EMPLOYMENT TRIBUNALS

Claimant:	Mr D Brigham
Respondent:	DX Network Services Ltd
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Mr Senior and Mr Pearse
On:	18-21 January 2021 (by CVP) and 11 February 2021 (in chambers)
Representation	
Claimant:	Mrs F Almazedi (Solicitor)
Respondent:	Miss N Webber (Counsel)

RESERVED JUDGMENT

1. The claimant's complaints of:

   1.1 detriments and automatically unfair dismissal (relating to health and safety complaints);

   1.2 detriments and automatically unfair dismissal (relating to protected disclosures);

   1.3 ordinary unfair (constructive) dismissal; and

   1.4 disability discrimination (reasonable adjustments and harassment);

   fail and are dismissed.

REASONS

INTRODUCTION

Tribunal proceedings

2. Neither party objected to holding this hearing as a remote hearing. The form of remote hearing was "V: video - fully (all remote)". A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing.

3. This claim has been case managed during preliminary hearings on:

   3.1 2 April 2020 (Employment Judge Jones);

   3.2 29 June 2020 (Employment Judge Rostant).

4. We considered the following evidence during the hearing:

   4.1 a joint file of documents and a medical report provided by the claimant;

   4.2 a witness statement and oral evidence from the claimant; and

   4.3 witness statements and oral evidence from the respondent's witnesses:

      4.3.1 Mr Richard Brook;

      4.3.2 Mr Andrew Senior;

      4.3.3 Mr Eddie Collins; and

      4.3.4 Miss Lynn Beaty.

5. This hearing was originally listed for five days; however, the fifth day was vacated due to the Tribunal's regional training requirements. We also adjourned the hearing from 11am of the third day of the hearing until 10am on the fourth day of the hearing due to a representative's family bereavement.

6. The parties confirmed that no adjustments were requested. We reminded the parties that they could request additional breaks at any time if needed.

CLAIMS AND ISSUES

7. The list of issues was discussed with the parties in detail at the start of the hearing. The revised list of issues that the Tribunal considered in reaching its conclusions on this claim is set out below.

8. The claimant brought the following complaints under the Employment Rights Act 1996 ("**ERA**") and the Equality Act 2010 ("**EQA**"):

   8.1 detriments on the grounds that he made:

      8.1.1 health and safety complaints and/or;

8.1.2 protected disclosures;

8.2 automatic unfair (constructive) dismissal on the same grounds;

8.3 ordinary unfair (constructive) dismissal;

8.4 disability discrimination (failure to make reasonable adjustments and harassment).

LIST OF ISSUES

9. We discussed a draft list of issues with the parties at the start of the hearing and agreed the amended list of issues reproduced below with the parties.

HEALTH AND SAFETY DETRIMENT COMPLAINTS

Health and safety complaints (s44(1)(c)(i) ERA)

10. Was the claimant an employee at a place where there was no representative or safety committee for the purposes of s44(1)(c)(i) ERA?

11. If so, did the claimant bring to the respondent's attention (or a prescribed person's attention)*, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety? *The claimant he says he brought the circumstances set out in Annex 1 to the respondent's attention.*

**Underlined wording inserted by the Tribunal after the hearing, in view of Annex 1, paragraph 2.*

Detriments

12. Did the respondent do the things set out at Annex 2?

13. By doing so, did it subject the claimant to detriment?

14. If so, was it done on the ground that he made a health and safety complaint in the manner set out in s44(1)(c)(i) ERA?

WHISTLEBLOWING DETRIMENT COMPLAINTS

Qualifying disclosure (s43B ERA)

15. Did the claimant make one or more qualifying disclosures as defined in section 43B ERA?

16. The Tribunal will decide:

16.1 What did the claimant say or write? When? To whom? *The claimant says he made disclosures on the occasions set out in Annex 1.*

16.2 Did he disclose information?

16.3 Did he believe the disclosure of information was made in the public interest?

16.4 Was that belief reasonable?

16.5 Did he believe it tended to show that:

16.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

16.5.2 the health or safety of any individual had been, was being or was likely to be endangered?

16.6 Was that belief reasonable?

17. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

Detriments

18. Did the respondent do the things set out at Annex 2?

19. By doing so, did it subject the claimant to detriment?

20. If so, was it done on the ground that he made a protected disclosure?

COMPLAINTS RELATING TO TERMINATION OF EMPLOYMENT

All complaints (unfair (constructive) dismissal, and automatically unfair dismissal)

21. Did the respondent dismiss the claimant? In particular:

21.1 Did the respondent do the things set out at Allegations (a) to (u) inclusive of Annex 2?

21.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

21.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

21.2.2 whether it had reasonable and proper cause for doing so.

21.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

21.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

22. What was the effective date of termination for the purposes of s97 ERA?

Automatic unfair dismissal (s100 and s103A ERA)

23. If the claimant was dismissed, was the reason or principal reason for dismissal an automatically unfair reason in that:

    23.1 the claimant made the health and safety complaints alleged above in the manner set out in s100(c)(i) ERA; and/or

    23.2 the claimant made the protected disclosures alleged above under s103A ERA?

    If so, the claimant will be regarded as unfairly dismissed.

Ordinary unfair dismissal

24. If the claimant was dismissed and such dismissal was not due to an automatically unfair reason, the respondent has not pleaded a potentially fair reason for such dismissal for the purposes of s98 ERA.

DISABILITY DISCRIMINATION CLAIMS – Equality Act 2010 ("EQA")

Disability status (s6 EQA)

25. Did the claimant have a disability for the purposes of s6 EQA at all relevant times because of his asthma?

Reasonable adjustments (s20 and s21 EQA)

26. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

27. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

    27.1 Requiring the claimant to carry out his contractual obligations, which the claimant states involved:

        27.1.1 Clearing the loading bays;

        27.1.2 Sorting and distributing parcels;

        27.1.3 Working the 2 Man;

        27.1.4 Loading and unloading wagons/lorries;

        27.1.5 Operating the belt;

        27.1.6 Cleaning up the warehouse general tidying;

        27.1.7 Scanning parcels;

        27.1.8 Various duties near the back wall barrier;

27.1.9 Moving deliveries to the correct loading bays; and

27.1.10 Checking parcels in-coming and outgoing.

28. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that the claimant was required to work in dusty conditions which exacerbated his asthma?

29. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

30. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant. However, it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

30.1 allowing the claimant to undertake alternative work; and/or

30.2 issuing the claimant with appropriate PPE (namely a mask with filter).

31. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Harassment (s26 EQA)

32. Did the respondent engage in conduct as follows: those matters set out in Annex 2 at Allegations (a), (c), (d), (e), (g), (l), (m), and (s)?

33. If so was that conduct unwanted?

34. If so, did it relate to the protected characteristic of disability?

35. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

FINDINGS OF FACT

Context

36. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they

are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

37. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the Gestmin case:

"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

38. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

39. The respondent provides delivery services within the UK, including next day and scheduled delivery parcel freight. It has a workforce of around 5000 staff, operating from around eighty-five depots in the UK and Ireland, including depots in Leeds and Normanton.

40. The claimant was employed by the respondent as a night shift warehouse operative at its Leeds depot from 26 November 2015 until he resigned in late 2019. The date on which the claimant's employment terminated is disputed and our conclusions on this date are set out in our findings of fact below.

41. The claimant's employment was subject to an initial probationary period of 3 months. He worked 25 hours per week at the start of his employment, but increased his shifts to work full time (45 hours per week, Monday to Friday nights) from 14 February 2019 onwards. The respondent's HR services team confirmed the claimant's increase in hours in a letter headed "Re: Change of Hours", which was dated 26 February 2019. That letter stated that: *"All other contractual terms and conditions will remain unchanged".* It did not refer to any further probationary period.

42. The claimant started his shift at 11pm each night and worked until 9am the next day. He did not work in a particular area of the warehouse and his duties depended on the work allocated to him on that particular shift. The claimant's duties included:

    42.1 moving any boxes and parcels left from the previous evening into the correct loading bays;

    42.2 unloading parcels from the delivery vans arriving at the depot and putting those into the correct loading bays;

    42.3 re-loading the delivery vans with the parcels to be delivered that night;

    42.4 sweeping, cleaning and putting packages into the loading bays for the next evening's deliveries.

43. The claimant worked alongside other warehouse operative colleagues, including Mr Andrew Senior, Mr Dan Comstive, Mr Aaron Haron, Mr Ryan Brellsford and Mr John Steele. Mr Senior had more experience than the claimant and some of his colleagues because he had worked there for a longer period of time. However, Mr Senior was employed at the same grade as the claimant and his colleagues at that time. Mr Senior was promoted to a team leader role in April 2020, several months after the claimant's employment ended in October 2019.

Leeds depot's management structure

44. The respondent's management structure at the Leeds depot included:

    44.1 Supervisors, including Kenny (who dealt with the transport/logistics side of the respondent's operation);

    44.2 Shift managers, such as:

        44.2.1 Mr Mark Stephenson (Night shift manager and the claimant's line manager);

        44.2.2 Mr Jason Barber (Back shift manager – the last two hours of the backshift crossed over with the first two hours of the night shift);

    44.3 an Operations manager: Mr Matthew Sparks initially carried out this role along with Mr Barber. The respondent had a reorganisation in early 2019, following which Mr Sparks moved into a driving role and Mr Barber became the Back shift manager. Mr Eddie Collins took over the role of Operations Manager from late April 2019 to November 2019; and

    44.4 a General Manager: Mr Richard Brooks carried out this role from March 2012 to June 2019 when he moved to another role within the respondent's business. The role was then vacant for a couple of months, until Mr Kieron Talbot-Sykes joined the depot in late August or early September 2019.

45. We find that the claimant's day to day relationship with Mr Stephenson, his line manager, was no different to that of his colleagues' relationship with Mr Stephenson. We accept Mr Collins' evidence that Mr Stephenson was not particularly close to any members of his team. Mr Collins had spoken to Mr Stephenson about complaints raised by other colleagues regarding Mr Stephenson's comments towards them.

