Case No.:1600426/2016
1600050/2018
1600899/2018
(Admin Code: V)

EMPLOYMENT TRIBUNALS

Claimant: Mr M. Gregory

Respondent: Kingspan Ltd.

HELD AT: Mold **ON:** 4th – 8th & 11th – 15th March 2019
&
Wrexham (hybrid) 26th – 28th April 2021
In chambers 28 – 29th April 2021 & 10th June 2021

BEFORE: Employment Judge T. Vincent Ryan
Ms. C. Peel
Mr. J. Albino

REPRESENTATION:

Claimant: Ms A. Pitt, Counsel
Respondent: Mr. C. Breen, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. Public Interest disclosures:

    1.1 Disclosures: the claimant made protected disclosures, relating to health and safety and breaches of legal obligation, as alleged, as follows:

        1.1.1 Comments made by the Claimant on January 27th in relation to alleged health and safety matters.
        1.1.2 In the Claimant's grievance on 14th- 15th April 2016.
        1.1.3 In an email to the Respondent's board of directors on 20th June 2016.
        1.1.4 In an email to Mr. Peter Bullough and Mr Philip Smith 13th September 2016.

1.1.5 In emails of 3rd and 4th May 2018 to the Respondent's board of directors.

1.2 Detriments: The Claimant was not subjected to any detriment by any act, or any deliberate failure to act, by the Respondent done on the ground that he made a protected disclosure(s). This claim fails and is dismissed.

1.3 Dismissal: the reason, or principal reason, for the Claimant's dismissal was a breakdown in the relationship of trust and confidence and was not that he made protected disclosures; the breakdown in the relationship was not caused by the fact that the disclosures were made and the decision to dismiss was not materially influenced by the disclosures. This claim fails and is dismissed.

2 Assertion of statutory rights:

2.1 Holiday pay: The claimant asserted his statutory right to holiday pay in emails that he sent to the Respondent in March, April, and May 2018 as alleged.

2.2 Dismissal: the reason, or principal reason, for the Claimant's dismissal was not that he had brought proceedings to enforce a statutory right, or alleged that the Respondent had infringed a relevant statutory right. This claim fails and is dismissed.

3 Disability Discrimination:

3.1 Discrimination arising: wrist pain and discomfort arose in consequence of the Claimant's disability (Carpal Tunnel Syndrome); the Respondent did not treat the Claimant unfavourably because of that. This claim fails and is dismissed.

3.2 Harassment: the Respondent's behaviour towards the Claimant on 27th of January, 30th January and 1st February 2016 was unwanted by the Claimant but it was not related to the claimant's protected characteristic of disability, and insofar as disability formed the background to some of the Respondent's conduct it was not reasonable for the conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account his perception but also all other circumstances of the case. This claim fails and is dismissed.

3.3 Victimisation:

3.3.1 The Claimant did protected acts, as alleged, in the following documents:

3.3.1.1 His grievance raised on 17th February 2016.

3.3.1.2 The email that he sent to the Respondent's board of directors on 20th June 2016.

3.3.1.3 His emails of 3rd April 2018 and 18th April 2018 to Ms P. Mulliner.

3.3.2 The Respondent did not subject the Claimant to a detriment because the Claimant had done a protected act or acts or because the Respondent believed that the Claimant had done, or may do, a protected act. This claim fails and is dismissed.

4 Holiday pay: The Respondent did not fail to pay to the Claimant holiday pay that was properly due to him and it did not make an unauthorised deduction from his wages in the sum of £1,920 or otherwise. This claim fails and is dismissed.

Introduction:

1. The final hearing was part-heard in March 2019. The resumed hearing was re-listed and then further adjourned due to listing and availability issues. Final listing was then affected by restrictions and difficulties consequent upon the Covid 19 pandemic. The resumed hearing in April 2021 was the earliest available date for resumption. This delay in finishing a part-hard case was disappointing and concerning. Before the resumed hearing I wondered whether it would be possible to conduct a fair trial in the light of that delay, but I was satisfied that it was and that we did; in that, I expressed my gratitude not only to my colleagues but to both counsel appearing at the hearing without whose practical, professional, and courteous, constructive approach the hearing could have been fraught; it was not.

2. Counsel for the Claimant noted with disappointment that at the hybrid hearing in April 2021 both Ms Peel and I were using electronic bundles rather than the original paper bundles provided in March 2019, which she thought would have been marked. I confirm that the originals, with any markings, highlighting or annotations were available to us for our deliberations and preparation of the judgment.

3. Notes: whereas Ms Peel and Mr Albino had their full sets of handwritten (including shorthand) notes from the initial hearing to hand, mine were not available to me in circumstances explained to the parties. I am satisfied as to the accuracy of the available notes as compared, discussed, and agreed in chambers. The parties were invited to comment and provide transcripts of any controversial section of evidence in chief or cross examination where they feel special attention needed to be paid to what they say was said by any witness; neither party raised any objection to the panel concluding its deliberations on the agreed notes of Ms Peel and Mr Albino and neither made any other submission on the point; I thank them again.

REASONS

The Issues: The parties presented the following "agreed" list of issues:

1. Discrimination for something arising from disability section 15 Equality Act 2010

The Tribunal has already determined that the Claimant was disabled by reason of his Carpal tunnel syndrome.
The relevant time for the purposes being 27th January 2016 -19th February 2016.

1.7. At the relevant time did the Respondent know or could the Respondent have reasonably been expected to know that the Claimant had a disability?
1.8. Further did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability?
1.9. Did the following constitute unfavourable treatment?
1.9.2. The detriment alleged of harassment of the Claimant by his refusal to use the press brake machine on 27th January 2016.
1.9.3. The alleged treatment on 30th January 2016.
1.9.4. The Respondent informing the Claimant there was no work for him to do and to go home on 1st February 2016.
1.9.5. The Claimant being informed by Jemma Corbett that he was unfit for work.
1.9.6. That the Claimant was not sent vacancies for positions (the Respondent will state there were no suitable vacancies) during his sick leave in June 2016
1.10. Can the Respondent show that the alleged treatment is a proportionate means of achieving a legitimate aim?

2. Harassment Section 26 Equality Act 2010

2.7. Did the Respondent harass the Claimant contrary to section 26 Equality Act 2010?
2.8. Did the Respondent engage in unwanted conduct related to the Claimant's disability the alleged acts being?
2.8.2. The alleged behaviour of the Respondent on January 27th, 2016
2.8.3. The alleged behaviour of the Respondent on 30th January 2016
2.8.4. The Respondent informing the Claimant there was no work for him and to go home on 1st February 2016.
2.9. Did the conduct have the purpose or effect of violating the Claimant's dignity or create an intimidating hostile degrading humiliating or offensive environment for the Claimant?

3. Victimisation Section 27 Equality Act 2010

3.7. Did the Respondent victimise the Claimant by putting the Claimant to a detriment because the Claimant did a protected act?

3.8. Do the following constitute protected acts further to the Claimant's protected characteristic:
  3.8.2. The grievance raised on 17th February 2016.
  3.8.3. The email sent to the board of directors on 20th June 2016.
  3.8.4. Emails of 3rd April 2018 and 18th April 2018 to Pam Mulliner.
3.9. Do the following constitute detriments because of those protected acts:
  3.9.2. Events 20th June 2016
  3.9.3. During the grievance meeting on 13th July 2016
  3.9.4. Accused of interfering with witnesses.
  3.9.5. Allege the Claimant had called Matthew Lowton as a witness when he had not
  3.9.6. Documentary evidence was ignored.
  3.9.7. Undue pressure was applied during the hearing.
  3.9.8. Not permitted to ask questions
  3.9.9. The termination of the Claimant's employment on 18th May 2018.

4. Health and Safety Section 44 Employment Act 1996

4.7. Was the Claimant subject to any detriment by any act, or deliberate failure to act by the Respondent contrary to section 44 employment rights act 1996?
  4.7.2. Was the Claimant put to a detriment on?
    4.7.2.1. 22nd /23rd January 2016
    4.7.2.2. 27th January 2016
    4.7.2.3. 1st February 2016
    4.7.2.4. By the alleged refusal to deal with the Claimant's grievance of 14/15th April 2016
    4.7.2.5. The manner in which the grievance meeting was held on 22nd April 2016
4.8. On 13th July 2016 at the grievance meeting in respect of the following specific allegations of detriment
  4.8.2. Accused of interfering with witnesses.
  4.8.3. Allege the Claimant had called Matthew Lowton as a witness when he had not.
  4.8.4. Documentary evidence was ignored.
  4.8.5. Undue pressure applied during the hearing.
  4.8.6. Not permitted to ask questions
  4.8.7. Following the alleged disclosure on 13th September 2016 refusal to hear the Claimant's grievance.
  4.8.8. Following the alleged disclosure on 13th September 2016 the alleged refusal to hear the Claimant's grievance.
  4.8.9. Following the email to Pamela on 7th May 2018 the decision to dismiss the Claimant.

5. Protected Disclosure s47B Employment Rights Act 1996

5.7. Was the Claimant subject to any further detriment by the Respondent on the grounds the Claimant had made a protected disclosure?

5.8. Did any of the following constitute protected disclosures further to section 47 Employment Rights Act 1996:
  5.8.2. Comments made by the Claimant on January 27th in relation to alleged health and safety matters.
  5.8.3. The Claimant's grievance on 14th 15th April 2016
  5.8.4. Email to the board of directors on 20th June 2016
  5.8.5. Email to Peter Bullough and Phil Smith 13th September 2016
  5.8.6. Emails of 3rd 4th May 2018 to the board of directors
5.9. Did the following constitute detriments in relation to the relevant protected acts above?
  5.9.2. On 1st of February the Claimant was informed there was no work for him, and he was to go home.
  5.9.3. The alleged refusal to deal with the Claimant's grievance on 14th 15th April
  5.9.4. The alleged manner in which the grievance meeting was held on 22nd April 2016
  5.9.5. The alleged behaviour following the email to the board of directors on 20th June 2016
  5.9.6. The refusal of Peter Bullough to hear the Claimants alleged grievance until he was well enough to attend a meeting.
  5.9.7. Following the disclosures on 3rd 4th May 2018 the termination of the Claimant's employment.

6. Unfair dismissal section 98 ERA 1996

6.7. Did the Respondent dismiss the Claimant for a potentially fair reason (SOSR)?
6.8. Or, as the Claimant avers, did the Respondent dismiss the Claimant due to:
  6.8.2. The Claimant raising alleged health and safety issues and /or
  6.8.3. The Claimant raising or making alleged public interest disclosures and/or
  6.8.4. By way of victimisation because the Claimant alleged disability discrimination
6.9. Did the Respondent act reasonably in treating that reason as sufficient reason for dismissal?
6.10. Was a fair procedure followed by the Respondent in respect of the Claimant's dismissal?
6.11. Whether, even if the Respondent did not follow a fair procedure, or the principal reason is found not to be a fair reason would the Claimant's employment have terminated in any event; and/or
6.12. Did the Claimant contribute or cause his own dismissal?

7. Assertion of Statutory Rights Section 104 Employment Rights Act 1996

7.7. Was the Claimant dismissed (and therefore unfairly dismissed) for the principal reason that he asserted a statutory right further to section 104 Employment Rights Act 1996?

7.8. Did the emails from the Claimant in March, April, and 17th May in relation to his holiday pay constitute an assertion of a statutory right.
7.9. If so, was this the principal reason for dismissal?

8. Holiday Pay

8.7. Did the Respondent deduct £1,920 from the Claimants pay?
8.8. If so, was the deduction unauthorised?

Background facts:

9. The Respondent: The Respondent manufactures insulation panels for the construction industry. It is a large employer, employing several thousand employees, with a professional HR department. It operates from more than 100 plants or manufacturing sites, including in Holywell, Flintshire where the Claimant worked, and its headquarters are in County Cavan, Ireland. It has several Divisions with a management structure in each division and within each plant.

