EMPLOYMENT TRIBUNALS

Claimant: **Mr N Hughes**

Respondent: **Eurochange Ltd**

Heard at: **Bristol** **On: 15-17 March 2021**

Before: **Employment Judge Oliver**
Members Mr H J Launder
Ms R A Clarke

Representation
Claimant: **In Person**
Respondent: **Miss Klaudia Zakrzewska, Litigation Consultant**

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

REASONS

1. The issues in the case were confirmed and agreed at the start of the hearing, following the case management orders made by Employment Judge Gray on 8 July 2020.

2. **Time limits**

2.1 Given the date the claim form was presented and the dates of early conciliation any complaint about any act or omission which took place more than three months before that date (taking account of any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

2.2 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

2.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

2.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

2.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

3. **Protected disclosure ('whistleblowing')**

3.1 Did the Claimant make one or more qualifying disclosures as defined in section 438 of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1 What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:

3.1.1.1 On 9 May 2019 the Claimant says he sent a qualifying disclosure to his HR department expressing concerns that a colleague, Ella-Louise Amos, was stealing from the company;

3.1.1.2 On 17 May 2019 the Claimant says he sent the above alleged disclosure and the reply to the Head of Risk and Compliance at the Respondent, Debbie Burrows;

3.1.1.3 On 19 May 2019 the Claimant says he sent an update to the Head of Risk and Compliance informing her he believed serious crimes had been committed by HR, the divisional manager and the Area Manager. Further, also of the phonecall he says he had from his Area Manager where he says the Area Manager told him he was aware that the Claimant had contacted HR and that he was not to make any further disclosures and all issues should be reported to him.

3.1.2 Were the disclosures of 'information'?

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

3.1.4 Was that belief reasonable? The Claimant asserts that he believed his disclosures were in the public interest because he believes that innocent employees were being penalised by the Respondent (by a pay deduction) to offset the losses suffered by the theft by other employees.

3.1.5 Did he believe it tended to show that:

3.1.5.1 a criminal offence had been, was being or was likely to be committed (for disclosures 1 to 3);

3.1.5.2 information tending to show any of these things had been, was being or was likely to be deliberately concealed (for disclosure 3).

3.1.6 Was that belief reasonable?

3.2 If the Claimant made qualifying disclosures as he asserts, the Respondent accepts those disclosures were made to the Claimant's employer.

4 **Dismissal (Employment Rights Acts. 103A)**

4.1 Was the making of any proven protected disclosure the principal reason for the Claimant's alleged constructive dismissal?

4.2 The Claimant did not have at least two years' continuous employment and the burden is therefore on them to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the constructive dismissal was the protected disclosure(s).

4.3 Did the Claimant tarry before resigning and affirm the contract?

4.4 The Respondent submits that the Claimant just resigned.

5 **Detriment (Employment Rights Act 1996 section 47B)**

5.1 Did the Respondent do the following things:

5.1.1 breach the Claimant's confidentiality as set out in the grounds of claim, which the Claimant says he discovered on the 14 May 2019;

5.1.2 the Area Manager being aggressive and intimidating to the Claimant over the phone on the 18 May 2019;

5.1.3 from the 19 May 2019 to the 8 November 2019 the Head of Risk and Compliance at the Respondent, Debbie Burrows not taking action to resolve the Claimant's concerns.

5.2 By doing so, did it subject the Claimant to detriment?

5.3 If so, was it done on the ground that he had made the protected disclosure(s) set out above?

Evidence

6. We had an agreed bundle of documents. The respondent's representative said that this bundle contained all of the documents that had been disclosed by the respondent. We did have a concern that there were no internal emails between individuals at the respondent included in the bundle, and it was unclear if the respondent had complied fully with its obligations of disclosure. We briefly adjourned the hearing at one point so that a specific email that was clearly relevant to the issues could be disclosed.

7. In terms of witness evidence we heard from the claimant, from Deborah Burrows (Group Head of Operational Risk and Compliance at the respondent's parent company) and Susan Townsend (Group HR Manager at the respondent's parent company).

8. We took statements as read. The respondent's witness statements were very short and contained virtually no actual evidence about what had happened.