46. The Leeds depot was also part of the respondent's national structure, which included:

    46.1 a Health and Safety team, who provided support and guidance to the depots and carried out annual health and safety assessments; and

    46.2 shared services, including HR Business Partners and in-house legal support.

Employee representation

47. The respondent did not recognise a trade union and did not have any employee representatives at the Leeds depot. In addition, the respondent did not have any health and safety representatives or committee at the Leeds depot.

Warehouse conditions

48. The respondent moved its Leeds depot to its current Stourton site in or around 2014. The Leeds depot operated on a 24 hour basis, handling freight. The freight that the Leeds depot dealt with could consist of anything from small parcels to pallets of goods to irregular shaped items, such as kayaks or large blinds.

49. The Leeds depot consisted of a refurbished warehouse and a large yard from which its delivery vehicles operated. The warehouse had six shutter doors at one side, through which the vans would enter to drop off any parcels from their trailers. There were no loading bays at the depot and vans would enter the warehouse itself. Instead, the vans would reverse into one of the four middle bays, reading to be unloaded.

50. The warehouse operatives would unload the smaller parcels into a mobile cage, from which they were placed on a belt in the middle of a warehouse. Operatives would then pick parcels from the belt and place them into cages with postcodes attached to them. When a cage was full, an operative would use a pallet truck to move the cage to the bay where the relevant delivery van was ready for loading. Larger items were carried straight from the vans to the relevant loading bays.

51. All of the witnesses agreed that the warehouse could become quite dusty from time to time because of the nature of the parcel delivery operation. All of the respondent's employees were responsible for keeping the depot tidy during their shift. For example, they had to pick up any loose banding or any other debris from parcels which would otherwise form a potential trip hazard.

52. The respondent did not take any special measures to reduce the level of dust in the warehouse, apart from sweeping up dust at the end of the shift and placing it in an outdoor skip. Some dust blew in and out of the warehouse, due to vehicle movement when the delivery vans arrived and departed with their parcels. The respondent had previously used a mechanical sweeper at the Leeds depot. However, we accept Mr Collins' evidence that the mechanical sweeper was less effective at reducing dust than sweeping by hand because the mechanical sweeper would leave lines of dirt on either side of the area being swept.

53. The claimant and Mr Senior both said that the level of dust was lower during the wetter months of the year, because the dampness from the vans would suppress the level of dust. They exchanged text messages in July 2019, during which Mr Senior commented that the dust was 'bad' and the claimant said: *"It's always bad just worse when it's hot".*

54. The depot suffered from serious flooding over the Christmas holiday period in 2015. The respondent closed the depot for a short period after the flood, during which it was deep cleaned. The level of dust worsened around this time, due to the delivery vans bringing additional dirt into the depot in the aftermath of the flood. However, the amount of additional dirt from the aftermath of the flooding decreased over time and had no impact on the level of dust by 2018.

Health and Safety Executive visit

55. The Health and Safety Executive ("**HSE**") attended the Leeds depot on 9 September 2019, following a telephone complaint by the claimant on 29 July 2019 regarding 'excessive dust levels' and diesel fumes from the delivery vans left running in the warehouse whilst they were being loaded or unloaded. The claimant stated in his witness statement that he also raised an issue with the HSE regarding asbestos. However, this is not reflected in the HSE's record of the claimant's call. We find that the claimant did not raise any issues regarding asbestos with the HSE because the HSE's note of the claimant's call was contemporaneous and goes into detail about other matters raised by the claimant, including the impact of dust upon his breathing.

56. The HSE did not inform the respondent in advance that they were going to inspect the depot, although they did inform the claimant in a telephone call on 21 August 2019 that they would make an unannounced visit to the site in the next couple of weeks. The HSE did not tell the respondent that the claimant had raised a complaint.

57. Page 3 of the HSE report dated 6 September 2019 stated:

"Looked at the site and discussed the issue with dust. No evidence of dust on any of the less used areas of the site. There are small vans parked in the warehouse that are filled from the trailer units. There is more likely to be a problem with diesel fumes at peak times than a problem with dust. Agreed with the company that it would be pragmatic to get some dust monitoring done to reassure the staff that there isn't a fume or dust problem."

58. The HSE case notes stated that:

"With respect to health and safety management of other substances hazardous to health, sustainable compliance was found for the following reasons: issues raised with regards to diesel fumes and dust presence but on time of visit no evidence seen – company agreed to undertake air monitoring."

59. The HSE also noted that:

59.1 the asbestos survey carried out in 2014 did not cover the entire site and told the respondent to obtain a new asbestos survey; and

59.2 a barrier separating pedestrian and vehicles along the main warehouse walkway showed signs of damage.

60. Mr Tom Kelly (the respondent's Regional Director) emailed Mr Talbot-Sykes and others to ask that they carried out the actions required by the HSE. The respondent obtained a further asbestos survey that confirmed that the site was safe from asbestos.

61. The respondent also commissioned Workplace Exposure consultancy services to carry out air quality sampling of diesel engine exhaust emissions and carbon monoxide on 3 December 2019 (after the claimant's employment had ended). Workplace Exposure's report dated 16 December 2019 noted: "*Whilst not diesel emissions, it is advised to consider improving on the dust exposure controls. Some of the sweeping brushes look worse for wear and dust and debris build up around the warehouse. Provide a suitable vacuum to remove debris and clean the floors regularly. Consider how the vans/trucks are cleaned inside and outside."* Page 8 of the report also noted that: *"There are sweepers at other depots, but not at this site."* Page 7 of the Report stated that: *"Respiratory Protective Equipment is not used by staff but would be available on request…"*

62. The respondent sent a copy of Workplace Exposure's report to the HSE on 20 December 2019, stating: *"My conclusion is that we are meeting statutory obligations but still have room to improve. We are planning to do a couple of thing which might help…including…re-enforcing the need to avoid vehicle idling during the loading/unloading processes through the team leaders on site, and reviewing the cleaning arrangements to see whether this can be improved both in terms of mechanism and times to try to reduce dust where practicable."*

Claimant's concerns regarding dust in the warehouse - Annex 1 and Annex 2 allegations (a) and (b)

63. The claimant accepted during his evidence that Mr Senior was not a manager at the time of the claimant's employment, but was in fact another warehouse operative. The claimant's representative accepted during her submissions that Mr Senior would not have been able to take any action regarding the claimant's complaints regarding dust on behalf of the respondent.

64. The respondent operated a suggestion box. At some point during 2018 or early 2019, the claimant and Mr Comstive prepared a letter complaining about dust in the warehouse and asked other colleagues to sign it. Mr Senior recalled seeing the letter, but did not recall whether he signed it. The respondent's managers did not inform the claimant or his colleagues of any action taken in response to this letter. Mr Comstive and the claimant discussed in their text messages on 30 March 2019 whether they should put another letter into the suggestion box regarding dust but they did not do so.

65. The claimant alleged that between 2018 and October 2019:

    65.1 Mr Brook and Mr Collins dismissed his concerns about dust, told him to stop moaning and said that he had worked there for years and was 'alright'; and

65.2 the claimant asked Mr Brook and Mr Collins if they would investigate the dust levels, but that they ignored him by 'failing to get back to him, fobbing him off and failing to take any meaningful steps to investigate [his] concerns'.

66. We find that:

66.1 the claimant did raise verbal concerns regarding dust with Mr Stephenson. Mr Senior confirmed that he heard the claimant complaining about the dust levels in the warehouse whilst they were working together on the nightshift;

66.2 the claimant did not raise any complaints directly with Mr Brook until late April 2019. We find that Mr Brook did not see and was not informed of the contents of the suggestion box letter. Our findings of fact regarding the meetings held by Mr Brook are set out in detail later in this Judgment. We do not accept the claimant's contention that Mr Brook dismissed the claimant's concerns or failed to take any meaningful steps to investigate such concerns. We also note that Mr Brook left his role as General Manager of the Leeds depot in June 2019 and was not responsible for the day to day management of the depot after that date;

66.3 the claimant did not raise any complaints with Mr Collins during 2018 or early 2019 because Mr Collins was not working in the Leeds depot at that time. The claimant did not provide any specific examples of when he raised any complaints about dust to Mr Collins between late April and the start of his long term sickness absence on 23 September 2019 (which lasted until the claimant's employment terminated), save for the text that he states he sent to Mr Collins on 22 July 2019. Our findings regarding the text message are set out in more detail later in this Judgment; and

66.4 the claimant's complaints in his 15 October 2019 email were raised with Mr Talbot-Sykes.

Claimant's allegations regarding asbestos in the warehouse roof - Annex 2 allegation (c)

67. We find that the claimant did not raise any concerns about asbestos from 2018 onwards, as he alleged. Our view is that the claimant has become confused between the matters that he raised with HSE (dust and diesel fumes) and the HSE's report which referred to the respondent's asbestos survey. In particular, we note that:

67.1 the claimant did not raise asbestos as an issue in his email on 29 April 2019 to Mr Brook (which is referred to later in our findings of fact); and

67.2 the claimant did not discuss asbestos with the HSE during his call to them on 29 July 2019.

If the claimant was concerned about asbestos during 2018 and 2019, it is probable that he would have raised this as an issue either with Mr Brook or with the HSE.

68. The HSE noted in their report dated 6 September 2019 that the respondent's asbestos survey dated 14 April 2014 was insufficient. This was because the surveyor had not managed to obtain access to all areas of the warehouse, although he still issued a certificate stating that asbestos was not detected. The respondent obtained a new asbestos survey in late 2019 and the survey found that there was no asbestos at the site.

Claimant's concerns regarding Mr Stephenson and Mr Sparks' conduct (March and April 2019) – Annex 2 allegations (d), (e), (g), (h) and (q)

69. The claimant was concerned about Mr Stephenson and Mr Sparks' conduct towards him during March and April 2019. He later raised these concerns with Mr Brook and further information regarding his concerns are set out in his email of 29 April 2019 (which we consider in more detail later in this Judgment). The respondent did not call Mr Stephenson or Mr Sparks to give evidence and we note that they were no longer employed by the respondent as at the date of this hearing. We have reached our findings based on the documents and the evidence provided by the claimant and the respondent's witnesses.