10. The Claimant:

10.1. Mr Gregory was employed by the Respondent from 2007 until his dismissal on 18th May 2018, with pay in lieu of notice.

10.2. He was employed as a Senior Operator to reflect his expertise, experience, and training (but not seniority over colleagues who could be considered subordinate to him). He had undergone extensive training and was enrolled on an ILM course. Subject to issues described below, the Claimant was viewed as a reliable, thorough, punctual, meticulous, and hard-working employee whose work and expertise was appreciated by management. However, his relationship with colleagues became strained by what they considered his challenging behaviour, and he considered their bullying. It appears to the tribunal that the Claimant was disliked by some or many of his peer group work colleagues because of his conduct towards them and his manner. There was no evidence before the tribunal that his colleagues' views of him were in any way related to any protected disclosures, protected acts or assertion of rights; the tribunal finds that the dislike was a personal matter or matter of personality (albeit, that said, the Claimant presented himself courteously to the tribunal at all times and the tribunal does not in any sense condone or excuse the apparent personal animosity faced by the claimant because of personality clashes with his colleagues and what they perceived to be his provocative conduct; see 10.6 below).

10.3. At all material times the Claimant was a member of GMB Union, and he was a Health & Safety Representative.

10.4. The Claimant has lived with bi-lateral carpal tunnel syndrome (CTS) since 2006 and this physical impairment is a disabling condition (as

defined by s. 6 Equality Act 2010); the Claimant's symptoms were partially relieved by surgery in October 2016, during a protracted absence form work between February 2016 and his dismissal in 2018. The Claimant has been diagnosed as having traits of autism spectrum disorder, obsessive compulsive disorder and paranoia which have been found not to amount to a disability; the Claimant applied for re-consideration of that judgment but then did not pursue his application; it was withdrawn. He refers to his living with disabling mental impairments, but he does not pursue claims related to them save for victimisation. The Claimant has had certified absence from work owing to stress and anxiety and he has periods of depression.

10.5. Whilst at work, and before an extended period of absence commencing in February 2016, the Claimant was managed/supervised by Mr Waring who would typically manage 16-22 people day to day.

10.6. There was evidence from witnesses, including the Claimant, and from the hearing bundle, that leads us to conclude that some of the Claimant's colleagues considered him as a loner, as being difficult to get on with, "a bit odd and abrasive" (quoted from the Claimant's submissions at paragraph 6) and even that some colleagues found that he was difficult to get on with owing to him being unpredictable, argumentative, provocative and on occasions intimidating. He was accused of going out of his way to antagonise people such as by attracting their attention by whistling at them when asked not to, or by deviating from his path when walking around the site to bump into people. Unbeknown to his colleagues at the time, it seems that he covertly recorded hours and hours of conversations during working shifts, in fact just about all conversations during at least the timescale of the events described below.

10.7. During the matters described below the Claimant would raise all sorts of issues, and not just health and safety related but complaints about his colleagues too and pursue it (them) vigorously with a considerable amount of paperwork and emails. During that he alleged cover-ups, conspiracy against him and collusion by senior management and some of his colleagues. He alleges dishonesty and corruption throughout the Respondent company. The Claimant would keep asking questions and raising issues until he got the answer that he wanted; he did not take "no" for an answer and whilst he challenged others, he would not accept any point of view except his own; he considered himself to be always correct on every issue. The Claimant seems to have routinely voice-recorded shifts and meetings and these recordings were covert. He made very many hours of recordings, his transcripts of which (with comments added) are in the bundle. The tribunal considers the content of the transcripts with some caution taking into account that the recordings were covert, and its suspicion that there was an element of the Claimant setting up colleagues and provoking responses that were

unguarded and that may not have truly reflected what would have occurred but for provocation; the tribunal is concerned that this behaviour may have been with a view to amassing evidence for use in this litigation and the Claimant's recorded comments are therefore self-serving. We did not wholly discount them however and they were considered in so far as specific parts were referred to and audible or any part of a transcript was agreed. Transcripts and recordings were disclosed and available to the tribunal.

11. The witnesses:

11.1. Mr P. Bullough: The Respondent's Divisional Finance Director. Mr Bullough received emails from the Claimant on 13th September 2016 (p403 in the hearing bundle, to which all other page references relate), which is relied upon as a protected disclosure and 14th September 2016 (p.410-412) relied upon as a grievance.

11.2. Ms. J. Corbett: one of the Respondent's HR Officers at the material time (now Manager).

11.3. Mr D. Corrigan: Currently a Divisional Managing Director. Grievance Appeal Officer in relation to the Claimant.

11.4. Mr. J. Doran: Production Manager and Supervisor.

11.5. Mr. V. Gibney: Dismissal Appeal Officer.

11.6. Mr. M. Gregory: The Claimant.

11.7. Mr. T. Hughes: Quality Manager at the material time; Grievance Officer.

11.8. Mr J. Kieran: UK & Ireland Operations Director; Dismissing Officer.

11.9. Mr. P. McGowan: Health & Safety and Environmental Manager.

11.10. Ms. P. Mulliner: Head of HR.

11.11. Mr. J. Waring: Supervisor.

12. Disability – physical impairment:

12.1 The Claimant suffered symptoms of pain and discomfort in his left hand, wrist, and forearm from 2006 onwards and in 2008 was diagnosed with carpal tunnel syndrome (CTS). This affected in particular his left hand. The Claimant made it known to his colleagues that he would suffer pain, occasional numbness and burning sensations with pins and needles, stiffness and loss of grip which varied over time. He self-medicated, and eventually in 2016 he underwent surgery. The Claimant made his difficulties known to his line management. The Claimant was referred to Occupational Health Advisors in 2015 and a report dated 18 June 2015

from Karen Manford of Summit OHSS Limited appears at page 635. The report was based on an assessment that took place on 17 June 2015 at the Respondent's site. This referral was due to anxiety issues. He reported that those issues centred around his relationships with his colleagues and because he had been involved in a disciplinary process. There was also an ongoing investigation into historical grievances that had cited the Claimant. During the assessment and consultation, the Claimant also reported problems with pins and needles in his left hand and said that he had been diagnosed with carpal tunnel syndrome in 2008. He confirmed his reluctance to undergo the then recommended surgery and the condition appeared to settle without the need for surgery. Notwithstanding this the Claimant reported, and it is set out in Ms Manford's report, that he had residual pins and needles in his left hand with a reduction of grip and he was advised to return to his GP for a re-referral for specialist services. Ms Manford advised that the Claimant was fit to work but should be kept to the recommended levels of vibration exposure and existing guidelines when using tools. She also considered that a "manual handling risk assessment be performed of his duties". Her conclusion was that the Claimant was unlikely to be classed as a disabled person under the Equality Act 2010 but that it was advisable to proceed with caution. Neither his anxiety nor CTS affected his daily activities in her view.

12.2 The Claimant submitted Fit Notes from 17 February to 17 March 2015 citing the reason for absence as stress. (Page 628 and following).

12.3 The Claimant was assessed for fitness to work by his GP on 22 February 2016 because of the conditions listed as CTS/stress at work. He was certified as not fit for work. The adjustment section was scored through. That Fit Note was for the period 18 February 2016 to 6 March 2016. The Claimant's subsequent Fit Notes of 7 March and 21 March 2016 only related to stress or anxiety. They commence in the bundle at page 683.

12.4 At page 647 there is a further referral to OH (Summit) of 19 April 2016 which says that from 11 February 2016 until that referral the Claimant's conditions were "carpal tunnel syndrome/stress at work". It referred to a letter dated 11 February 2016 which also appears in the bundle from the Claimant's GP which stated that the Claimant's symptoms at that time were minimal and he could cope working on particular machines namely "top hats" and "roof lights" (the Claimant's complaint at that time was being required to work on the press). The referral was made by Gemma Corbett, HR Manager and in the meantime the Claimant continued to submit Fit Notes to the Respondent citing anxiety rendering him unfit for work without a suggestion of adjustments.

12.5 The Claimant was again referred to Ms Manford for an OH Report following assessment in May 2016. Ms Manford's report of 9 May 2016 is in the bundle at page 651. This followed an assessment that took place at the Respondent's site on 5 May 2016. The Claimant still reported

symptoms of anxiety due to issues at work and pins and needles in his left wrist due to CTS. The Claimant reported intermittent problems with pins and needles in his left hand and in his right hand, but to a lesser degree, and with some reduction of grip. He was subject to further specialist review later in the year and depending on those results there would be consideration of surgical intervention to correct the wrist issues. Ms Manford considered that due to his anxiety issues he was unfit for work. Ms Manford suggested that any return to work in Shop 1 where the Claimant was usually based would be helped by "an individualised manual handling wrist assessment, which would look at Mr Gregory's individual capabilities in his particular job role in which Mr Gregory can actively participate in informing the assessment of his actual capabilities in relation to his current wrist pain". Once again Ms Manford confirmed that it was generally advisable to proceed as though the Equality Act would apply although in her opinion, he was unlikely to satisfy the definition of disability.

12.6 The Claimant would frequently complain to Mr Waring and others about pain in his wrists this was known therefore to the Respondent prior to January 22 2016.

Facts specific to the Claimant's claims as clarified by him at a preliminary hearing held on 4th September 2018 and set out in agreed minutes signed on the same date and not challenged subsequently, and the list of issues (where the clarified claim is under-lined, but the findings of fact are not):

13. <u>January 22/23, 2016: The Claimant suffered a detriment when he was informed by the Respondent that he was being taken off the roof lights machine and was going to be put on the press brake permanently which he had highlighted to the Respondent had an adverse effect on his disability and suggested that it required assessment. (The Claimant says that on 27th January 2015 and 1st February 2015 he pointed out that the equipment ought to have been risk assessed but it was not). He told his manager John Waring. The discussion [incident] on the night shift of 22/23 January 2016 involved his supervisor, Jim Doran. This claim is advanced under Section 44 Employment Rights Act 1996 (ERA)</u>.

13.1 The Respondent runs several different processes using different machinery including the press brake, top hats, and roof lights. The Claimant is trained and is a Senior Operator in respect of all the equipment. His seniority was because of his ability and experience in operating the more complicated machinery. The Claimant worked on each of the said pieces of equipment frequently and regularly as rostered until the events below.

13.2 The Claimant was at the time working on roof lights. Towards the end of his shift on 23 January Jim Doran spoke to him and indicated the intention of both him and Mr Waring that he work on press brakes. The Respondent required a Senior Operator on press brakes; this was for operational and commercial reasons to meet demand. The Claimant told Mr Doran that he did not want to move from roof lights citing his CTS and saying that the press brakes machine required a risk assessment; he was specific and adamant that the equipment needed a risk assessment. Mr Doran asked the Claimant whether he would work overtime on the press brake on Sunday 24 January and Tuesday/Wednesday 26/27 January 2016. The Claimant refused, saying that he would only do overtime on the 27 January and only on top hats. He subsequently discussed that with his Supervisor Mr John Jones, albeit that was not the machine that the Respondent required him to work on as part of his overtime commitment. In those circumstances as the Claimant had not accepted overtime hours on 24 or 26 January those hours were allocated to other operatives who worked the equipment including the press brake as required by the Respondent. The allocation of work to available operators was for operational and commercial reasons.

14. <u>On 27 January 2016 at approximately 7.05am the Claimant says he was discriminated against by the Respondent when he refused to use the press brake because it would exacerbate pain in his left wrist (something arising in consequence of his disability), and he was subjected to harassment when John Waring shouted at him. On this occasion he will say he made a further protected disclosure to the Respondent relating to breaches of legal obligation regarding RIDDOR. Furthermore, that at approximately 3.00pm he repeated his protected disclosure in conversation with John Waring and Paul Fairclough and he was harassed by them when they approached him and said both that the matter was not reportable and that they had seen his earlier grievance. The Claimant advances claims in respect of the incidents of January 27 2016 under</u>

Section 15 Equality Act 2010 (EA), (discrimination arising from disability), Section 26 EA harassment, Section 47(b) ERA detriment for raising health and safety, and Section 44 ERA health and safety detriment in respect of health and safety matters.

