taking copious notes, there may somewhere be a record of the claimant recording Mr Walton saying this. If so, to an extent that would be self-serving. In the circumstances explained by Mr Walton we cannot see that he would have had the reaction which the claimant contends for.

We fear at this stage of the process the claimant was seeing detriments where they did not exist and seeking to ascribe any change in his work circumstances to the disclosures he had made. We note that Mr Walton accepts that he was at least aware that the claimant had raised a grievance against the company. He explains in paragraph 5 of his witness statement that "The first thing he said to me was that he had raised a grievance against the company".

Being aware that there was a grievance is not the same thing as being aware that there had been protected disclosures or whistle blowing, but in any event Mr Walton says that he did not want to know about the grievance – he did not want to get involved.

Payment as a basic scaffolder

Mr Walton denies that he told the claimant that he was going to be paid as a basic scaffolder, although he accepts that the claimant's first pay whilst at Novartis was, wrongly, at a basic scaffolder's rate. Whilst the claimant suggests that Mr Walton made this statement to him on his arrival at Novartis, Mr Walton's evidence is that the error in the rate of pay only came to light some weeks later when the claimant received his first payslip for the Novartis period. Mr Walton accepted that he had asked the Novartis site administrator, Miss Ellerby to put the claimant on a basic scaffolder rate but that was on the misunderstanding that that was what the claimant was rather than being a charge hand scaffolder. As soon as the error came to light it was corrected. We see this as a further example of the claimant seizing upon anything that goes wrong as being because of his protected disclosures.

9.2.9. *Detriment 11 – failings with regard the treatment of the claimant's second grievance*

This again is in two parts – delay and the status of the grievance officers.

We accept that a delay in dealing with an employer's grievance can be a detriment, although we note that when the respondent's grievance procedure says that "Where practicable the hearing will be arranged within five working days of receipt of the original grievance" (page 112) it is being somewhat aspirational. Clearly whether it will be practicable depends upon the detail and complexity of the grievance which is raised. The grievance (page 275) whilst dated 11 September 2019 was not given to the respondent until 15 September. It runs to three pages and cross-references to other documentation. The grievance was acknowledged approximately two weeks later (page 278) when the claimant was advised that the HR advisor was trying to arrange a

suitable date and time for the grievance hearing. In the event the grievance hearing did not take place until 29 October 2019 which, as Mr Quickfall points out, was six weeks on not seven.

In these circumstances we do not consider that that amount of delay could reasonably be regarded as a detriment. However if we are wrong on that we are satisfied that the respondent has given an innocent explanation for the delay. The person dealing with the grievance, Ms Edson was recently appointed and so getting acclimatised which required her to visit various sites to familiarise herself. She was also dealing with a complex redundancy situation. Perhaps in an ideal World the grievance hearing would have taken place earlier but we do not accept that the delay that took place was on the ground that the claimant had previously made protected disclosures.

As to the status of Mr Hindson who was to be the grievance officer, Ms Mulvihill accepts that it was inappropriate to appoint someone who was more junior to Mr Ackroyd and Mr Leonard against whom the grievance was primarily directed. Further Ms Edson herself was junior to Mr Spicer who had assisted Mr Leonard at the grievance appeal. However we are satisfied that those were simply mistakes made by Ms Edson because she was new to the business. It is fanciful to suggest that she took those steps because the claimant had previously made protected disclosures.

9.2.10. *Detriment 13 – loss of overtime*

The claimant in fact worked a considerable amount of overtime in his first period at the oil refinery, less when at Novartis and probably none in his second period at the oil refinery. We accept that ceasing to be given overtime when it was available and an expectation can properly be regarded as a detriment.

However in relation to the time working at Novartis, the evidence we heard from Mr Walton was that the claimant would be frequently asked if he wanted to undertake overtime – asked on a daily basis. Mr Walton explained that these requests would typically be met by the claimant saying that he would have to get back to him but when pushed would then decline. We see from the print out on page 438 that the claimant only undertook 3.5 hours overtime whilst at Novartis. On the evidence before us we are satisfied that that was the claimant's choice. What his reason for declining was we are unaware and it is not really relevant. We find that it was certainly not a case of the claimant not being offered overtime because of protected disclosures.