The respondent's witnesses said the statements had been drafted by their representatives and they were asked to sign them. This meant that the evidence about what the respondent's witnesses did, and why, was largely given orally in response to questions from the claimant and the Tribunal. We note that this was somewhat unfair to the claimant, as the purpose of exchanging witness statements is so that the parties know what the other will be saying at the Tribunal hearing. It also made it more difficult for the Tribunal to decide the case, as there was no detailed written evidence from the respondent.

9. We also heard submissions from both parties.

Findings of Fact

10. We have considered all the evidence and submissions and we find only those facts necessary to decide the issues in the case.

11. The claimant was employed by the respondent from 29 March 2018 until 8 November 2019 as a Foreign Exchange Sales Advisor. He worked in Bristol and he resigned from his employment following allegations he had made that another employee was stealing from the respondent, which resulted in a grievance hearing and appeal.

12. We have seen the respondent's whistleblowing policy. This states there is a right to report concerns confidentially and this will be complied with unless the company has a legal obligation to disclose identity. It also states that any person raising genuine concerns under the policy will not under any circumstances be subjected to any form of detriment or disadvantage as a result, and the victimisation or harassment of an individual making a protected disclosure is a disciplinary offence and will not be tolerated.

13. The claimant made an initial complaint on 3 May 2019. The claimant called the HR Department of the respondent and spoke to Sarah Ketteringham. He reported a concern that a colleague was stealing from the company. On 9 May, he sent an email to Ms Ketteringham setting out details of cash losses involving a particular employee and specifically an incident in September 2018. He said he had been asked by Mr Harry Perritt, the area manager, to write down his thoughts on what had happened but he had heard nothing further. He also alleged Mr Perritt had required him to cover up for cash losses. The email says, "*I think it may be time that someone from outside the Bristol management structure has a look into the cash differences that have occurred when the particular employee has been working*", and it states at the end that he was making a qualifying disclosure.

14. This email was sent on to Elizabeth Grant, the HR Representative of the south Division which covers the Bristol branch where the claimant worked. An email provided during the proceedings shows that Ms Grant then sent this onto Mr Kevin Brown, the divisional manager. This email says, "*I think you will need to deal with it as he has bypassed Harry. It is a disclosure as opposed to a grievance in my eyes*". We note that this appears to be in breach of the policy which says disclosures would be confidential.

15. On 14 May, the claimant received a reply from Ms Grant which said she had sent the disclosure to the Bristol divisional manager. It said he only took over in

March, so they had carried out an extensive review of all shorts identified in the division since then and had not identified any concerning pattern or irregularities which would suggest there is anything untoward taken place. It also said sorry that Mr Perritt had not come back to him when he raised his initial concerns and that they would speak to him about appropriate action to take into circumstances. The reply does not address the specific incident in September 2018 that had been raised by the claimant. The claimant was not aware the disclosure would be shared with others by HR and his evidence was that this was a detriment as it meant it was not properly investigated.

16. On 17 May, the claimant called Deborah Burrows the Head of Risk Compliance at the parent company of the respondent (NoteMachine UK Limited). She asked him to send a copy of the email and the claimant sent this the same day.

17. On 18 May, the claimant was telephoned by Mr Perritt. The claimant alleges that he was told that Mr Perritt was aware the claimant had contacted HR, Mr Perritt was angry about this, and he said in future all issues should be reported to him and not to HR. The claimant alleges that Mr Perritt was aggressive and intimidating during this call. We find that this call did occur as described by the claimant. Mr Perritt did not attend to give evidence to the Tribunal contradicting the claimant's version of events. We also note that this incident was found to have happened by Ms Burrows in her grievance investigation.

18. On 19 May, the claimant sent information about this call to Ms Burrows. He also set out in detail the reason why he said a particular employee must have stolen the money in September based on four steps in the chain of events. The claimant says this proved there had been theft as there was no other explanation. He also refers to later being required to file a false contra under instruction from Mr Perritt. The claimant says he expected Ms Burrows to take immediate action.