14.1 The Claimant attended work and instructed an agency worker to leave the top hats machine and he started to operate it as part of his overtime shift, despite having been asked to do overtime on the press brake.

14.2 During the shift Mr Waring approached the Claimant and asked why he was not operating the press brake; the Claimant told him that he was only prepared to do top hats. There was a heated exchange between Mr Waring and the Claimant with them talking across each other. Mr Waring was insistent that the Claimant as a Senior Operator had been requested and was required to work on the press brakes, and the Claimant was equally insistent that he would not do so, and he would not take the instruction from Mr Waring. The Claimant stated that his refusal was due to his wrist pain adding that the press brake required a risk assessment, and the fact that he had symptoms of pain and discomfort or pins and needles necessitated a formal RIDDOR Report. Mr Waring confirmed that he would seek advice from Mr McGowan. The Claimant said he would report the matter to Mr Corrigan because he was not prepared to work on the press brakes and indeed, he stayed working on the top hats.

14.3 The reason Mr Waring was seeking advice from Mr McGowan is that Mr McGowan was the Health and Safety Manager and he, Mr Waring, did not think the matter was reportable under RIDDOR or that risk assessments were required on all the machines as indicated by the Claimant. Mr Waring referred to the fact that he knew that the Claimant suffered wrist pain because the Claimant had said so over a lengthy period. Mr Waring was aware of the Claimant's referrals to Occupational Health Advisors. Mr Waring however had not been informed that the Claimant was unable to operate any particular machinery. Mr Waring expressed his concern that if the Claimant was unable to operate machinery because it was causing pain to the Claimant then the Claimant should not operate it and it was a matter personal to him and not one requiring a risk assessment of all equipment. Until this time the Claimant had operated the press on occasions and had done so relatively recently without complaint. On this occasion and during this exchange with Mr Waring the Claimant stated "I am not going on that machine".

14.4 Mr Waring believed that the Claimant's symptoms were not reportable under RIDDOR. Mr Waring believed and understood from the Occupational Health Reports and what he had been told about them, that what the Claimant needed was an assessment of his personal condition and what he could and could not do because of CTS. Mr Waring was satisfied that all the equipment had been properly risk assessed and that further risk assessments of machinery were not required. The Claimant did not accept that risk

assessments of machinery are different to a personal manual handling assessment of the Claimant's ability to perform certain operations and the effect of his CTS.

15. On 30 January 2016 the Claimant will say he was unfavourably treated after being informed again by the Respondent that he was to be put on the press brake which the Claimant believed would be detrimental to his health and he stated this to Jim Doran. He will say Jim Doran was acting on John Waring's instructions. He advances claims in respect of this incident under Section 44 ERA and Sections 15 and 26 EA (discrimination arising from disability and harassment).

    15.1 On 30 January 2016 a colleague of the Claimant's (AW) who had overheard the heated exchange the previous day between the Claimant and Mr Waring took the matter up with the Claimant; the Claimant felt insulted by him. AW used offensive language to describe the Claimant saying that his view was shared by "everybody". During the shift AW and the Claimant continued with unpleasantries and the Claimant gave evidence that he felt anguished and distressed by AW's behaviour such that he called his Supervisor Mr Doran.

    15.2 Later during that shift Mr Doran spoke to the Claimant once again about going on the press and said that he would meet with him on the following Monday evening, and he and Mr. Waring would answer any questions or concerns that the Claimant may have. The Claimant stated his reluctance to speak to Mr Waring on the subject and said that there were other operatives capable of using the press brake. The Claimant reiterated that risk assessments were required of the equipment in Shop 1 and that he was not prepared to go on the press brake without it being risk assessed.

16. On the 1 February 2016 the Claimant will say that he was discriminated against by the Respondent, suffering detriment, when he was informed that there was no work for him to do and he was sent home from his employment being told to go on sick leave. The Respondent refused to carry out any risk assessments as had been requested by the Claimant in the meantime. The Claimant advances

claims in respect of this incident under Sections 15 and 26 EA and Sections 44 and 47(B) ERA.

16.1 Mr Waring approached the Claimant and once again there was a heated exchanged on similar lines to the previous one of the 27 January. Once again, the Claimant demanded that risk assessments were carried out on the machinery and he refused to operate the brake; once again Mr Waring stated that risk assessments were not required on the machines, but a manual handling assessment was necessary and, if one of those personal assessments prohibited the Claimant from operating certain equipment, he would be taken off it. The Claimant stated that everything hurt his wrists namely that operating any machinery could have that effect and he would feel discomfort and pain at various times and to varying degrees using any machinery in Shop 1. Mr Waring stated that if that potential existed then he could not be allowed to operate any equipment without medical opinion and a personal manual handling assessment being done. Mr Waring instructed the Claimant to go home and to see a doctor and to obtain a report as to what he was able to do. This latter request from Mr Waring was following a telephone conversation he had with Mr McGowan. The Plant Manager agreed that the Claimant ought not to be required to operate any equipment if all the equipment caused him discomfort and pain.

16.2 The Claimant disagreed with Mr Doran and Mr Waring that a personal manual handling assessment was required. He considered that they were wrong. He disagreed with the extant OH report that talked in terms of his duties and capabilities; he insisted that all the machinery was risk assessed, generally. The Claimant has never accepted the OH opinion, or explanation given by Mr Waring, that what was required was an assessment personal to the Claimant, his duties, and capabilities in terms of CTS and his use of equipment in Shop 1.

16.3 On 2 February 2016 (page 119) Mr Waring emailed the Claimant in answer to a query from the Claimant, explaining why he had been sent home. Mr Waring confirmed that because the Claimant had stated that all roles which he could do within Shop 1 had an impact on his wrist condition, albeit with different severities, and he had no other work available that would not have such an impact he had suggested that the Claimant obtain advice from his GP. Mr Waring reiterated his suggestion that the Claimant contact his GP to ascertain the seriousness of his condition and his capability for work and said that the Respondent awaited the GP's recommendations on this issue. Mr Waring went on to confirm his understanding of why RIDDOR did not apply, namely that there was not a specific incident or disease linked with the Claimant's work. CTS is a reportable condition if linked to one's work and the exposure to a specific hazard such as percussive or vibrating tools. The Claimant was not required to use percussive or vibrating tools in Shop 1. His CTS pre-dated his employment by the Respondent. The Claimant disagreed with Mr. Waring's explanation and has never accepted it.

16.4 There then followed a series of emails that are in the bundle between the Claimant and the Respondent's HR Department about the Respondent's requirements, the Claimant's condition, and requests for updates. Ms Corbett asked after the Claimant's wellbeing. The Claimant's Trade Union Representative informed the Respondent that he had advised the Claimant to stay off work pending medical evidence and legal advice. That situation was accepted by the Respondent and it was consistent with Mr Waring's last instruction to the Claimant.

16.5 On 11 February 2016 the Claimant's GP wrote to the Respondent. The letter appears at page 133. The GP confirmed that the Claimant had been suffering bilateral CTS for several years and was awaiting to see a specialist. He indicated that the Claimant's symptoms become worse using "certain machinery" (press). The doctor said he would be grateful if the Claimant could be considered to work on roof lights as his symptoms were "minimal and could cope with this".

17. On 26th February 2016 the Claimant submitted a written grievance dated 17th February 2016 by email. He says he was told by Jemma Corbett of the HR Department that he was unable to carry out all the duties that his role required due to his disability and then on 19 February 2016 this was confirmed when the Respondent stated that the Claimant was unfit for work. In respect of this incident the Claimant advances claims under Sections 15 and 26 EA and Sections 44 and 47(B) ERA.

17.1 The Claimant's grievance dated 17 February 2016 is in the bundle at page 140 (the covering email being at page 139). In his grievance the Claimant alleges discrimination by John Waring in changing his duties and responsibilities to his detriment without reasonable justification. The Claimant then set out the sequence of events of 22 January 2016, 27 January 2016, 30 January 2016, and 1 February 2016. The Claimant continued to maintain that risk assessments were required. He repeated that he disagreed that there was any need for him to have a personal manual handling assessment. He stated that he required a risk assessment to be carried out on the equipment in Shop 1; he stated, erroneously, that this was in accordance with the Occupational Health recommendation of 2015. That assessment recommended "an individualised manual handling wrist assessment".

17.2 In view of the apparent impasse and the physical effects of the Claimant using equipment in Shop 1 upon his wrists the Respondent suggested he consider redeployment to a security role in which he could use his administrative skills, checking in and out vehicles consignments orders and deliveries.

17.3 The Respondent does not normally send out job vacancy lists to employees who are certified as unfit to work. It did not send vacancy lists to the Claimant for this reason. If an employee is unfit to work, it was deemed inappropriate to send vacancies that were to be filled by employees who were fit to work.

17.4 The Respondent formed the view that it needed the Claimant to return to his role when fit for work or at least to attend so it could carry out the required manual handling assessment as recommended in the said Occupational Health Report, and so that it could consider reasonable adjustments based upon such assessment. The offer of the role in security was a genuine offer of what the Respondent considered to be suitable alternative employment, suited to the Claimants abilities but which would not impinge on his wrist condition.

17.5 The Claimant's grievance was assigned to Mr Hughes with the assistance of Ms Mulliner, Head of HR. Ms Mulliner was recruited by the Respondent after the commencement of the Claimant's absence from work on 1 February. She had previously worked elsewhere when the Claimant was also employed at that company but nothing about that coincidence seems to the tribunal to be of relevance to the issues in this case. The Claimant suggested that this coincidence unduly influenced Ms Mulliner who was prejudiced against him; the tribunal found nothing to substantiate this assertion and, in the light of Ms Mulliner's evidence, finds it to be wrong. She was not biased or prejudiced against him; she dealt conscientiously with him and matters related to him; the coincidence of earlier co-terminal employment was irrelevant to the issues in this case.

17.6 The Claimant's grievance was investigated by Mr Hughes. Mr Hughes interviewed Mr Waring and notes of that interview of 31 March 2016 commence at page 170. On the same date Mr Hughes interviewed Mr McGowan and those notes commence at page 173. On the same date Mr Hughes interviewed Paul Fairclough, Shop 1 Supervisor and notes of that interview commence at page 175. Mr Hughes interviewed John Doran on 22 April 2016 and notes of that interview are at page 223. Mr Hughes interviewed a Shop 1 Operator (ML) on 28 April 2016 and notes of that interview appear at page 231. Another Operator (AL) was interviewed also on 28 April 2016 and those notes commence at page 232. MS, another Operator in Shop 1, was interviewed on 28 April 2016 and those notes appear at 233. Shop 1 Operator LR was interviewed on the same date and the notes of that interview are at 234. Likewise Shop 1 Operator CW was interviewed on the same date and those notes appear at 235. AW, with whom the Claimant had had an altercation on one of the dates mentioned above, was interviewed on 3 May 2016 (page 236). The investigation was appropriate, thorough and was carried out conscientiously.

17.7. The substantive grievance hearing was on 22 April 2016 and notes commence at page 218.The Claimant was represented by the Trade Union Official.

17.8. Mr Hughes grievance outcome letter is dated 11 May and commences at page 242. Mr Hughes considered all that the Claimant had said as supported by his Trade Union Representative. He considered all the documentation and considered the witness interviews that he had conducted both before and after the hearing in the light of what the Claimant raised. He considered a considerable amount of documentation provided by the Claimant including during the grievance proceedings, after the initial grievance letter. Mr Hughes was a plausible and credible witness whose evidence is accepted. The Tribunal finds that he dealt with the matter conscientiously. Mr Hughes recommended that a job description be provided for the Claimant and that "a risk assessment… be carried out specific to yourself and your capabilities based on the role you occupy as a Senior Operator". He emphasised that the assessment did not have to be a general risk assessment of all the machines, because it was about the Claimant's individual capability. He recommended this based on the earlier Occupational Health Report referred to above. He explained the delay in obtaining it due to a lack of understanding as to what was required. This related to the confusion between an assessment personal to the Claimant's ability or disability and a risk assessment of the machinery in Shop 1. The Claimant's allegations of bullying and harassment were dismissed based on witness evidence although it was evident to Mr Hughes that the relationship had been damaged, and he recommended a form of mediation. The Claimant was informed of his right to appeal.