70. The claimant was absent from work for four days starting on 2 April 2019 due to gastroenteritis. The claimant's absence was not linked to dust inhalation, as he alleged. Mr Stephenson was concerned about absence levels on the night shift at that time and texted the claimant on 2 April 2019, stating:

    "Hope you are back tonight if not I can't keep your job open

    Mark".

71. The claimant was on annual leave on 22 April 2019. Mr Stephenson texted the claimant's wife on that day, stating: *"Just a reminder back at work tonight"*. We find it is likely that Mr Stephenson had those contact details for his team programmed into his mobile phone and he probably sent the text message to the wrong contact by accident.

72. We find that it is probable that Mr Stephenson sent these two text messages to the claimant because he wanted to take steps to reduce absence levels in the night shift. We note that the claimant told Mr Brook that Mr Stephenson had sent a similar message to one of his colleagues. The wording of Mr Stephenson's first text message did not reflect good management practice, as accepted by Mr Brook during his discussions with the claimant in April 2019 (please refer to our findings of fact below).

73. The claimant alleged that on 24 April 2019, Mr Stephenson approach the claimant in front of colleagues and told him that if he did not finish by the morning, then he and his colleagues would be out of a job. We find that Mr Stephenson made this comment to all of the night shift team, not just the claimant. The reason for our finding is that shortly afterwards the claimant described the incident to Mr Brook's in his email of 29 April 2019 as follows:

"On 24/04/19 on entering the warehouse not just myself but a number of colleagues were told that if the work didn't get finished by the morning we would all be out of jobs…I find it ridiculous a manager can speak to staff this way and threaten people's jobs to try and get them to work faster."

74. We find that the claimant did complain about Mr Stephenson's text message dated 2 April 2019 to Mr Sparks on an informal basis and that Mr Sparks did not take any significant action before he changed roles later that month. The claimant then raised these concerns with Mr Brook. We note that the claimant's email to Mr Brook on 29 April 2019 stated that "*I have spent much time deliberating over putting in a complaint"* which we have concluded meant that the claimant did not raise a formal complaint about Mr Stephenson 's behaviour with Mr Sparks.

75. We accept that Mr Sparks did tell the claimant that he was at risk of failing his probationary period because the claimant raised this as a concern with Mr Brook in April 2019. The claimant increased his working hours in February 2018 and his letter confirming his change of hours did not mention any probationary period. We find that Mr Sparks was mistaken as to the terms on which the claimant increased his working hours.

Claimant's discussions with Mr Brook (late April and May 2019) regarding Mr Stephenson and Mr Sparks' conduct – Annex 2 allegation (f)

76. The claimant spoke with Mr Brook on 24 April 2019 to complain about his treatment by Mr Stephenson. Mr Brook asked the claimant to email him details of his concerns. The claimant emailed Mr Brook and the respondent's HR team on 29 April 2019, stating:

"I have spent much time deliberating over putting in a complaint but come to the conclusion that nothing is getting better and my treatment by Mark Stephenson is only getting worse…

- *On 2/4/19 whilst off work sick I received a text from Mr Stephenson threatening my job unless I returned to work that night even though I was signed off sick from work by my doctor. I found this behaviour totally disgusting at a time when a company should be concerned…I reported this to Matthew Sparks later the same day but nothing came of it…*

- *During my telephone conversation with Matthew Sparks I was told I will fail my probation period and have to start the 3 month probation period again which I felt was harsh as my attendance up until that point was good and feel that dependency* [sic] *days I have taken in the past are being used against me.*

- *On 22/04/19 whilst still on annual leave my wife received a text message from Mr Stephenson with a reminder that I was back in work that night which was totally uncalled for as I know what days I work anyway but nobody else*

received the message just myself and one other colleague and I see this as another way of singling me out.

- *On 24/04/19 on entering the warehouse not just myself but a number of colleagues were told that if the work didn't get finished by the morning we would all be out of jobs…I find it ridiculous a manager can speak to staff this way and threaten people's jobs to try and get them to work faster.*

There are a number of other issues in the warehouse that numerous people have discussed with me including pay, equipment, the way in which the trucks are driving and how certain people get preference over holidays…"

77. The respondent's HR team emailed the claimant on 30 April 2019, acknowledging his grievance and stating that they would contact him again shortly to arrange a hearing.

78. Mr Brook was working nights that week and decided that he would have an informal discussion with the claimant regarding his concerns. It is common ground that they spoke for around two to two and a half hours regarding the matters set out in the claimant's email.

79. We find that it is probable the claimant mentioned dust during their discussions, but it was not a major focus of the meeting because the claimant did not highlight dust as an issue in his email. We accept that the claimant believed that the respondent was moving to another warehouse location in the near future, which we thought would solve any problems. We also accept that Mr Brook had not told the claimant of any definitive plans for such a move. We find that the claimant did not request masks, filters or dust extractors because he said in oral evidence that he had not requested any such PPE during his employment.

80. Mr Brook also checked in on the claimant during that week when they were working on the night shift to make sure that he was happy. The claimant did not raise any further concerns with Mr Brook during this period either verbally or in writing.

81. The respondent did not hold any formal grievance process to consider the claimant's concerns because both Mr Brook and the claimant felt that matters were resolved following their discussion.

82. We accept Mr Brook's evidence that he did not look at any of the text messages that the claimant referred to in his email of 29 April 2019 or speak to either Mr Stephenson or Mr Sparks before meeting with the claimant to discuss his email. Mr Brook apologised for any 'discomfort' caused to the claimant by Mr Stephenson and Mr Sparks' conduct. He also accepted in cross-examination that the text messages sent by Mr Stephenson were not appropriate behaviour by a manager. Mr Brook spoke with Mr Stephenson regarding the claimant's complaints and the claimant stated that Mr Stephenson's behaviour improved for a few weeks. Mr

Brook also checked with the claimant that he was happy on a few occasions before he left his role as General Manager of the Leeds depot in June 2019.

Claimant's search for another job (June 2019 onwards)

83. The claimant was looking for other work from June 2019 onwards. The claimant and Mr Comstive texted each other during June 2019. The claimant said that he was applying for a job at Selco but that he could not leave until he obtained another role due to his financial circumstances. The claimant confirmed during his evidence that his application to Selco was unsuccessful.

84. The claimant texted Mr Senior in June 2019 saying: *"I'm gunna make Monday my official job search day from now on I need out of there".* The claimant said in a separate text message around the same time to Mr Senior: "*I know that dust is too much I'm gunna look for something else doctor wants to check me for asthma when I'm ok again cos it's second time I've got really bad in last 18 months he said it's unusual for a [non] smoker".*

85. The claimant also exchanged text messages with Mr Harran, saying that there might be a role for him at a friend's workplace. He also mentioned another role that offered the opportunity to learn a new trade.

Claimant's complaint to the Health and Safety Executive (29 July 2019) – Annex 1

86. The claimant telephoned the Health and Safety Executive ("**HSE**") on 29 July 2019. We considered the HSE's report, as stated in the earlier paragraphs of this Judgment headed "Warehouse Conditions".

87. We find that the claimant told his colleagues that he had complained to the HSE during August 2019. However, we find that management were not aware of the HSE's impending visit. There were text messages in the hearing file relating to a visit from the respondent's internal health and safety team, rather than the HSE in early August 2019.

88. The claimant also exchanged text messages with Mr Senior after the HSE visit, in which he said: *"Kenny has grassed me in to Eddie saying I'd rang health and safety, that's why we been sweeping all shit out every day and clearing yard for this woman coming I reckon".*

89. However, Mr Senior replied saying: *"Fuck knows when I told Eddie she was here he said what's she doing here so he didn't know she was coming".*

90. Mr Talbot-Sykes was working in the warehouse when the HSE inspector arrived on 6 September 2019. Mr Collins was not working at the time of the HSE visit because he was working on a later shift that day. Mr Talbot-Sykes told Mr Collins that the HSE inspector had visited the site when Mr Collins arrived at work.

Claimant's allegations regarding Mr Stephenson's and Mr Sparks' conduct (July to September 2019) – Annex 2 allegations (k), (m), (t) and (s – second part of (s))

91. The claimant texted Mr Stephenson on 22 July 2019 stating that he had a chest infection, his doctor had sent him to the hospital for an X-ray and that he had been coughing up blood for a few days. The claimant asked Mr Stephenson for Mr Collins' phone number, in Mr Barber's absence, and Mr Stephenson provided this to the claimant. We find it probable that Mr Stephenson thought that Mr Collins would speak to the claimant regarding these matters and did not discuss them with the claimant.

92. The claimant also alleged that Mr Stephenson and Mr Sparks told him to stay at home without pay, rather than suspend him on medical grounds, investigate the dust issue and/or consider appropriate PPE. The claimant also said that they failed to support him, including by failing to offer him alternative duties. The claimant did not provide any evidence in his witness statement (or any documents) to suggest that Mr Stephenson and Mr Sparks told him to stay at home without pay and there was no evidence in the hearing file to support this allegation.

93. In addition, the claimant did not state in his evidence that Mr Stephenson had suggested that he use up his holidays because he was unable to attend work due to the dust. The claimant said that he chose to book holidays to help to manage his condition whilst still being paid (the claimant and his colleagues were eligible for SSP during any period of sickness absence).

94. The claimant was absent for three days in September 2019. Mr Stephenson sent a 'letter of concern' to the claimant dated 16 September 2019, which stated that the respondent would monitor the claimant's absence and may consider formal disciplinary action if his attendance did not improve. The letter stated that it was not a formal warning and did not form part of the respondent's disciplinary procedure. We find that this was a standard letter regarding absence management under the respondent's absence management policy. The claimant had not obtained a GP's note for that absence.

