EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121892/2018

Held in Glasgow on 15,16,17 April and 13 May 2019

Employment Judge P McMahon
Tribunal Member N Elliot
Tribunal Member D McFarlane

Mr E Ivers **Claimant**

Littleinch Ltd **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's claim under Section 103A of the Employment Rights Act 1996 is unsuccessful and is dismissed.

REASONS

Introduction

1. The claimant presented a claim to the Tribunal on 22 October 2018. The claimant claimed unfair dismissal as a result of making a protected disclosure.

2. The respondent admitted that the claimant was dismissed but asserted that it was not for reasons connected to a protected disclosure, it was due to a breakdown in trust and confidence, and also denied that the claimant had made a protected disclosure.

3. The case was heard on 15 – 17 April and 13 May 2019. Both parties exchanged outline written submissions and made oral submissions on the last day of hearing.

4. A Joint Bundle was provided. Not all documents were referred to in evidence.

5. Evidence was heard on oath or affirmation from all witnesses. For the respondent, evidence was heard from Mr Irvine Watson, the Managing Director of the respondent, Ms Janice Pitman, HR Manager of the respondent and Ms Sandra Denham, Home Manager of the respondent. For the claimant, evidence was heard from the claimant only.

Issues

6. The issues to be determined by the Tribunal were as follows:-

   6.1 Did the claimant make a protected disclosure? i.e.

      6.1.1 Was the disclosure a qualifying disclosure?, and

      6.1.2 Was the disclosure made in accordance with one of six specified methods of disclosure?

   6.2 Was the reason, or principal reason, for the claimant's dismissal that the claimant made the protected disclosure?

   6.3 In the event that the claimant was unfairly dismissed, what loss did the claimant suffer arising from his dismissal?

7. The matter being relied upon by the claimant as a protected disclosure, and which the claimant asserted was the reason for his dismissal, was an email sent by the claimant to Mr Irvine Watson and copied to Ms Sandra Denham, both of the respondent, dated 30 August 2018 timed at 11:04am, a copy of which was produced at page 44 of the Joint Bundle (the "disclosure email").

Findings in fact

8. The Tribunal considered the following facts to be admitted or proved:

9. The respondent operates a care home for the elderly. The claimant began employment with the respondent at its care home on 3 October 2016. He was dismissed with immediate effect on 3 September 2018 and received a payment in lieu of 4 weeks' contractual notice. As at the date of termination

of the claimant's employment with the respondent he had been continuously employed by the respondent for 1 year and 11 months.

10. At the time of his dismissal the claimant was employed by the respondent in the role of maintenance technician and health and safety adviser. Duties involved in the maintenance part of the claimant's role included carrying out general repairs and maintenance of the respondent's premises including painting, and general repairs and maintenance of equipment. Duties involved in the health and safety adviser part of the claimant's role included providing advice on health and safety issues, identifying any health and safety issues that may arise, resolving any such issues which were minor and reporting those which were serious. The respondent expected the claimant to bring health and safety issues and concerns to its attention as part of his role, which the claimant did on several occasions during his employment prior to the events of 30 August to 3 September 2018.

11. During his employment with the respondent the claimant received training at a cost of approximately £3,000. This included health and safety training and the claimant obtained a NEBOSH (National Examination Board in Occupational Safety and Health) qualification. The respondent paid for this training.

12. One of the health and safety issues the claimant raised with both Mr Watson and Ms Denham during his employment prior to the events of 30 August to 3 September 2018 related to the lack of gas safety certification for equipment in the kitchen. The claimant considered that this was a breach of health and safety law. Reference was made to related copies of documentation produced at pages 40, 124,125 and 126 of the Joint Bundle in this respect. The claimant raised his concerns regarding this matter with both Ms Denham and Mr Watson on several occasions during his employment dating back to 2017. There were delays in the respondent dealing with this issue.

13. The claimant had also raised a health and safety concern in relation to families of residents walking in an area of the grounds of the respondent's premises used for delivery vehicles prior to the events of 30 August to 3 September

2018. He raised this with Ms Denham who passed it on to Mr Watson to deal with. The claimant was later advised that Mr Watson had decided it was not a risk.

14. The claimant considered that when he raised health and safety issues with the respondent prior to the events of 30 August to 3 September 2018 they either took too long to deal with them, he was ignored or the respondent took no action. The respondent did not appear to treat the health and safety issues the claimant raised, referred above, as a priority. Other than feeling ignored, the claimant was not subjected to any other negative consequences by the respondent as a result of raising these health and safety issues.

15. In mid-July 2018 Ms Denham raised a concern with the HR manager, Janice Pitman, that the claimant had behaved inappropriately by shouting at her. An investigation was carried out by Ms Pitman which involved speaking to the claimant about the allegation, who said it was Ms Denham who had shouted at him and that there was a personality clash between them both. After investigating the matter, Ms Pitman concluded that there was a communication problem between both the claimant and Ms Denham, that no disciplinary action against the claimant was necessary and that a mediated outcome would resolve matters.

16. This mediated outcome reached by Ms Pitman included that Ms Denham was to become more familiar with the claimant's workload and discuss that with him regularly so that she would appreciate more what tasks he was working on. After this, the claimant and Ms Denham started having regular meetings to discuss the claimant's workload.

17. On 29 August 2018 a gas engineer attended the respondent's premises to carry out a service visit arranged by Mr Watson. As part of this service visit the engineer carried out a check on two boilers at the respondent's premises, "boiler 1" and "boiler 2".

18. During this visit the engineer told the claimant that boiler 1 had deposits that were causing an unstable flame and that the gasket set would need to be

replaced. The engineer did not tell the claimant that boiler 1 could not be used or switched on but the claimant suspected this was the case.

19. During this visit the engineer told Mr Watson that boiler 2 was operating properly but that boiler 1 had an unstable flame. He told Mr Watson that there were filing deposits which were causing the unstable flame in relation to boiler 1. The engineer gave Mr Watson a form headed, "Warning /Advice – Danger Do Not Use Notice Report" (a copy of which was produced at page 41 of the Joint Bundle). This form indicated that, due to an unstable flame, boiler 1 was "at risk", rather than "immediately dangerous", and that the boiler had been turned off and a "Danger Do Not Use Label" affixed. Mr Watson signed the form to acknowledge receipt and instructed the engineer to carry out the required repair. Boiler 1 was repaired and brought back into operation the following month. In the meantime, another boiler could act as a back-up.

20. The following day, 30 August 2018, the claimant went to see Mr Watson at approximately 10.00am to have an expenses claim form signed. When he was leaving Mr Watson's office, Mr Watson asked the claimant to go to the plant room and switch on boiler 1. Mr Watson did not explain to the claimant at the time that the reason he was asking the claimant to do this was because the engineer had advised him on 29 August 2018 that he could try this and it may burn off the filing deposits, he did not give the claimant any explanation as to why he was asking him to do this.

21. The claimant went to the plant room and once there noticed that there was a black and yellow sticker on the front of boiler 1 with the text, "At Risk. Do Not Use" (the "at risk sticker").

22. When the claimant saw the at risk sticker on boiler 1 he believed that it would be a breach of gas safety regulations to turn it on. This was based on his NEBOSH health and safety training. A specific part of that course related to gas safety regulations and the use of "at risk" notices and labels. The claimant also believed that turning the boiler on in such circumstances would be a risk to the health and safety of the staff and residents of the care home. The claimant contacted the HSE gas safety advice line for guidance. The reason

for this was that he wanted to be absolutely sure of the position. He asked the HSE gas safety advice line if there were any circumstances in which a boiler marked "do not use" could be switched on and the guidance he received was that if he turned on the boiler in such circumstances it would be a breach of the Gas Safety (Installation and Use) (Amendment) Regulations 2018 (the "Regulations").

23. Shortly after his call to the HSE gas safety advice line, on the same date, the claimant sent the disclosure email at approximately 10.30am to 11.04am. The claimant thought that Mr Watson would just ignore the disclosure email. The subject of the email was "At risk warning on boiler" and read as follows:

"Hi Irvine, further to our conversation this morning I called the HSE gas safety advice line and asked about turning the boiler marked "At Risk" on and I was told I would be in breach of the Gas Safety (Installation and Use) (Amendment) Regulations 2018, therefor I am not allowed to turn the boiler back on."

24. When the claimant sent the disclosure email he believed that what it stated was accurate and that it tended to show that there had been and was likely to be a breach of the Regulations and a risk to the health and safety of staff and residents at the care home. The claimant also believed that such a breach of the Regulations would be a criminal offence.

25. The respondent had a whistle-blowing procedure. The claimant did not make reference to this in relation to the disclosure email. When the claimant sent the disclosure email he was motivated by wanting to make sure he was doing what was required of him personally and pre-empt a query from Mr Watson as to why he hadn't done as he was asked. However, the claimant did also want to tell Mr Watson it was a breach of the law to turn on boiler 1 and they shouldn't do it and he believed that sending the disclosure email was in the interests of the staff and residents of the care home because it was not safe to use the boiler.

26. Mr Watson received the disclosure email and responded to it by email dated 30 August 2018 (a copy of which was produced at page 43 of the Joint Bundle). The subject was the same and the email read as follows:

"Eddie,

It would be very useful to discuss these issues before you seek external advice.

Do you know what the issue is with the boiler? Did you discuss the issue with the engineer at the time of the visit? Did you establish what the course of action in respect of the boiler? Do you know the sequence of events with the boiler when the boiler is switched on in respect of the current issue?

Kind regards"

27. The only other communication between the claimant and Mr Watson prior to the claimant's dismissal on 3 September 2018 was a short conversation on the morning of Monday 3 September 2018 and an email from the claimant to Mr Watson on the same date timed at 04:47am (although it was in fact sent at 11.47am), a copy of which was produced at page 43 of the Joint Bundle.

28. The short conversation between the claimant and Mr Watson on the morning of Monday 3 September 2018 occurred at some time before 11.47 when the claimant saw Mr Watson in passing in the hallway and the conversation consisted only of Mr Watson asking the claimant to respond to the questions in his email of 30 August 2018 and the claimant replying that he would.

29. The email of 3 September 2018 had the same subject as those on 30 August 2018 and read as follows:

"Sorry I took so long to answer, I thought the questions were rhetorical because the engineer visited you to give you a report on what was wrong with the boiler.

I sought external advice because you asked me to turn on a boiler which was clearly marked "Do Not Use" and there was no other person within the company who was qualified to answer my concerns. I did not disclose my

name or the name of the care home to the advisor, I merely wanted his advice.

The gas supply has carbon deposit in it which has partially blocked the filter, resulting in an unstable flame, which I discussed with the engineer during his visit, and I established that a full strip down and rebuild, replacing the gaskets is required. I do not know what effect turning the boiler would have if it was turned on before the faults are rectified, but I do know turning the boiler on would be in breach of the Gas Safety (Installation and Use) (Amendment) Regulations 2018."

30. Shortly after the claimant sent the disclosure email on 30 August 2018, he made his way to his workshop and on the way, when passing Ms Denham's office, Ms Denham asked the claimant if he was available for a supervision meeting that afternoon. The claimant agreed to attend a supervision meeting that day and it was further agreed between the claimant and Ms Denham that it would take place after lunch. The supervision meeting took place at some point during the afternoon on 30 August 2018.

31. It was normal practice for Ms Denham to have supervision meetings with the respondent's employees and she had these meetings regularly. The claimant had not been invited to a supervision meeting before.

32. Although it happened on occasion, it was unusual for employees to be invited to a supervision meeting on the day it was to take place. The claimant had not been informed of the invitation to the supervision meeting in advance of this and it was not clear when the decision had been made to invite the claimant to this meeting.

33. It was usually the case that employees would be given a template form for the purposes of a supervision meeting in advance of the meeting taking place. The claimant did not get such a form in advance of his supervision meeting. When the claimant attended the supervision meeting, he was given a template form (a copy of the completed version of which was produced at pages 45 and 46 of the Joint Bundle) at the outset of the meeting. The first two parts of

the form, in relation to what his role was, had already been completed by Ms Pitman. She had been asked to do this in advance.

34. Ms Denham had arranged with Ms Pitman that she would also attend the meeting as note-taker. This was not the norm, usually Ms Denham would conduct supervision meetings on her own.

35. The format of the discussion at the supervision meeting loosely followed the sections of the template form the claimant was given at the beginning of the meeting with the headings or questions at each section on the template form being addressed in turn.

36. When the claimant was given the template form at the beginning of the meeting, the first two parts of the form within the first section, with the headings “Role” and “Health and Safety Advisor”, relating to what the claimant’s role was, were already completed. The rest of the text on the template form was a note of the meeting, prepared at some point after the meeting, but before the claimant’s dismissal on 3 September 2018, by Ms Pitman. The discussion in respect of the first section of the form consisted only of reading through the notes under each of the two headings, “Role” and “Health and Safety Advisor” and the claimant being asked if anything was missing or incorrect. The claimant responded by shaking his head.