With regard to the second period at the oil refinery the claimant is shown as only working 3 hours overtime. Mr Ackroyd's explanation to us that whilst earlier in the shutdown there had been a huge amount of work to do and an equivalent amount of overtime available, because the shutdown work had taken longer than envisaged, the overtime budget had been exhausted and it was in those circumstances that no one was offered very much overtime towards the latter part of the shutdown.

We are satisfied that that is a valid explanation. If the respondent had been seeking to "punish" the claimant for making protected disclosures then surely it would have withheld overtime from him from the start of his time at the oil refinery whereas the reverse was the case. Mr Ackroyd referred to the claimant for some periods of time working seven days per week.

9.2.11. *Detriment 14 – denying the claimant a morning break whilst working at the oil refinery*

It is common ground that at the Greenergy site, and for that matter also at the Novartis site, workers were permitted a morning break which involved them travelling back from their precise place of work to the canteen or mess room with an opportunity to wash, remove their overalls if they wished and have refreshment. We were told however that sometime previously that had been considered to be inefficient by the respondent with the result that the right to that type of morning break had been "bought out" following consultation with the union. It followed that no one had that type of morning break at the oil refinery. We were told that they did have *a* morning break, albeit one which they would have to spend nearer to their actual place of work and with perhaps less facilities than would have been the case previously.

It follows that the reason that the claimant did not have that more luxurious morning break when at the oil refinery was not because he was being singled out but simply because that type of break was no longer available on that site. Whilst that was the state of affairs in consequence of the claimant having been transferred to the oil refinery, we have already found that that transfer was not in itself a detriment because of making a disclosure. Significantly when the claimant was then transferred briefly to Novartis he again had the benefit of a full morning break. On the logic of the claimant's case, if he was being punished for making disclosures then why was he allowed to have a morning break of that type at Novartis?

9.2.12. *Detriments 15 and 16 – non-renewal of the claimant's safety passport and removal from Mr Critchley's training matrix at Lindsey Oil Refinery*

We deal with these two final alleged detriments together because they are interconnected. Mr Critchley accepts that the claimant was removed from the training matrix to which he had been added on his arrival at the oil refinery. The reason that he was removed from the matrix was simply because he was moving on to Novartis.

Mr Walton has explained to us that appropriate steps were taken whilst the claimant was at Novartis to have him booked on to a refresher course so that his safety passport could be renewed. In fact that training had been booked for 26 and 27 November 2019 (page 430) and it seems that the claimant was booked on to that course on or about 1 November 2019 as a result of actions taken by Ms Ellerby the Novartis site administrator.

By the time the claimant returned to the oil refinery his safety passport had expired. There was however we were told a period

of grace on the basis if an employee had been booked on to a refresher course.

When the claimant sought entry to the refinery site on 11 November 2019 he was initially denied access because the only record readily available simply indicated that the safety passport had expired. The arrangements which by that time Ms Ellerby had already made at Novartis for the claimant to undergo refresher training had not been communicated to Mr Critchley at the oil refinery site. Regrettably it took a couple of hours for this to be sorted out and before the claimant could get on to the oil refinery site. Perhaps the claimant found this embarrassing or awkward but he does not say that when dealing with this matter in his witness statement at paragraph 48. Whether being paid for sitting in his van could be regarded as a detriment is debatable.

In so far as it was, the claimant's contention that Mr Ackroyd's motive in moving the claimant to Novartis had been to remove him from "his site" and was part of his retaliation – hence the claimant not being on Mr Critchley's training matrix, is in our judgment manifestly not the case. At worst there was a failure to communicate between the Novartis site and the oil refinery site and we accept the respondent's explanation that that is the innocent explanation for this slight mishap and that it was not done on the ground that the claimant had made protected disclosures.

9.3. Accordingly for all these reasons we conclude that this claim fails and is dismissed.

Employment Judge Little
Date 31st December 2020