19. On 21 May, the claimant spoke to the police at work. He said he was distressed and concerned for his own safety. On 23 May, an incident occurred between the claimant and the employee he had accused of theft. At the end of the day, he received an email from Ms Burrows saying that she was not able to start her investigation until 9 June. The claimant was then off work with a stress related problem from 29 May.

20. Ms Burrows began to conduct an investigation into the issues raised by the claimant. As noted, her witness statement was very short and did not provide any detail about what she did and why, and so our findings are based on her answers to questions from the claimant and the Tribunal. Ms Burrows interviewed some sixteen witnesses and on 11 July she met the claimant.

21. On 31 July, she sent the outcome of her investigation. The key findings for these purposes are as follows.

22. On the theft allegation she states "*as I have approached this investigation from the grievance angle, I am unable to comment on the allegations of theft*". The letter states that initial concerns raised in September 2018 were not investigated or shared with a divisional manager and the desktop investigation by the divisional manager used the information available at the time. Her conclusion was, "*Upheld*

- I conclude that the AM was not following procedures when he was made aware of the allegations in September 2018 and that the DM did not conduct a full investigation in May." She then upheld some other issues relating to application of shorts to staff cards, advertising of a promotion, and bullying and intimidation in relation to another member of the team. These are not relevant to our findings.

23. Ms Burrows also dealt with the HR response to the qualifying disclosure and says this was partially upheld. She says that HR treated this disclosure more in line with the grievance process rather then whistleblowing procedures. She also says HR failed to establish any contact with the claimant prior to passing this to the divisional manager for further investigation, and HR did not ensure that all aspects of the investigation were adequately covered. She also states, "*HR failed to give guidance to individuals on how to handle the information being discussed and this resulted in the DM speaking with the AM and the AM then taking further action directly with yourself and trying to intimidate you from making any further allegations to HR*".

24. There were no findings on whether theft had occurred. Ms Burrows also did not deal with the issue of the claimant being required to file the false contra by Mr Perritt. The reason for this was not explained at the time to the claimant. It was not shown in the documents disclosed to the claimant, and it was not contained in the witness statements.

25. We had an explanation from Ms Burrows for the first time at the hearing in answer to questions from the claimant and the Tribunal. She explained that she took the claimant's email to the Group Head of HR Ms Townsend, and they agreed they needed to discuss it with the Managing Director of the respondent. They showed him the information from the claimant. The Managing Director then asked Ms Burrows to do a grievance hearing based on some of the information in the claimant's emails. He directed her as to the areas he wanted her to cover. The Managing Director told Ms Burrows she did not need to look into the theft allegations. He did not tell her why, and she did not know why she was asked to do this. Her evidence was she was led to believe the theft issue would be handled separately, although we have not seen that being done anywhere in the evidence. Ms Townsend was also aware of this instruction. She also did not know why the Managing Director directed Ms Burrows to treat this as a grievance and not look into the theft allegations which were the protected disclosure. Ms Burrows did as directed by the Managing Director. She treated the issue as a grievance only and only looked at certain issues. There is no evidence that Ms Burrows explained to the claimant that this was being treated as a grievance investigation on certain issues only, or that she would not be making findings on the theft allegations - whether at the time she met with the claimant or at any other time.

26. On 7 July the claimant sent an appeal to the Group Head of HR. It provides an overview of what he describes as the primary issue of the non-investigation into the successive allegations of theft by a senior cashier in September 2018 and further allegations of theft. He gives considerable details about other issues that he is not happy with in the grievance outcome.

27. On 14 May the claimant emailed Ms Townsend and asked her to satisfy herself as to the guilt of the senior cashier before they met. He explains that "*guilt was ignored, denied and avoided and this was the sources of my mental anguish*

and torture". There was a reply on 23 August explaining that Ms Burrows' outcome letter said the allegation of theft could not be confirmed. In evidence Ms Townsend clarified that this was because it had not been investigated by Ms Burrows.

28. On 12 September the claimant met with Ms Townsend. We have seen the notes of that meeting. At the start the claimant makes it clear that he objects to the fact there were no comments by Ms Burrows on the actual allegations of theft and he says this is inappropriate. He goes onto confirm he is not happy the allegations of theft were not investigated. He provides further details of events he says prove the theft took place. There was discussion about the various other issues he had raised.