37. The notes under the headings in the next three sections of the form entitled “What I do well in my role?”, “What I would like to do better in my role?” and “How I could achieve this? (support, training)” respectively and the note under the heading “How could we improve the quality of service we provide at Erskine Care Centre?” are, generally speaking, an accurate reflection of the key points discussed at those parts of the meeting. The claimant said very little in relation to any of these matters.

38. There was a discussion in relation to health and safety issues. Ms Denham asked the claimant to set up monthly health and safety meetings. The claimant said that his health and safety advice was being ignored and gave the example of families still walking in areas used by delivery vehicles and was told that Mr Watson had approved this. The claimant mentioned a gasket

was to be fitted to a boiler and he was told he should take it up with Mr Watson. The claimant responded that he felt like he was being cut out of the loop. 6-monthly checks which were carried out by the claimant were mentioned and the claimant queried if he required Mr Watson's approval to which Ms Pitman responded, approval was required where it had financial implications. Ms Denham also asked the claimant to continue to encourage staff to use the maintenance book to report maintenance issues.

39. There was then a further general discussion at the supervision meeting. During this discussion the claimant said that that he was unhappy in his job and he was actively looking for another job. He also said that he hated his job and was doing the bare minimum and gave the example that there were tasks that he could do himself but he outsourced them, such as a vacuum cleaner he could have fixed himself but outsourced it instead. The claimant also said he felt like a school boy.

40. The claimant was very defensive during the meeting and it was an uncomfortable meeting from the outset. At one stage, the claimant stood up, threw his pen down on the desk, stood over Ms Pitman, who was sitting down and said, "am I being sacked". When asked to sit down again the claimant did so. Ms Pitman and Ms Denham interpreted this behaviour as being aggressive and hostile respectively.

41. The meeting was brought to a close with a statement that another meeting would be rescheduled for two weeks' time.

42. On 30 August 2018, after the supervision meeting, Ms Pitman and Ms Denham sat together for approximately 10 to 15 minutes reflecting on what had happened at the meeting then went to Mr Watson's office for the purpose of reporting to him what had happened at the meeting. They told Mr Watson that they had concerns in relation to the claimant's attitude and behaviour at the supervision meeting. They reported that the claimant said he hated his job, that he was doing the absolute minimum and he was looking for another job. Ms Denham said that the claimant was hostile and Ms Pitman said that he was aggressive. No decision to dismiss the claimant was made during this

discussion and the outcome was that Mr Watson was going to take time to consider what Ms Pitman and Ms Denham had told him. Ms Pitman and Mr Watson then had a follow-up discussion the next day, 31 August 2018, at which the final decision to dismiss the claimant was taken by Mr Watson.

43. Ms Denham also told Mr Watson that she had concerns about the claimant's commitment to the role given his responsibilities and about whether he could be trusted and that she had concerns about the claimant staying on in his post given the attitude and hostility he had displayed. Ms Pitman told Mr Watson that she felt that the claimant could not continue in his role with what he had said in the meeting. Mr Watson thought that Ms Pitman and Ms Denham were recommending to him that the claimant should be dismissed because of his behaviour and attitude displayed at the supervision meeting.

44. Mr Watson drafted a handwritten letter of dismissal and gave this to Ms Pitman on Monday 3 September 2018, who then typed it up and Mr Watson signed the final version of the letter, also on Monday 3 September 2018. A copy of this letter (the "dismissal letter") was produced at page 47 of the Joint Bundle. It read as follows:

"Dear Eddie

Re: Dismissal with notice

I am writing to inform you that your employment as Maintenance Technician with Erskine Care Centre has been terminated with immediate effect following a breach of trust and confidence as a result of the supervision meeting held on Thursday the 31st August 2018 of which a copy is attached.

After this meeting, we cannot allow you to carry on working within the care home with the attitude you displayed in terms of lack of commitment and enthusiasm for your role which is to provide a safe environment for vulnerable adults.

You will be paid 4 weeks' notice, which is within your contract of employment and that you are not expected to work along with any holiday entitlement owed. Any expenses you have incurred should be sent in for the attention of

the accounts department. Please leave all keys key fobs along with any tools and equipment belonging to the company with HR.

Your P45 will be sent out in due course.

You have the right to appeal this decision but must do so within 5 working days and in writing to Janice Pitman, Erskine Care Centre, Rashielee Avenue, Erskine, PA8 6HA.

Yours sincerely

Irvine Watson

Managing Director"

45. Ms Pitman, gave the claimant the dismissal letter at approximately 3.45pm on Monday 3 September 2018. The only discussion that took place when Ms Pitman gave the claimant the dismissal letter was that Ms Pitman told the claimant he was being dismissed and that he did not need to work his notice and the claimant asked for a copy of the supervision meeting notes before he left, which Ms Pitman then gave him.

46. The claimant was given the opportunity to appeal the respondent's decision to dismiss him. The claimant did so by a letter dated 5 September 2018 (the "appeal letter") (a copy of which was produced at page 48 of the Joint Bundle). In the appeal letter the claimant also requested that the respondent provide him with the exact reason, in detail, as to why it was deemed necessary to terminate his employment with immediate effect. The respondent responded by letter dated 10 September 2018, (the "invitation to appeal letter") (a copy of which was produced at pages 49 and 50 of the Joint Bundle). The part of that letter which related to the reason for the claimant's dismissal read as follows:

"You requested that we provide the exact reason, in detail as to why it deemed necessary to terminate your employment with immediate effect. Stated in the letter given to you on Monday 3rd September 2018 it clearly states the following:

we cannot allow you to carry on working within the care home with the attitude you displayed in terms of lack of commitment and enthusiasm for your role which is to provide a safe environment for vulnerable adults.

As requested in detail as to why we felt it was necessary to terminate your employment with immediate effect was the way in which you conducted yourself throughout the supervision, clearly demonstrated you had no interest or commitment to your role. The attitude you displayed towards the Care Home Manager & the HR Adviser was negative, uncooperative, defensive and aggressive.

Examples of these are:

Negative: You viewed the supervision process as a reprimand, when it was clearly explained to you it was a meeting in which both parties could discuss areas of concern, improvement, praise and to offer assistance and support.

Uncooperative: You were clearly reluctant to participate. This was evident by your negative attitude which was shown by some of your responses in the meeting. When asked what you did well in your role you answered, the bin sheds, clean garden and Sandra Denham had to prompt you for more answers.

Defensive: When the supervision meeting began you commented on 'how it made you feel like a school boy being told off'. You quoted at one point 'so I'm not doing my job properly?' Sandra Denham did not use those words. You then went onto say that you were 'actively looking for another job, you hated your job, you were doing the bare minimum' and that instead of fixing things you now outsourced them to other companies. An example of this you gave was a hoover you said you would normally take apart and fix but you sent it to a company to do as you couldn't be bothered.

Aggressive: When Janice Pitman the HR Advisor asked you to verify that you were actively looking for a new job, as the main concern was the care home being left with no maintenance technician and she explained the role would need to be advertised, you stood up, and said so am I being sacked' then

again 'am I being fired'? This behaviour was viewed as threatening and not the kind of conduct we expect.

I hope this is explained in better detail for you."

47. The respondent instructed an external HR consultant to conduct the claimant's appeal. The claimant's appeal hearing took place on 18 September 2018, a copy of the minutes of which were produced at pages 53 and 54 of the Joint Bundle.

48. The claimant said at the appeal hearing that he considered that the notes of the supervision meeting had been edited and that he had not seen the document until he was being dismissed on 3 September 2018. He also said that the allegation that he had been aggressive had not been mentioned to him until the respondent sent the invitation to appeal letter. It had not been mentioned, either in the dismissal letter or in the notes of the supervision meeting. The claimant did not mention at the appeal hearing that he considered that the real reason for his dismissal was that he had made a protected disclosure.

49. The claimant's appeal was not upheld and this was confirmed by letter dated 26 September 2018 (a copy of which was produced at pages 51 and 52 of the Joint Bundle).

Observations on the evidence

50. All of the witnesses gave clear and candid evidence in certain areas, accepting a number of matters in cross examination, and all were more vague or unclear in their evidence in others. There were relatively few areas in the case where there was a direct conflict of evidence on essential matters and where the Tribunal preferred the evidence of some witnesses over that of others or were not convinced by explanations provided, and these specific areas are detailed below, as are the reasons why the Tribunal had the preferences that it did. Otherwise, generally speaking the Tribunal considered the witnesses to be giving an honest account of events as they remembered them.

51. The Tribunal heard oral evidence regarding the claimant's role and duties which was not disputed. Mr Watson said the claimant was expected to just deal with minor health and safety issues and concerns himself, giving the example of a door not closing properly, but did expect him to report serious health and safety issues. He said it was part of the claimant's role to advise on health and safety issues. The claimant said he reported health and safety concerns to both Ms Denham and Mr Watson on several occasions prior to the events of 30 August to 3 September 2018.

52. Mr Watson gave evidence in relation to the training the claimant received and the cost of this, which was not disputed. The claimant said he obtained a NEBOSH qualification and that the respondent paid for this.

53. Ms Denham gave evidence that the claimant had raised the issue relating to the gas safety certification for equipment in the kitchen a couple of months before the events of 30 August to 3 September 2018 and that she had passed it to Mr Watson for him to deal with it. Ms Pitman said that she heard the claimant saying to Ms Denham at one point that there was no gas safety certification for equipment in the kitchen and hadn't been for months and her response was to tell the claimant that she would email Mr Watson about it. Ms Pitman said she did not get involved in this as it was not her remit.

54. Mr Watson's evidence in respect of the gas safety certification for equipment in the kitchen matter was vague in parts. He explained that the respondent had experienced difficulties in appointing a contractor in relation to this issue, but he couldn't remember details, for example, in relation to when the issue arose, how long it remained outstanding and whether he had received communications from the claimant in respect of the matter and he accepted that there had been a delay in the matter being resolved after the claimant reported it. The claimant was clear in his evidence in this respect, that he had raised the matter on several occasions over a lengthy period and all he was ever told was that Mr Watson was looking into it.

55. There was less evidence in relation to the issue the claimant raised regarding families of residents walking in an area of the grounds of the respondent's

premises used for delivery vehicles. Ms Pitman said that she was aware of the claimant raising the matter and that, again, it was passed to Mr Watson to deal with. The claimant said he felt he was ignored in relation to this matter.

56. The claimant said that when he raised health and safety issues with the respondent prior to the events of 30 August to 3 September 2018 the respondent either took too long to deal with them, he was ignored, or the respondent took no action. From the evidence provided by the claimant in this respect and the evidence provided by the respondent's witnesses in relation to the delay in dealing with the gas safety certification for equipment in the kitchen and the vague recollection of when and how it was dealt with, and the evidence of Ms Pitman and Ms Denham that they simply passed health and safety matters the claimant raised to Mr Watson to deal with, or in Ms Pitman's case did not consider it a part of her remit at all, the Tribunal formed the view that the respondent did not appear to treat the health and safety issues the claimant raised prior to the events of 30 August to 3 September 2018 as a priority. The claimant was also candid in his evidence that, other than feeling ignored, there were no other negative consequences for him as a result of him repeatedly raising these health and safety issues with the respondent. There was no suggestion made that the respondent was annoyed or angry with the claimant for raising these matters.

57. Ms Pitman gave evidence in relation to the outcome of the incident in July 2018 and there was no material challenge to that evidence. There was a suggestion from Ms Pitman of there not being a particularly good working relationship between the claimant and Ms Denham, she referred to a communication breakdown between them and that the claimant had reported that he felt there was a personality clash between them. It also appeared to the Tribunal from the evidence in relation to the incident in July 2018 that Ms Pitman had sought to adopt an even-handed approach to the claimant and Ms Denham and had not taken sides. There was, for example, no suggestion that Ms Pitman sought to use the incident as an excuse to take action against the claimant.

58. Both the claimant and Mr Watson gave evidence as to their respective conversations with the gas engineer on 29 August 2018. Mr Watson also gave evidence in relation to there being a degree of redundancy built in to the boiler system and there being a back-up boiler, that the repair to boiler 1 was instructed on 29 August 2018 and that boiler 1 came back in to operation the following month, which was not disputed. There was no suggestion in the evidence that there was any disruption caused to the respondent's business before boiler 1 was repaired and brought back into operation.

59. Mr Watson also explained in his evidence that the reason he asked the claimant to turn on boiler 1 on 30 August 2018 was because the engineer had advised him on 29 August 2018 that he could try this and it may burn off the deposits but if not, the boiler would automatically turn itself off. However, there was no suggestion that Mr Watson gave this, or any other explanation to the claimant at the time and there was no evidence of any discussion at all as to why Mr Watson was asking the claimant to turn on boiler 1 on 30 August 2018.

60. The claimant gave evidence that upon seeing the at risk sticker on boiler 1 he knew that to turn it on would be a breach of gas safety regulations as that was covered in his NEBOSH training, a specific part of which course related to gas safety regulations and the use of "at risk" notices and labels. He also gave evidence to the effect that the reason he contacted the HSE safety advice line was because he wanted to be absolutely sure, that when he did so he asked if there were any circumstances in which a boiler marked "do not use" could be switched on and the guidance he received was that if he turned on the boiler in such circumstances it would be a breach of the Regulations.

