EMPLOYMENT TRIBUNALS

Claimant: Mr D Downes

Respondent: MPA Group Ltd

Heard at: Birmingham **On:** 1 to 4, 8, 16 & 17 March 2021

Before: Judge Hughes **Sitting with**: Mrs S Bannister & Mr R Virdi

Representation:
Claimant: In person
Respondent: Mr O Lawrence, Counsel

JUDGMENT having been sent to the parties on 22 March 2021, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and issues

1 This Employment Tribunal gave a judgment at the above hearing that the claimant was not automatically unfairly dismissed for making disclosures qualifying protection; that he was not subjected to detriments because of making disclosures qualifying for protection; and that although he was a disabled person, the respondent did not have actual or constructive knowledge of his disability and consequently he was not harassed or directly discriminated against because of disability. The claimant withdrew a claim for notice pay. After we gave oral reasons on liability, the respondent made a costs application. We decided there were grounds to award costs to the respondent but that we should not exercise our discretion to do so.

2 We gave reasons for the judgment orally on 17 March 2021 and the Judgment was sent to the parties on 22 March 2021. Mr Downes made a request for written Reasons on 1 April 2021.

3 The claimant presented a Claim Form on 25 October 2019. He had complied with the Early Conciliation requirements. The dates of his employment were 3 September 2018 to 1 August 2019 and consequently he lacked sufficient service to claim ordinary unfair

dismissal. The claimant alleged that he had made public interest disclosures and that he was subjected to detriments and then automatically unfairly dismissed for doing so. The claimant said that he was a disabled person by reason of a hearing impairment and that he had been directly discriminated against. The discrimination allegations related to remarks allegedly made by his manager. In fact, the allegations are more properly classed as harassment. There was a claim for notice pay which was withdrawn. At the hearing before us, the claimant said that he had intended to claim unauthorised deductions from wages in respect of commission payments but accepted that this claim was not included in the Claim Form. Consequently, that claim could not be pursued.

4 The respondent submitted a Response. The respondent did not accept that the claimant was disabled and contended that it was not aware that the claimant had a condition which could amount to a disability. The respondent denied that the claimant had made disclosures qualifying for protection (i.e. public interest disclosures). The respondent said that the claimant was not subjected to detriments or dismissed for making disclosures. It was the respondent's case that he was dismissed because of his conduct which had caused the employment relationship to break down. The respondent said that he was paid in lieu of notice.

5 There was a case management discussion before Judge Harding which set this case down for a seven day hearing. By the time that we came to hear it, the listing had been reduced to six days but it was unclear why that had occurred. It was necessary to add two to the hearing to complete it.

6 We were provided with a bundle of documents – R1. Numbers in square brackets in this judgment refer to pages in the bundle, unless otherwise specified. There was an agreed list of issues. Witness statements had been produced for all of the witnesses. We were also provided with written submissions.

7 We heard evidence from the claimant in support of his case. He called his wife, Mrs Lisa Downes, to give evidence; and an acquaintance, Mr Roger Tice, who is the Managing Director of Richter Associates which became a client of the respondent. The respondent called Mr Peter Corley, who was then Sales Manager, and was the claimant's line manager. The respondent also called Miss Samantha Gallagher who was Human Resources Manager and then promoted to Human Resources Director. We heard submissions on the sixth day of the hearing, deliberated, and handed down our oral reasons on the eighth day.

Findings of Fact

The following are the primary findings of fact we made relevant to the issues we had to determine.

8 The claimant was employed by the respondent as Research and Development Patent Box Consultant from 3 September 2018 to 1 August 2019. In short, he was responsible for selling the respondent's services

to companies who have a Research and Development function as part of their business. The respondent provides advice to those companies to enable them to claim back money from HMRC for research and development work undertaken. The respondent charges a fee for providing those services which is a proportion of the amount that is recovered from HMRC.