Claimant's allegations regarding Mr Collins's conduct (July to September 2019) – Annex 2 allegations (i), (j), (l), (o) and (r)

95. The claimant provided a copy of a text message to Mr Collins dated 22 July 2019. The message stated:

"… is there any chance of getting a couple of extra days holidays? Been really badly [sic] *and not going to get better breathing in all dust in warehouse, doctor gave me a week's sick note but I don't want to go sick to run up my points, can you give me a call when you get a minute please..."*.

96. Mr Collins gave evidence that he did not recall receiving the claimant's text message. We find that Mr Collins did not receive the text message, although the claimant had sent it to him. We note that text messages are not always reliable and that the claimant did not send a follow up text or call Mr Collins to check he had received the message. Given our findings on this issue, we find that there was no reason for Mr Collins to refer the claimant to occupational health at that point in

time. The claimant was absent in July 2019 for a short period due to a chest infection. However, his previous absence for a chest infection was in December 2017 and his GP notes do not refer to any further chest or breathing difficulties until 25 September 2019 (by which point the claimant was absent due to work-related stress).

97. The claimant alleged that between July and August 2019, Mr Collins humiliated him by telling his colleagues (Ryan Brellsford and Mr Senior) that when the claimant came back from sickness absence he would be getting a disciplinary and that he had taken unauthorised leave when the Claimant had been on booked holiday. Mr Collins denied making such comments. We find that Mr Collins did not make such comments to Mr Brellsford and Mr Senior because:

    97.1 Mr Comstive asked the claimant whether Mr Collins had called the claimant and whether the claimant had been authorised to take leave on Friday. The claimant responded saying: *"No but Michael said Eddie was kicking off the piece of shit"*. He also made other derogatory comments regarding Mr Collins in the text exchange. Mr Comstive's comments do not suggest that Mr Collins had mentioned any disciplinary issues, but the claimant's comments indicated that he felt strongly about the matter; and

    97.2 Mr Senior did not recall during his evidence Mr Collins mentioning that the claimant would be subject to a disciplinary for unauthorised absence.

98. The claimant has also alleged that:

    98.1 on an unknown date in September 2019, Mr Collins talking with colleagues of the Claimant (Aaron Harran and John Steele) whilst he was off sick and 'slagging him off' by suggesting that he was a 'trouble maker' and telling people that management had given him the authority to get rid of him;

    98.2 on or around the 10th September 2019, Mr Collins mocking the Claimant to his colleagues saying: "be careful with that dust boys, we had health and safety in yesterday" and trying to intimidate the Claimant by telling his colleagues (Mr Senior and Mr Brellsford) that he and management knew who reported it; and

    98.3 on or around the 22nd September 2019, Mr Collins mocking the Claimant by making false and exaggerated coughing noises to embarrass the Claimant.

99. The claimant was unable to confirm the context in which he states Mr Collins made comments to Mr Harran and Mr Steele and Mr Collins denied making those comments. There was no evidence that Mr Collins was trying to 'get rid of' the claimant. We note that the absence management letter sent by the respondent to the claimant on 16 September 2019 expressly stated that no disciplinary action was being taken. In addition, Mr Talbot-Sykes later took steps to offer the claimant an alternative role at the Normanton depot at the claimant's request.

100. We find that Mr Collins did not mock the claimant by making comments to Mr Senior and Mr Brellsford about the HSE visit on or around 10 September 2019. We note that Mr Senior did not recall any such comments. The claimant was unsure about whether Mr Collins knew that he had complained to the HSE. The claimant texted Mr Brellsford on 10 September 2019 complaining about Mr Collins. The claimant texted:

"…thinking about putting complaint in about eddie he's just been a dickhead lately and with what he was saying to everyone before when i was off

what would us say as an outsider do u think the dust comment and him saying he knows who rang health and safety was a dig at me?

101. Mr Brellsford responded saying:

"Not sure if it was a dig [to be honest] *he was probably being sarcastic or something about* [health & safety]

[Up to] *you if you put complaint in though i guess"*

102. We also accept Mr Collins' evidence that he did not mock the claimant by making 'fake' coughing noises because that would be an unprofessional way to behave and because Mr Senior did not recall any such 'fake' coughing noises.

103. We also note that the claimant did not raise any specific complaints about these issues in his email on 15 October 2019 to Mr Talbot-Sykes (which we consider in more detail later in this Judgment), although he did say that management did make 'jokes' about his complaint to health and safety.

Claimant's sickness absence (September and October 2019) – Annex 2 allegations (n) and (p)

104. The claimant was absent on sick leave for 3 days in early September 2019. He was absent again on sick leave from 23 September 2019 until his employment ended. The claimant's GP provided a fit note which expired on 11 October 2019 stating that the claimant's absence was due to work-related stress.

105. The claimant had previously texted Mr Comstive in March and in June 2019 regarding sick leave. The claimant texted Mr Comstive on 30 March 2019, saying: *"warm weather is gunna fuck me in summer I'll have to call in sick July August with sun allergies".* The claimant texted Mr Comstive in June 2019, saying: *"I think I'm gunna wait til about September and smash in a week or 2 sick".*

106. The claimant said during cross-examination that he knew his breathing would be affected by the dust levels during July/August/September 2019 and that he would need to take time off. We find that the claimant was 'showing off' in his text messages to Mr Comstive, but that he had not 'planned' to take sick leave. We note that the respondent did not pay any enhanced sick pay and the claimant would have been put to a financial disadvantage if he had taken sick leave for other reasons.

107. We note that the claimant was absent from work from 23 September 2019 and that he obtained a GP's note stating his absence was due to work-related stress. The claimant's GP's note expired on 11 October 2019. We note that the respondent's manager's handbook does not suggest that managers should contact employees on sick leave before they return to work. However, we find that as a matter of best practice, the respondent should have contacted the claimant during his absence to check if they could offer any support to the claimant to assist him to return to work.

108. The claimant obtained a second GP's note, but did not provide a copy of this note to the respondent, despite the emails form Mr Talbot-Sykes and Ms Beatty chasing for a copy as set out in our findings below.

Claimant's emails with Mr Talbot-Sykes (15 October 2019 onwards) – Annex 2 allegations (s – first part of (s)) and (u)

109. The claimant emailed Mr Talbot-Sykes on 15 October 2019, stating that:

"I put in a sick note on 23rd of September to the 11th of October for work related stress, this was due to a number of reasons including my health, being made the focus of jokes by members of management for my complaint to the health and safety (which have been open about) and fears of losing my job due to illness.

… after months of testing I have finally been diagnosed with asthma which my doctor agrees is occupational from the time of symptoms being the times I have been exposed to high levels of dust, I have been advised to let you know that my diagnosis immediately.

…I have also been advised by my doctor not to go back to work in the warehouse as dust can be a trigger to my asthma but I should be fit for work from the 1st of November if there is anything else I could be doing that isn't in the warehouse, I don't mind going out helping drivers or anything else you may think of or there just may be no work for me I don't know.

Although myself and my doctor agree my condition is down to work he has also booked my in to see a specialist so they can confirm this also…"

110. Mr Talbot-Sykes and the claimant exchanged further emails on 15 and 16 October 2019. Mr Talbot-Sykes confirmed that there were no positions that would meet the claimant's criteria at the Leeds depot, but that he had asked to see if there were any non-warehouse positions at the respondent's Normanton depot. The claimant stated:

"If a possible opportunity came up at the Normanton depot and I was able to travel there on public transport I would happily take that as long as it works out financially beneficial to me, I would even consider some warehouse work there as I have been in the past and [their] warehouse is much cleaner and more modern than where we're based."

111. Mr Talbot-Sykes asked the claimant to provide his availability to attend a welfare meeting and to return a consent form permitting the respondent to contact the claimant's GP for more information. He also asked the claimant to provide his GP's certificate for his continuing absence by the respondent's payroll date of 22 October 2019, so that their payroll team could process the claimant's statutory sick pay.

112. The claimant did not provide his availability to attend a welfare meeting with the respondent. The claimant had obtained another job on 21 October 2019. On the same day, the claimant prepared a handwritten resignation letter and posted it to the respondent.

Claimant's resignation letter - Annex 2 allegations (s) and (u)

113. The claimant addressed his resignation letter to Mr Talbot-Sykes and HR. The claimant said in his resignation letter: *"I am resigning due to the treatment that I have been subject to since I have reported health and safety issues in the workplace verbally and in writing. My concerns have not only been ignored, I have also been subjected to ridicule in the form of comments by management and I have been unreasonably threatened with disciplinary action and dismissal when I have taken time off for emergency dependant leave and because of issues with my health caused by the dust levels in the warehouse."*

114. The claimant's letter provided detailed information regarding his concerns and stated that he was resigning as of 21 October 2019. However, the claimant stated during cross-examination that he would have been happy to transfer to the Normanton depot and continue to work for the respondent if he had not already found alternative employment.

Claimant's emails with Mr Talbot-Sykes and Ms Beaty (22 October 2019 onwards) - Annex 2 allegations (s) and (u)

115. Ms Beaty emailed the claimant on 22 October 2019, informing him that they had not received his GP's fit note and asking for the claimant to email a copy so that they could process his statutory sick pay without any delay. The claimant did not respond to this email. Ms Beaty emailed again asking for a copy of the fit note on 31 October 2019 but the claimant did not respond. As a result, the respondent was unable to process the claimant's SSP from 11 October 2019 onwards.

116. Mr Talbot-Sykes also emailed the claimant on 22 October 2019, informing him that there were two possible vacancies at the Normanton depot and asking him again for his availability for a welfare meeting. The claimant did not respond until 3 November 2019, when he said that he had posted his resignation letter to the respondent on 21 October 2019. He also said that his doctor's note would be with the respondent 'in due course'.

117. The respondent's HR team emailed the claimant on 8 November 2019 and acknowledged receipt of his resignation letter. The email also said: *"Following receipt of your resignation letter and as you are no longer an employee of DX, we*

would like to give you the opportunity for a modified version of the grievance process whereby an impartial manager within the business will be appointed to thoroughly investigate the concerns you raised in your resignation letter".