61. The Tribunal had been referred in evidence to the "Warning /Advice – Danger Do Not Use Notice Report" (a copy of which was produced at page 41 of the Joint Bundle) which indicated that use of an "At Risk" appliance could result in a breach of the Regulations, which was consistent with what the claimant said he knew from his training and what he said the HSE gas safety advice line had told him.

62. The claimant's evidence was also that he thought that turning on the boiler with an at risk sticker on it would be a "lack of care" for the health and safety of the workforce and residents at the care home because it was not safe to use the boiler. The Tribunal considered that, whether or not a person had specific health and safety training, they would likely believe that turning on a boiler with an at risk sticker on it which was in breach of the Regulations would not be safe and accepted the claimant's evidence in this respect.

63. Furthermore, it was not suggested or shown by the respondent that the claimant did not believe that turning on the boiler in the circumstances would be a breach of the Regulations and/or would be a risk to the health and safety of staff and residents of the care home.

64. The Tribunal accepted the claimant's evidence that he believed at the time he sent the disclosure email that what it stated was accurate and that it tended to show that there had been and was likely to be a breach of the Regulations and a risk to the health and safety of staff and residents at the care home on the basis that the email stated that turning on a boiler marked "at risk" would be a breach of the Regulations and that approximately 30 minutes to an hour before the claimant sent the disclosure email to Mr Watson he had asked the claimant to do that, not telling the claimant that the gas engineer had said that it could be done. The claimant had also said that he thought Mr Watson would just ignore his email.

65. The Tribunal also accepted the claimant's evidence that he believed that a breach of the Regulations would be a criminal offence. However, the claimant's evidence as to why he thought that was not clear. The Tribunal noted that whilst the claimant had referred to the HSE gas safety advice line advising him that turning on a boiler marked "at risk" would be a breach of Regulations in the disclosure email, there had been no mention of him being advised that it was a criminal offence.

66. The claimant, Mr Watson and Ms Pitman all said that the respondent had a whistle-blowing procedure. It was not one of the documents produced in the Joint Bundle and referred to. None of the witnesses were familiar with the

terms of the procedure. When asked if he was aware of there being a whistle-blowing procedure, the claimant answered yes, but couldn't remember what it said. The claimant did not make any reference to the procedure in relation to the disclosure email. There was no suggestion that the claimant sought to use or intended to send the disclosure email in accordance with the procedure.

67. The claimant also gave evidence to the effect that his motivation for sending the disclosure email was that he wanted to let Mr Watson know why he was not doing something he had been asked to do, to pre-empt a question. He also answered yes when it was put to him by the respondent's representative that his sending of the disclosure email was motivated by self-interest and said it was "to keep myself in the right". The claimant did also give evidence to the effect that he wanted to tell Mr Watson that turning on boiler 1 was a breach of the law and they shouldn't be doing it and that he believed sending the disclosure email to Mr Watson served the interests of the staff and the residents of the care home because it was not safe to use the boiler. The Tribunal thought it was entirely plausible that the claimant would believe that sending an email telling his employer that switching on a boiler in a care home setting which is marked "at risk" would be a breach of the Regulations would be in the interests of the safety of the staff and residents of the care home.

68. It was apparent that the timing shown on the email from Mr Watson to the claimant on 30 August 2018 in response to the disclosure email was incorrect, which neither party was able to explain, and neither Mr Watson nor the claimant could remember exactly what time it was sent at. Nor could Mr Watson remember exactly what time the disclosure email was sent at, but he did receive it. The claimant said the time shown on the disclosure email itself "sounds about right" and also that it may have been sent at approximately 10.30am. In the circumstances that the timing shown on two other emails produced in the Joint Bundle was incorrect, the Tribunal accepted the claimant's oral evidence that the disclosure email was sent between 10.30am and 11.04am.

69. It was also a matter of agreement that the email from the claimant to Mr Watson on 3 September 2018 timed at 04:47am (a copy of which was produced at page 43 of the Joint Bundle) was in fact sent at 11.47am.

70. The claimant did not claim that Mr Watson expressed any anger or that he was annoyed with him in relation to him sending the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter. The only evidence that Mr Watson may have been at all was his said email of 30 August 2018 which suggested at least a degree of irritation or displeasure on his part. However the claimant candidly said in evidence that it was not unusual for Mr Watson to send emails like this and there was no suggestion otherwise from the claimant that Mr Watson expressed any anger or irritation to him in relation to him sending the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter. Mr Watson's own evidence was that he was not angry with the claimant, he was never angry when staff raised health and safety issues, that he would have expected the claimant to come back to him before seeking advice elsewhere after he saw the at risk label on the boiler and the questions he asked in his email to the claimant related to the information the engineer provided when he spoke to him and he wanted to understand what the claimant knew about the matter as they had not discussed it.

71. Ms. Denham gave evidence that it was normal practice for her to hold supervision meetings with the respondent's employees. The claimant said that he had seen Ms Denham hold a number of these meetings which was why he knew that she would usually conduct these meetings on her own. Ms Denham accepted that the claimant had not been invited to a supervision meeting before and said that this was because Mr Watson was supposed to hold such a meeting with the claimant but had not done so as he was too busy.

72. Ms Denham thought that the invitation to the supervision meeting was made before 30 August 2018, but she was not sure when, and accepted that on occasion employees were invited to supervision meetings on the day. The

claimant's evidence was clear in this respect and the Tribunal accepted the claimant's evidence that he was invited to the supervision meeting on the day and concluded this was immediately after he sent the disclosure email as the claimant remembered that after he sent it, he made his way to his workshop and on the way he met Ms Denham and she invited him to the supervision meeting to take place after lunch. There was no suggestion that the claimant did anything else between sending the disclosure email and making his way to his workshop.

73. Ms Denham, Ms Pitman and the claimant were all clear that the supervision meeting took place on the afternoon of 30 August 2018. None were clear on exactly what time in the afternoon. The Tribunal considered from the evidence available that it was more likely to be mid-afternoon than late afternoon because of the reference by the claimant to agreeing to meet "after lunch", the claimant said that after the meeting he continued with his daily tasks and the respondent's witnesses said that after the meeting, firstly Ms Denham and Ms Pitman sat together for a short period of time and then went to see Mr Watson to discuss what had happened at the supervision meeting itself, suggesting that the supervision meeting concluded some time before the end of the working day to leave time for these further tasks and events to take place.

74. Ms Denham said she had decided to invite the claimant to the supervision meeting before 30 August 2018. Ms Pitman also said the meeting had been scheduled for the afternoon on 30 August 2018. However, neither gave clear evidence as to exactly when the decision was made or when the scheduling was done.

75. Ms Denham said she normally, although again accepted not always, gave employees a template form in advance of supervision meetings and also accepted that she couldn't remember if she had done so in relation to the claimant. The claimant, again, was clear that he didn't get the form in advance of the meeting.

76. Both Ms Denham and Ms Pitman said that Ms Pitman had been asked to attend the supervision meeting as a note-taker by Ms Denham and she had also been asked to, and did, prepare the first two parts of the template form in advance of the meeting. The claimant also said that the first two parts of the template form had been completed when he was given the form at the beginning of the meeting.

77. It was not asserted by the claimant that the reason he was invited to attend the supervision meeting on 30 August 2018 was in any way related to him sending the disclosure email or its contents, including the fact that he had contacted the HSE gas safety advice line in relation to the matter. Nevertheless, the Tribunal did note that there were several factors that could indicate that this may have been the case, which were:

- the claimant had not been invited to a supervision meeting before;
- He had not received the template form in advance of the supervision meeting when this was usually issued in advance;
- He was invited to a supervision meeting on the day when usually more advance notice would be given; and
- He was invited to the supervision meeting after he had sent the disclosure email.

78. However, taking into account the following, the Tribunal found that the evidence did not support a conclusion that the motivation for inviting the claimant to the supervision meeting related to the claimant sending the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter:

79. There was no suggestion that Ms Denham or anyone else told the claimant, or gave him any indication from what they communicated that the real reason he was invited to the supervision meeting related to the claimant sending the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter.

80. It was normal practice for Ms Denham to conduct supervision meetings with the respondent's employees and she conducted these meetings regularly. She also gave evidence that one had not taken place with the claimant because Mr Watson was supposed to do it but was too busy, and that there were also two other supervision meetings with other employees scheduled for same day. Mr Watson also said supervision meetings took place all the time.

81. Ms Denham had begun meeting the claimant regularly as part of the outcome of the incident in July 2018 and it appeared to the Tribunal that inviting the claimant to his first supervision meeting the following month was consistent with that recently adopted approach.

82. Ms Denham said the reason for inviting the claimant to the supervision meeting was that she had concerns which had built-up in relation to the claimant's attitude and performance. Ms Denham in evidence had given examples of concerns she had in relation to the claimant's attitude and performance, as did Mr Watson. Her evidence that she asked Ms Pitman to attend, which was unusual, and gave the reason for this as being that she was concerned in relation to the claimant's attitude, was consistent with that stated reason.

83. Mr Watson said that he did not know the supervision meeting with the claimant was taking place beforehand and there was no suggestion that he did. The disclosure email was not sent to or copied to Ms Pitman, and there was no suggestion that she was aware of it at any stage.

84. The disclosure email was copied to Ms Denham but she said she received numerous emails every day and it could take her time to get to them and that she didn't know when she read it, and didn't remember ever reading it before the Tribunal proceedings. Ms Denham's evidence also suggested that if an email was sent to Mr Watson and related to health and safety and she was only copied in, she would assume Mr Watson was dealing with it. The Tribunal also noted in this context that it was not unusual for the claimant to raise health and safety issues, as referred to above, and it appeared from Ms Denham's evidence, in particular in relation to the claimant's previous reports

of health and safety concerns and the discussion which took place at the supervision meeting itself, that she did not show any great interest or take much involvement in health and safety matters. She said she felt it was outwith her knowledge, she considered that she was not responsible for health and safety matters, Mr Watson was, and she did not get involved in them, they would simply be passed to Mr Watson to deal with. Accordingly, the Tribunal considered that it was plausible that Ms Denham either didn't see the disclosure email at all or, if she had noticed such an email had come in to her email inbox, it may not have registered with her as it related to health and safety and was sent to Mr Watson and only copied to her.

85. Even if Ms Denham had noticed that the disclosure email had come in to her email inbox and it had registered with her, for the invitation to the supervision meeting to have been motivated by it, Ms Denham would not only have had to have noticed that the disclosure email had been received in her inbox almost as soon as it was received, she would then have had to have promptly read it and been sufficiently motivated by its contents to decide to act upon it as a priority by inviting the claimant to a supervision meeting because of it, all in the short period between the claimant sending it and her meeting him as he passed her door on the way to his workshop shortly afterwards. In the circumstances that the disclosure email was sent to Mr Watson and copied to her, it related to health and safety, and in light of the degree of interest and involvement Ms Denham took in relation to health and safety issues, the Tribunal considered that, whilst that was possible, it was unlikely.

86. The Tribunal also considered it unlikely that Ms Pitman would have been asked to accompany Ms Denham to the supervision meeting and complete the first two parts of the form until a decision had been made to invite the claimant to the supervision meeting. That being the case, for the invitation to the supervision meeting to have been motivated by the claimant sending the disclosure email, Ms Denham would have had to have arranged with Ms Pitman that she would accompany her to the supervision meeting and ask her to complete the first two parts of the form and Ms Pitman then to have done so in a relatively short space of time between receipt of the disclosure email

on the morning of 30 August 2018 and the supervision meeting taking place that afternoon. Again, the Tribunal considered that, whilst that was possible, it was unlikely.

87. Much of the evidence about what was discussed and what happened at the supervision meeting was not in dispute. The material issues where the evidence of the claimant on one hand and Ms Pitman and Ms Denham on the other was at odds related to the extent of the discussion in relation to health and safety issues at the meeting , some of the things which the claimant allegedly said during the general discussion towards the end of the meeting, whether or not Ms Pitman and Ms Denham interpreted the claimant's behaviour as being aggressive or hostile towards the end of the meeting and what allegedly occurred which gave rise to that impression.

88. In relation to the extent of the discussion regarding health and safety issues at the supervision meeting, there was a conflict in the evidence between the claimant's version of the discussion on the one hand and Ms Pitman's and Ms Denham's version on the other in that the claimant said that he had given the lack of gas safety certificates for kitchen equipment and the gas boiler needing a new gasket as examples of his health and safety advice that was being ignored and that he explained what he meant by the requirement for a gasket to be fitted to the boiler. Taking into account the following, the Tribunal preferred Ms Pitman's and Denham's version of the extent of the health and safety discussion:

89. Ms Pitman's and Ms Denham's evidence that the only example the claimant gave with reference to his health and safety advice being ignored was families still walking in areas used by delivery vehicles and that his only mention of the boiler was to say that a gasket was to be fitted to it was clear and consistent and they corroborated one another in this respect.