9 The Claimant produced a disability impact statement for these proceedings [55]. In that statement, he explained that he has had hearing problems all his life. When he was young, grommets were fitted to his ears to drain excess discharge produced from his ear canals to assist his hearing. The grommets were not a permanent solution. Between 1998 and 2000 the claimant had ear operations because of persistent complications to his left ear. Those were: a mastoidectomy which is a surgical procedure to remove infected bone from behind the ear; and a tympanoplasty which is reconstructive surgery of the ear drum and the small bones in the middle ear. The consequence was that the claimant has a cavity in his left ear which significantly reduces his ability to hear. The claimant also has problems with his right ear. The claimant undertook some hearing tests some years ago and had taken similar tests more recently (after his employment terminated). Those show that his hearing has worsened over time [79 & 203A] and at the relevant time it is likely that his hearing impairment was in the moderately to severe range [220]. The claimant explained that he struggles to hear certain sounds and has particular difficulties with conversations in crowded environments. This can lead to him missing instructions. He also explained that in order to properly hear in a crowded environment he has to face the person who is speaking and concentrate very hard. The claimant has to ensure that water does not get inside his ears in order to prevent infections, which makes it difficult to shower and prevents him from swimming or having baths. The claimant also explained that he suffers from tinnitus which is a buzzing sound in the ears. Since the events in question, the claimant has been fitted with a hearing aids which he says have assisted with his ability to hear.

10 The respondent's representative submitted that the hearing test results may have been inaccurate if the claimant had ear infections at the relevant times. We rejected that proposition. We thought it fanciful to suggest that hearing test would be administered by a suitably qualified professional on a person whose ears were infected because it would compromise the test results.

11 The claimant also explained that his condition is degenerative. We accepted that the medical evidence supported that. That is the reason why the claimant has recently started wearing hearing aids. We were mindful that the fact that he now wears hearing aids is not something to take into account when assessing whether he was a disabled person at the material time, but it does confirm the rest of the medical evidence and the claimant's own evidence that his condition is degenerative.

12 The claimant did not take any time off sick because of his hearing impairment. Miss Gallagher's evidence was that the respondent was unaware of his condition because he had not taken time off sick. The claimant took issue with that and said that sickness is not the same thing

as disability. Whilst we fully accepted that, we did think that the claimant had misconstrued the point Miss Gallagher was making. She was simply pointing out the claimant had had no disability-related sickness absence such as might cause the respondent to know that the claimant had a condition that could amount to a disability.

13 There was a dispute between the parties as to the information which the claimant supplied when he commenced employment. It was his position that he had completed a form relating to disability at the outset. Miss Gallagher said that the respondent does not use disability questionnaires and that no such document existed. The respondent's representative pointed out that the claimant did not tick the box in the Claim Form which asks about disability and adjustments, but since he had, of course, claimed disability discrimination, we did not think anything turned on that. The claimant had filled in an emergency contact details form whilst working for the respondent but that was not completed until 18 March 2019 [114-115]. The document did not ask whether the staff member completing the form considered themselves to have a disability. It did ask whether they suffered from any medical conditions to which the claimant responded: "Not applicable". During cross-examination the respondent's representative suggested that the fact that the claimant had done so, indicated that he had no disability. The claimant took issue with that and said that having a medical condition is not the same as having a disability. We agreed with the claimant on that point. Our conclusion was that if the claimant had filled in any form relating to disability it was most likely for the agency who put him forward for the job with the respondent rather than a form which the respondent uses. We concluded that the claimant had not established that the respondent was aware he was disabled from the outset by reason of completing a disability questionnaire.

14 The claimant gave evidence that during his successful interview for the job, he told Mr Corley and Mr Lowndes, the Sales Director, that he was "hard of hearing" and that this made him a good listener and therefore enhanced his ability to undertake the sales role. In our view, it was quite likely the claimant said this. It was consistent with wanting to present his hearing condition as a positive attribute for the role. Although we thought it likely that the claimant did make this comment as part of the interview, we thought that Mr Corley and the Director attached no significance to it. Mr Corley's evidence, which we accepted, was that he did not recall the comment having been said. This was supported by the claimant's evidence that in everyday life he plays down his hearing problems. The claimant's position can be contrasted with that of Mr Tony Cassidy, who was recruited as a Sales Representative at the same time. The respondent's witnesses said that they knew he had a hearing condition, because he made it plain from the outset. Mr Corley said the sales team made appropriate adjustments by ensuring that Mr Cassidy was sitting in the best place to be able hear at points when he was in the office. The other matter which we thought significant in this context was that the sales role did not involve being in the office very often at all. There would be a monthly sales meeting and generally members of the team would be in the office twice a month and operated from home otherwise. That was not the position during the first few weeks of employment, when the claimant and Mr Cassidy were being trained by

Mr Corley. Mr Corley said that when he was providing the training he did not realise that the claimant had a hearing impairment, and we accepted that.