118. The claimant responded on 11 November 2019, stating: *"I would like to decline the opportunity as I have been through the process before and nothing came of it. I no longer have any trust or confidence that the process will be conducted fairly or impartially and would be a waste of my time…"*.

119. We find that the claimant's employment with the respondent terminated on 23 October 2019, which was the earliest date on which the respondent could have received the claimant's letter.

Scanners allegation (21 November 2019) – Annex 2 allegation (v)

120. Mr Comstive texted the claimant on or around 21 November 2019, stating: *"Mark was asking about you this morning they think you're still employed there and they've been asking about the scanners as well"*. The claimant responded saying that Michael had told him that Kenny was accusing him of taking scanners. He did not receive any direct communication from Kenny, Mr Stephenson or any of the respondent's managers regarding this issue.

Claimant's health

121. There is an issue as to whether the claimant's asthma amounted to a disability for the purposes of s6 of the EQA during all or part of the period in which he complains disability discrimination took place (i.e. from 2018 to 21 November 2019 inclusive).

122. We note that:

122.1 the claimant's GP notes include consultations regarding coughs, chest infections and similar complaints on four occasions during his employment. He also attended the GP for reviews of his condition:

122.1.1 22 November 2017 – diagnosed with an upper respiratory tract infection, following a one week history of a dry cough and tightness in the chest. The claimant was absent from work for 5 days;

122.1.2 11 and 15 December 2017 – diagnosed with a lower respiratory infection, associated with a cough, green sputum and breathlessness. The GP noted that there was no sign of wheezing on 11 December, but there was 'evidence of significant wheezing' on 15 December 2017;

122.1.3 22 July 2019 – diagnosed with a lower respiratory tract infection, following a chesty cough and blood-stained sputum;

122.1.4 2 August 2019 – the claimant was reviewed by his GP, his chest had cleared and the GP arranged for him to have a chest radiograph;

122.1.5 13 September 2019 – the claimant was reviewed by his GP and his chest was described as 'normal'; and

122.1.6 25 September 2019 – the GP noted that the claimant was suffering from symptoms of chest tightness and using his partner's salbutamol inhaler occasionally. The claimant was given a fit note for stress at work for this period.

122.2 the claimant was prescribed short term antibiotics and asthma-related medication (prednisolone) on visiting his GP during this period. He also self-medicates on occasion with his partner's inhaler from time to time; and

122.3 the claimant was diagnosed by a Nurse as potentially suffering from asthma on 11 October 2019 and he informed the respondent of his diagnosis in his email of 15 October 2019.

123. The claimant stated in his disability impact statement that:

123.1 he has suffered from asthma since the beginning of 2018;

123.2 his condition affects his day to day activities and is 'substantial and serious'. The claimant also gave examples of the impact of his asthma on his day to day activities.

124. However, the claimant admitted under cross-examination that parts of his disability impact statement were incorrect. For example, the claimant said in his oral evidence that:

124.1 he had no serious difficulties with his breathing between his chest infections in December 2017 and July 2019;

124.2 he gave up playing football for his local team because he started working Saturday mornings in February 2019, not because of his asthma and that he continued to play football on an informal basis with his friends.

125. We find that:

125.1 the claimant did not have any significant difficulties with his breathing between December 2017 and July 2019. Prior to 2017, his GP notes do not record any significant incidents relating to the claimant's breathing;

125.2 the claimant took medication to assist with his asthma around the times of his GP visits, but did not take medication at any other times on a regular basis;

125.3 the claimant's breathing difficulties worsened during the Summer and early Autumn of 2019. He suffered from more serious problems on an intermittent basis which led to his GP sending him for medical tests. For example, the claimant had a chesty cough and blood-stained sputum in July 2019 and suffered from chest tightness on 25 September 2019 which impacted his breathing. This in turn impacted his ability to carry out

domestic and work-related day to day activities and also impacted on his sleep; and

125.4 as at 11 October 2019, it was evident that the claimant's breathing difficulties were likely to last for 12 months or more on a recurring basis, resulting in his doctor's diagnosis of occupational asthma.

126. The claimant was on sick leave on 11 October 2019 (having been absent from work since 23 September 2019) and remained on sick leave until his employment terminated. We find that the respondent knew of the impact of the claimant's asthma on his normal day to day activities when the claimant informed Mr Talbot-Sykes of his asthma diagnosis by email on 15 October 2019. We find that there is insufficient evidence to suggest that the respondent ought reasonably to have known of the claimant's condition before 15 October 2019. In particular, we note that the claimant's GP was carrying out tests during the Summer of 2019 but had not made a diagnosis at this time.

RELEVANT LAW

127. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' written submissions.

EMPLOYMENT RIGHTS ACT 1996 ("ERA") CLAIMS

128. Complaints relating to health and safety detriments, whistleblowing detriments, automatic unfair dismissal and ordinary unfair dismissal are dealt with in the ERA.

Health and safety concerns

129. Employees raising health and safety concerns are protected under the ERA if their concerns fall within the categories set out in s44 ERA:

> **44 Health and safety cases**
>
> (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—
>
> a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
>
> …
>
> (c) being an employee at a place where—
>
> (i) there was no such representative or safety committee, or
>
> …
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
>
> …

Qualifying disclosure

130. A protected disclosure is defined by s43A ERA as a 'qualifying disclosure' under s43B ERA:

43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

131. S43F of the ERA sets out the provisions relating to disclosure to a prescribed person (which includes the Health and Safety Executive):

s43F Disclosure to prescribed person.

(1) A qualifying disclosure is made in accordance with this section if the worker—
(a) makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
(b) reasonably believes—
(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
(ii) that the information disclosed, and any allegation contained in it, are substantially true.

132. S47B of the ERA sets out a worker's right not to be subjected to a detriment on the ground that they have made a protected disclosure.

47B Protected disclosures

(1) 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.

…

(2) …this section does not apply where –

…

(b) the detriment in question amounts to dismissal…

….

What amounts to a detriment?

133. The test of whether an act or omission is a 'detriment' for the purposes of a whistleblowing complaint is the same as for a discrimination complaint. The House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary [*2003] ICR 337 held that whether an act amounts to a detriment requires the Tribunal to consider:

    133.1 Would a reasonable worker take the view that he was disadvantaged in terms of the circumstances in which he had to work by reason of the act or acts complained of?

    133.2 If so, was the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?

134. We note that the Court of Appeal in *Deer v University of Oxford* [2015] IRLR 481, held the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome. However, the House of Lords in *Shamoon* also approved the decision in *Barclays Bank plc v Kapur & others (No.2)* [1995] IRLR 87 that an unjustified sense of grievance cannot amount to a 'detriment'.

Burden of proof and drawing of inferences – detriment claims

135. In *International Petroleum Ltd and others v Ospiov and others* EAT 0058/17, the EAT set out the correct approach to whistleblowing detriment complaints as follows:

    135.1 the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he is subject is either his health and safety complaint and/or his protected disclosure;

    135.2 s48(2) ERA then requires the employer to show why the detrimental treatment was done. If the employer fails to do so, inferences may be drawn against the employer. However, these inferences must be justified by the Tribunal's findings of fact.

Dismissal claims

136. The right not to be unfairly dismissed is set out in s94 of the ERA.

Constructive dismissal

137. In order to bring a claim for unfair dismissal under s111 of the ERA, the claimant must first show that his resignation amounted to a 'dismissal', as defined under s95(1) ERA.

s95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—…

…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

138. The claimant must show the following key points to demonstrate that his resignation amounted to a dismissal under s95(1) of the ERA:

138.1 that a fundamental term of his contract was breached;

138.2 that he resigned in response to that breach; and

138.3 that he did not waive or affirm that breach.

139. Employees sometimes rely on a particular act or omissions as being the 'last straw' in a series of events. In the case of *Omilaju v Waltham Forest Borough Council* [2005] IRLR 35 it was held the last straw may not always be unreasonable or blameworthy when viewed in isolation. But, the last straw must contribute or add something to the breach of contract.

Mutual trust and confidence

140. The implied term of mutual trust and confidence was held in the cases of *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 642 (as interpreted by the EAT in *Baldwin v Brighton and Hove City Council* [2007] IRLR 232) as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

141. It is not necessary for the employer to intend to breach the term of trust and confidence (*Leeds Dental Team Ltd v Rose* [2014] IRLR 8*)*: *"The test does not require an ET to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence then he is taken to have the objective intention…"*.

142. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833, Underhill LJ considered previous caselaw and held that the Tribunal must consider the following questions:

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

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

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

(4) If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)

breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation…)

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

Respondent's reason for dismissal

143. The right not to be automatically unfairly dismissed for raising health and safety concerns is set out at s100 of the ERA. The equivalent provisions for protected disclosures are set out at s103 of the ERA.

100 Health and safety cases

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

…

(c) being an employee at a place where—
(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

…

103A Protected disclosure

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

144. The ordinary unfair dismissal rights are set out at s98 of the ERA:

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

…

145. If the claimant's resignation amounted to a dismissal, then we do not need to consider the fairness or otherwise of the dismissal under s98 of the ERA because the respondent has not pleaded a fair reason for such dismissal.

EQUALITY ACT 2010 ("EQA") CLAIMS

Disability status

146. Section 6(1) of the Equality Act defines 'disability' for the purposes of that Act as follows:

> A person (P) has a disability if -
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

147. Schedule 1 of the Equality Act 2010 sets out factors to considered in determining whether a person has a disability. The government has also published statutory guidance entitled "Guidance on matters to be taken into account in determining questions relating to the definition of disability", including examples of normal day to day activities.