90. Although not a particularly strong indicator as the Tribunal found that there were other omissions in the notes, the respondent's witnesses' evidence was also consistent with the notes of the supervision meeting to the extent that the notes did not mention the lack of gas safety certificates for kitchen equipment

as being an example the claimant gave of his health and safety advice being ignored and the notes were not clear as to whether the gas boiler needing a new gasket was a separate point that was made rather than an example the claimant gave of his health and safety advice being ignored. Also, the use of the question mark and the erroneous reference to "gaskit" rather than "gasket" in the notes was consistent with Ms Pitman's and Ms Denham's evidence that there was no further discussion or explanation given in relation to the claimant's statement that a gasket was to be fitted to the boiler and they did not know what he was referring to, rather than the claimant 's evidence that he gave an explanation in relation to this.

91. It was unlikely, in the Tribunal's view, that the claimant would have given the fact that the gas boiler needed a new gasket as an example of his health and safety advice being ignored as the issue had only arisen at all the previous afternoon, the claimant did not know about Mr Watson's intention to turn the boiler on and the fact that there was an at risk sticker on the boiler until that morning, the claimant had not discussed his concerns with anyone within the respondent's organisation and he had only a matter of hours before sent the disclosure email which was the first time he had brought it to anyone's attention.

92. It also appeared to the Tribunal that Ms Pitman and Ms Denham did not take particular interest in the health and safety issues the claimant mentioned and did not think anything to do with health and safety was relevant to the supervision meeting. They both said that health and safety was outwith their area of knowledge, that they did not explore any of the issues the claimant raised with him and simply referred him to Mr Watson in respect of any health and safety issues. When it was put to him, the claimant said he couldn't remember whether he was just referred to Mr Watson when he mentioned any health and safety related issues at the supervision meeting.

93. In relation to the general discussion towards the end of the supervision meeting, and the question of whether or not Ms Pitman and Ms Denham genuinely interpreted the claimant 's behaviour as being aggressive or hostile at one point in the meeting and their description of the events that led them to

that conclusion, the evidence of the claimant on one hand and Ms Pitman and Ms Denham on the other was at odds in some material respects. Ms Pitman's and Ms Denham's evidence was that the claimant said he hated his job and that he said he was doing the bare minimum and gave an example of that, being that there were tasks that he could do himself but he now outsourced them, such as a vacuum cleaner he could have fixed himself but outsourced it instead. The claimant denied that he said that he hated his job and that he said he was doing the bare minimum and did not agree that he gave the example of doing the bare minimum referred to. Ms Pitman and Ms Denham described the claimant's behaviour as being aggressive or hostile at one point in the meeting and described events that led them to that conclusion i.e. the claimant standing up, throwing a pen down on table and asking if he was being sacked while standing over Ms Pitman. The claimant accepted that he asked if he was being sacked and that he stood up at one point and was asked to sit down. He denied, however, that he threw down his pen or that he stood over Ms Pitman at the point at which he stood up. Taking into account the following, the Tribunal concluded that the respondent's witnesses' version of these matters should be preferred:

94. In relation to the claimant allegedly saying that he hated his job and that he was doing the bare minimum and giving the outsourcing example of that and in relation to Ms Denham forming the view that the claimant had been hostile, and Ms Pitman that he had been aggressive, and the events that led them to that conclusion referred to at paragraph 93 above, both Ms Pitman's and Ms Denham's evidence was clear and entirely consistent in relation to these matters and they corroborated one another in this respect.

95. Although there was some suggestion of a poor relationship between Ms Denham and the claimant, that was not the case with Ms Pitman, in fact there was some evidence which suggested that there was a good relationship between Ms Pitman and the claimant at the time. Ms Pitman's evidence, which the claimant did not dispute or contradict, was that, upon her telling the claimant she was coming to the supervision meeting with Ms Denham, the claimant had said to her that he was glad she was coming. There was

no suggestion that Ms Pitman had any animosity towards the claimant or bore him any ill-will at the time of these events and she appeared to take an even handed approach in her dealings with the claimant in relation to the incident in July 2018 and had not sought to use it against him. The Tribunal did not think it was realistic that Ms Pitman and Ms Denham would conspire to fabricate a false narrative that the claimant said and did the things they alleged or that they formed the view that the claimant had been hostile/aggressive, and the events that led them to that conclusion to present him in a negative light and falsely report these things as fact to Mr Watson to complain about his attitude and behaviour.

96. Mr Watson's evidence was also that Ms Pitman and Ms Denham reported to him shortly after the supervision meeting, that they were quite alarmed and they said the claimant had displayed an aggressive attitude and that he had said that he hated his job and that he was doing the bare minimum.

97. The claimant himself said that he was very defensive and not happy with the way the meeting was going. He said that the meeting was strained. He also accepted that he asked if he was being sacked and that he stood up at one point and was asked to sit down. He denied, however, that he threw down his pen or that he stood over Ms Pitman at the point at which he stood up.

98. The notes of the supervision meeting mentioned that the claimant said he was doing the bare minimum. They did not, refer to the claimant giving the outsourcing example or to him saying he hated his job. However the Tribunal considered that, given the specificity of the outsourcing example, it would have been a particularly unlikely matter to fabricate and, in relation to whether the claimant said he hated his job, the Tribunal did not consider that this was out of step with some of the other things the claimant said at the meeting.

99. The Tribunal noted that there was no mention of the claimant becoming aggressive in the notes of the supervision meeting. Nor was there any mention of the claimant throwing down his pen and standing over Ms Pitman who was sitting down. Ms Pitman gave an explanation for this to the effect that the notes of the meeting were intended to capture what was actually said

at the meeting rather than the impression Ms Pitman and Ms Denham got from what was said or how they interpreted the claimant's behaviour. The Tribunal considered that this was a plausible explanation in relation to Ms Pitman and Ms Denham interpreting the claimant's behaviour as being aggressive or hostile not being captured in the notes, although it did not explain the fact that there was no mention of the claimant throwing down his pen or standing over Ms Pitman while saying am I being sacked. The Tribunal did however also notice that the notes of the supervision meeting did not refer to the claimant standing up at one point, which the claimant accepted he did do, indicating that not all of what was happening in relation to body language or actions at the meeting was included in the notes.

100. The Tribunal considered whether the fact that the supervision meeting ended with a statement that another meeting would be rescheduled for two weeks and Ms Denham in her evidence said that she expected that to happen indicated that Ms Denham and/or Ms Pitman were not really concerned about the claimant's behavior at the supervision meeting, which could cast doubt on whether the claimant had said and done the things that they alleged and that they had a genuine impression that the claimant's behaviour had been aggressive or hostile. The Tribunal did not consider that that was the case i.e. that Ms Pitman and Ms Denham were actually unconcerned by the claimant's behavior at the supervision meeting, that the claimant had not said and done the things that they alleged and that they did not have a genuine impression that the claimant's behaviour had been aggressive or hostile when taken together with the evidence of Ms Pitman and Ms Denham as to what happened immediately after the supervision meeting came to an end and how they felt, referred to at paragraph 103 below, which, in the Tribunal's view, was consistent with Ms Pitman and Ms Denham being very concerned about what had happened at the supervision meeting. The Tribunal also considered that that could be a natural way to bring an uncomfortable meeting to an end as much as it could be a natural way to bring a meeting to an end at which nothing remarkable had happened. Ms Denham also said in evidence that she was not surprised that the claimant was dismissed

101. Based on what the Tribunal had concluded had occurred at the meeting, the Tribunal did not consider that Ms Pitman and Ms Denham forming the impression that the claimant had been aggressive or hostile was unlikely or implausible. However, whilst accepting Ms Pitman's and Ms Denham's evidence in this respect, the Tribunal did also recognise that the claimant may not have intended that his behavior or actions be interpreted in this way.

102. There was some reference at the hearing to the claimant and other employees having previously been informed of the possibility of a transfer of the respondent's business and that the employees' employment would transfer to a new owner or they could choose to leave. The claimant accepted that, when saying that he was looking for another job, he did not suggest that the reason for this was linked to the possibility that his employment may transfer on the possible sale of the respondent's business.

103. Both Ms Pitman and Ms Denham gave evidence to the effect that they sat together after the supervision meeting, at first in silence, and that they were both shocked at the claimant's behaviour at the meeting. Ms Denham described them both as being "stunned", she said she was taken aback. Ms Pitman said they sat looking at each other "in pure shock" and she thought she may have said "did that just happen". This specific evidence, about what happened between the end of supervision meeting and going to see Mr Watson struck the Tribunal as detail that the witnesses would be unlikely to invent.

104. Mr Watson, Ms Pitman and Ms Denham all said that there was a discussion between all three of them on 30 August 2018 after the supervision meeting and that no final decision was made to dismiss the claimant at that time.

105. Ms Pitman's evidence was that a further discussion took place with Mr Watson and that the final decision to dismiss was taken at that time by Mr Watson. There was some degree of confusion as to when exactly this took place. Ms Pitman's final position was that it was probably on Friday 31 August 2018. Mr Watson's evidence was that he took the final decision to dismiss up to two days after Ms Pitman and Ms Denham first came to see him on 30 August

2018 and before 3 September 2018. On that basis, and on the basis that 1 and 2 September 2018 was a weekend, the Tribunal concluded that this further discussion took place on 31 August 2018.

106. Ms Pitman's evidence also indicated that she thought Ms Denham was at this follow-up discussion, although, again, it was not entirely clear. Mr Watson was not asked about this. However, Ms Denham was clear that she did not have any further discussions or conversations in relation to the matter after the initial discussion with Mr Watson. The Tribunal considered that Ms Denham was more likely to remember her own involvement in matters correctly rather than Ms Pitman and the fact that Ms Pitman's evidence was that the final decision was made at this further discussion, and Ms Denham's evidence was also clear that she was not involved in the final decision to dismiss the claimant, and Ms Pitman's evidence in this respect was not entirely clear in any event, the Tribunal accepted Ms Denham's evidence in relation to this matter.

107. Ms Denham, Ms Pitman, and Mr Watson all gave evidence to the effect that Ms Pitman and Ms Denham reported to Mr Watson that they were concerned about the claimant's attitude and behaviour at the supervision meeting and that they reported that the claimant had said he hated his job, that he said he was doing the absolute minimum, he was looking for another job and he was aggressive or hostile. Ms Denham said that she told Mr Watson the claimant was hostile and Ms Pitman said that she told Mr Watson that the claimant was aggressive. Mr Watson also said that Ms Pitman and Ms Denham appeared to be quite alarmed.

108. Ms Pitman said that she recommended dismissing the claimant to Mr Watson but she was candid that she did not actually use the word dismiss, she said she told Mr Watson that she felt the claimant could not continue in his role with what he had said in the meeting. Ms Pitman also said that all three were in agreement that there was no future for the claimant in the company based on events within the supervision meeting and what the claimant said within that meeting.

109. Based on Ms Denham's evidence she did not, in fact, go so far as to say that she was in agreement that there was no future for the claimant in the company. She was also candid in her evidence that, when discussing matters with Mr Watson, she did not mention dismissal or recommend it but she did tell Mr Watson she had concerns about the claimant's commitment to the role given his responsibilities and concerns as to whether they could trust the claimant and concerns about the claimant staying on in his post given the attitude and hostility he displayed.

110. Although Ms Denham did not recommend dismissal, neither she nor any of the other witnesses said that she had expressed a view that the claimant should not be dismissed or that he should be allowed to stay in employment. Based on this and based on what Ms Denham had actually said, the Tribunal accepted that Ms Pitman had the impression that Ms Denham was in agreement that there was no future for the claimant in the respondent's company, albeit that she had not explicitly said this.

111. Mr Watson's evidence was that "they" (Ms Pitman and Ms Denham) recommended dismissal based on the supervision meeting. Again, based on what Ms Pitman and Ms Denham reported to Mr Watson about the claimant's behaviour and attitude at the supervision meeting referred to above and based on what both Ms Pitman and Ms Denham actually said in relation to their views on the claimant's continued employment referred to above, the Tribunal concluded that Mr Watson had the impression that together they were recommending that the claimant should be dismissed. Mr Watson did not differentiate between Ms Pitman and Ms Denham in this respect.

112. There was no suggestion that the reasons for Ms Pitman's and Ms Denham's concerns regarding the claimant and their motivation for reporting these to Mr Watson and making the comments they did in relation to the claimant's continued employment to Mr Watson related to the claimant sending the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter, and the Tribunal did not consider that the evidence supported such a conclusion taking into account the following:

113. Ms Pitman and Ms Denham were both adamant in their evidence that the reasons for their concerns regarding the claimant and the reasons for making the comments they did in relation to the claimant's continued employment related to his behaviour and attitude displayed at the supervision meeting and these were the reasons they gave to Mr Watson for the views they were expressing at the time.

114. As noted above, Mr Watson's evidence was that the recommendation he believed Ms Pitman and Ms Denham were making was based on the supervision meeting.

115. There was no suggestion in any of the evidence of Ms Pitman, Ms Denham or Mr Watson that the fact that the claimant had sent the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter, was mentioned during the discussions referred to above involving Ms Pitman, Ms Denham and/or Mr Watson.