15 When the respondent signs up new clients it is a requirement that an Anti-Money Laundering check ("AML") is carried out. The respondent had contracted with a third party provider for this service. However, much sooner than had been anticipated, the respondent ran out of credits for the checks to be made. Mr Corley's evidence was that the Directors took a decision that for a short period of time the checks would not be done so that they could find a new provider or renegotiate the contract with the existing provider. He said that the Directors approved a system whereby when the client's details were input on the respondent's system, he or Ms Samantha Wildman, who was his de facto deputy, would instead make an entry to say the check had not been done. Originally this required them to input a written confirmation that the check had not been done, but the system was changed so that a six digit number (matching the AML check) had to be input. At that point, which was November 2018, six zeroes were entered for clients who had not been checked. There were two reasons for that: (1) a six digit number had to be entered, or the rest of the client details could not be entered on the new system and (2) to enable the respondent to identify clients who needed AML checks once the issues with the third party provider were resolved. Mr Corley said that although the intention was that this arrangement would be very short term, in fact it lasted for about three or four months, which meant that about 40 clients were signed up without AML checks taking place. Eventually the checks were resumed, after the respondent had renegotiated the contract with the existing provider, and steps were taken to deal with the backlog of AML checks required. We think it important to emphasise that this practice, which clearly was a breach of a legal obligation, had been put in place by the Directors, so that any allegation to them that Mr Corley was bypassing AML checks, would have been met with the response: "We know, and we approved it". That position reflects badly on the respondent, but is nevertheless the case.

16 Miss Gallagher confirmed that when she later looked into this, her fellow Directors confirmed they had approved this as a temporary measure.

17 Clearly by signing up clients and not undertaking checks, the respondent was failing to comply with a legal obligation. The claimant's evidence was that when he found out about the arrangement, he felt uncomfortable because he was aware there could be serious consequences. We accepted that, but the question for us was whether he raised his concerns with the respondent and, if he did, whether he was treated detrimentally because of doing so. We deal with this below in paragraphs 20, 21, and 35, by reference to the dates of the alleged disclosures.

18 Shortly after the claimant commenced employment, he arranged a meeting with a prospective client, Mr Roger Tice, the Managing Director of Richter Associates. Mr Tice is a friend of his brother, and also knew the claimant professionally. The meeting took place on 12 October 2018.

The claimant travelled to the meeting with Mr Tice, who gave him a lift. Mr Corley met them at the venue and they went for lunch afterwards. It is common ground that Mr Corley told the claimant that he could claim back expenses for a round of drinks because it was associated with the sales meeting. There is a dispute as to whether Mr Corley told the claimant he could claim mileage, even though he had not used his car to travel to the meeting. The claimant and Mr Tice gave evidence that he did, and Mr Corley denied it. There is also a dispute about whether Mr Corley told the claimant that if he wanted to take his wife to see a show in London, he should arrange a meeting with a prospective client, and could then claim back travel and hotel expenses. The claimant's evidence was that this was said. Mr Corley denied it. Mr Tice said that he did not hear Mr Corley say that.

19 We were unable to reach a definitive conclusion about whether the claimant was encouraged to claim mileage when he had not driven to the appointment. We thought it rather unlikely, because Mr Corley was responsible for signing off expenses for the Sales Team. We concluded that the claimant was not encouraged to use a client meeting as a pretext for an overnight stay in London, mostly because when something similar occurred in November 2018 (covered below at paragraph 30), Mr Corley challenged the claimant's expense claim.