17.9. The Tribunal finds that the Respondent dealt with the Claimant's grievance honestly and conscientiously.

18. On the 15th April 2016 the Claimant submitted a written grievance dated 14th April 2016 to the Respondents HR Department by email in which he says he made a number of protected disclosures relating to breach of legal obligation and raising health and safety matters regarding the maintenance of plant and equipment and what he terms as his exclusion from health and safety duties by the Respondent, unlawful deductions from his wages, failing to show recommendations of an occupational health consultant and his doctor and complaints of ongoing victimisation. The Claimant says that the Respondent refused to deal with his grievance and that this amounts to a detriment. He advances claims under Section 44 and 47(B) ERA in respect of this.

18.1. The Claimant's grievance is at page 201 and is under headings "Unlawful deduction of wages", "Failing to act following recommendations

of Occupational Health", Ongoing victimisation because of grievances/whistleblowing/approach to Health and Safety role", "Health and Safety concerns", "Mishandling of data under the Data Protection Act 1998", "Historic grievances not dealt with correctly". The letter makes a series of allegations relevant to each heading but without specific details and discloses by reference to earlier disclosures and an alleged failure to act in response. The Claimant disclosed alleged detrimental treatment amounting to breaches of legal obligation and matters relevant to health and safety.

18.2. At the hearing of 22nd April (see 17.7), Mr Hughes stated that he was confining his considerations to the grievance of 17th February and he would not be dealing then with the additional grievance of 14th April; he had not had time to investigate it.

18.3. This grievance fell for consideration with the others and the Claimant's various complaints, grievances, and disclosures as part of the Respondent's strategy described at paragraph 23 below (a suggestion of a round table meeting).

19. On the 22 April 2016 the Claimant says that Tony Hughes and Pam Mulliner handled the grievance meeting in respect of his 17 February 2016 grievance in such a way as to amount to detrimental treatment and they failed to provide the Claimant with a fair and impartial grievance consideration and by insulting him. With regard to this the Claimant advances claims under Sections 44 and 47(B) ERA. These claims include that there was selective inclusion and partial exclusion of issues that had arisen that he raised in his written grievance of the 14 April 2016 and he complains of the use by the Respondent of libellous and inflammatory witness statements and then producing inaccurate and manipulated minutes.

19.1 The Tribunal has made findings relevant to the hearing of 22 April 2016 in paragraph 18 above where the Claimant had alleged that the Respondent failed to deal with the grievance. Those findings relate also to the allegation at paragraph 19.

19.2 The Tribunal did not find any evidence to support the allegation that witness statements were inaccurate and manipulated or that the minutes were inaccurate and manipulated. The Tribunal finds that the documentation relied

upon by Mr Hughes and the minutes of the meeting are a fair reflection of what was said.

20. On 20 June 2016 the Claimant says he suffered further detriment, and, on that date, he made protected disclosures to the board of directors regarding breaches of legal obligations concerning alleged failures to maintain plant equipment and his exclusion from health and safety duties. He was invited to a "without prejudice" meeting, initially referred to as "an off the record chat", where a proposal was made that he leaves the company and the Claimant says reliance is placed on illegal and libellous statements, the Respondent refusing to deal properly with the grievance and attempting to engineer his departure from the Respondents business. In this regard he pursues claims under Section 27 EA (victimisation) and Section 47(B) ERA.

20.1 On 17 June 2016 the Claimant sent an email to the Directors of the company addressed to Sebastien Chouteau. He expressed his concern about some activity that had taken place at the Respondent company and listed matters by reference to the company's Code of Conduct relating to various bullet point headings set out in his email. He raised health and safety concerns, alleged disregard for legislation of data protection and alleged fraudulent activity. That email appears at page 306(a) – 306(d).

20.2 The Respondent was concerned that the relationship between the Claimant and itself had broken down and in conversations on 20 and 27 June 2016 between the Claimant and Ms Mulliner sought alternative solutions in "without prejudice" and "off the record" discussions. The issues were not resolved. The Claimant continued in employment but absent from work.

21. In June 2016 the Claimant says that during his absence on sick leave the dates for applications to various vacancies in the Shop One Department lapsed or expired such that he was unable to apply for those positions which he had not been informed. The vacancies related to a few team leader type roles. In this

regard the Claimant pursues a claim under Section 15 EA (discrimination because of something arising from disability).

21.1 The Tribunal has already made a finding of fact that it was not the Respondent's practice to distribute its vacancy list to employees who were absent on sick leave. The Respondent wanted to fill vacancies; the Claimant was unfit to work (as certified). He was employed in a substantive role.

21.2 The Respondent did not distribute vacancy lists to the Claimant whilst he was certified as unfit to work through stress and anxiety or CTS/stress. This was because the Claimant was unfit to work.

22. On the 13 July 2016 the Respondent held the Claimant's grievance appeal hearing. The Claimant says that he was ganged up on and victimised by the appeal chair Derek Corrigan and Pam Mulliner and says that he suffered the following detriments:

22.1. He was accused of interfering with witnesses. When questioning one of the witnesses, Mr Loton, the Claimant asked a series of repetitive questions regardless of the answers given. Mr Corrigan considered that the Claimant was not making headway and due progress was being hindered by the repetitive and leading nature of the questions; the Claimant was dissatisfied with the answers that the witness was giving to him. In his role as Chairman Mr. Corrigan requested that the Claimant move on and did not attempt to influence Mr Loton's answers inappropriately. The Claimant was allowed to ask appropriate questions and to repeat the question but not to do so disproportionately or to the point of hindering the process. The Tribunal finds that the Grievance Appeal Hearing was conducted appropriately and chaired efficiently.

22.2. It was alleged that he had called Matthew Loton as a witness when he had not. The Respondent understood that the Claimant required the attendance of Mr Loton as a witness but whether or not that was the case there was information that Mr Loton could give to Mr Corrigan that was of potential value in reaching a conclusion with regard to the appeal.

22.3. Documentary evidence he produced was ignored. The Claimant produced a vast amount of documentation for the hearing. The Tribunal accepts Mr Corrigan's evidence that prior to the hearing he read the Claimant's grievance, the witness statements and notes of the grievance meeting and the correspondence that then ensued from the Claimant. Mr Corrigan concluded that the Claimant's voluminous set of questions was not helpful to his consideration of the appeal against the grievance outcome. Mr Corrigan concentrated on Mr Hughes' grievance outcome

and the appeal points in relation to it. Mr Corrigan told the Tribunal that the Claimant submitted 43 pages of questions which he said was not an exhaustive list of questions. Mr Corrigan's understanding, and the Tribunal accepted that this was a genuine understanding or misunderstanding, was that the Claimant had requested for ten witnesses to attend the Grievance Appeal Hearing but only one was prepared to attend and that was Mr Loton. The Respondent's policy does not include calling witnesses for Grievance Appeal Hearings but an exception was made for the Claimant. The requested witnesses were approached but nine declined the invitation. Mr Corrigan understood that six of the ten witnesses had been interviewed before Mr Hughes' conclusion/outcome.

22.4. Undue pressure was applied to him during the course of the appeal hearing. Mr Corrigan considered that regardless of the Claimant's perception of events he was persuaded by the outcome of Mr Hughes' grievance outcome and the fact that it was in part dependent upon the ten witnesses interviewed in a situation where the Claimant still insisted that he wanted risk assessments carried out on the machinery in Shop 1. Mr Corrigan suggested conciliation or mediation between the Claimant and his Line Managers and offered any further assistance that the Claimant may wish to have. The Tribunal accepts that the Claimant may have felt that he was subjected to pressure however there is no evidence to support the allegation that pressure was applied by Mr Corrigan or Ms Mulliner during the hearing. The Tribunal accepts the evidence of Mr Corrigan that he reached the appeal outcome conscientiously and without influence or input from any other person. He upheld Mr Hughes' grievance outcome and found no evidence to support the allegations of bullying unfair treatment. Mr Corrigan issued his appeal outcome letter on 14 September 2016 upholding the recommendation that there be conciliation between the Claimant and Mr Waring, with a review of his job description and further assessments carried out on his personal capabilities to perform his role. Mr Corrigan gave evidence to the Tribunal that he considered that redeployment to the Security Department with a change of line management would be a suitable and indeed beneficial role for the Claimant and he was surprised that it was declined. The Tribunal finds that Mr Corrigan's opinion was genuine and conscientious. The grievance appeal outcome letter is at page 407.

22.5. The Claimant twice sought to update his appeal in writing. The appeal of 22 May being updated on 5 June and that commences at page 268. It was again updated on 12 July commencing at page 339.

22.6. The Claimant was prevented from asking some questions. The Claimant says that these detriments were in respect of health and safety matters and pursues a claim under Section 44 ERA and amount to victimisation

(Section 27 EA) relating to the protected act of the grievance of 17 February 2016 In this regard the Tribunal repeats its findings at paragraph 22.1 and 22.4.

23. The Claimant says that he made another protected disclosure on 13 September 2016 in writing to Mr P Bullough and Mr Phil Smith alleging illegal conduct, discrimination breaches of legal obligations. He says that he suffered a detriment because the Respondent refused to deal with his grievance until they considered he was well enough to attend a meeting in person. He pursues claims in respect of this. These allegations are made under Sections 44 and 47(B) ERA.

23.1 On 13 September 2016 the Claimant sent an email to Peter Bullough copying in Sebastien Chouteau. This email commences at page 402. The subject matter marked as urgent and important referred to the grievance and email correspondence with Pam Mulliner. The Claimant attached 18 documents of varying lengths. One of the attachments was what he called a formal grievance. The subject matter of that grievance was "further discrimination, victimisation, fraud, slander, libel, harassment, bullying, threats, conspiracy and blackmail". This email was sent the day before Mr Corrigan's grievance appeal outcome. On 16 September Mr Bullough replied to the Claimant (paragraph page 413) saying that rather than respond to the many issues raised he suggested meeting with the Claimant instead, and that he wished to involve Mr Philip Smith, Managing Director UK, and Ireland in that meeting, but that Mr Smith was then on holiday. Mr Bullough confirmed he had by then received a copy of Mr Corrigan's grievance appeal outcome and hoped the Claimant had also received it so that they could discuss the recommendations that he had made.

23.2 Mr Bullough acknowledged the Claimant's email on 13 September (page 413-414). He expressed his deep concern at the allegations made and confirmed that whilst he did not know all the details, he had reviewed the Claimant's case and procedures to that date. He acknowledged that Mr Corrigan's appeal outcome was not yet published and referred to more than 200 questions raised by the Claimant during the process. Mr Bullough said he had never experienced such several documents in a grievance previously, differentiating the internal grievance procedure from High Court proceedings. Mr Bullough apologised for the "slower than normal response time to your appeal" he asked that Mr Gregory consider Mr Corrigan's findings and hoped that an amicable solution could be reached.

23.3 Mr Bullough did not refuse to deal with the Claimant's concerns and grievances but proposed dealing with them through a personal meeting involving the relevant Managing Director. This was an attempt to resolve matters amicably to mutual satisfaction.