116. As noted above, there was no suggestion that Ms Pitman was aware of the disclosure email at any point prior to the claimant's dismissal, and whilst the disclosure email was copied to Ms Denham, as also referred to above, her evidence was that she didn't know when she read it and didn't remember ever reading it before the Tribunal proceedings and the Tribunal considered that it was plausible that Ms Denham either didn't see the disclosure email at all or, even if she had noticed such an email had come in to her email inbox, it may not have registered with her as it related to health and safety and was sent to Mr Watson and only copied to her. Even if either or both of Ms Pitman and Ms Denham had been aware of the disclosure email at the point at which they were reporting matters to Mr Watson after the supervision meeting, in the circumstances that it related to health and safety, and was sent to Mr Watson, and in light of the degree of interest and involvement Ms Denham and Ms Pitman appeared to take in relation health and safety issues as referred to above, there was no indication from the evidence that they would have been motivated by the disclosure email or its contents, including the fact

that the claimant had contacted the HSE in relation to the matter, to take any action against or in relation to the claimant because of it.

117. For the same reasons discussed at paragraph 95 above, the Tribunal did not think it was realistic that Ms Pitman and Ms Denham would conspire to create a false narrative that they had genuine concerns about the claimant's attitude and behaviour at the supervision meeting and then report these concerns and make the comments to Mr Watson about the claimant's continued employment for those reasons, when the real motivation for doing so was related to the claimant sending the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter.

118. The Tribunal considered whether the existence of the possible transfer of business referred to above cast doubt on whether Ms Pitman and Ms Denham had genuine concerns about the claimant's attitude and behaviour at the supervision meeting, which may in turn cast doubt on whether they reported these concerns and made the observations that they said they did to Mr Watson, and/or their asserted motivation for doing so, and concluded it did not. This was because it was noted that the claimant accepted that he did not suggest at the supervision meeting that the reason he was saying he was looking for another job was linked to the possibility that his employment may transfer on the possible sale of the respondent's business, and even if he had, the Tribunal also considered that although that may have explained the claimant saying he was looking for another job, it would not have explained the claimant saying that he hated his job and was doing bare minimum or explained the claimant's behaviour referred to above which Ms Pitman and Ms Denham interpreted as being aggressive or hostile.

119. As referred to above, the fact the supervision meeting ended with a statement that another meeting would be rescheduled for two weeks and Ms Denham in her evidence said that she expected that to happen was not, in the Tribunal's view, a strong indicator that Ms Pitman and Ms Denham were actually unconcerned by the claimant's behavior at the supervision meeting.

120. Mr Watson gave evidence in relation to his concerns about what Ms Pitman and Ms Denham were reporting to him had happened at the supervision meeting and the reasons for the claimant's dismissal. He said that when Ms Pitman and Ms Denham reported to him what had happened at the supervision meeting, he thought that there was no spirit of co-operation from the claimant and he was concerned that the claimant was not working closely with his manager, which he considered was essential. He said that he was planning to retire from the business and needed to leave it in good hands, make sure that the system was safe and that people could work co-operatively together and the claimant expressed contempt for reporting to his manager in a meeting to discuss workload. He said he was concerned that, with the claimant having expressed aggression and that he hated his job, it would be very difficult for Ms Denham to work with somebody who displayed that type of attitude and if someone says they hate their job and are doing the minimum it's very difficult to resile from that. He also said that it is important for work to be prioritised for patient care and safety and he had no confidence that that would be done.

121. Mr Watson stated that the reason he dismissed the claimant was because at the supervision meeting he displayed aggressive behaviour, he made a clear admission that he was doing the absolute minimum, that he was outsourcing work to other places when he would normally do it himself and he was looking for a job elsewhere.

122. He said the decision to dismiss was based on feedback from Ms Denham and Ms Pitman, and it came as a recommendation from them based on the supervision meeting, but the final decision was his. He also gave evidence that he had no reason to disbelieve Ms Denham and Ms Pitman and he was confident that what they reflected to him was the correct position.

123. Mr Watson denied emphatically that the claimant's dismissal was in any way connected to or affected by the disclosure email or its contents including the fact that he had contacting the HSE gas safety advice line about the matter. Mr Watson gave evidence to the effect that he never had an issue with the claimant raising health and safety issues before, he would expect him to bring

these issues to his attention and it was part of his job to advise on health and safety issues. He also pointed out that the repair to the boiler had already been instructed.

124. Ms Pitman also gave evidence in relation to what she understood the reason was for the claimant's dismissal which was generally consistent with Mr Watson's evidence is this respect. She said the decision was taken that it was too high a risk to continue to employ the claimant in light of his attitude. Ms Pitman also said it was agreed that there was no future for the claimant at the company based on the events and what was said at the supervision meeting.

125. In relation to the production of the letter of dismissal, Ms Pitman's evidence was that the letter was handwritten by Mr Watson and given to her to type up and Mr Watson remembered signing the letter which had been written on his instruction. The claimant gave evidence in relation to being given the letter of dismissal and the extent of the discussion at that time and asking for and being given a copy of the supervision notes. This evidence was not disputed by the respondent.

126. There was little evidence led by either party in relation to the appeal process and there was no material dispute between the witnesses in relation to the evidence which was heard in this respect.

127. Taking the evidence as a whole, other than in the email exchanges between the claimant and Mr Watson on 30 August and 3 September 2018 referred to above and during the short conversation between the claimant and Mr Watson on 3 September 2018 referred to above, there was no suggestion in any of the evidence of the claimant, Mr Watson, Ms Denham or Ms Pitman that the fact that the claimant had sent the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter, was mentioned, whether at the supervision meeting, during the discussions between Mr Watson, Ms Denham and Ms Pitman after the supervision meeting, during the appeal process or at any other time, or that the claimant mentioned that he thought his dismissal was in any way connected with doing so.

128. The claimant accepted that he did not mention at any stage during the appeal process that he thought that the reason for his dismissal was that he had made a protected disclosure. The claimant gave an explanation for this which was to the effect that this wasn't mentioned in his dismissal letter, he was answering the matters that were in his dismissal letter and he didn't think one could appeal against anything that was not in the dismissal letter. The Tribunal was not convinced by this explanation as this would appear to indicate the claimant thought that if an employee appealed a decision by their employer to dismiss them, and they knew the real reason they were dismissed was a different, wholly unfair, reason to the one the employer asserted, that could not be the basis for their appeal if the employer had not mentioned it. The Tribunal also noted that the minutes of the appeal hearing noted the claimant drawing attention to other matters at the appeal hearing that were not referred to in the dismissal letter and were not the reasons for his dismissal asserted by the respondent.

Relevant law

Protected disclosure

129. The Employment Rights Act 1996 ('ERA') contains provisions in relation to protected disclosures.

Section 43A of the ERA provides a definition of "protected disclosure" as follows:

"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

Section 43B(1) of the ERA provides a definition of "qualifying disclosure" as follows:

"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, is being or is likely to be deliberately concealed."

130. For a disclosure to fall within the definition of a "qualifying disclosure" as defined in Section 43B of the ERA it must disclose information.

131. Section 43L of the ERA provides that the disclosure of information does not need to disclose information the recipient was not already aware of.

132. In **Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, EAT**, the Employment Appeal Tribunal (the "EAT") stated that, "the ordinary meaning of giving 'information' is conveying facts".

133. In **Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA,** the Court of Appeal held that 'information' in the context of Section 43B of the ERA is capable of covering statements which might also be characterised as allegations.

134. The Court of Appeal in **Kilraine** also made clear that the factual context in which a disclosure is made is highly relevant to the question of whether or not it amounts a qualifying disclosure.

135. In relation to disclosures which give information about an actual or potential breach of a legal obligation, where that obligation is not obvious, the

disclosure may have to identify the source of the obligation, however in such circumstances, the identification of the legal obligation would not have to be detailed or precise but would have to be more than a belief that certain actions are wrong, **Eiger Securities LLP v Korshunova 2017 ICR 561, EAT.**

136. For a disclosure to fall within the definition of a "qualifying disclosure" as defined in Section 43B of the ERA it must, in the reasonable belief of the worker making the disclosure, tend to show one more of the matters referred to at Section 43B(1)(a) to (f) of the ERA noted above (the "relevant failures").

137. For a disclosure to fall within the definition of a "qualifying disclosure" as defined in Section 43B of the ERA it must also, in the reasonable belief of the worker making the disclosure, be made in the public interest.

138. A mixed subjective and objective test needs to be applied to assessing whether or not a worker holds a reasonable belief. The subjective element is that the worker believes that the information disclosed tends to show one of the relevant failures/is in the public interest and the objective element is that the belief must be reasonable (See for example **Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT**).

139. As was highlighted in **Darnton v University of Surrey 2003 ICR 615, EAT,** this means that there can be a qualifying disclosure of information even if the worker is wrong that it tends to show a relevant failure. The same can be said of the requirement that in the worker's belief, the disclosure is made in the public interest.

140. The belief needs to be that the information disclosed tends to show a relevant failure has, is or is likely to occur, not that it actually has, is or is likely to. However, a belief that it actually has, is or is likely to occur can be relevant to establishing what the worker's belief was at the relevant time, **Taylor v University Hospitals Birmingham NHS Trust EAT 0039/14.**

141. The particular reasons why the worker holds the belief, whilst relevant, are not of the essence as was held in **Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR**

731, CA. In principle, a Tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his or her belief but nevertheless find it to have been reasonable for different reasons not articulated at the time.

142. Motivation is relevant to the determination of whether or not a worker has a reasonable belief that a disclosure is made in the public interest to the extent that it is one of the factors to be taken into account. However, it is not determinative and the correct test is, did the worker reasonably believe that the disclosure was in the public interest, not was the worker motivated to make the disclosure in the public interest. It is possible for a worker who is motivated predominately, even wholly, by self-interest to also reasonably believe that his or her disclosure is made in the public interest, as observed in **Chesterton Global Ltd**.

143. Section 43C of the ERA provides as follows:

"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —

(a) to his employer…."

Unfair Dismissal

144. Section 103A of the ERA provides that the dismissal of an employee is automatically unfair where the reason (or, if more than one reason, the principal reason) for his or her dismissal is that he or she made a protected disclosure.

145. The substantive or procedural fairness of the decision to dismiss, which would be central to the assessment of claims of 'ordinary' unfair dismissal under Section 98 of the ERA, is not the critical issue in the assessment of an automatically unfair dismissal claim based on Section 103A of the ERA, as was highlighted in **ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA.** What matters is, was the fact that the employee made a protected disclosure the reason (or, if more than one reason, the principal reason) for the dismissal.

146. Section 108(3)(ff) of the ERA provides that the continuous service qualification of two years that applies to claims of 'ordinary' unfair dismissal under Section 98 of the ERA does not apply to claims of automatically unfair dismissal under Section 103A of the ERA. The cases of **Smith v Hayle Town Council 1978 ICR 996, CA** and **Ross v Eddie Stobart Ltd EAT 0068/13** provide that where the employee has been continuously employed by the respondent for less than two years, the burden of proof will be on the employee to show, on the balance of probabilities, that the reason for dismissal was the automatically unfair reason (in this case that the reason (or, if more than one reason, the principal reason) for dismissal is that the employee made a protected disclosure). This reverses the burden of proof that applies to claims of ordinary unfair dismissal, where the burden of proof lies on the employer.

147. The requirement in Section 103A of the ERA that the disclosure is 'the reason (or, if more than one, the principal reason) for the dismissal' means that for the claim to succeed, it needs to be established that the disclosure was not only a reason, but rather that it was the employer's "primary motivation" as observed in **Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA**.

148. In **Croydon Health Services NHS Trust v Beatt 2017 ICR 1240, CA** the Court of Appeal provided the following guidance in relation to identifying the reason for an employee's dismissal: 'the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision — or, as it is sometimes put, what "motivates" them to do so'.

149. In **Kuzel v Roche Products Ltd 2008 ICR 799, CA**, the Court of Appeal endorsed the approach that it is permissible to draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact, stating that a tribunal assessing the reason for dismissal can draw 'reasonable inferences from primary facts established by the evidence or not contested in the evidence'. However, a tribunal will not be obliged to draw such inferences.

150. The issue of the employee's job role may be relevant when determining the reason for dismissal in a protected disclosure case (see for example **Blackbay Ventures Ltd (t/a Chemistree) v Gahir 2014 ICR 747, EAT**). In that case the EAT made the observation that, concluding that an employee was dismissed for making disclosures that she was employed to make would be a surprising conclusion to reach.

Submissions

151. The parties each provided outline written submission to the other party and to the Tribunal, which were supplemented in oral submissions. The following is a summary.

Claimant's submissions

152. The claimant submitted that, contrary to the stated reason for dismissal, the respondent unlawfully terminated the claimant's contract of employment on 3 September 2018 by reason of him making a protected disclosure. The claimant said that the protected disclosure he made was his email to Irvine Watson on the 30th August 2018 (referred to in this Judgment as the "disclosure email"). The claimant had also confirmed that there were no other communications being relied upon as being protected disclosures themselves or as part of or in combination with any other disclosures.