148. The caselaw and legislation indicates that:

148.1 the Tribunal must focus on what the claimant maintains they cannot do (or cannot do without difficulty) as a result of their physical or mental impairment (*Aderemi v London & South East Railway Ltd* UKEAT/0316/12);

148.2 'substantial' adverse effect for these purposes means 'more than minor or trivial' (s212(2) of the Equality Act);

148.3 'long term' is defined under paragraph 2 of Schedule 1 of the Equality Act as a condition that:

148.3.1 has lasted or is likely to last for 12 months or more;

148.3.2 is likely to recur (i.e. it could well happen – Martin v University of Exeter UKEAT/0092/18); or

148.3.3 is likely to last for the rest of the claimant's life;

when viewed at the time of the alleged discriminatory acts; and

148.4 the condition must be assessed as if the claimant were not receiving medication and other treatment, where such medication or other treatment has led to a temporary (rather than a permanent) improvement (Schedule 1, paragraph 5 of the Equality Act).

Reasonable adjustments

149. The legislation relating to a claim for failure to make reasonable adjustments is set out at sections 20 and 21 of the EQA:

> **20 Duty to make adjustments**
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
> (2) The duty comprises the following three requirements.
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
> …
>
> **21 Failure to comply with duty**
>
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
> …

150. We note that 'substantial' in the context of 'substantial disadvantage' is defined at s212(1) of the EQA as: "more than minor or trivial".

151. We also note that the duty to consider making reasonable adjustments falls on the employer. There is no onus on a disabled person to suggest adjustments. However, the courts have held that a failure to 'consult' about reasonable adjustments is not in itself a failure to make reasonable adjustments. In *Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 644 EAT, Elias J held at paragraph 71: *"[t]he only question is, objectively, whether the employer has complied with his obligations or not".* The EAT went on to state: *"whilst, as we have emphasised, it will always be good practice for the employer to consult …there is no separate and distinct duty of this kind".*

Harassment

152. The provisions relating to harassment are set out at s26 of the EQA:

> **26 Harassment**
> (1) A person (A) harasses another (B) if –
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are – …disability;
…

153. There are three elements to the definition of harassment:

153.1 unwanted conduct;

153.2 the specified purpose or effect (as set out in s26 EQA); and

153.3 that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336.

154. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).

155. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of a protected characteristic (such as disability), it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of that characteristic. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of that characteristic. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT.

156. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

157. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt

her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

158. The EAT in *Dhaliwal* also stated that:

"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

159. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding….An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

Burden of proof – EQA complaints

160. The burden of proof for discrimination and victimisation complaints is dealt with by s 136 Equality Act 2010, as follows:

> **136 Burden of proof**
> …
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
> …
> (6) A reference to the court includes a reference to -
> (a) an employment tribunal;
> …

161. The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave guidance as to the application of the burden of proof provisions. That guidance remains applicable under the EQA (see *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913). The guidance outlines a two-stage process:

161.1 First, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. That

means that a reasonable tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see *Madarassy v Nomura International plc* [2007] ICR 867, CA.

161.2 The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act.

162. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 made clear that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

APPLICATION OF THE LAW TO THE FACTS

163. We have applied the law to our findings of facts as set out below.

ANNEX 1 – DID THE CLAIMANT RAISE PROTECTED DISCLOSURES OR HEALTH AND SAFETY COMPLAINTS?

Factual findings

164. We have set out our detailed factual findings on these issues earlier in this Judgment. The relevant findings are summarised in the paragraphs below.

Mr Senior

165. The claimant's representative accepted that Mr Senior was a colleague of the claimant's and was not an appropriate person to whom the claimant could raise protected disclosures or health and safety complaints regarding dust.

Mr Brook, Mr Collins and Mr Stephenson

166. We found that:

166.1 the claimant raised complaints regarding the dust levels and the problems that they caused for himself and his colleagues in the warehouse to Mr Stephenson from 2018 until the claimant went on sick leave on 23 September 2019;

166.2 the claimant mentioned the dust levels in the warehouse to Mr Brook briefly in their discussion on 24 April 2019, but that the claimant did not pursue this issue because he thought it would be resolved when the Leeds depot was relocated to another site. We noted that Mr Brook changed roles in June 2019 and no longer had responsibility for the Leeds depot from that time; and

166.3 Mr Collins was not working in the Leeds depot during 2018 and did not rejoin the depot until late April 2019. We found that the claimant did not

raise any complaints regarding the dust levels in the warehouse to Mr Collins.

*Health & Safety Executive ("**HSE**")*

167. We also found that the claimant telephoned the HSE on 29 July 2019 to complain about the dust levels in the warehouse and the breathing difficulties that this caused him. However, we found that Mr Collins and Mr Stephenson were not aware that the claimant had complained to the HSE until after the HSE visited the Leeds depot on 6 September 2019.

Health and safety complaints (s44(1)(c)(i) ERA)

168. It was common ground that there were no representative or safety committees at the Leeds depot for the purposes of s44(1)(c)(i) ERA.

169. We have concluded that the claimant did make the complaints referred to at paragraphs 1 and 2 of Annex 1 and that it was reasonable for him to bring these to the respondent's attention via his managers and the HSE. Therefore, the claimant did bring to the respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

Protected disclosures (s43B ERA)

170. We have concluded that the claimant did make the complaints referred to at paragraphs 1 and 2 of Annex 1 and that these constituted protected disclosures. In particular:

    170.1 the claimant's complaints disclosed information regarding his concerns about the level of dust in the warehouse;

    170.2 the claimant believed that the disclosure of that information was made in the public interest, because he believed that the dust levels impact both his and his colleagues' breathing;

    170.3 the claimant's belief was reasonable, based on his knowledge at that time;

    170.4 the claimant believed that this information tended to show either a breach of a legal obligation (relating to the respondent's health and safety duties) and/or that the health or safety of the claimant and/or his colleagues was being endangered; and

    170.5 the claimant initially made his complaint to the respondent (as his employer) and later to the HSE (because the HSE is a prescribed person under s43F of the ERA)).

ANNEX 2 – DO THE CLAIMANT'S ALLEGATIONS AMOUNT TO DETRIMENTS?

All allegations relating to Mr Senior

171. During the oral evidence and in her submissions, the claimant's representative accepted that Mr Senior was a colleague of the claimant's and was not an

appropriate person to whom the claimant could raise protected disclosures or health and safety complaints regarding dust. We therefore agreed with the parties that where the list of issues refers to Mr Senior as a 'manager' who could and/or should have conducted various acts, the claimant is in fact only referring to the other managers mentioned in his allegations.

Allegations (a) and (b)

172. We rejected these allegations because we found that:

172.1 We found that Mr Brook held a lengthy meeting with the claimant to discuss the concerns that the claimant raised in late April 2019. The claimant mentioned the dust levels in the warehouse in passing, but this did not form the main focus of his complaints which were set out in his email on 29 April 2019. In any event, Mr Brook did not 'dismiss' the claimant's concerns, tell him to 'stop moaning', 'fob him off' or otherwise fail to investigate the claimant's concerns. Mr Brook and the claimant both regarded the matters discussed as resolved and the claimant did not raise any further issues with Mr Brook or seek to pursue a formal grievance.

172.2 We found that the claimant did not complain about the dust levels in the warehouse to Mr Collins. Mr Collins could not, therefore, have taken the actions that the claimant alleges in response.

Allegation (c)

173. We rejected this allegation because we found that the claimant did not complain about asbestos to any of his manager. We noted in our findings of fact that:

173.1 the claimant's email to Mr Brook on 29 April 2019 did not raise any concerns regarding asbestos, although the claimant raised details concerns regarding other matters;

173.2 the HSE's contemporaneous notes of the claimant's phone call to them on 29 July 2019 (raising complaints regarding dust levels and diesel fumes) did not mention asbestos;

173.3 the HSE on its own initiative asked to see the respondent's asbestos survey during their visit to the Leeds depot on 6 September 2019. The respondent produced a valid certificate, but the HSE concluded that the inspection could have been more thorough. The respondent obtained a further asbestos survey and the result of that survey was that there was no asbestos in the building.

Allegation (d)

174. Mr Stephenson did text the claimant's wife on 22 April 2019, reminding him that he was due back to work the next day. However, we concluded that:

174.1 the wording of the text did not suggest any 'threat' was being made, it was simply a straightforward reminder. No confidential information was contained in the text;

174.2 the wording suggested that Mr Stephenson had texted the claimant's wife by accident, rather than the claimant; and

174.3 even if the claimant did feel 'humiliated' by the text, a reasonable worker would not have felt humiliated given the wording of the text and the fact it was only sent to the claimant's wife.

Allegation (e)

175. We found that Mr Stephenson made the comment to the whole team, not just to the claimant. The claimant himself recognised that the comment was made to everyone in his contemporaneous text messages reporting the discussion.

176. We found that the reason why Mr Stephenson made this comment was because he wanted the claimant's team to work hard to complete their tasks. Mr Stephenson did not make this comment because of the claimant's protected disclosures and/or his health and safety complaints.

Allegation (f)

177. We have rejected this allegation because we found that Mr Brook did not ignore the claimant's email of 29 April 2019. They had a lengthy discussion about the email and both regarded the matters raised by the claimant were resolved.

Allegation (g)

178. We found that Mr Stephenson did text the claimant on 2 April 2019 saying that he would lose his job if he did not return to work. However, the claimant was on sick leave at that time due to gastroenteritis, which was not related to dust inhalation. The claimant's most recent absence which related to chest infections or breathing difficulties before 2 April 2019 was in December 2017.

179. It is clear that this text does not represent best practice and we note that Mr Brook apologised to the claimant for this behaviour during their meeting in late April or early May 2019. However, we found that the reason Mr Stephenson sent this text was to try and reduce the respondent's absence levels. Mr Stephenson did not send this text because of the claimant's protected disclosures and/or his health and safety complaints.

Allegation (h)

180. We found that the claimant complained to Mr Sparks about Mr Stephenson's text to the claimant on 2 April 2019, but that Mr Sparks did not take any action before he changed roles later that month. The claimant did not raise a formal complaint regarding Mr Stephenson at that time, as set out in the wording of his email to Mr Brook on 29 April 2019.