20 The first alleged protected disclosure was to Mr Corley. In his further and better particulars of claim, the claimant said this occurred on 25 October 2018 when he became aware the AML checks were being bypassed because he saw Mr Corley do so when entering a client on the system [49-51]. His case was that he told Mr Corley: "I don't feel comfortable with the AML checks not being undertaken because I know how important it is, previously being a mortgage advisor", and that Mr Corley said, "I do it all the time, don't worry about it". In the grounds of Response to the claim, the respondent denied it was said, and pointed out that on the day in question the claimant was in Chessington visiting a client and Mr Corley was in Skegness [52-54]. By the time of the hearing before us, the claimant had changed the date to 18 October 2018 and the client had been clarified to be Richter. Mr Corley's evidence, which we accepted, was that Richter was not entered onto the system until November. We accepted that. We therefore concluded that the claimant made no disclosure at that point. Given that we concluded no disclosure was made, we did not have to decide whether the words the claimant alleged he said, would amount to a disclosure of information.

21 The second alleged disclosure was to Mr Lowndes, Sales Director for the respondent. In his further and better particulars of claim, the claimant said this occurred on 31 October 2018 at the Advanced Engineering Show in Birmingham and that he had said: "John, I feel a bit uncomfortable with the AML checks not being carried out and if the FCA ever did an audit it could get me into a lot of trouble", and that Mr Lowndes told him it would be "sorted" [49-51]. The claimant's case was that this was a reference to what he had witnessed Mr Corley do when entering the details for Richter. The respondent denied this happened. We concluded that it did not occur, because the date of the alleged disclosure pre-dated Richter's details being put on the system.

22 In November 2018 there was an exchange of emails about sales leads ("partnerships") [135 to 138]. Mr Corley emailed the Sales Team on 7 November 2018 explaining that if they were looking to form partnerships outside their area or nationally, he should be informed, so that he could decide who was best placed to follow up taking into account "many factors that include, participation, time input, training, company resource etc." At that point the members of the Sales Team were Ms Samantha Wildman and Mr Greg Davidson, both of whom were well established in the role, and had their own "sales pipelines"; and the Claimant and Mr Cassidy, who had just joined, and were looking to build up a client base (i.e. a sales pipeline). Mr Corley's evidence, which we accepted, was that he did not set them any performance targets because he knew it would take time for them to settle into the role and form relationships with new clients. He also explained that the respondent uses a third party provider ("Think") to generate sales leads and set up appointments with prospective clients for members of the Sales Team (including him). There was a bonus payable if a Sales Representative made twelve sales in a three month period [135].

23 That same day, the claimant queried who was covering which areas and said: "I've noticed there have been appointments from Think that I thought would be in my area", and Mr Corley said he would clarify the areas at a sales meeting the following week [136].

24 Sales projection figures were circulated that day by Mr Zach Simmons in the form of a table [136A]. In his email he explained that it was generated by looking at leads and prospects on the CRM (which we understood to be some form of electronic diary system). Mr Corley sent follow-up emails asking the team to check all their leads and prospects were up to date and to provide him with their own forecasts so he could compare them to those generated by the automated system [136A & 137].

25 The automatically generated table showed predicted sales for November, December and January of: 9 for Mr Corley; 22 for Ms Wildman; 16 for Mr Davidson; 4 for Mr Cassidy; and 0 for the claimant. The claimant replied to Mr Corley on 8 November 2018 saying that he could predict no sales so far for November but was working to change that and that: "Any Think appointments would be greatly appreciated" [137].

26 The claimant's case was that Mr Corley was deliberately diverting sales leads from him and Mr Cassidy to Ms Wildman and Mr Davidson. He also suggested that Mr Corley was giving them appointments outside their sales areas. Mr Corley said that he was not diverting sales leads and that it would be counter-productive to do so, because his objective was to ensure that all members of the Sales Team were successfully generating leads. He explained that he did not expect the claimant or Mr Cassidy to perform as well as the established members of the team. He also explained that geographical area was only one of many factors he considered when deciding which member of the team was most suitable to deal with a particular client or prospective client. We completely accepted his evidence on those points.

27 However, what was clear to us was that at this very early point in his employment, the claimant was already questioning Mr Corley's motives, and was aggrieved that his projections were worse than those of the established team members. By way of example, the claimant emailed Mr Corley on 11 November 2018 saying: "Desperate to get these two wins, Greg is out at a meeting in Swadlincote on 20th which is about 15 minutes from me and I was wondering if I could do it instead of Greg?" [138].