23.4 On 20 September 2016 the Claimant declined the invitation to meet Mr Bullough. Rather than taking up the suggestion of mediation with Mr Waring the Claimant required disciplinary proceedings be taken against Mr Waring. In his letter the Claimant also makes several demands which if not met would be taken as deemed admissions. Mr Bullough's response to 23 September (page 431) was to propose use of mediation such as through ACAS. The Claimant declined. The Claimant had already spoken to ACAS by this time. The Claimant asked Mr Bullough to send to him in writing whatever it was that he wished to discuss with the Claimant. In response to that exchange of correspondence Mr Bullough sent an email to the Claimant on 26 September 2016 confirming that the company's formal proceedings would be followed without the use of independent mediation as soon as the Claimant was well enough. The Tribunal finds that the Respondent offered to deal with the Claimant's grievance of 13 September 2016 informally by way of a high-level meeting, informally through mediation, informally through mediation involving an independent mediator such as ACAS, and formally when the Claimant was well enough to attend a meeting. Throughout this time the Claimant's certified absence was due to stress. The Respondent did not refuse to meet with or deal with the Claimant's grievance of 13 September 2016. The tribunal finds that the Claimant's several grievances overlap, and that the Respondent was willing to meet with the Claimant to discuss them all and to consider his disclosures at a meeting in preference to many and varied, voluminous files of documents, or rather a ream of emails and multitudinous attachments to emails. Various grievances and grievance appeals not only overlapped the same issues but overlapped in time such that the Respondent found it administratively and operationally difficult to keep pace dealing with each one in any sensible sequence; it chose instead to propose a meeting when the Claimant was well enough to attend one. The Respondent was prepared to meet the Claimant to, in my words, "thrash it out", for the Claimant to air all his issues and for the parties to work towards a resolution of them and the Claimant's return to work. This did not occur prior to the Claimant's dismissal; he refused to meet with the Respondent's management.

24. The Claimant claims entitlement to holiday pay. The Claimant's continued period of long-term sickness absence commenced in February 2016. He says that for the first six weeks of his absence he was contractually entitled to receive 80% of his pay; he says that he was paid subject to deduction of £1,920 which he believes may have been related to a reimbursement of training fees in

respect of a course which he could not complete owing to its absence through ill-health; at the end of the six-week period the Claimant was paid statutory sick pay in the normal course until entitlement expired; the Claimant received no pay from August 2016 until his effective date of termination of employment in May 2018. The Respondent's holiday year runs each year from 1 January to 31 December. The Claimant is not in a position to concede that the deduction made from his pay in the first six weeks was appropriate or accurate. He claims entitlement to holiday pay which has not been paid to him throughout the period from the commencement of sickness absence in February 2016 to December 2016 and for the holiday year January 2017 to December 2017.

24.1 In accordance with the Respondent's handbook employees must ensure that the company is fully aware of where they are and how they can be contacted when they are on sick leave.

24.2 The Respondent also has a procedure for booking and taking annual leave, namely that due notice must be given of any leave request and prior approval obtained before leave is taken. On 21 September 2017 Ms Mulliner reminded the Claimant of these requirements when the Claimant had retrospectively informed the Respondent that he had taken annual leave. Notwithstanding the breach of procedure, on that occasion the Respondent honoured the Claimant's retrospective claim for holiday pay. The Claimant was therefore told on 9 April 2018 (page 476) that should he wish to take further annual leave he must give 1 month's advance notice as a minimum. Because of the breach of procedure, which was repeated when the Claimant claimed holiday pay in April 2018, Ms Mulliner initially said that the claim would not be met.

24.3 The Claimant wrote to Ms Mulliner requiring payment of his annual leave entitlement "remaining from 2016 and 2017" (9 April 2018 at page 479). Faced with the Claimant's further request for payment Ms Mulliner sought advice from her colleague Kevin Jones who dealt with this aspect of payroll. Mr Jones advised Ms Mulliner of holiday pay due to April 2018 and at the end of May 2018 (page 480).

24.4 The Claimant continued to claim unpaid holiday pay and provided his own calculation at page 482. The Claimant gave advance notice also of a request for future leave to be taken in May 2018. Ms Mulliner acknowledged his request and confirmed that the payroll department would calculate his holiday pay. Furthermore, Ms Mulliner suggested, with the Respondent's general approval,

that leave would be granted at regular intervals over the coming weeks or as one longer period, as the Claimant may prefer, rather than requiring him to make repeated requests. It would also facilitate regular payments to him. She reminded the Claimant that the law prohibited payment of lump sums in lieu of annual leave.

24.5 The Respondent paid the holiday pay that it calculated was due to the Claimant notwithstanding the Claimant's earlier breaches of the holiday pay procedure. The Claimant has not proved there was any shortfall in holiday payment. The Tribunal accepts the Respondent's calculations, and that due payment was made. The Claimant was not entitled to carry forward the holiday pay he has sought to carry forward.

24.6 The Claimant presented an additional document bundle and an extract from the Claimant's contract appears at page COE4 (internal page 3 of 7). Holidays for full time workers working shifts, as was the Claimant, is dependent on the shift pattern and is calculated by way of shifts rather than calendar days or weeks. The company's holiday year ran from 1 January to 31 December each year. Holidays were to be taken during normal shut down periods, but any holidays not allocated to those periods were the subject of prior notification and authorisation. Holidays were to be taken in the current holiday year and may not be carried forward without prior managerial agreement. This only applied to contractual holidays and not statutory holiday entitlement. Payment in lieu of holidays could not be made other than in circumstances agreed in advance by management; this too only applied to contractual and not statutory holidays. In the last year of employment annual holiday entitlement was a pro-rata proportion of the total annual leave entitlement.

24.7 The Claimant was not entitled to carry forward his untaken holidays. He was never prevented from taking holidays or making holiday requests whilst on sick leave and indeed was encouraged by the Respondent to do so. He was paid on at least two occasions despite being in breach of the company's procedure, by concession of the Respondent. He was not refused any correctly requested holidays.

25. The Claimant says that he was entitled to but was not paid holiday pay for the period from 1st January 2018 until his dismissal in May 2018; he will quantify this claim in his schedule of loss in due course. The Claimant confirmed that his total holiday claim comprised in two separate claim forms covering the period from February 2016 until May 2018 is in the region of £4,605.86 and gross.

25.1 See findings of fact under paragraph 24 above.

26. The Claimant also claims that he was unfairly dismissed. The Respondent says that was dismissed for a reason related to his conduct and/or some other substantial reason either way resulting in a breach of the implied term of trust and confidence. The Claimant alleges that the reason, and if more than one the principal reason for his dismissal was any one or more of the following, his having raised health and safety issues and/or his having made public interest disclosures and/or because he asserted the statutory right to holiday pay and/or by way of victimisation because he alleged disability discrimination.

26.1 The Respondents usual practice where there is long term sickness absence would be to carry out a capability review after a few months' absence. During the Claimant's absence there had been long and involved grievance proceedings and the Respondent deferred any consideration of a capability review pending resolution of interpersonal problems that may have facilitated the Claimant's return to work. The Claimant had reported symptoms of stress and reported that formal procedures exacerbated those symptoms. The Respondent gave him additional leeway.

26.2 On 28 March 2018 Ms Mulliner wrote to the Claimant concerning long term absence capability review as he had been absent from work since early February 2016. At that time his Fit Note certified that he was unfit to work through stress until June 2018. The Respondent wished to meet with the Claimant to discuss his symptoms of anxiety, how they could be managed, and with a view to his return to work or alternatively termination of employment. Termination could occur if it proved unlikely that the Claimant would be capable of performing his contract. That letter commences at page 467. The Respondent confirmed it would need access to medical records. The Claimant was reminded he could be represented at a meeting. Included with the letter were forms of authority for access to medical records. In response the Claimant challenged some of what was said by Ms Mulliner including concerning the Fit Notes, such as that she was incorrect in referring to 25 months potential absence by the date of the review meeting whereas it would be 26 months. He stated he would not feel comfortable attending a meeting and declined the invitation to attend the planned meeting for 4 April 2018. He asked for contact to be made in writing. He declined to return the medical consent forms suggesting that the Respondent proceed through "your legal channels". Any additional information could be obtained by way of emailing a list of questions to him. He was not prepared to disclose his address details to the Respondent, citing "historical intimidation and threats I have received from a number of employees of Kingspan". He did not feel it necessary in any event that the Respondent would make a request for access to GP records. The Claimant considered that it was not his ill health, but the "misconduct and deceitful tactics" used against

him that made it “near impossible for me to be able to return to work at present”. The Claimant confirmed his intention to return to work but only after “measures have been taken to eliminate the campaign of bullying, harassment, victimisation, discrimination, conspiracy continuing against me”. The Claimant stated to Ms Mulliner that the longer the then Employment Tribunal case was going on the more likely it was that he would not be able to return to work as work was not what he considered to be a safe place. The tribunal finds no evidence of a campaign of bullying, harassment, victimisation, discrimination, or a conspiracy against the Claimant; there was none.

26.3 In his letter at page 473 of the bundle the Claimant set out a list which he said was not an exhaustive list but only his initial thoughts on reasonable adjustments which could permit him to return to work and they included the dismissal “of all persons whom has knowingly lied during the grievance process when my grievances were supposed to be dealt with… dismiss all persons whom has contributed to my illness through misconduct”.

26.4 The Respondent was concerned that the Claimant was suggesting his absence was linked to the on-going Tribunal proceedings, that he required the dismissal of staff members before he would return to work, and he made accusations concerning the company at large and Ms Mulliner in particular.

26.5 The Respondent considered, notwithstanding the Claimant’s repeated intention to return to work, that if the Claimant’s demands and allegations continued there would be, or there already had been, a complete breakdown of trust and confidence between the parties. To consider this further the Claimant was invited to attend a meeting by letter dated 20 April 2018 from Ms Mulliner (page 494). The Tribunal considers that Ms Mulliner’s letter is self-explanatory, and its rationale is clear. Ms Mulliner gave clear, consistent, and credible, plausible evidence to the Tribunal and the Tribunal considers that this letter accurately reflects the state of the situation as of April 2018. The Tribunal finds that the reason for the Respondent inviting the Claimant to a meeting to discuss his continued employment was for the reasons set out in that letter.

26.6 Mr Kieron was appointed to chair the said meeting which was a “some other substantial reason” (SOSR) meeting. The Claimant was aware of the risk of termination of employment.

26.7 The Claimant’s response was to raise further enquiries and Ms Mulliner reassured him that documentation would be provided prior to the meeting and that he could provide written representations if he wished. On 26 April 2018 (page 506) Ms Mulliner explained in an email why the Respondent considered some other substantial reason meeting was advisable. The Tribunal’s finding is that that letter is an accurate reflection of the Respondent’s rationale. Once the matter was referred formally to Mr Keiron, providing him with submissions and background information, Ms Mulliner had no further dealings and took no part in the decision making.

26.8 On 3 May 2018 (page 531) Ms Mulliner sent a full explanation and required documentation in readiness for the SOSR meeting. That letter is self-explanatory. The SOSR hearing submission commences at page 533. The Tribunal accepts it as an accurate reflection of the Respondent's position and rationale in reaching this stage of proceedings, subject to Mr Keiron's deliberations.

26.9 The SOSR hearing was scheduled for 14 May 2018. The Claimant did not attend; his attendance was excused at his request. In an email dated 7 May 2018 the Claimant said that he would not be attending or providing any further information than that he had provided to that date.

26.10 Mr Keiron concluded that the parties' relationship had deteriorated to the extent it had completely broken down and he set out his reasons in an outcome letter date 18 May 2018 commencing at page 582. That is a clear and accurate conscientious statement of his rationale. The parties had reached an impasse in their relationship; continued employment was untenable given the Claimant's demands and the state of the relationship, especially as characterised by the Claimant with an alleged widespread and corrupt conspiracy against him. The Claimant was reminded of his right to an appeal.
26.11 The Claimant's employment ended on 18 May 2018. The reason for the termination of employment was the breakdown in relationship between the parties. The breakdown had occurred for the reasons stated and to the extent described in the SOSR hearing outcome letter of 18 May 2018.

26.12 Having read available documentation and the Respondent's submissions, having heard from the Claimant, and considering the documentation provided, Mr Keiron concluded that the relationship of trust and confidence between the Respondent and the Claimant had broken down irretrievably. The Tribunal found Mr Keiron to be a credible, clear, and plausible witness who gave a conscientious account to the Tribunal of the rationale for his decision.