181. However, we have concluded on balance that Mr Sparks' failure to speak to Mr Stephenson about this matter was not because of the claimant's protected disclosures and/or his health and safety complaints. In reaching this decision, we have taken into account matters including:

    181.1 we have not heard any direct evidence from Mr Sparks or Mr Stephenson and neither party was able to provide any hearsay evidence on this issue. Although Mr Brook apologised to the claimant for any discomfort that management may have caused at their meeting in late April or early May 2019, he did so without asking Mr Sparks or Mr Stephenson first to enquire what had happened;

    181.2 Mr Collins gave evidence that Mr Stephenson had been the subject of similar complaints from other operatives and tended to treat all members of his team in a similar manner. These complaints were raised with him after he took over the role of Operations Manager from Mr Sparks;

    181.3 the claimant referred to this issue in his email to Mr Brook on 29 April 2019, but he does not state that he thought Mr Sparks had failed to deal with Mr Stephenson's behaviour on 2 April 2019 because he had raised complaints about dust levels; and

    181.4 the burden of proof is on the claimant in detriment complaints to show that their protected disclosures and/or health and safety complaints were a (more than trivial) reason for the treatment to which they are subject. We have concluded that he claimant has failed to discharge the burden of proof in respect of this allegation.

Allegation (i)

182. We rejected this allegation because we found that Mr Collins did not humiliate the claimant by telling Mr Brellsford and Mr Senior that the claimant would be 'getting a disciplinary' upon his return to work in July or August 2019 for the reasons set out in paragraph 97 of our findings of fact.

Allegation (j)

183. Mr Collins did not refer the claimant to occupational health after July 2019. However, we rejected this allegation because we found that Mr Collins had no reason to refer the claimant to occupational health at that time on the basis of his knowledge of the claimant's condition from 22 July 2019. The respondent asked the claimant's consent to contact his GP for medical advice once the claimant informed Mr Talbot-Sykes of his diagnosis on 15 October 2019. We note that:

    183.1 the claimant's absence due to a chest infection for 5 days from 22 July 2019 was the first absence that the claimant had taken related to his chest or breathing difficulties since December 2017;

    183.2 we found that Mr Collins was not aware of the contents of the claimant's text message to Mr Stephenson on 22 July 2019 and had not received the

text message that the claimant sent to Mr Collins directly on the same date; and

183.3 the claimant's GP noted during a review with the claimant on 2 August 2019 that his chest had cleared.

Allegation (k)

184. We rejected this allegation because we found that it was the claimant who wanted to use his holiday to avoid coming into the warehouse during the Summer of 2019 when he thought the dust levels would be at their worst, rather than at Mr Stephenson's suggestion. This is reflected in the claimant's texts with Mr Comstive set out in our findings of fact.

Allegations (l), (o) and (r)

185. We rejected these three allegations because we found that Mr Collins did not 'mock' the claimant to his colleagues on or around 10 September 2019, he did not make 'false and exaggerated coughing noises' and he did not 'slag him off' or suggest that he was a 'trouble maker' for the reasons set out in paragraphs 98 to 103 of our findings of fact.

Allegation (m)

186. We found that the letter that Mr Stephenson sent to the claimant on 16 September 2019 was the respondent's standard absence management letter. The letter stated that it was not a formal warning and did not form part of the respondent's disciplinary procedure.

187. We have concluded that it was part of the respondent's normal practice to send such letters and that it was not sent because the claimant raised protected disclosures and/or made health and safety complaints.

Allegation (n)

188. There was some confusion over the dates to which this allegation related. We found that this allegation related to the claimant's ongoing absence from 11 October 2019 until his employment terminated. The respondent paid statutory sick pay to its employees, with no payment made until the fourth day of absence.

189. The claimant did not send in a GP's note to cover his absence from 11 October 2019 onwards, despite the respondent's emails asking him to provide this before the October payroll cut-off date. This was the reason why the respondent did not pay the claimant statutory sick pay for the remainder of his October sickness absence. It was not because the claimant made protected disclosures and/or made health and safety complaints.

Allegation (p)

190. We found that the respondent should have contacted the claimant before his GP's note expired on 11 October 2019 to offer their support and ask him if they could take any steps to assist him to return to work. However, we found that the

respondent's failure to contact the claimant was not due to the claimant's protected disclosures and/or made health and safety complaints. We note that:

190.1 the company's absence management policies do not appear to deal with long term sickness absence and do not set out managers' responsibilities to keep in touch with absent employees; and

190.2 when the claimant emailed Mr Talbot-Sykes on 15 October 2019, Mr Talbot-Sykes responded promptly, considered the claimant's concerns, sought his consent to contact his GP and asked him to confirm when he might be available to attend a wellbeing meeting.

Allegation (q)

191. We found that Mr Sparks told the claimant that he was at risk of failing his probationary period (as set out in the claimant's email of 29 April 2019 to Mr Brook), rather than that he had failed his probationary period (as alleged at allegation (q)).

192. However, we found that the reason for Mr Sparks' comment was that he was concerned about absence levels in the depot. Mr Sparks believed mistakenly that the claimant's move from part time to full time employment in February 2019 meant that the claimant had to undertake a further probationary period. We note that the claimant did not raise protected disclosures and/or made health and safety complaints with Mr Sparks. In addition, the claimant did not state in his email on 29 April 2019 to Mr Brook complaining of Mr Sparks' behaviour that he believed that Mr Sparks had made this comment because of the claimant's complaints regarding dust levels in the warehouse to Mr Stephenson.

Allegations (s) and (u)

193. The claimant accepted during this hearing that the grievance that he was referring to was in fact his email to Mr Talbot-Sykes dated 15 October 2019. We found that Mr Talbot-Sykes dealt with all points raised by the claimant's email and that their subsequent emails evidence that he:

193.1 considered alternative duties and found an alternative role or the claimant at the respondent's Normanton depot;

193.2 invited the claimant to confirm when he could attend a wellbeing meeting;

193.3 asked the claimant to provide his written consent for the respondent to contact his GP.

194. In addition, the claimant rejected the respondent's offer of a grievance process.

Allegation (t)

195. The claimant did not provide any evidence of this allegation in his witness statement or during his oral evidence.

Allegation (v)

196. We concluded that Mr Stephenson did ask Mr Comstive about the claimant. However, it was Kenny who accused the claimant of taking scanners. We concluded that Mr Stephenson spoke to Mr Comstive because of Kenny's accusation of the claimant and not because the claimant had made protected disclosures and/or raised health and safety complaints.

Conclusion on detriment complaints

197. We have therefore concluded that the claimant was not subject to any detriment on the ground that he made protected disclosures and/or raised health and safety complaints.

DISABILITY DISCRIMINATION

Disability status and respondent's knowledge

198. We have concluded that:

    198.1 the claimant's asthma amounted to a disability from 11 October 2019, when it was diagnosed by a Nurse during the claimant's final sickness absence;

    198.2 the respondent had knowledge of the claimant's disability from 15 October 2019, when the claimant informed Mr Talbot-Sykes of his condition by email on that date.

199. Our detailed findings of fact on the claimant's medical condition are set out earlier in this Judgment. The key reasons for our conclusion on this point are:

    199.1 the claimant's asthma did not have a substantial adverse impact on his day to day activities until Summer 2019; and

    199.2 it was not apparent that the claimant's condition would be long term (i.e. that it would last for 12 months or more or would be likely to recur) when viewed at the time of the allegations) until early October 2019, after the claimant had had a number GP reviews and chest radiographs.

Reasonable adjustments claim

200. We concluded that the respondent did have a provision, criterion or practice of requiring the claimant to carry out the warehouse operative duties set out in the list of issues.

201. We also concluded that the claimant would have been put at a substantial disadvantage in relation to such PCP if he had returned to work after 11 October 2019, because the conditions that he would have been required to work in would have exacerbated his asthma.

202. However, the claimant was not in fact put at that substantial disadvantage because he did not in fact return to work before his employment terminated. In addition, the respondent had offered to take reasonable steps, such as offering the claimant a

role at its Normanton depot (which the claimant stated had lower dust levels than the Leeds depot) and seeking to obtain medical advice on the claimant's condition.

Harassment (s26 EQA) - Annex 2 at Allegations (a), (c), (d), (e), (g), (l), (m), and (s)?

203. The claimant has pleaded harassment relating to an actual disability, rather than a perceived disability. The claimant's allegations of harassment can only be brought in respect of unwanted conduct which is alleged to have taken place before 11 October 2019, i.e. the date that we found that the claimant's asthma amounted to a disability. (We note that the claimant was on sick leave from 23 September 2019 until his employment terminated and that any allegations relating to continuous issues that took place in the workplace must relate to incidents prior to 23 September 2019).

204. The only allegation that took place after 11 October 2019 was allegation (s). However, we have found that Mr Talbot-Sykes dealt with all points raised by the claimant's email of 15 October 2019 and that their subsequent emails evidence that he:

    204.1 considered alternative duties and found an alternative role or the claimant at the respondent's Normanton depot;

    204.2 invited the claimant to confirm when he could attend a wellbeing meeting;

    204.3 asked the claimant to provide his written consent for the respondent to contact his GP.

CONSTRUCTIVE DISMISSAL

Was the claimant dismissed?

205. We do not propose to repeat our summary of factual findings for those incidents that we found that as a matter of fact did not take place when considering the claimant's detriments allegations.

206. The incidents that we found did take place were as follows (in date order):

Allegations (d) and (g) – Mr Stephenson's text messages on 2 and on 22 April 2019

207. We found that Mr Stephenson's text message on 2 April 2019 was sent whilst the claimant was absent due to gastroenteritis, rather than due to any conditions relating to dust inhalation. The wording of that text could have been regarded as a breach of contract, however we find that the claimant waived that breach when he accepted Mr Brook's apology for Mr Stephenson's behaviour in late April or early May 2019, did not raise a formal grievance at that time or otherwise seek to pursue the matter further and continued to be line managed by Mr Stephenson.

208. We found that the text message on 22 April 2019 did not amount to a breach of contract because it was just a reminder to the claimant that he was due to return to work the next night. We found that it was sent to the claimant's wife by mistake.