29. On 1 October, the claimant was sent the outcome of the appeal. The key findings are as follows.

30. On the non-investigation of theft, the outcome says there was no longer any evidence to support the allegations made. There was a failure to follow correct procedures when originally reported and this had been addressed with AM and DM going forward through retraining.

31. There is a finding that cover-up allegations were not substantiated and there had been a breakdown in procedure rather than wilfulness. The outcome says the DM could not investigate further in May as too much time had elapsed. There was no CCTV and records were only held for three months, although we note the respondent was able to retrieve older emails during this hearing. The outcome also says the DM should have handled with the issues more care and the HRBP should have been given guidance on how to handle a qualifying disclosure.

32. The appeal outcome also says that HR did treat the qualifying disclosure as whistleblowing not a grievance. Ms Townsend says that the appeal on the revelation of the claimant's identity is upheld, but she finds it was not done as a deliberate malicious unlawful act. She says it was correct that the issue should have been dealt with by parties not involved in the allegations, but it was not done deliberately. This was a failing and may be considered an unlawful act with reference to Public Interest Disclosure Act.

33. The outcome also states that "*the allegation of the area manager requesting you to falsify records was not investigated as part of the grievance by Ms Burrows*." The appeal does not explain what she did about this finding that this had not been investigated, and when asked in evidence Ms Townsend said she could not recall what she did about this.

34. The appeal says the outcome of the grievance is "*for others to establish further details and take action accordingly*". In evidence Ms Townsend explained that the retail director was going to speak to Mr Perritt about not having dealt with the original disclosure. We don't know if the retail director did so, or if they took any other action. Ms Townsend does not address in the appeal the telephone call by Mr Perritt on 18 May and we have no evidence that anything at all was done with Mr Perritt to address his behaviour on that call. Ms Townsend said in evidence that she could not recall why she did not deal with this issue in her outcome letter.

35. Finally, the outcome says there has been a breach of the Public Interest Disclosure Act and the scope and details of investigations were not adequate given the seriousness of the allegations. As already mentioned, we don't know what if any action was taken by the retail director at the respondent and we had no direct evidence in the hearing about any actions taken as a result of the allegations that had been upheld.

36. Ms Townsend explained that she dealt with the appeal using the evidence provided to her by Ms Burrows and she had also spoken to the HR business partners but she did not recall speaking to anyone else. She did not conduct her own investigation of the issues. She confirmed in evidence that she did not investigate the original allegation of theft, her appeal related to Ms Burrows' decision only. She was aware of the instruction from the Managing Director to Ms Burrows in relation to not investigating the theft allegations but she did not know why that instruction was given.

37. The Tribunal finds that some of Ms Townsend's outcome letter was unclear. There were findings of failures, but it is unclear what the explanations are for some of these, and what action was taken as a result. When asked questions by the Tribunal she was unable to recall and explain some of her reasoning.

38. The claimant was not satisfied with the outcome. He sent an email to the respondent on 11 October. He said they had acknowledged the Public Interest Disclosure Act had been broken, and those responsible for gross misconduct continued to be employed, including the area manager who victimised and intimidated him. He said he was not able to return to work as the situation remained as it was before and they had failed to allow him to return to a safe environment. There were then settlement discussions with an offer being made on 25 October. The claimant took some legal advice, and he rejected the offer on 8 November when he resigned.

39. We heard some additional oral evidence from the claimant as to why he resigned. He said it was because none of his issues had been resolved, and also because the relevant manager was still working there after harassing and intimidating him.

Applicable law

40. **Protected disclosures.** Sections 43A to 43L of the Employment Rights Act 1996 set out the definition of a protected disclosure. Under section 43B 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, is being or is likely to be deliberately concealed."

41. A qualifying disclosure becomes a protected disclosure if it is made in a way listed in sections 43C to 43H, which includes a disclosure to the person's employer.

42. **Detriment for making a protected disclosure.** Under section 47B(1) of the ERA – "*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*." The test for whether treatment of a worker by an employer was "on the ground" of a protected disclosure is as set out in ***NHS Manchester v Fecitt*** [2012] IRLR 64 (CA). The protected disclosure must "materially influence" the employer's treatment of the worker, meaning it must have been more than a trivial influence.