28 The claimant's case is that at this point Mr Corley had an agenda to dismiss him for making disclosures. We rejected that proposition for a number of reasons: firstly no disclosures had been made; secondly, if Mr Corley wanted to dismiss him, he could have done because the claimant was working a six month probationary period; thirdly, the claimant was later confirmed in post by Mr Corley at the end of his probationary period (see below); and finally, as Mr Corley said, it would have been counter-productive to set up the new members of the sales team to fail.

29 The claimant also alleged that Mr Corley set up two fictitious appointments for him with a company in Manchester, and that when he turned up he was not expected. Mr Corley said that Think had set up the appointments, and that it was not uncommon to turn up for a meeting with a prospective client and to be told you were not expected. We accepted that. We thought that the claimant's view of the situation became increasingly tainted by confirmation bias i.e. every time something happened which he was unhappy about, it fed into his theory that Mr Corley 'had it in for him'.

30 In November 2018, the claimant had an appointment to meet a client in London. He drove down the day before with his wife and stayed overnight in a hotel. He travelled to the meeting by public transport and returned to his home by train. His wife drove back later. The claimant claimed mileage for both journeys. He also claimed for a meal he had purchased at the station. When he submitted his November expense claim, Mr Corley, who was responsible for signing it off, noticed the meal had been purchased at a station and questioned the validity of the mileage claim. On 5 December 2018, he told the claimant there was a problem with the claim, but untruthfully led him to believe that it had been queried by the Finance Team. The claimant emailed to say his outward journey was by car but he had used trains and a taxi on the way back. He said that he claimed mileage because he thought it would save the respondent money [140]. Mr Corley suggested that he come to the office the following Monday to discuss it and attached a letter inviting the claimant to an investigation meeting with himself and Miss Gallagher [140 & 141]. The letter said that the meeting was to discuss: "your mileage claim for 19 November 2018 to the value of £126.00 in connection with a client meeting in London, as I have reason to believe you travelled by train that day", and that the purpose was to determine whether to take action under the disciplinary policy [141]. There was no note of the meeting. The claimant's account was that Miss Gallagher was hostile to him. She denied that and said she remained calm throughout, but that the claimant became rather emotional. We accepted that. The claimant provided the same explanation. Towards the end of the meeting, Mr Corley said words to the effect of: "That clears it up for

me". In evidence, he explained that this was said in the contact of confirming that he had no more questions for the claimant. At the end of the meeting, the claimant was informed by Miss Gallagher that it was a serious issue that could amount to gross misconduct and that he would be invited to a disciplinary hearing. Mr Corley had no further involvement with the disciplinary process.

31 On 6 December 2018, Mr Lowndes sent a letter to the claimant inviting him to a disciplinary hearing about concerns over the validity of his expense claim. The claimant was informed of his right to be accompanied and given the opportunity to submit a written statement in advance [143-144]. He did so the following day [146-148]. In that statement he gave the same account as before and said he had receipts for the train journeys. He calculated the actual expense as being "129.75, but said that as the mileage came to £126.00, he thought it would have been unfair to the respondent to claim the additional £3.75 actually incurred. He made reference to the "That clears it up for me" remark. He said: "I feel privileged to work for MPA and really feel I have found a company that I can settle down and have a career with and am mortified that there is a suspicion of my actions being dishonest". He said he had made a genuine administrative error and it would not happen again, and that he would always discuss expense queries with Mr Corley before submitting a claim in the future. Significantly, the claimant did not say Mr Corley had encouraged him to falsify expense claims, or that Mr Corley was treating him detrimentally for making a disclosure.

32 Miss Gallagher asked Mr Corley about the comment made towards the end of the meeting, and later forwarded the claimant's statement by email, with the text: "FYI…Confidential" followed by a smiley face emoji [151]. Mr Corley replied confirming that he meant that they had covered everything [151].

33 The claimant criticised Miss Gallagher for forwarding his statement to Mr Corley because it was confidential. We did not think that to be well-founded, because it was important to clarify what Mr Corley had meant. The claimant also criticised her for the emoji, saying that she and Mr Corley were mocking him. Miss Gallagher denied that, and said that she often uses emojis in emails. Whilst we accepted that people frequently do use emojis in work-related emails, we thought it ill-judged to have done so in an email relating to a disciplinary process. We did not accept that Miss Gallagher was mocking the claimant.