153. The claimant said the respondent had breached the following statutory provision:

"The Employment Rights Act 1996, Section 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

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

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

(d) that the health or safety of any individual has been, is being or is likely to be endangered,"

154. Reference was made to the following statutory provision:

"Section 43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure

(a) to his employer,"

155. The claimant submitted that on 29th August 2018 Mr Watson signed both the Warning Advice Notice, a copy of which was produced at page 41 of the Joint Bundle (on which the "At Risk (AR) because of an UNSTABLE FLAME" box was ticked, and "has been turned off and a DANGER DO NOT USE LABEL affixed" box was ticked), and the Gas Safety Certificate, a copy of which was produced at page 42 of the Joint Bundle (where under the heading INSPECTION DETAILS, at the APPLIANCE SAFE TO USE box the word NO is entered).

156. The claimant said that on 30th August 2018, at approximately 10am the claimant went to Mr Watson's office to hand in an expense claim form, Mr Watson asked him switch on the boiler, so he went to the plant room and saw that the boiler had a Warning AT Risk Do Not Use label affixed. He knew it was an offence to turn the boiler on, so he called the HSE gas safety advice line and received confirmation that it was an offence.

157. The claimant said he sent Mr Watson the disclosure email at approximately 10.30am (on 30th August 2018) and told him it was an offence under the "Gas Safety (Installation and Use) (Amendment) Regulations 2018, Regulation 34 (1) The responsible person for any premises shall not use a gas appliance or permit a gas appliance to be used if at any time he knows or has reason to suspect it cannot be used without constituting a danger to any person.".

158. It was submitted that Mr Watson instructed the claimant to turn on the boiler, giving him permission to turn the boiler on. The claimant then made reference to the following further statutory provision:

"Regulation 34 (2) For the purposed of paragraph (1) above, the responsible person means the occupier of the premises, the owner of the premises and any person with authority for the time being to take appropriate action in relation to any gas fitting therein."

159. The claimant said that Mr Watson and Ms Pitman submitted that Ms Denham supported the action of dismissal, however she has gone on record in this process to say she would have had let him continue in his job, by saying she would have scheduled a meeting for a later date and stating that she never asked for him to be dismissed, supporting the assertion that the dismissal was unjust.

160. The claimant concluded his submissions by addressing remedy and said that he was claiming £23,870.51 in compensation, factoring in the current, to date, and projected loss of earnings, based on previous earnings history while employed and taking into consideration the following contributing factors: he had applied for over 200 jobs in the last six months since his dismissal without success, he believes this is because he was dismissed and he has been left with no means of supplying a future employer with a satisfactory reference based on the nature of his dismissal from the respondent. It is therefore reasonable to project that under the current circumstances this outcome is most likely to persist for a least the next six months.

161. The claimant also said he claimed a 25% ACAS uplift because he was not offered any meetings or mediation before his dismissal, and had never previously been given any warnings, either verbal or written.

Respondent's submissions

162. The respondent's representative said that the respondent refuted the claimant's claim that his dismissal was automatically unfair contrary to Section 103A of the Employment Rights Act 1996 and set out that the claimant, an

employee with less than two years' service, was dismissed due to behavioral and attitudinal concerns that he displayed during the course of a supervision meeting with Ms Pitman and Ms Denham.

163. The respondent denied that the claimant had made any qualifying protected disclosure and even in the event that it is held by the Tribunal that he did, this was not the reason for his dismissal.

164. The respondent's representative submitted that the claimant has failed to provide any substantive evidence of efforts taken to mitigate his loss and as a result, should the claimant succeed, then any compensation in respect of loss of earnings should be reduced by 100%. The respondent's representative did however accept that the respondent had earlier conceded that the claimant had applied for over 200 jobs since his dismissal. It was submitted that the respondents were under no obligation to consider the ACAS Code of Practice on Disciplinary and Grievance Procedures in relation to the claimant's dismissal as he lacks the requisite service to complain of unfair dismissal.

165. The respondent's representative submitted that the Tribunal should find in favour of the respondent and should dismiss the claimant's claim.

166. The respondent's representative made reference to the witness evidence and invited the Tribunal to prefer the evidence of the respondent's witnesses over that of the claimant. He submitted that the respondent's witnesses gave evidence in a credible, reliable and wholly believable manner. He said that they presented as hard working business people who have worked extremely hard to make their business successful, we have heard that the respondents had concerns regarding the claimant's attitude prior to the supervision meeting, the respondent's recollection of proceedings was entirely credible and honest and it was submitted that the respondent's evidence should be accepted. The respondent's representative said that the respondent invested in the claimant's Health and Safety training therefore the narrative that he has been dismissed for raising health and safety concerns simply does not ring true, Mr Watson was categorical in his evidence that he acted upon the events

of the supervision meeting of 30 August when dismissing the claimant, and no other reason. He said that Mr Watson is a hardworking and experienced business owner who was frank with the Tribunal as to the difficulties he had had in finding a reliable contractor for his business, and that whilst there was a period in which there was a lack of a Gas Safe Certificate, he at all times acted in accordance with all legislation and sought to have the correct professionals service the appliances at this premises.

167. The respondent's representative said that the claimant's evidence should be treated with considerable caution and circumspection, that the claimant gave evidence in an inconsistent way and his answers were framed in such a way as to attempt to justify his claim on the basis of evidence which, in the respondent's representative's submission, was insubstantial at best, and at worst non-existent. The respondent's representative suggested that the claimant framed his answers in a way to best suit his circumstances rather than honestly and truthfully. He said that, in particular, the claimant effectively denied that his behaviour during the supervision meeting was unreasonable despite the fact that two female members of staff described his as being aggressive and feeling threatened by his manner. The respondent's representative claimed that it should not be understated the fact that this was a male member of staff displaying such behaviour to two female members of staff. He said that the claimant was unclear as to what he determined to be the 'protected disclosure', although accepted in oral submissions that the claimant had clarified that it was the disclosure email.

168. The Tribunal was invited by the respondent's representative to make the following findings in fact referred to at paragraphs 169 to 181 below:

169. The claimant commenced employment on 3 October 2016

170. On 29 August 2018 an engineer employed by C Hanlon attended the respondent's premises to carry out a service on the heating boilers.

171. During the servicing Irvine Watson was given a status update by the engineer. Mr Watson was advised that boiler 2 was operating correctly but that boiler 1 had an unstable flame. Mr Watson was advised by the boiler engineer that he

could try and switch the boiler back on and the problem may have cleared however if the flame became unstable the boiler would shut down.

172. On 30 August 2018 the claimant was asked by Mr Watson to try the boiler to see whether the unstable flame would clear. The claimant attended the plant room to find the warning on the boiler. The claimant contacted the HSE and was advised not to switch the boiler on and therefore did not switch the boiler on.

173. On 1 October 2018 the boiler was repaired and brought back into service.

174. On 31 August 2018 the claimant attended a supervision meeting with Ms Janice Pitman and Mrs Sandra Denham. A supervision meeting was given to all members of staff and this was not particular to the claimant.

175. During the course of the meeting the claimant was aggressive and threatening in his manner towards two female members of staff.

176. The Claimant stated that he was doing the bare minimum, complained about having to report to the Home Manager, stated that he was actively looking for a new job and hated his job.

177. Following this meeting Ms Pitman and Mrs Denham raised concerns with Mr Watson and recommended that the claimant be dismissed. The respondent's representative clarified in oral submissions that the respondent's position was that Ms Pittman recommended dismissal, although it was accepted that she didn't use the word dismiss, and Ms Denham was more neutral.

178. The respondent fairly dismissed the claimant as they are entitled to do for an employee with less than two years' service.

179. The respondent dismissed the claimant for the reasons set out in the letter of 3 September, and not any other reasons.

180. The claimant did not make any qualifying protected disclosure. He was employed as the Health and Safety advisor and was simply performing his job. Further the claimant was not disclosing facts but merely an allegation.

181. In all of the circumstances the dismissal was fair.

182. The respondent's representative said the respondent's principal position is that the claimant was fairly dismissed solely for his behaviour and conduct during the supervision meeting.

183. Further the respondent's position is that no protected disclosure was made. The respondent's representative reminded the Tribunal that albeit evidence was led on other Gas Certificate matters, the only protected disclosure claim plead by the claimant relates to the events of 29/30 August 2018 and more specifically the email sent to Mr Watson on 30 August 2018 at 11.04am (as per page of 44 the document bundle) and this is therefore the only matter the Tribunal can consider as an alleged 'protected disclosure'.

184. The respondent's representative submitted that the question the Tribunal needs to consider is 'has the employee made a protected disclosure?' In his submission the answer is no, under section 43(1)(b) of the ERA the claimant has not reported a failure on the part of their employer to comply with a legal obligation. The respondent's representative went on to make the following further submissions:

185. The respondent's representative said that the Tribunal then has to consider if there has been a disclosure of information which conveys facts. In his submission there has not been, the claimant called the HSE as part of his role as Health and Safety Advisor. The respondent's representative referred the Tribunal to the authority *of* **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 (EAT).** In oral submissions the respondent's representative went on to say that that to be a "fact", in this context, the information disclosed needed to be information Mr Watson was not aware of and he was, there would need to be specific reference to the section of the Regulations rather than the Regulations generally and there would need to be more specific reference to the nature of the breach.

186. The respondent's representative said that the disclosure must relate to one of the six types of "relevant failure" and the failure to comply with a legal obligation constitutes this. He said that the employee must have a reasonable

belief that the information tends to show one of the relevant failures. In the respondent's representative submission, it is clear that the claimant's call to the HSE was simply an interaction that would be expected of a health and safety advisor carrying out his day to day duties.

187. The respondent's representative submitted that 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 (section 103A, Employment Rights Act 1996). He said that the boiler issue was not the reason nor was it the principal reason. The reason for the dismissal was solely the claimant's conduct during the supervision meeting and on this basis the claim for whistleblowing must fail.

188. It was submitted that where the employee does not have the qualifying service necessary to bring a claim for ordinary unfair dismissal, the burden is on the employee to show the reason for dismissal, **Kuzel v Roche Products Ltd [2007] IRLR 309 (EAT)**. In this case the claimant lacks the requisite qualifying service and it was submitted on behalf of the respondent that he has failed to discharge the burden of proof.

189. The respondent's representative said that, in addition, whilst the public interest disclosure test is no longer determinative, on cross examination the claimant conceded that he had mentioned the issue with the boiler to Mr Watson to "cover his back" as Mr Watson would have chased him for progress; and not to protect any member of the public.

190. The respondent's representative submitted that the claimant was fairly dismissed by the respondent and that he was dismissed solely for his behaviour during the supervision meeting. The respondent's representative said that during this routine meeting the claimant displayed a lack of interest in his role, discussed his disdain for the position he held, he advised that he was openly looking for another job and behaved in an aggressive and threatening manner, towards two female members of staff, during the course of the meeting. He advised that he was doing the bare minimum. It was this behaviour and only this behaviour which resulted in the claimant's dismissal

and the boiler, or any issue related to that, played no part. It was submitted that the claimant does not have two years' service upon which to claim unfair dismissal and is trying to manufacture a narrative which allows him to raise a claim against his former employer.

191. The respondent's representative said that the respondent spent money sending the claimant on health and safety courses and it would be entirely contradictory for the respondent to spend their own money training a member of staff in health and safety and then dismiss him for raising a health and safety concern and said it quite simply makes no sense.

192. The respondent's representative submitted that the claimant was not entitled to an appeal and the fact that he was offered one, and the respondent hired an independent consultant, spoke to the overall fairness of the process followed.

193. The respondent's representative said that it was principally submitted that the claimant was not automatically unfairly dismissed as a result of him making a protected disclosure, the respondent believes that the claimant was simply doing his job as a Health and Safety Advisor, a job the respondent spent money training him to perform. The respondent's position is that the claimant acted in an aggressive and inappropriate manner at his supervision meeting and was solely dismissed for this and the respondent is of the view that after this occurred the claimant realised that he did not have sufficient service to challenge matters and has fashioned his claim, following advice, to be able to present a claim to the Tribunal. He said that if the Tribunal accepted that submission, then the claimant is not entitled to any compensation. It was further submitted that if the claimant did make a protected disclosure this played no part in the respondent's decision to dismiss.

194. The respondent's representative concluded his submissions by turning to the issue of remedy saying that the respondent's principal position is that the claimants' claim must fail and as such he is not entitled to compensation but if the Tribunal did not accept that then any compensation awarded to the claimant should be reduced by 100% for a failure to mitigate. The

respondent's representative made the claim that as the claimant noted in his evidence that he does not look for work every day, it is the respondent's position that he has failed to adequately mitigate his losses.

Discussion and decision

Protected Disclosure

195. The first issue for the Tribunal to determine was, 'did the claimant make a protected disclosure?'

196. The disclosure relied upon by the claimant as a protected disclosure was the disclosure email. No other matters were being relied upon as being protected disclosures themselves or as part of or in combination with any other disclosure(s). There was no dispute that the disclosure email was sent or that it was received by the person to whom it was sent, Mr Watson, the Managing Director of the respondent. Accordingly, the Tribunal concluded that the claimant did make a disclosure when he sent the disclosure email.