27. Health and safety issues: The Claimant says that he was invited to attend a Some Other Substantial Reason meeting on 14th May 2018 but that he refused because he felt that his safety was in imminent danger from his colleagues if he was to attend work on site. He did not attend that meeting. The Claimant sent an email on 7 May 2018 to Pam Mulliner explaining why he would not attend and in so doing he raised health and safety issues which he says caused or contributed to the decision to dismiss him.

27.1 The Tribunal has made findings of fact relevant to this allegation at paragraph 26 above.

28. Public interest disclosure issues: the Claimant says that on 3 May 2018 by email he disclosed to the Respondent's board of directors that Pam Mulliner was concealing evidence that was relevant to these tribunal proceedings thus showing that there had been a breach of legal obligation, that a criminal offence had been committed, was being committed, would likely to be committed or that a miscarriage of justice was likely to occur; he says furthermore that on 4 May 2018 he repeated this disclosure providing further information, namely audio recordings, which he said proved his allegation against Pam Mulliner. The Claimant says that these two disclosures or either of them caused or contributed to the decision to dismiss him.

28.1 It came to the Claimant's attention that a colleague had obtained a covert recording of a conversation involving Pam Mulliner during a redundancy procedure (not itself relevant to the Claimant). On the covert recording Ms Mulliner appeared to admit to the destruction of important records. The Tribunal notes Ms Mulliner's denial that she destroyed any records but admitted that she made a light-hearted comment that gave that impression. In any event that matter with the Claimant's colleague was resolved by way of a compromise settlement.

28.2 On 3 May 2018 the Claimant wrote to the Respondent's Board of Directors making a disclosure concerning the above recording and Ms Mulliner's comments. He disclosed the audio recording to the Directors.

28.3 Ms Mulliner was not involved in the decision to dismiss the Claimant and her involvement in the SOSR process ended with her preparation of submissions.

28.4 Mr Keiron dismissed the Claimant for the reasons stated in his outcome letter of 18 May 2018 and he was not influenced by the said disclosure of 3 May 2018.

29. Assertion of a statutory right: The Claimant says that he requested annual leave in March and in April 2018 and again on 17 May 2018. These requests were by

email to Pam Mulliner who replied to him denying his entitlement. He was only part paid holiday pay that he says was due to him. The Claimant says that his assertion of the statutory right to holiday pay caused or contributed to the decision to dismiss him.

29.1 The Tribunal has already made findings about the correspondence passing between the Claimant and Ms Mulliner regarding entitlement to holiday pay.

29.2 The Claimant asserted his right to holiday pay, and he claimed holiday pay outside the company's normal procedures as laid down in the contract/handbook. He was paid regardless of his breaches of procedure. He also claimed holiday pay on occasion in accordance with the policy and due payment was made.
29.3 The Respondent honoured at least two holiday pay claims made outside of procedure. The Respondent also proposed an alternative way of dealing with the Claimant's holiday pay to provide him with regular income.

29.4 Mr Keiron dismissed the Claimant for the reasons stated in his SOSR hearing outcome letter of 18 May 2018 and he was not influenced or affected by the Claimant's assertion of his statutory right regarding annual leave and payment.

30. Disability discrimination – victimisation: The Claimant relies on two protected acts when he raised issues relating to his disability with Pam Mulliner in email correspondence namely on 3 April 2018 at 23:36 and on 18 April 2018 at 14:43. The Claimant says that these protected acts or either of them caused or contributed to the decision to dismiss him.

30.1 The Tribunal has already made findings regarding the Claimant's email of 3 April 2018 in response to the invitation to long term absence capability review at page 471. In that email the Claimant refers to "the campaign of bullying harassment victimisation discrimination and conspiracy continuing against "him". The Claimant refers to a claim to the Employment Tribunal. He suggests that that was the reason or part of the reason why the Respondent "has failed to make the workplace a safe environment" for him to work in. He alleges that a dismissal would be an attempt to cover up wrongdoing by the company.

30.2 On 18 April 2018 there was a chain of correspondence following 3 April 2018 regarding holiday approvals, process, and payment.

30.3 On 18 April 2018 the Claimant stated in an email to Pam Mulliner that failure to pay annual leave entitlement would amount to "further claims of discrimination as you would be placing me at a substantial disadvantage compared to other employees who are not on sick leave" the Claimant said failure to pay him by a stated time and date would be taken to be "deliberately worsening my mental health issue and would also be creating delays to current Employment Tribunal claims".

30.4 The Tribunal has already made findings of fact regarding the issue of holiday pay and the Respondent's dealing with it, namely that they accommodated the Claimant by accepting his claims albeit that they were made retrospectively, and it proposed an alternative way of facilitating the Claimant's access to holiday pay. The Tribunal has made findings of fact regarding the decision to dismiss him which was for the reasons set out in Mr Keiron's outcome letter following the SOSR meeting and in Mr Keiron's statement. He was not influenced by the Claimant's email correspondence of 3 and 18 April 2018.

31. Allegation of conspiracy: In answer to questions, the claimant expressly named the people listed below as being involved in a conspiracy against him motivated by his disclosures and health & safety activities, and alleged corruption. The claimant has no evidence to support these allegations. The tribunal finds there was no such conspiracy nor corruption as alleged. The alleged conspiracy was said to be "company-wide" including:

    31.1. Ms Mulliner

    31.2. Mr Loton

    31.3. Mr A Hughes

    31.4. Mr D. Corrigan

    31.5. Mr J. Wareham

    31.6. Mr J Doran

    31.7. Mr P Fairclough

    31.8. Mr L. Roberts

    31.9. Mr M Swift

    31.10. Mr L Knapper

    31.11. Mr Woollam

    31.12. Mr Keiron

31.13. The respondent's solicitor (whom he reported to SRA)

31.14. Counsel No1 (not Mr Breen) who represented the Respondent at a preliminary hearing

31.15. Counsel No2 (not Mr Breen) who represented the Respondent at a preliminary hearing.

32. **The Law**:

32.1. **Public Interest Disclosure**:

32.1.1. S.43A Employment Rights Act 1996 (ERA) defines protected disclosures, in the context of public interest disclosures generally referred to as "whistle blowing". S. 43B ERA lists the types of disclosures that qualify for protection at 43B (1) (a) – (f) ERA including disclosures that a person failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and that the health and safety of any individual has been, is being or is likely to be endangered. Any such disclosure must be made appropriately as required by sections 43C – s. 43H ERA.

32.1.2. A worker has the right not to be subjected to any detriment by the employer done on the ground that the worker has made a protected disclosure (S. 47B ERA). S.103A provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason, (or if more than one, the principal reason), for the dismissal is that the employee made a protected disclosure, an automatically unfair dismissal (s. 1O3A).

32.1.3. It is good practice to decide why an employer acted as it did before becoming involved in lengthy esoteric debate about whether there has been a protected disclosure, so as to ensure the relevance of any such finding; if the tribunal were to find that the employer's actions were not influenced by any potential disclosure but have a clear and obvious innocent explanation for action or inaction then there is no need to over-deliberate to establish whether in fact the comment or observation made by the employee amounted to a qualifying or protected disclosure. The tribunal should establish the employer's motivation and rationale for action or deliberate inaction.

32.1.4. ***Kilraine -v- Wandsworth LBC*** **[2018] ICR 1850** held that an "allegation and information" are not mutually exclusive but to amount to a qualifying disclosure it must have sufficient factual content and specificity such that it is capable of tending to show one

of the matters listed in section 43B; if the worker has subjective belief that the information disclosed shows one of those matters an the statement has sufficient factual content and specificity it is likely that the workers belief will be held to be a reasonable belief; whether a particular disclosure satisfies the statutory test should be assessed in the light of the context in which it is made.

32.1.5. The Tribunal needs to consider a Claimant's state of mind at the time of the disclosure to determine whether the belief was reasonable and whether that subjective belief is objectively reasonable (***Phoenix House Limited -v- Stockman*** **[2017] ICR 84**. A question for the Tribunal to consider is whether the protected disclosure materially influenced (in the sense of being more than a trivial influence) the Respondent's treatment of the Claimant both as regards any detriment and decision to dismiss (***Fecitt and others -v- NHS Manchester*** **[2012] ICR 372**.

32.1.6. The protection given to an employee carrying out health and safety activities (and by analogy, or who makes a protected disclosure) is broad. It would protect an employee (or worker, as appropriate), who caused "upset and friction" by the way in which they went about the said activity (or making a protected disclosure); an example of this would be where the person involved was perceived as being overzealous even to the point of allegedly demoralising colleagues. The protection seeks to guard against resistance or any manifestation of their conduct being unwelcome. It would undermine the statutory protection if an employer could rely upon the upset caused by legitimate health and safety activity, the manner in which such activities are undertaken, as a reason to dismiss. The manner in which such activities are undertaken will not easily justify removal of protection unless they are, for example, wholly unreasonable, malicious or irrelevant to the task in hand. (***Sinclair v Trackwork Ltd UKEAT/0129/20/OO (V)***). This authority was reported after conclusion of submissions but before we deliberated; we took note of it and considered its effect, if any.

32.2. **Assertion of a statutory right**: an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal was that the employee brought proceedings against an employer to enforce a relevant statutory right or alleged that the employer had infringed a right of his which is a relevant statutory right. It is immaterial whether the employee had the right or whether or not that right had been infringed but the Claimant's assertion that the right had been infringed must be made in good faith. The relevant statutory rights for these purposes include rights conferred by the Employment Rights Act 1996 (ERA) and a Trade Union and Labour Relations (Consolidation) Act 1992, the Working Time Regulations 1998, and other listed regulations.

32.3. **Disability discrimination**:

32.3.1. **Burden of proof:** S.136 Equality Act 2010 (EqA) Provides that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. This however does not apply if A shows that A did not contravene the provision. As the law currently stands, the tribunal must consider whether the Claimant has proved facts from which it could conclude that there was unlawful discrimination subject to which the burden passes to the Respondent to show that there was none; that is a shorthand description of what is described as the "shifting burden" however S.136 takes precedence and was applied by the tribunal.

32.3.2. **Arising**:

32.3.2.1. Section 39 (2) EqA provides that an employer must not discriminate against an employee as to terms of the employee's employment, by dismissal or by subjecting the employee to any detriment where the reason for the employer's conduct relates to a protected characteristic. Protected characteristics are listed at s.4 EA and they include disability.

32.3.2.2. Section 15 EqA provides that it is unlawful for an employer to discriminate against a disabled employee by treating that employee unfavourably because of something arising in consequence of disability where the employer cannot show that the treatment was a proportionate means of achieving a legitimate aim, in circumstances where the employer knew, or ought reasonably to have known, that the employee was a disabled person at the material time.

32.3.2.3. The "something" envisaged by EqA must be more than a trivial reason for the treatment. Furthermore, it is not necessary for the tribunal to find that the something arising out of disability was known by the Respondent to arise out of disability; a respondent to a claim would have to establish that it did not know or could not reasonably have been expected to know of the disability.

32.3.3. **Harassment**: A harasses B if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or the effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment B. (s.26 EqA).

32.3.4. **Victimisation**: victimisation is where A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act. Protected acts include bringing proceedings under the EqA , giving evidence or information in connection with proceedings under EqA, doing any other thing for the purposes of or in connection with EqA, making an allegation (whether or not express) that A or another person has contravened EqA. (s.27 EqA).

32.4. **Dismissal:** Section 94 ERA confers the right on an employee not to be unfairly dismissed by his or her employer. Section 95 ERA describes the circumstances in which an employee is dismissed and s.98 (1) provides that it is for the employer to show the reason or principal reason for dismissal and that the reason is a potentially fair reason within s.98 (2) (reasons related to capability, conduct, redundancy, force of law) "or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" ("SOSR"). Subject to the employer fulfilling that requirement it is for the tribunal, without substituting its judgment for that of the employer, to determine whether the dismissal was fair or unfair in all the circumstances, whether the employer acted reasonably or unreasonably in treating the reason as sufficient reason as determined in accordance with equity and the substantial merits of the case (s.98 (4) ERA).