Allegation (h) - Mr Spark's failure to investigate the claimant's complaint about Mr Stephenson's text message on 2 April 2019

209. We found that this was not a breach of contract because the claimant did not consider it appropriate to raise a formal complaint about this issue until his email to Mr Brook on 29 April 2019. In any event, the claimant accepted Mr Brook's apology for Mr Spark's behaviour in late April or early May 2019 and did not pursue the matter further or seek to raise a formal grievance at that time.

Allegation (q) – Mr Sparks telling the claimant that he may fail his probationary period in March/April 2019

210. We found that Mr Sparks incorrectly told the claimant that he may fail his probationary period, not that he had actually failed his probationary period (as alleged by the claimant). We considered that this issue may have amounted to a breach of contract but that, in any event, the claimant accepted Mr Brook's apology for Mr Spark's behaviour in late April or early May 2019 and did not pursue the matter further or seek to raise a formal grievance.

Allegation (p) – the respondent's failure to contact the claimant during his sick leave from 23 September to 15 October 2019

211. We concluded that this was not a fundamental breach of contract. When the claimant contacted Mr Talbot-Sykes by email, Mr Talbot-Sykes responded promptly and dealt with all of the claimant's concerns (as referred to above in our conclusions on the claimant's detriment complaints).

212. In any event, the claimant confirmed during his evidence that he would have accepted the role that Mr Talbot-Sykes had offered him at the respondent's Normanton depot if he had not already found alternative employment. This evidences the fact that the relationship of mutual trust and confidence had not broken down, otherwise the claimant would not have been willing to work for the respondent at another depot.

Conclusion on constructive dismissal complaint

213. We have concluded that the claimant was not dismissed by the respondent. We find that the claimant had planned to leave the respondent's employment since June 2019, as set out in his text messages with his colleagues, and that he resigned to take up a new role working for a friend which he started immediately.

214. We do not, therefore, need to reach any conclusions on:

    214.1 the reason for the claimant's alleged dismissal; and/or

    214.2 the fairness or otherwise of such alleged dismissal;

    because we found that the claimant resigned from his employment voluntarily and was not dismissed.

CONCLUSIONS

215. We have concluded that the claimant's complaints of:

215.1 detriments and automatically unfair dismissal (relating to health and safety complaints);

215.2 detriments and automatically unfair dismissal (relating to protected disclosures);

215.3 ordinary unfair (constructive) dismissal; and

215.4 disability discrimination (reasonable adjustments and harassment);

fail and are dismissed.

_____

Employment Judge Deeley
Date: 18 February 2021

JUDGMENT SENT TO THE PARTIES ON

22 February 2021

ANNEX 1 – H&S COMPLAINTS/PROTECTED DISCLOSURES

1. From the beginning of 2018 (when the claimant was diagnosed with asthma), did the claimant regularly and frequently raise complaints about dust in the warehouse?

The claimant will say that they were raised with Mr Senior, Mr Brooks, Mr Collins and Mr Stephenson, all of whom were managers with whom the claimant had contact in the course of his work. The claimant will say that the warehouse, which was always dusty was particularly so following the depositing of silt in the warehouse as the

aftermath of a flood in 2017 and the claimant will say that he complained about the dust in the atmosphere causing breathing difficulties for him but also for his colleagues. He will also say that he complained that the lack of extractor fans meant that sweeping up the dust simply had the effect of adding it the dust in the air.

2. The claimant says that his email of 29 April 2019 to Mr Brooks confirms that he raised the complaint about dust during their discussion on 24 April 2019. The claimant says that he also raised his complaint about dust to the Health & Safety Executive on or around 25 July 2019.

ANNEX 2 – DETRIMENTS/CONSTRUCTIVE DISMISSAL

FACTUAL COMPLAINT	LEGAL COMPLAINT
a) Between 2018 and October 2019, the respondent's managers (Andrew Senior, Richard Brook and Eddie Collins) dismissing the Claimant's concerns about the dust and telling him to stop moaning and that he had worked there for years and that he was alright.	H&S detriment PD detriment Constructive dismissal
b) Between 2018 and October 2019 Claimant asking Mr Senior, Mr Brook and Mr Collins if they would carry out investigations into the dust and management ignoring the Claimant's requests by failing to get back to him, fobbing him off and failing to take any meaningful steps to investigate the Claimants concerns.	H&S detriment PD detriment Constructive dismissal
c) From 2018 onwards, Mr Collins, Mark Stephenson and Mark Sparks falsely telling the Claimant that there had been an inspection of a roof at the workplace and that it did not contain asbestos and had been passed as safe and a certificate issued.	H&S detriment PD detriment Constructive dismissal Harassment
d) Mr Stephenson (under the direction of management) texting the Claimant's wife (instead of the claimant) on the 22/04/2019, reminding the Claimant that he was due back to work on the next day. Breaching the Claimant's confidentiality and making him feel humiliated.	H&S detriment PD detriment Constructive dismissal Harassment
e) On or around the 24/04/2019, Mr Stephenson approaching the Claimant in front of colleagues and telling him that if he did not get finished by the morning, then he and his colleagues would be out of a job.	H&S detriment PD detriment Constructive dismissal Harassment
f) On or around April 2019, Richard Brook ignoring the Claimants' written grievance and request for masks filters and dust extractors and measures that would protect himself and his	H&S detriment PD detriment

FACTUAL COMPLAINT	LEGAL COMPLAINT
colleagues from the dust. The Claimant also asked that the dangerous driving issue be addressed.	Constructive dismissal
g) On or around April 2019 Mr Stephenson sending the Claimant a text whilst he was off sick from dust inhalation stating that if he did not come to work he would be dismissed.	H&S detriment PD detriment Constructive dismissal Harassment
h) From around March 2019 onwards, Mr Sparks failing to investigate or do anything about the threat from Mr Stephenson, despite the Claimant telling Mr Sparks that Mr Stephenson 'had it in for him' because he had reported concerns about the dust on behalf of himself and his colleagues.	H&S detriment PD detriment Constructive dismissal
i) Between July and August 2019, Mr Collins humiliating the Claimant telling the Claimant's colleagues (Ryan Brellsford and Mr Senior)* that when he came back from sickness absence he would be getting a disciplinary and that he had taken unauthorised leave when the Claimant had been on booked holiday. **clarified by the claimant's representative's email of 19/7/20*	H&S detriment PD detriment Constructive dismissal Harassment
j) Mr Collins failing to send the Claimant to Occupational Health after July 2019, despite the fact that he was off sick, the claimant advising the respondent that he had had problems breathing and that he was unable to work in the warehouse because of the dust and that he would have to get sick notes because he could not come in due to the dust.	H&S detriment PD detriment Constructive dismissal
k) Mr Stephenson suggesting that the Claimant use up his holidays because he was unable to attend work due to the dust.	H&S detriment PD detriment Constructive dismissal
l) On or around the 10th September 2019, Mr Collins mocking the Claimant to his colleagues saying: *"be careful with that dust boys, we had health and safety in yesterday*" and trying to intimidate the Claimant by telling his colleagues (Mr Senior and Mr Brellsford) that he and management knew who reported it.	H&S detriment PD detriment Constructive dismissal
m) On or around 16/09/2019, Mr Stephenson threatening the Claimant by letter with attendance management when he was unable to attend work due to the effects of the dust and telling him that if he didn't come in he would have points added to his record. The Claimant was not offered alternative duties or a referral to Occupational Health and no concern or mention of his condition or welfare was made in the letter.	H&S detriment PD detriment Constructive dismissal Harassment

FACTUAL COMPLAINT	LEGAL COMPLAINT
n) Failure to pay the Claimant sick pay when he was off work with asthma and effects of dust inhalation.	H&S detriment PD detriment Constructive dismissal
o) On or around the 22nd September 2019, Mr Collins mocking the Claimant by making false and exaggerated coughing noises to embarrass the Claimant.	H&S detriment PD detriment Constructive dismissal
p) Failure to take any steps to assist the Claimant following his failed return to work on the 22nd September 2019 and failure thereafter to enquire after his welfare when he went off sick again.	H&S detriment PD detriment Constructive dismissal
q) Mr Sparks telling the Claimant that he had failed his probationary period despite the fact that he had been employed since 2015 with the company.	H&S detriment PD detriment Constructive dismissal
r) On or around September 2019, Mr Collins talking with colleagues of the Claimant (Aaron Harran and John Steele) whilst he was off sick and 'slagging him off' by suggesting that he was a 'trouble maker' and telling people that management had given him the authority to get rid of him.	H&S detriment PD detriment Constructive dismissal
s) Failure to investigate and or deal with the Claimant's written grievance of the 18th October 2019*, including failure to refer to Occupational health and carry out a risk assessment and/or request the Claimants' medical reports and GP notes. Failure to look for and/or provide the Claimant with alternative duties when the Claimant had advised that he was coughing up blood and had breathing difficulties. **Claimant accepted during cross-examination that he was referring to his email dated 15 October 2019 to Mr Talbot-Sykes and that 18th October 2019 was a mistake.*	H&S detriment PD detriment Constructive dismissal Harassment
t) Mr Stephenson and Mr Sparks telling the Claimant to stay at home without pay rather than medically suspend and or investigate the dust issue and or look at PPE and a failure to support the Claimant generally and failing to offer the Claimant suitable alternative duties.	H&S detriment PD detriment Constructive dismissal
u) From 21 October 2019 onwards, Kieran Talbot-Sykes under the direction of Mr Brook and Management failing to investigate or look at why the Claimant had resigned, including failing to look	H&S detriment PD detriment

FACTUAL COMPLAINT	LEGAL COMPLAINT
at alternative duties and/or any measures to avoid the Claimant having to leave employment.	
v) On or around the 21st November 2019, Mr Stephenson telling the Claimant's colleague (Dan Comstive) that the Claimant had stolen scanners from work knowing that this statement was untrue.	H&S detriment PD detriment