43. We have directed ourselves in accordance with the Court of Appeal decision in ***Chesterton v Nurmohamed*** [2017] EWCA Civ 979***.*** The Tribunal must determine whether the worker subjectively believed at the time that the disclosure was in the public interest and, if so, whether that belief was objectively reasonable. The case also provides guidance about how to assess whether a disclosure is reasonably believed to be in the public interest. The case provides a list of factors that can be of assistance where the disclosure relates to the claimant's own contract or personal interests - the numbers in the group whose interest the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the alleged wrongdoing disclosed (with deliberate wrongdoing more likely to be in the public interest); and the identity of the alleged wrongdoer.

44. In relation to detriment, we are assessing whether a reasonable worker would or might take the view they have been disadvantaged in the circumstances in which they had to work. This principle is taken from the case of ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 (HL) in relation to discrimination law.

45. In relation to the burden of proof, it is for the Tribunal to analyse the mental processes (which can be conscious or unconscious) as to why the respondent acted as it did. It is for the employee to prove that they made a protected disclosure and that there had been detrimental treatment. It is then for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2) ERA). If the respondent has not proved an admissible reason for the treatment the tribunal is entitled to infer that there has been a detriment on the ground that the claimant made a protected disclosure. The Tribunal is not obliged to draw this inference, and they can find an alternative reason. We have considered in particular the EAT decisions in ***Ibekwe v Sussex Partnership NHS Foundation Trust*** UKEAT/0072/14, and ***International Petroleum Ltd and others v Osipov and others*** UKEAT/0229/16 and UKEAT/0058/17.

46. **Time limits.** A claim for detriment for making a protected disclosure must be made "*before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them*" (section 48(3)(a) ERA).

47. **Dismissal for making a protected disclosure.** Under section 103A ERA, employees shall be regarded as automatically unfairly dismissed if the reason or principal reason for the dismissal is that they have made a protected disclosure. The qualifying period usually required for an unfair dismissal claim does not apply (section 108(3) ERA).

48. The definition of a dismissal includes circumstances where an employee is entitled to terminate their employment contract without notice by reason of the employer's conduct (section 95(1)(c) ERA). This requires a significant breach going to the root of the contract, or something that shows the employer no longer intends to be bound by one or more essential terms of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221, CA). This fundamental breach can be a breach of the mutual duty of trust and confidence, which is an implied term of all employment contracts. The test is whether the employer acted without reasonable or proper cause in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (***Mahmud and Malik v BCCI*** [1997] ICR 606, HL).

49. When looking at a constructive dismissal for making a protected disclosure the Tribunal is to focus on the employer's reasons for their actions which amounted to the breach of contract. The issue is not the employee's response to the employer's actions. The key question is the reason why the employer acted as it did.

50. In addition, the employee must resign in response to the breach. An employee cannot delay too long or they may be found to have waived the breach or affirmed the contract. An individual can explain a delay in resigning, but continued performance of the contract would generally indicate an affirmation. This is applied less strictly in employment cases compared to other cases, but the Tribunal should consider the facts very carefully before deciding that the employee has affirmed the contract (***Buckland v Bournemouth University Higher Education Corporation*** [2011] EWCA Civ 131, CA).

Conclusions

51. We note that we are not making any decision on whether thefts did actually take place or whether there has been any kind of conspiracy or cover-up related to theft as has been alleged by the claimant. Our task in this case is to decide whether the claimant was treated badly because he made protected disclosures, and also whether he resigned for this reason.

52. **Time limits.** We have found acts of detriment for making a protected disclosure within time (as explained below), in particular the failure to address the claimant's concerns which continued until the outcome of the appeal on 1 October 2019. The claim was submitted on 26 November 2019. We therefore find there

was a series of similar acts or failures and the claim was made to the Tribunal within three months (plus early conciliation extension) of the last one.

53. **Were there protected disclosures?** The respondent accepts that three disclosures were made as set out in the list of issues. These are the emails on 9 May to HR about allegations of theft, 17 May to Ms Burrows forwarding those original allegations, and 19 May 2019 reporting further issues including the content of a call from Mr Perritt.