32.5. **Holiday pay**: The Working Time Regulations 1998 provide for entitlement to annual leave regulations 13 and entitlement to additional annual leave regulations 13 A. The entitlement to annual leave is four weeks in each leave year and the aggregate entitlements including additional annual leave is subject to a maximum of 28 days in each leave year, inclusive of public holidays. Regulation 14 provides for compensation where a worker's employment is terminated during the leave year and, on the date on which the termination takes effect, the proportion the worker has taken of the leave to which they were entitled in the leave year differs from the proportion of the leave year which has expired; in those circumstances the employer shall make a payment in lieu of leave that has accrued but not been taken. S.13 ERA also provides that a worker has a right not to suffer unauthorised deductions from wages, that is a deduction that is not authorised by statutory provision or a relevant provision of the worker's contract or where the worker has previously signified in writing agreement or consent to the making of the deduction.

32.6. **Health & Safety**:

32.6.1. Section 44 ERA provides that an employee has the right not to be subjected to any detriment by any act or failure to act by his employer done on the ground that having been designated to carry

out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out those activities, whilst being a representative of workers on matters of health and safety at work or a member of the safety committee performed or proposed perform such functions, where there was no safety committee or representative the employee brought matters to the attention of the employer by reasonable means that he thought were harmful or potentially harmful to health and safety, or in circumstances of danger, where the employee held the reasonable belief that the danger was serious and imminent, the employee took certain steps to protect himself or other persons including by leaving work refusing to return to work. The appropriateness of steps taken is to be judged by reference to all the circumstances including in particular the employee's knowledge and the facilities and advice available to him at the time.

32.6.2. Section 100 ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is one of six health and safety related reasons listed in that section, being the same or similar circumstances to those envisaged in section 44 ERA.

32.6.3. The fact that an employer disagrees with an employee as to whether there were circumstances of danger or whether certain steps were appropriate is not relevant (***Oudahar v Esporta Group Ltd UK EAT/0566/10/DA***.)

32.6.4. Detriment will be established if a reasonable worker would or might take the view that the treatment in question had, in all the circumstances, been to their detriment (***Jesudason v Alder Hay Children's Hospital NHS Foundation Trust [2020] EWCA Civ 73***).

32.6.5. It is not a defence for the Respondent to show that it would have acted in a similar way for other reasons; if the detriment was because of a protected act, it falls foul of the statutory protection.

32.6.6. As stated above in relation (by our analogy) to "whistleblowing protection, the protection given to an employee carrying out health and safety activities is broad. It would protect an employee, who caused "upset and friction" by the way in which they went about the said activity; an example of this would be where the person involved was perceived as being overzealous even to the point of allegedly demoralising colleagues. The protection seeks to guard against resistance or any manifestation of their conduct being unwelcome. It would undermine the statutory protection if an employer could rely upon the upset caused by legitimate health and safety activity, the manner in which such activities are undertaken, as a reason to dismiss. The manner in which such activities are undertaken will not

easily justify removal of protection unless they are, for example, wholly unreasonable, malicious or irrelevant to the task in hand. (***Sinclair v Trackwork Ltd UKEAT/0129/20/OO (V)***). The tribunal took these principles into account, although the report was seen after close of submissions.

33. **Application of law to facts addressing the listed issues**:

33.1. Discrimination for something arising from disability section 15 Equality Act 2010

The Tribunal has already determined that the Claimant was disabled by reason of his Carpal tunnel syndrome.
The relevant time for the purposes being 27th January 2016 -19th February 2016.

33.1.1. At the relevant time did the Respondent know or could the Respondent have reasonably been expected to know that the Claimant had a disability?

33.1.1.1. The tribunal re-iterates a relevant finding from the judgment with reasons signed on 6th February 2017 following the preliminary hearing into the disability issue of 12-13th December 2016; the tribunal finds nothing new to contradict that finding although not all of the Respondent's witnesses were the same at each hearing; that said the same finding applies: "The Respondent's witnesses gave evidence of the Respondent's working practices, the available personal protective equipment and their respective recollections of observing the Claimant at work as well as their knowledge of his working regime, availability for overtime and what was known of his attendance at work record. …….. They generally observed the Claimant on shift handovers and when the Claimant, or they, worked …. shifts. None of them was able to give evidence of the Claimant's life and how he managed it outside of work. They gave evidence in respect of day-to-day activities only in so far as those activities formed part of the observable working day".

33.1.1.2. None of the Respondent's witnesses at the final hearing knew that the Claimant was disabled by CTS. His line managers knew that he complained at times of pain in his wrists. They also knew that he was generally able and willing to work on all the machines in Shop1 at least until the issues detailed above; it was because of his ability and the frequency that he used all the machines that they were surprised when he objected so strenuously to using the press brake.

33.1.1.3. All the relevant OH reports at the time concluded that the Claimant was unlikely to be considered in law as a disabled person, although cautiously it might be wise to consider him as such. Specifically, the OH advisor said that the Claimant's day to day activities were not substantially adversely affected by CTS.

33.1.1.4. The Respondent's management knew that the Claimant ought to be assessed personally as to what he could and could not do with what equipment in Shop 1 without impacting adversely on his wrists because of CTS but none of them knew of the impact of CTS on his day-to-day activities outside work, or any within work other than that some jobs sometimes caused him some pain and discomfort. They knew that the Claimant had, at that time, declined surgical intervention that was suggested but not recommended as being necessary; they knew he felt that he could manage without it and so it seemed to the Respondent's managers.

33.1.1.5. The Respondent's knowledge was limited; neither the Claimant prior to the above incidents nor the OH reports said anything to put the Respondent on notice to ask further questions or to consider that the Claimant's CTS was a disabling condition (such as to satisfy the definition in s.6 EqA 2010, albeit the managers were not necessarily aware of its wording or thinking in those specific terms). They understood that sometimes in some conditions to varying degrees the Claimant had some difficulty with his wrists at work.

33.1.1.6. The tribunal; finds that at the material time the Respondent neither knew or ought reasonably to have known that the Claimant was disabled by CTS. The Claimant does not contest the judgment that he was not disabled by a mental impairment.

33.1.2. <u>Further did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability?</u> This claim fails because the Respondent neither knew nor could it reasonably have been expected to know that the Claimant was a disabled person (s15 92) EqA. The alleged unfavourable treatment was because of the Claimant's refusal to comply with management instructions, his insistence on arguing points with his line manager while refusing to accept the need for a personal assessment of his capabilities as recommended by OH. Furthermore, the treatment was because he continued to complain that all activities caused him pain, but without co-operating in a

personal assessment while insisting on all the machinery in Shop 1 being risk assessed. He was not sent vacancies whilst off work on sick leave because the Respondent never did that; he was certified unfit to work mostly and for the longest period owing to anxiety and/or stress. The Respondent did not consider it appropriate to send job vacancies in such circumstances, not least because the Claimant had a substantive post and was expected to return to it when he was well enough. The respondent wanted to fill vacancies as they occurred; the claimant was certified as unfit to work.

33.1.3. Can the Respondent show that the alleged treatment is a proportionate means of achieving a legitimate aim? In a situation where the Claimant alleged that all work activities caused him pain and refused to co-operate in a personal "wrist assessment" of his capabilities on the machinery, the Respondent's actions were proportionate. They needed the co-operation of the Claimant; he doggedly refused to co-operate; he refused to accept management's authority and to follow instructions, even for his benefit, but instead levelled repeated unsubstantiated allegations of conspiracy and corruption. He became unmanageable.

33.2. Harassment Section 26 Equality Act 2010

33.2.1. Did the Respondent harass the Claimant contrary to section 26 Equality Act 2010?

33.2.2. Did the Respondent engage in unwanted conduct related to the Claimant's disability the alleged acts being?

33.2.2.1. The alleged behaviour of the Respondent on January 27th, 2016

33.2.2.2. The alleged behaviour of the Respondent on 30th January 2016

33.2.2.3. The Respondent informing the Claimant there was no work for him to go home on 1st February 2016.

33.2.2.4. And Did the conduct have the purpose or effect of violating the Claimant's dignity or create an intimidating hostile degrading humiliating or offensive environment for the Claimant?

33.2.2.5.

Everything said and done by the Respondent as alleged by the Claimant was unwanted by him. The Respondent's words and actions were related to the Claimant rendering himself unmanageable as described. In so far as the unwanted conduct related to the Claimant's disability it was with a view to assisting him by avoiding him having to work on machinery that caused pain to his wrists, but rather to ensure that there was a personal assessment before he undertook work. He steadfastly refused to co-operate in such an assessment believing that he knew better and that generalised risk assessments were required throughout

Shop1; he had either misunderstood the OH recommendation and requirements of RIDDOR or chose to over-complicate matters and to wilfully and disingenuously misinterpret them; the tribunal is prepared to give the Claimant the benefit of the doubt to an extent but find that, unreasonably, he would not re-consider his mistaken position and he closed his mind to the possibility that anyone else other than he was correct; instead he preferred to attribute everything to a conspiracy against him and to widespread corruption (which he has failed to substantiate). The Respondent did not know the Claimant was disabled at the material time; its actions and words did not have the purpose of creating the harassing effect. More likely than not the Claimant did feel such an effect. The Claimant's perception was however unreasonable. He seems to the tribunal to have lost self-awareness, insight, and any degree of proportionality and sensible perspective, such was his conspiracy theory.

33.3. Victimisation Section 27 Equality Act 2010

33.3.1. Did the Respondent victimise the Claimant by putting the Claimant to a detriment because the Claimant did a protected act?

33.3.2. Do the following constitute protected acts further to the Claimant's protected characteristic:

33.3.2.1. The grievance raised on 17th February 2016. Yes, self-evidently.

33.3.2.2. The email sent to the board of directors on 20th June 2016. Yes, self-evidently.

33.3.2.3. Emails of 3rd April 2018 and 18th April 2018 to Pam Mulliner. Yes, self-evidently.

33.3.3. Do the following constitute detriments because of those protected acts:

33.3.3.1. Events 20th June 2016

33.3.3.2. During the grievance meeting on 13th July 2016

33.3.3.2.1. Accused of interfering with witnesses.

33.3.3.2.2. Allege the Claimant had called Matthew Loton as a witness when he had not

33.3.3.2.3. Documentary evidence was ignored.

33.3.3.2.4. Undue pressure was applied during the hearing.

33.3.3.2.5. Not permitted to ask questions

33.3.3.2.6. The termination of the Claimant's employment on 18th May 2018.

None of the above, in so far as they occurred at all, were "because" of the protected acts. The Claimant was asked not to hector Mr Loton and was not accused of "interfering" with him; that was reasonable chairing of the meeting; by the same token the Claimant may have felt pressure, but the tribunal finds that no undue pressure was applied to him and he was, at every stage, allowed to ask questions that were relevant and not overly repetitious. The Respondent genuinely believed that the Claimant wanted Mr Loton to attend the hearing and if that was not the case, they were simply mistaken. In so far as the Respondent's managers were reasonably able to keep up with the frequency and quantity of written submissions and documentary disclosures they did so, and they did not wilfully ignore it or the Claimant; their task was however extremely onerous. The Claimant did not help himself with the amount and complexity of his numerous written submissions; grievances crossed with outcomes and appeals with further submissions and renewed, repeated grievances. In essence there was a considerable overlap between each of the Claimant's submissions, grievances, and appeals. The Respondent may not have read absolutely everything that was ever sent to it by the Claimant but the tribunal's finding is that the appropriate officers did in fact make every effort to deal with the paperwork relevant to their considerations and they did so effectively and proportionately at least until the matter reached Mr Bullough who openly offered a meeting rather than risk further embroilment in the reams of paperwork, having read at least the initial grievance to him; that is not a finding that he ignored the Claimant's submissions but rather that he intended a better way of dealing with the tsunami of paperwork. Ultimately the Claimant was dismissed because of the obvious complete breakdown of the relationship, as stated in the dismissal letter; the Claimant would not meet the Respondent; he accused all and sundry of crimes and collusion and breaches of legal obligations, saying they were all in a large conspiracy; he demanded dismissals of a number of people as a pre-condition of his returning to work; he made the employment relationship untenable by this behaviour and not by the fact that he alleged discrimination owing to actual physical disability or previously alleged mental health disability. The Respondent invited him to discuss those matters without pre-condition, but the Claimant refused.