197. For the disclosure to meet the definition of a "protected disclosure" within the meaning of Section 43A of the ERA, it must both have been a "qualifying disclosure" in terms of Section 43B of the ERA, referred to by the claimant in submissions, and the method of disclosure, in particular, to whom the disclosure was made, must comply with the provisions of Sections 43C to 43H of the ERA.

198. In relation to the requirement that, for a disclosure to fall within the definition of a "qualifying disclosure" as defined in Section 43B of the ERA, it must convey facts in accordance with the guidance in **Cavendish,** referred to by the respondent's representative in submissions, a relevant example of the EAT applying the guidance in **Cavendish** was provided in the case of **Royal Cornwall Hospitals NHS Trust v Watkinson EAT 0378/10**. In that case the EAT held that an employee informing the board of the Trust that he had obtained counsel's advice to the effect that the Trust and the associated Primary Care Trust would be acting unlawfully if they did not consult on proposed changes to services 'was giving information about what had to be done' by the Trust and the Primary Care Trust in order to comply with their

legal obligation to consult, and thus was disclosing information in the context of Section 43B of the ERA. In the Tribunal's view there was no material difference between an employee giving information about what had to be done in that case from the claimant giving information about what had not to be done in the present case.

199. The respondent sought to argue that the claimant's disclosure did not convey facts, placing reliance on **Cavendish**. However, following the guidance in **Cavendish** and **Kilraine,** and noting the example provided in **Royal Cornwall**, the Tribunal concluded that the disclosure email did meet the requirement in Section 43B of the ERA to be a disclosure of information in that it conveyed facts that the claimant had contacted the HSE gas safety advice line, he had asked about turning on the boiler marked "at risk" and he had been told by them that switching it on would be a breach of the Regulations and he was not allowed to switch the boiler back on, all in the context that the person the claimant had sent the disclosure email to, Mr Watson, knew that the claimant had already been asked to switch on the boiler, because he had been the person who asked the claimant to do it. The disclosure email did not merely make an allegation, as appeared to be suggested, but even if it did, as observed in **Kilraine**, that would not in itself prevent a disclosure from meeting the requirements of Section of 43B of the ERA in any event.

200. It was suggested that for the disclosure email to meet the requirements of Section 43B of the ERA it would need be information that Mr Watson was not already aware of. However, in accordance with Section 43L of the ERA, that is not required. In any event, although Mr Watson knew there was a problem with the boiler, the respondent did not claim that he already knew before he received the disclosure email that the claimant had contacted the HSE gas safety advice line, he had asked about turning on the boiler marked "at risk" and he had been told by them that switching it on would be a breach of the Regulations and he was not allowed to switch the boiler back on.

201. It was also suggested that, for the disclosure email to meet the requirements of Section 43B of the ERA, it would have needed to specify an actual regulation within the Regulations, not just the Regulations themselves. The Tribunal did not accept that that was a requirement, by identifying the Regulations the claimant had provided sufficient specification in accordance with the guidance in **Eiger Securities** referred to above.

202. It was further suggested that the claimant had not been sufficiently specific about the nature of the breach. Again the Tribunal did not accept that submission as the disclosure email stated that turning on a boiler that was marked “at risk” would be a breach of the Regulations and the Tribunal was not of the view that the claimant needed to be more specific about the nature of the breach in the context, as indicated by the claimant in his submissions, that the recipient of the disclosure email had already asked the claimant to switch the boiler on.

203. The Tribunal then turned its attention to the question of whether or not the claimant held a reasonable belief that the disclosure email tended to show a relevant failure in accordance with Section 43B(1) of the ERA. Applying the guidance in **Korashi**, taken together with that in **Darnton**, that the claimant only needed to hold a reasonable belief and didn’t need to show he was actually right in that belief applying a mixed subjective and objective test, the Tribunal concluded on the evidence that, in the reasonable belief of the claimant, the disclosure email tended to show that a person had or was likely to fail to comply with a legal obligation (with reference to Section 43B(1)(b) of the ERA) and that the health or safety of any individual had been or was likely to be endangered (with reference to Section 43B(1)(d) of the ERA) but not that a criminal offence had been or was likely to be committed (with reference to Section 43B(1)(a) of the ERA) in the circumstances that:

204. At the time the claimant sent the disclosure email he believed that turning on the boiler which had an at risk sign on it was a breach of the Regulations and represented a risk to the health and safety of the staff and residents, he had attended training which suggested this was the case and he had contacted the HSE gas safety advice line and been told that turning on a boiler in such

circumstances would be a breach of the Regulations. Applying the guidance found in **Taylor**, the Tribunal considered that the claimant's belief in this respect was relevant.

205. The claimant also believed that turning on the boiler which had an at risk sign on it was a criminal offence but the claimant's evidence in relation to why he thought that was the case was not clear and it was not clear to the Tribunal what the basis for that belief was.

206. The disclosure email itself stated that the HSE gas safety advice line had told the claimant that turning on the boiler which had an at risk sticker on it would be a breach of the Regulations.

207. As referred to above, approximately 30 minutes to an hour before the claimant send the disclosure email to Mr Watson, he had asked the claimant to switch on the boiler which had an at risk sign on it, without telling the claimant that the engineer had advised him that he could do this. As observed in **Kilraine**, the factual context in which a disclosure is made is highly relevant to the question of whether or not it amounts a qualifying disclosure and the Tribunal considered that this context in the present case was highly relevant as it meant the recipient of the disclosure already knew that the claimant had been asked to switch on the boiler, while the disclosure was informing the recipient that the claimant would be in breach of the Regulations if he did as he was asked.

208. The claimant believed that Mr Watson would ignore the disclosure email. This context appeared to the Tribunal to be analogous to the facts in **Royal Cornwall**, that the employee did not think the employer would consult on proposed changes to services notwithstanding the employee's disclosure to the employer that he had received advice that the employer would be acting unlawfully if they did not do so.

209. To meet the requirements of Section 43B of the ERA the disclosure must also, in the reasonable belief of the claimant, have been made in the public interest. Whilst the respondent's representative was right in submissions in saying that this is not determinative, at least to the extent that it is not sufficient on its own

to mean a disclosure is a qualifying disclosure, it is an essential requirement of the statutory test. The Tribunal concluded that, in the reasonable belief of the claimant, the disclosure email was made in the public interest because, although he appeared to be motivated predominately by self-interest, applying the guidance in **Chesterton Global Ltd**, this is relevant but not determinative and was to be weighed in the balance with the fact that the claimant, in sending the disclosure email also wanted to tell Mr Watson that it was a breach of the law to turn on the boiler and that they shouldn't do it and believed that it was in the health and safety interests of staff and residents of the care home as it was not safe to use the boiler. The Tribunal also considered that the health and safety interests of colleagues and residents of a care home, are by their very nature in the public interest.

210. For a disclosure to fall within the definition of a "protected disclosure" as defined in Section 43A of the ERA the method of disclosure, and in particular, to whom the disclosure is made, must comply with the provisions of Sections 43C to 43H of the ERA. The disclosure email meets the requirement at Section 43C(1)(a) of the ERA, referred to by the claimant in submissions, in that it was sent to Mr Watson, the Managing Director of the claimant's employer.

211. Accordingly, for the reasons set out above, the Tribunal concluded that in all the circumstances, by sending the disclosure email to Mr Watson, the claimant had made a "qualifying disclosure" as defined in Section 43B(1) of the ERA and that the method of disclosure was in accordance with Section 43C(1)(a) of the ERA and that, therefore it was a 'protected disclosure' as defined in Section 43A of the ERA.

Unfair Dismissal

212. The second issue for the Tribunal to determine was, 'was the reason or principal reason for the claimant's dismissal that he made a protected disclosure?'

213. Most of the disputed evidence in the case related to this question. With reference to paragraph 50 at the observations on the evidence above, the

Tribunal did not accept the respondent's representative's submission in relation to the starkly contrasting characterisation of, and the weight to be given to, the claimant's evidence on the one hand and that of the respondent's witnesses on the other.

214. The Tribunal noted that the claimant had been employed by the respondent for less than two years at the date of termination of his employment but also noted that, as this was a claim of automatically unfair dismissal under Section 103A of the ERA, there was no continuous service qualification. The Tribunal also noted, taking into account the guidance in **Smith** and **Ross**, that in these circumstances the burden of proof was on the claimant to show, on the balance of probabilities, that the reason for dismissal was the automatically unfair reason, i.e. in this case, that the reason (or, if more than one reason, the principal reason) for dismissal is that the claimant made a protected disclosure.

215. In determining the reason or principal reason for the claimant's dismissal, following **Croydon** the Tribunal asked itself, what were the factors that were operating on the mind of the decision maker, Mr Watson, which caused him to take the decision to dismiss the claimant i.e. what motivated him. The Tribunal was also mindful of the guidance in **Fecitt** that to establish that the reason (or, if more than one, the principal reason) for the dismissal was that the claimant made a protected disclosure, it needed to be established that the protected disclosure was Mr Watson's primary motivation.

216. As noted above, Mr Watson's evidence was that the reason for the claimant's dismissal was the attitude and behaviour of the claimant at the supervision meeting in that he displayed aggressive behaviour, he made a clear admission that he was doing the absolute minimum, that he was outsourcing work to other places when he would normally do it himself and he was looking for a job elsewhere. Mr Watson denied emphatically that the claimant's dismissal was in any way connected to or affected by the claimant sending the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter. Mr Watson gave evidence to the effect that he never had an issue with the claimant

raising health and safety issues before, he would expect him to bring these issues to his attention and it was part of his job to advise on health and safety issues, which was consistent with his earlier evidence in respect of what the claimant's duties were. He also pointed out that the repair to boiler 1 had already been instructed when he received the disclosure email. The Tribunal noted, with reference to the submissions, that none of the witnesses in the case, including Mr Watson when giving evidence on the reason for dismissal, sought to place any significance on the fact that the claimant is male and Ms Pitman and Ms Denham are female.

217. Following the approach in **Kuzel**, the Tribunal went on to consider if any reasonable inferences could be drawn from the other findings in fact as to the real reason or principal reason for the claimant's dismissal that either supported the claimant's position, that the real reason or principal reason was that he made a protected disclosure by sending the disclosure email, or supported the respondent's position, that the real reason for the claimant's dismissal was the attitude and behaviour of the claimant at the supervision meeting.

218. The Tribunal considered that the following factors were consistent or not inconsistent with Mr Watson's evidence that the reason for the claimant's dismissal was the attitude and behaviour of the claimant at the supervision meeting:

219. Ms Pitman's evidence in relation to what she understood the reason for the claimant's dismissal was, was generally consistent with Mr Watson's evidence in this respect.

220. The dismissal letter was consistent with Mr Watson's evidence is this respect to the extent that it linked the claimant's dismissal to the supervision meeting, although, as stated above, this letter was short and general in nature and contained little detail and so was not a particularly strong indicator either way. The invitation to appeal letter, which provided more detail relating to the reason for the claimant's dismissal was also consistent with Mr Watson's

evidence that the reason for the claimant's dismissal was the attitude and behaviour of the claimant at the supervision meeting.

221. The fact that the elements of the claimant's behaviour and attitude displayed at the supervision meeting that Mr Watson gave as the reasoning for dismissal occurred and were reported to him by Ms Denham and Ms Pitman, or in the case of the aggressive behaviour, that Ms Pitman and Ms Denham interpreted the claimant's behaviour as being such and reported that to Mr Watson, was consistent with Mr Watson's evidence that the reason for the claimant's dismissal was the attitude and behaviour of the claimant at the supervision meeting.

222. Based on what Ms Pitman and Ms Denham reported to Mr Watson relating to their concerns in respect of the claimant's behaviour and attitude displayed at the supervision meeting and the views they expressed in relation to the claimant's continued employment, Mr Watson had thought that they were recommending that the claimant should be dismissed based on the supervision meeting, which again was consistent with Mr Watson's evidence as to the reason for the claimant's dismissal.

223. The Tribunal considered whether or not the existence of the possible transfer of the respondent's business was inconsistent with Mr Watson's evidence as to reason for the claimant's dismissal. This may have been inconsistent to an extent in relation to the claimant looking for another job being part of Mr Watson's reasoning, however this was not a point that was put to Mr Watson and the Tribunal noted that the claimant accepted that he did not suggest at the supervision meeting that the reason he was saying he was looking for another job was linked to the possibility that his employment may transfer on the possible sale of the respondent's business, and even if he had, the Tribunal also considered that, although that may have explained the claimant saying he was looking for another job, it would not have explained the rest of the elements of the claimant's behaviour and attitude displayed at the supervision meeting that Ms Pitman and Ms Denham reported to Mr Watson and that Mr Watson gave as the reasoning for dismissal.