54. **Were these disclosures of information?** The respondent says these emails did not disclose information, these were simply allegations or statements of position. We disagree. We have looked at the emails and we find that all of them clearly set out information about what the claimant says has happened.

55. **Did the claimant believe that disclosure was made in the public interest, and was that belief reasonable?** The claimant gave evidence about why he did believe that, and we accept that evidence. In the list of issues, the claimant said that he believed this was in the public interest because innocent employees were being penalised by the respondent through a pay deduction in order to offset the losses sustained by theft by other employees. In evidence he explained this further. He said the effect of dishonest behaviour was that money was deducted from wages of other staff. He also explained that he believed it was in the public interest to know whether a business trading on the high street is corrupt.

56. The respondent says it was not reasonable to believe this was in the public interest as it was a purely internal matter, and the respondent's witnesses also thought that this might be the case.

57. We do not agree with the respondent, and we find that the claimant did have a reasonable belief that these disclosures were in the public interest. The question is whether the claimant's belief was objectively reasonable, so we have looked at the guidance in the case law - particularly ***Chesterton v Nurmohamed***. As well as affecting a number of employees, this issue potentially affected important interests - the deduction of actual wages from employees due to theft by others. The nature of the alleged wrongdoing itself is serious, being deliberate and criminal conduct. The claimant also referred to the public interest in knowing if the business is corrupt. The Tribunal itself also found that belief was objectively reasonable. It seems clear to us that allegations of theft and a potential cover-up are of public interest, particularly if that affects a business which is dealing with cash on the high street. It is difficult to see how allegations of theft relating to a business which deals directly with the public would not be in the public interest.

58. **Did the claimant believe this information tended to show that a criminal offence was likely to be committed or that information was being or likely to be concealed?** We find the claimant did believe this. He had made clear allegations about a criminal offence of theft which he said had been committed, and this included explaining the chain of events which led him to believe this. In his third disclosure he also reported a call from Mr Perritt, and said he had no doubt "Harry and Kevin were trying to warn me off". This is information tending to show that information about thefts was likely to be deliberately concealed.

59. **Was that belief on the part of the claimant reasonable?** We find that it was. This does not require us to find that the allegations are true. It is simply looking at whether the claimant reasonably believed that what he said tended to show certain things. The claimant gave clear information about why he believed these things had happened and what they showed, and that is sufficient to show he has a reasonable belief without finding whether that was correct or not.

60. The respondent argues the claimant did not reasonably believe that his disclosures tended to show anything. They say it is simply an allegation or a statement of position. He says in his first email he "hopes nothing untoward had happened", and the information provided was all circumstantial or hearsay. We do not agree with this position. The claimant gave clear information about why he believes certain things have occurred. It is not simply an allegation. It does not matter if the information is circumstantial or hearsay, that is a misunderstanding of the test. We are looking at whether the claimant provided information that tended to show these things, and whether his belief in this was reasonable that it tended to show these things. We find that those aspects of the test are satisfied.

61. Finally, the respondent accepts that these disclosures were made to the claimant's employer.

62. Therefore, the Tribunal finds the claimant did make three protected disclosures within the meaning of the Public Interest Disclosure Act.

63. Turning to the specific claims relating to detriment.

64. **Did the respondent do certain things?** The first allegation is to breach the claimant's confidentiality, which the claimant said he discovered on 14 May 2019. We find that this did happen. The claimant's first disclosure was made with an express request that it would be investigated by someone outside the Bristol management structure. Instead, it was forwarded to the divisional manager and the information was then passed on to the area manager who the claimant had actually complained about. We note that the respondent's own whistleblowing policy says that that disclosures should be kept confidential and this was not done.

65. Secondly, the area manager being aggressive and intimidating to the claimant over the phone on 18 May 2019. We find that this did happen. We have accepted the claimant's evidence about this call, so we find that Mr Perritt was aggressive and intimidating and in particular criticised the claimant for having made a disclosure to HR.