33.4. Health and Safety Section 44 Employment Act 1996

33.4.1. Was the Claimant subject to any detriment by any act, or deliberate failure to act by the Respondent country to section 44 employment rights act 1996?

33.4.1.1. No. The Claimant repeats the same allegations that the tribunal has dealt with under other heads of claim adding only allegations in respect of treatment alleged on 22-23rd January 2016 and an alleged refusal to deal with the grievance of 13-15th April 2016. On the latter point there was no refusal but rather a recognition that there was insufficient time to investigate it before concluding on the then earlier outstanding grievance followed by the Respondent's suggestion of dealing with everything holistically at a meeting when the Claimant was well enough (which offer he declined). On the former point (22-23.01.16) the allocation of work to available operators was for operational and commercial reasons.

33.4.1.2. The tribunal considers in this context that although the Claimant made protected disclosures and couches, (views), everything through the prism of whistleblowing and the raising of health and safety issues the tribunal finds that this is not a case where he was reasonably and even over-zealously carrying proper activities/making disclosures. His conduct generally was wholly unreasonable to the point of destroying the employment relationship, and in that regard was irrelevant to the appropriate pursuit of health and safety activities or making protected disclosures. It is hard to describe the Claimant's conduct as "malicious" but his allegations of corruption and conspiracy are unsubstantiated and so unreasonable in all the circumstances that we conclude that his conduct was certainly egregious and falls outside the statutory protection provided. The later finding is repeated below in respect of the s.47B ERA claim.

33.5. Protected Disclosure s47B Employment Rights Act 1996

33.5.1. Was the Claimant subject to any further detriment by the Respondent on the grounds the Claimant had made a protected disclosure? No, as explained both above and below.

33.5.2. Did any of the following constitute protected disclosures further to section 47 Employment Rights Act 1996:

33.5.2.1. Comments made by the Claimant on January 27th in relation to alleged health and safety matters.
33.5.2.2. The Claimant's grievance on 14th 15th April 2016
33.5.2.3. Email to the board of directors on 20th June 2016
33.5.2.4. Email to Peter Bullough and Phil Smith 13th September 2016
33.5.2.5. Emails of 3rd 4th May 2018 to the board of directors

In respect of each of the disclosures the Claimant raised matters of concern in respect of health and safety, and breaches of legal obligation, either in detail or by reference. Some of the communications lacked a degree of specificity but the Claimant clearly intended to raise what he felt was a health & safety averse atmosphere and he cited examples that established this to his mind. He believed what he was saying. Perhaps all his beliefs were not reasonable in that he was given explanations, but his mindset was such as to disbelieve and mistrust what his managers told him and to prefer his world- (or work-), view, namely that everybody was conspiring to do him harm. There is no evidence to support his conspiracy theory. In fact, he was often wrong about issues that he raised but there is no requirement for protection that a disclosure is accurate. The tribunal is prepared to give the benefit of any doubt to the Claimant and to find that he did make some protected disclosures. What is more significant is why the Respondent then acted as it did to the Claimant. We find as a fact that the reason the Respondent did or said as it did was not on the ground that he had made a protected disclosure(s). The respondent's reasoning was that it wanted to manage the claimant safely and to ensure an adequate (in terms of numbers and skills/experience) staff level to meet the needs of production. It wanted to deal with the claimant's concerns. It had a concern about the claimant's ability to operate machines without experiencing pain and discomfort and would have carried out the OH recommendations of a personal assessment of the claimant's wrist and duties if he had consented. The claimant refused to co-operate in such endeavour as he unreasonably fixated on what he insisted was required instead, a general risk assessment of the machinery in Shop 1.

33.5.3. Did the following constitute detriments in relation to the relevant protected acts above?
33.5.3.1. On 1st of February the Claimant was informed there was no work for him, and he was to go home.
33.5.3.2. The alleged refusal to deal with the Claimant's grievance on 14th 15th April

33.5.3.3. The alleged manner in which the grievance meeting was held on 22nd April 2016

33.5.3.4. The alleged behaviour following the email to the board of directors on 20th June 2016

33.5.3.5. The refusal of Peter Bullough to hear the Claimants alleged grievance until he was well enough to attend a meeting.

33.5.3.6. Following the disclosures on 3rd 4th May 2018 the termination of the Claimant's employment.

In terms of "whistle-blowing" detriment the tribunal has already made findings of fact and judgments as to the whys-and-wherefores which describe the Respondent's conduct innocently. The Respondent attempted to manage the Claimant reasonably and appropriately. The Claimant made himself unmanageable; he was un-cooperative, he made disproportionate and unreasonable demands with unacceptable pre-conditions before he would engage with the Respondent. The alleged conduct, in so far as it occurred at all (see findings of fact), was not on the ground of his whistleblowing. The tribunal considers in this context that although the Claimant made protected disclosures and couches, views, everything through the prism of whistleblowing and the raising of health and safety issues the tribunal finds that this is not a case where he was reasonably and even over-zealously carrying proper activities/making disclosures. His conduct generally was wholly unreasonable to the point of destroying the employment relationship, and in that regard was irrelevant to the appropriate pursuit of protected disclosures. It is hard to describe the Claimant's colleague as malicious but his allegations of corruption and conspiracy are unsubstantiated and so unreasonable in all the circumstances that we conclude that his conduct was certainly egregious and falls outside the statutory protection provided.

33.6. Unfair dismissal section 98 ERA 1996

33.6.1. Did the Respondent dismiss the Claimant for a potentially fair reason (SOSR)? Yes. This was not a label of convenience for the Respondent. The Claimant's conduct was egregious in that he set himself against management at every level and made fundamentally damaging yet unsubstantiated allegations with demands for multiple dismissals, regardless of due process, before he would engage with the Respondent or consider a return to work. The Respondent considered all matters carefully and conscientiously concluded that the relationship of trust and confidence had broken down irretrievably. The tribunal considers that conclusion to be a reasonable one in all the circumstances.

The Respondent gave the Claimant due notice of the hearing and provided him with time and documentation with which to prepare. He had the opportunity to attend to be heard and to be represented. He could appeal the decision. The procedure was fair. The entire set of circumstances described above was considered and the Respondent dismissed the Claimant based on the rationale set out in the dismissal letter. It always acted within the band of reasonable responses of a reasonable employer. The tribunal did not consider what it would have done had it been in the Respondent's shoes, as that is irrelevant, but considers that it is likely that most employers in such a situation would dismiss an employee who conducted themselves as the Claimant did. The test is whether we find that no reasonable employer would dismiss; we cannot find that. Dismissal was clearly within the range of reasonable responses of a reasonable employer dealing with an employee who conducted themselves as the Claimant did, refusing assistance, arguing every point regardless of merit while accusing so many people of a vendetta and conspiracy against him for which there is no evidence and only an unreasonable suspicion. The Respondent acted reasonably in treating the stated reasons as sufficient reason to dismiss the Claimant.

33.6.2. Or, as the Claimant avers, did the Respondent dismiss the Claimant due to:

33.6.2.1. The Claimant raising alleged health and safety issues and /or

33.6.2.2. The Claimant raising or making alleged public interest disclosures and/or

33.6.2.3. By way of victimisation because the Claimant alleged disability discrimination

The Respondent did not dismiss the Claimant for any of these reasons. It attempted to deal with the Claimant's health and safety issues, with his disclosures and with his grievances. The Claimant seemed set against resolving issues but preferred to accuse everyone of wrongdoing and to refuse to engage constructively while doing so.

33.6.3. Whether, even if the respondent did not follow a fair procedure, or the principal reason is found not to be a fair reason would the Claimant's employment have terminated in any event: The tribunal has found that the dismissal was procedurally fair. Even if there is some unfairness which we have missed then we consider that it was inevitable in all the circumstances that the Claimant would be dismissed at about this time had an even fairer procedure been adopted. The Claimant was intransigent and unreasonable. He was impervious to the Respondent's efforts to secure his return to work either with the benefit of a wrist assessment in Shop 1 or in an alternative suitable role such as security. He would not engage with

efforts to meet to deal with his many concerns holistically. He made dismissal after such a protracted absence with no sign of improvement in the relationship almost inevitable; in fact, it is hard to imagine any other outcome without a considerable change of understanding and of heart on the part of the Claimant; that has not occurred in respect of any aspect of this case over the last five years. The Claimant has pursued his allegations against everyone he has encountered in management, and even some of the Respondent's legal representatives such as one solicitor and two barristers (who I will not name in a published judgment because I have no reason to countenance the allegations of professional misconduct that have been made, roping them in to the widespread conspiracy that the Claimant blames for these circumstances).

33.6.4. Did the Claimant contribute or cause his own dismissal? Yes, wholly. The relationship broke down due entirely to the Claimant's his attitude and conduct towards colleagues (operatives, clerical and managerial), his refusal to engage until his preconditions (including the dismissal of a potentially large number of people) and his general intransigence. He made himself unmanageable.

33.7. Assertion of Statutory Rights Section 104 Employment Rights Act 1996

33.7.1. Was the Claimant dismissed (and therefore unfairly dismissed) for the principal reason that he asserted a statutory right further to section 104 Employment Rights Act 1996? No. See above. The dismissal was for the substantial reason that the relationship had irretrievably broken down for reasons wholly unrelated to the assertion of statutory rights. The Respondent was content to deal with the Claimant's holiday pay claims and even to allow him to receive payment outside the agreed procedures.

33.7.2. Did the emails from the Claimant in March, April, and 17th May in relation to his holiday pay constitute an assertion of a statutory right. Yes. The Claimant is well versed in statutory authorities and is aware of his rights. He also knew that he was protected from dismissal when asserting certain rights including entitlement to paid holidays. He clearly asserted that the respondent was not according to him his holiday rights.

33.7.3. If so, was this the principal reason for dismissal? No – see above. The Respondent was willing to accommodate the Claimant over holidays and paid him notwithstanding his serial breach of policy. It resolved any holiday issue and used the Claimant's said assertions as an opportunity to make matters simpler for him. This was not held against the Claimant. In respect of holidays, and by reason of the Respondent's compromises and the Claimant latterly complying with policy, this was not something that played a

significant or material part in the consideration of breach of trust and confidence.

33.8. Holiday Pay

33.8.1. Did the Respondent deduct £1,920 from the Claimants pay? No. The Claimant was unsure about this and why it was shown on a payslip. He had suspicions but no evidence to substantiate that a deduction was made, as opposed to being referred to on a document. Ms Mulliner said she knew of no reason for a deduction and did not think training fees were relevant. She could not explain why reference had been made to a deduction and did not think one had been made. It seems any reference to a deduction was erroneous and none was made.

33.8.2. If so, was the deduction unauthorised? See 32.8.1 The Claimant was not entitled to carry over holidays from one year to the next. He was paid for all his pre-dismissal accrued holiday entitlement. Prior to his dismissal he took holidays with or without prior authorisation. He was never incapacitated by illness from taking them. He had no requests refused. He was twice at least granted retrospective authority. The Claimant has been paid all holiday pay to which he was entitled. In earlier years he may not have used his full entitlement but that was a matter for him to manage and, in so far as he failed to do so, then the principle “use them or lose them” applied.

Employment Judge T.V. Ryan

Date: 10.06.21

JUDGMENT SENT TO THE PARTIES ON 11 June 2021

FOR THE TRIBUNAL OFFICE Mr N Roche