224. The Tribunal considered whether or not the fact that the claimant was not dismissed immediately after the meeting between Ms Pitman, Ms Denham and Mr Watson after the supervision meeting was inconsistent with Mr Watson's evidence as to the reason for the claimant's dismissal and concluded it was not. Mr Watson gave an explanation that the reason the claimant was not dismissed immediately was that, whilst he believed Ms Pitman and Ms Denham that they considered that the claimant had been aggressive in the supervision meeting with colleagues, he did not consider that the claimant would be a risk to residents in this respect and also said that he didn't dismiss immediately because it was not a decision to be taken lightly as he had made an investment in the claimant's training for the role. The Tribunal also did not consider that the delay between the allegations being brought to Mr Watson's attention on the afternoon of 30 August 2018 and the decision to dismiss the claimant taken at some point the following day on 31 August 2018, and the claimant being informed of his dismissal on the next again working day, on 3 September 2018, was a significant delay.

225. The Tribunal also considered whether or not the fact that aggression was not mentioned in the dismissal letter was inconsistent with Mr Watson's evidence as to the reason for the claimant's dismissal and concluded that it was not a particularly strong indicator either way. This was because, as referred to above, the dismissal letter was short and general in nature and provided little detail behind the decision to dismiss the claimant at all and the invitation to appeal letter, sent to the claimant a week later, did refer to the allegation that the claimant had been aggressive at the supervision meeting.

226. The Tribunal considered the claimant's submission to the effect that Mr Watson and Ms Pitman had said Ms Denham had supported the dismissal of the claimant whereas, Ms Denham said that she would have let the claimant continue in his job, by saying she would have scheduled a meeting for a later date and stating that she never asked for the claimant to be dismissed, and that this supported the assertion that the dismissal was unjust. The Tribunal considered whether or not this indicated anything that was inconsistent with Mr Watson's evidence as to the reason for the claimant's dismissal, or

supported the claimant's position that the real reason or principal reason for his dismissal was that he made a protected disclosure, and concluded it did not on the following basis:

227. Ms Pitman did not say in her evidence that Ms Denham supported the dismissal of the claimant, although she did say that all three, including Ms Denham, were in agreement there was no future for the claimant with the respondent's company. Whilst Ms Pitman was wrong about that because Ms Denham didn't go that far, as referred to above, it was accepted by the Tribunal that Ms Pitman genuinely had that impression in the circumstances. Also, whilst Mr Watson did say that Ms Denham recommended dismissal, and he was wrong about that as Ms Denham didn't go that far, as also referred to above, it was accepted by the Tribunal that Mr Watson genuinely had that impression too in the circumstances.

228. The Tribunal noted that neither Ms Denham nor any of the other witnesses said in evidence that Ms Denham would have let the claimant continue in his job. The Tribunal then went on to consider whether this could be inferred from, as the claimant put it in his submission, "by saying she would have scheduled a meeting for a later date and stating that she never asked for me to be dismissed".

229. What Ms Denham actually said in her evidence was that she thought the meeting, which was referred to as being rescheduled when the supervision meeting was being brought to a close, would take place. The Tribunal did not accept that that amounted to the same thing as Ms Denham saying that she would have preferred to have the meeting, or that she thought the meeting should take place at a later date, rather than the claimant being dismissed. The Tribunal did not consider that this, or the fact that Ms Denham did not ask for the claimant to be dismissed, indicated that she thought he should not be dismissed in the circumstances that she was expressing concerns about whether they could trust the claimant and concerns about the claimant staying on in his post given the attitude and hostility he displayed at the supervision meeting and she did not express any view that she would have let the claimant stay in employment and/or thought the claimant should not

be dismissed, and as referred to above, although Ms Denham said she thought another meeting would take place, she also said she was not surprised that the claimant was in fact dismissed. Accordingly, the Tribunal did not consider that an inference could be drawn that Ms Denham would have let the claimant stay in employment or that she thought the claimant should not have been dismissed.

230. In any event, even if Ms Denham would have let the claimant stay in employment and/or thought the claimant should not be dismissed, neither she nor any of the other witnesses suggested that she expressed such a view at all. Furthermore, Ms Pitman had the impression that Ms Denham agreed that there was no future for the claimant at the respondent and Mr Watson had the impression that Ms Denham was recommending dismissal. So, even if Ms Denham would have let the claimant stay in employment and/or thought the claimant should not be dismissed, there was no suggestion that Mr Watson decided to dismiss the claimant knowing that to be the case and despite that being the case.

231. The Tribunal went on consider if, notwithstanding Mr Watson's evidence that the reason for the claimant's dismissal was the attitude and behaviour of the claimant at the supervision meeting and the factors referred to above which were consistent or not inconsistent with that, there were sufficient findings in facts and surrounding evidence which either on their own or taken together would nevertheless support an inference being drawn that the real reason or principal reason for the claimant's dismissal was in fact as asserted by the claimant, i.e. that he made a protected disclosure, and concluded that was not the case taking into account the following:

232. The evidence did not support a conclusion that the reason or motivation for Ms Denham inviting the claimant to the supervision meeting, or for Ms Pitman and Ms Denham reporting what they said happened at the supervision meeting to Mr Watson and making the observations to Mr Watson in relation to the claimant's continued employment they did, related to the claimant sending the disclosure email or its contents, including the fact that the

claimant had contacted the HSE gas safety advice line in relation to the matter.

233. There was no suggestion in any of the evidence that Ms Pitman, Ms Denham and Mr Watson made any mention to one another of the fact that the claimant had sent the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter, at any stage up to and including the end of the appeal process.

234. The subject matter and the implications of the disclosure email, to the extent that boiler 1 should not be used in its current state and to do so would be a breach of the Regulations, was not something that appeared to have a particularly serious impact on the respondent because the repair to the boiler 1 had already been instructed and there was another boiler in place that could act as a back-up and there was no suggestion in the evidence that there was any disruption caused to the respondent's operations before boiler 1 was repaired and brought back in to use.

235. The claimant had raised health and safety concerns with the respondent previously, repeatedly so in relation to the lack of gas safety certificates for equipment in the kitchens, and, other than feeling ignored when he did so, the claimant was not subjected to any other negative consequences as a result. The Tribunal did note that there was a distinction between the disclosure email and previous occasions on which the claimant reported health and safety concerns, in that the disclosure email mentioned the claimant having contacted the HSE gas safety advice line and there was no suggestion that the claimant had done so on previous occasions. However, the indication from the disclosure email was that when the claimant contacted the HSE gas safety advice line, he was asking for and passing on advice received rather than, for example, telling the respondent that he had complained about the respondent or reported the respondent to the HSE. In fact, there was no suggestion in the disclosure email that the claimant had disclosed any information about the respondent at all when contacting the HSE gas safety advice line, and that was explicitly stated by the claimant later in his email of 3 September 2018, which was sent after Mr Watson made the decision to dismiss the claimant

but before this was communicated to him. Taking this distinction into account, the Tribunal considered that the fact that the claimant was not subjected to any negative consequences, other than feeling ignored, as a result of raising health and safety concerns with the respondent on previous occasions was still a relevant indicator tending away rather than towards an inference being drawn that the respondent decided to dismiss the claimant on this occasion for raising and health and safety issues, although not as strong an indicator given the existence of the distinction.

236. The respondent invested in health and safety training for the claimant, as part of which the claimant obtained a NEBOSH qualification. It was part of the claimant's role to advise on health and safety issues and report those which were serious. As part of his role, the respondent expected the claimant to bring health and safety issues and concerns to Mr Watson's attention, which the claimant did on several occasions. As above, the Tribunal did note that there was a distinction between the disclosure email and previous occasions on which the claimant reported health and safety concerns, in that the disclosure email mentioned the claimant having contacted the HSE gas safety advice line. However, noting the same surrounding circumstances as those noted at the paragraph above in relation to the nature of the contact with the HSE, the Tribunal considered that the fact that the claimant's role included advising and reporting on health and safety issues was still a relevant indicator (although, again, not as strong an indicator given the existence of the distinction) tending away rather than towards an inference that the respondent decided to dismiss the claimant for raising health and safety issues, drawing on the observations made by the EAT in **Blackbay Ventures Ltd**.

237. The evidence did not support a finding that Mr Watson was notably angry or annoyed with the claimant in relation to him sending the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter, and this together with Mr Watson responding to the disclosure email asking a series of questions, and then chasing a response to that when he saw the claimant on Monday 3 September

2018 was, in the Tribunal's view, more consistent with Mr Watson treating the disclosure email in the normal course of business and not something that was particularly out of the ordinary than something which motivated him to dismiss the claimant. The Tribunal thought that it would be surprising for an employer, who intended to dismiss an employee because they had made a disclosure, to draw attention to the disclosure by asking a series of questions about it and then chasing a response to those questions when they were not answered.

238. Although the process followed by the respondent in dismissing the claimant involved him being given the opportunity to appeal, which opportunity he took up, it did not include the allegations being put to the clamant, either in writing or at a meeting, prior to the claimant's dismissal. The Tribunal was mindful that this was not a case where the claimant had two years' service, and thus was not a case where the Tribunal was determining whether the claimant's dismissal was procedurally or substantively unfair under Section 98 of the ERA, which may have affected the evidence led by both parties. Nevertheless, based on the evidence the Tribunal did hear, it appeared to the Tribunal that the respondent would have found it difficult to demonstrate that a fair procedure had been carried out, so critical to the determination of a claim for unfair dismissal under Section 98 of the ERA, had the claimant had the requisite two year's continuous service and been able to raise a claim for unfair dismissal under Section 98 of the ERA. However, noting the guidance provided in **ALM Medical Services Ltd**, that the substantive or procedural fairness of the decision to dismiss is not the critical issue in the assessment of an automatically unfair dismissal claim based on Section 103A of the ERA, whilst the Tribunal did consider this a relevant factor to weigh in the balance with the other evidence, it did not consider that any such procedural failure on its own could support an inference being drawn that the real or principal reason for the claimant's dismissal was as asserted by the claimant, i.e. that he made a protected disclosure.

239. The claimant thought that Mr Watson would just ignore the disclosure email. There was also no suggestion that the claimant sought to use or intended to send the disclosure email in accordance with the respondent's whistleblowing

procedure and, other than his email exchange and short conversation with Mr Watson on 30 August 2018 and 3 September 2018 referred above, there was no suggestion that the claimant ever mentioned sending the disclosure email or its contents, including the fact that the claimant had contacted the HSE gas safety advice line in relation to the matter, or that he thought that his dismissal was in any way connected with doing so, be it at the supervision meeting, at the point of dismissal, during the appeal process or otherwise. The Tribunal's view was that these factors indicated that the claimant did not appear to consider that the disclosure email was something that was particularly out of the ordinary or significant. The Tribunal noted that there could be occasions where an employee did not think that a disclosure they made was particularly significant or that it would, or did, motivate their employer to dismiss them, yet that was the reason or principal reason for dismissal. However, the Tribunal's view was also that the indication that the claimant did not appear to consider that the disclosure email was something that was particularly out of the ordinary or significant was more consistent with Mr Watson treating the disclosure email in the normal course of business and not something that was particularly out of the ordinary than as something which motivated him to dismiss the claimant. As also noted above, the Tribunal was not convinced by the explanation the claimant gave for not mentioning that he believed that the reason for his dismissal was that he made a protected disclosure at the appeal stage and thought it likely that if the claimant had truly thought at the time that the real reason for his dismissal was that he had made a protected disclosure, he would have mentioned this at the appeal stage.

240. The claimant was dismissed within four days of him sending the disclosure email. The Tribunal considered that dismissal occurring within a relatively short period of time from when the disclosure was made could, in circumstances where there was a dearth of evidence that dismissal was for a reason unconnected to the disclosure, be an indicator that the reason or principal reason for dismissal was the fact the disclosure was made. However this factor of timing, i.e. the relatively short period of time between the claimant sending the disclosure email and the claimant's dismissal, was not sufficient to justify the drawing of an inference that the real reason or principal

reason for the claimant's dismissal was that he sent the disclosure email in this case in light of the evidence to the contrary and the factors noted above which were consistent or not inconsistent with Mr Watson's evidence that the real reason for the claimant's dismissal was the attitude and behaviour of the claimant at the supervision meeting.

241. Applying the relevant law referred to above, including the guidance provided in **Smith** and **Ross**, that the burden of proof was on the claimant, and the further guidance in **Fecitt,** that to conclude that the reason (or, if more than one, the principal reason) for the dismissal was that the claimant made a protected disclosure it needed to be established that the disclosure was not only a reason, but rather that it was the employer's "primary motivation", and taking into account Mr Watson's evidence as the decision maker as to the reason for dismissal, and the relevant factors and circumstances referred to above, the Tribunal could not and did not conclude that the reason or principal reason for the claimant's dismissal was that he made the protected disclosure. Rather, the Tribunal was satisfied on the evidence that the real reason or principal reason for the claimant's dismissal was as asserted by Mr Watson i.e. the attitude and behaviour displayed by the claimant at the supervision meeting on 30 August 2018. Accordingly, the claimant's claim under Section 103A of the ERA does not succeed.

242. Having concluded that the claimant's claim under Section 103A for unfair dismissal was not successful, the Tribunal did not consider it necessary to go on to determine the question of remedy.

P McMahon
Employment Judge

01 October 2019
Date of Judgment

Date sent to parties **7 October 2019**