66. Thirdly, the allegation that between May and November the Head of Risk and Compliance did not take action to resolve the claimant's concerns. We have taken this as an allegation relating to the full process by the respondent, including the appeal against Ms Burrows' findings. It is clear the claimant was not happy with the outcome. It is incorrect to say that no action was taken to address the claimant's concerns as some action was taken in relation to some of them - but we do find that there were two key areas where no action was taken.

67. Firstly, there is the investigation of the specific allegations of theft made by the claimant in his first disclosure relating to September 2018. We have heard that

the Managing Director gave an instruction to Ms Burrows that she should not investigate this. She did not do so, she treated the claimant's disclosure as a grievance instead. Ms Townsend's appeal was looking at what Ms Burrows did, and so she also did not do her own investigation into the theft. This was despite the claimant making it clear that he still wished it to be investigated at the appeal stage. Neither of the respondent witnesses was able to explain what the Managing Director actually did to investigate the theft allegations after they had been removed from Ms Burrows' remit.

68. Secondly, the behaviour by Mr Perritt during the call on 18 May. Ms Burrows found that this had been intimidating, but no action was taken. Ms Townsend did not address this at all in her appeal. This was a clear failure to resolve the claimant's concerns about what happened in this call with his direct manager.

69. **Did the respondent subject the claimant to a detriment by doing these things?** We find that they did. In relation to the breach of confidentiality, this was a breach of the respondent's own policy, it led to allegations not being properly investigated independently, and is also led to the telephone call from Mr Perritt. The call on 18 May was clearly a detriment, as it made the claimant feel intimidated. In relation to the failure to take action to resolve the claimant's concerns, this left the claimant feeling that a serious allegation of theft which he believed had taken place had never been properly investigated, and it was not explained to him why this had not been done. There was no action taken against Mr Perritt for his behaviour, and this meant the claimant felt unsafe to return to work.

70. All of these are matters which might cause a reasonable worker to take the view they have been disadvantaged in the circumstances in which they had to work, and so they are all detriments.

71. **Were these things done on the ground that the claimant had made the protected disclosures?** The test is whether the protected disclosure was a material influence, meaning more than a trivial influence, on the reasons for the respondent's actions.

72. Starting with the breach of confidentiality, it is clear that HR did not deal with this correctly as they sent it to the local manager. We have seen the email where it was forwarded on, and this said it was sent to the divisional manager as the claimant had bypassed the area manager. Having looked at this email we find that this was a mistake by HR, but it was not influenced by the fact that the claimant had made a protected disclosure. We find this conduct by HR was a genuine misunderstanding of the process and how it was supposed to work. We make that finding because we have looked at the email, and that indicates the HR business partner thought that this was the correct way to deal with the matter.

73. Next there is the area manager's behaviour on the call on 18 May. We find it is clear that this was on the ground that the claimant made a protected disclosure. Mr Perritt specifically criticised the claimant for making a disclosure through HR rather than raising the issue through him. There can be no other explanation than this was done because the claimant had made the protected disclosure.

74. Next there is the failure to investigate the specific allegation of theft during the process run by Ms Burrows and the appeal. We have found on the facts that this was because of the instruction given by the Managing Director to Ms Burrows that she should not investigate this allegation. We do not know why he gave this instruction. He did not appear as a witness, and the respondent's witnesses said in evidence that he did not tell them why. The respondent's witnesses did not know if this was then investigated separately. Certainly, this was never reported to the claimant, and we would expect that any evidence about a separate investigation would have been disclosed as part of these proceedings.

75. It is for the claimant to show that there was a protected disclosure and that there was a detriment. He has done that. It is then for the respondent to show the grounds on which it acted. The Tribunal can draw inferences from a lack of explanation, but we are not obliged to do that if we find there was an alternative explanation. We have also been careful to keep in mind that there is no legal obligation on the respondent to actually investigate disclosures if they do not wish to do so. A failure to investigation only becomes a breach of the law is if that failure causes a detriment to the employee, and the reason for the failure is materially influenced by the fact that the employee made a protected disclosure.

76. We have considered carefully whether we should draw an inference in this case. Ms Burrows and Ms Townsend had done as instructed, and we do not find their own failure to investigate the theft was because the claimant made a protected disclosure. However, we do find that this was caused by the instruction of the Managing Director. We draw an inference that this instruction was materially influenced by the fact that the claimant made a protected disclosure. We have had no explanation for this instruction. This then caused the whole grievance and appeal process to fail to look properly at the claimant's main concern, which was his original disclosure. It is open to us to draw this inference in the absence of an explanation from the respondent. We have had no evidence or alternative explanation and, on the facts we have found, we find there is no alternative explanation.

77. Next there is the failure to address the claimant's concerns about Mr Perritt's behaviour. There were clear allegations by the claimant in relation to what happened in the third disclosure he made to Ms Burrows. She found that this was intimidating in her outcome but no action was taken. Ms Townsend has this raised again with her by the claimant, and she has also seen this in Ms Burrows' findings. Again, no action was taken. This is a clear breach of the respondent's own whistleblowing policy. This says that disciplinary action will be taken if there is retaliation against an employee for making a disclosure. Neither witness was able to explain the reasons for this failure, which left the claimant feeling unsafe to come back to work.

78. We have considered this carefully. This occurred in the context of the instruction by the Managing Director not to investigate the theft, which effectively infected the whole grievance and appeal process. Again, on what we have in the evidence, we do draw the inference that the respondent's failure to address the claimant's serious concerns about this issue was materially influenced by the fact he had made a protected disclosure. No explanation has been provided for this failure. The Tribunal has been unable to find any other explanation from the facts.

Again, the way the burden of proof works means it is for the respondent to show the reasons for the claimant's treatment and they have not done so.

79. We therefore find that Mr Perrett's aggressive and intimidating behaviour to the Claimant over the phone on the 18 May 2019, and the respondent's failure to take action to resolve the claimant's concerns in relation to the allegation of theft and the behaviour by Mr Perrett, was done on the ground that the claimant had made the protected disclosures. The claim for detriment for making a protected disclosure succeeds.

80. Finally, there is the claim for constructive dismissal.

81. **Was the making of the disclosure the principal reason for the constructive dismissal?** We found various detriments to the claimant as explained above, and we are satisfied that these would also be breaches of trust and confidence which would potentially allow the claimant to resign and claim constructive dismissal.

82. As he has less than two years' service, the claimant must also show us that the making of the protected disclosures was the principal reason for his dismissal. With a constructive dismissal, he can do this by showing that the breaches were ones where he was treated as he was because he made a protected disclosure. The claimant gave us clear evidence that he resigned because none of his issues had been resolved, and in particular because the manager who he says harassed and intimidated him still works there and no action had been taken. This is also reflected in his resignation letters where he states it was not a safe environment for him to return to work. We accept that this was the reason for his resignation, and we find he did not simply resign for another reason as alleged by the respondent.

83. We have found the respondent's failure to investigate the theft allegations was materially influenced by the fact the claimant made a protected disclosure. This is one of the reasons the claimant felt none of his issues had been resolved. We also found that the failure to take action in relation to Mr Perritt's conduct was materially influenced by the fact the claimant made a protected disclosure. This was a major reason for his resignation. We also accept this was a serious breach as it left the claimant feeling unsafe to return to work. These are the reasons the claimant resigned. This treatment was on the grounds the claimant had made a protected disclosure. That leads us to finding that the making of the protected disclosure was the principal reason why the claimant was dismissed. He resigned in response to treatment that was materially influenced by the fact he had made a protected disclosure.

84. **Did the claimant delay too long before resigning and affirm the contract?** We do not find the claimant affirmed the contract. There was a delay between the outcome of the appeal on 1 October and the resignation on 8 November. We are aware there were some settlement discussions during this time which provide some explanation for the delay. An offer was made on 25 October, with the resignation on 8 November. Looking at the facts, we find it was clear the claimant was not waiving any breaches or affirming the contract. He said clearly at the time that he was unhappy with the outcome and was seeking to resolve it. There was no continuing performance of the contract as he was off sick. He

resigned because the proposed resolution was not satisfactory. We therefore find that the claimant did not delay and affirm the contract, and on that basis his claim for constructive dismissal succeeds.

Employment Judge Oliver
Date: 1 April 2021

Reasons sent to the parties: 14 April 2021

FOR THE TRIBUNAL OFFICE