34 The meeting took place on 11 December 2018. The minutes, which were taken by Miss Gallagher, and signed off as accurate by the claimant, show that Miss Gallagher explained that regardless of intent or reasoning, a false claim had been submitted. She explained that the respondent reimburses reasonable expenses, properly incurred, and wholly in relation to performing his role. She said that a reasonable expectation would be that the claimant would drive to the station on the day of the meeting, take a train to London and return the same day, which would come to about £53.15, not the amount claimed. She said that a conversation should have taken place with Mr Corley in advance, to agree what was reasonable. The claimant then said that depending on

the outcome of the meeting, he had some information to share about Mr Corley, which would bring his actions and integrity into question. This resulted in an adjournment for the claimant to produce a statement about the allegations. As before, the claimant did not say Mr Corley had encouraged him to falsify expense claims, or that Mr Corley was treating him detrimentally for making a disclosure.

35 The third and last disclosure relied on by the claimant is that he raised concerns about AML checks with Mr Lowndes on 11 December 2018. Plainly he did not, as is confirmed by the minutes he signed. The most he did was threaten to make allegations of some kind about Mr Corley if the meeting did not go his way.

36 The claimant sent a further statement on 12 December 2018 [156]. It alleged that on 12 October 2018 (the Richter meeting), Mr Corley encouraged him to falsify expenses; and on 1 November 2018, at the Advanced Engineering Show, Mr Corley told the claimant that it did not matter how expenses were classified, so long as he "wasn't ripping the company off" [157 & 158]. The claimant gave his account of the investigation meeting on 5 December 2018 and then described the disciplinary meeting of 11 December by saying: "I felt that I was becoming part of a witch hunt and that my job was in serious jeopardy" [158]. He then took issue with Miss Gallagher's calculation of a reasonable sum for expenses. After the above, which came to three pages, the claimant set out what he described as further reasons he considered to be relevant. These were in relation to sales leads, and his belief that Mr Corley was allocating them to Ms Wiseman and Mr Davidson. Specifically he stated: "I have had concerns about appointments that have been booked within my area being passed to Sam and Greg or Peter doing them himself", and "I feel there is now an agenda toward me from Peter because I have asked questions why himself, Sam and Greg are continuing to be given appointments that should come to Tony and I" [159]. On the fifth and final page of the statement the claimant said: "I have other concerns about Peter which are worrying me and could potentially be a problem for me if I don't report it. I would like to know who the company MLRO (Money Laundering Reporting Officer) is as I wish to discuss these issues with them". The claimant then said he went wondered if there was an agenda he was not party to. He said that if he was adjudged to have acted fraudulently, he would appeal and "take further advice". He concluded by saying that Mr Corley was trying to set him up because he no longer wanted him in the business due to raising concerns about sales leads [160]. Significantly, he did not say that Mr Corley was trying to set him up because he had made protected disclosures.

37 From the above document it was apparent to us that the claimant's main concern was being found to have acted fraudulently, and that his belief that Mr Corley had an agenda was fuelled by his discontent over what he believed was an unfair distribution of sales leads. Apart from a reference to the MLRO, the claimant made no complaint about the AML checks issue.

38 The meeting was to resume on 17 December, but prior to that there was a staff Christmas party on 14 December 2018, during which the

claimant alleged that Mr Corley grabbed him by the throat, and verbally abused and threatened him (agreed list of issues paragraphs 2 (c) and (d)). Mr Corley denied that and said that the claimant had become very drunk during the Christmas lunch and in the pub afterwards, and that because of his behaviour he, Mr Price (the respondent's owner) and Ms Wildman thought it best if she speak to him and ask him to calm down or go home, as it was felt that the situation could escalate if he was approached by a man. Mr Corley also said that he did not consider taking disciplinary action in respect of the claimant's actions because it was the sort of thing that happens at work Christmas parties and is best forgotten. We preferred Mr Corley's account for the reasons set out below in paragraph 39. We noted that if he had really got an agenda, as suggested by the claimant, he could have taken action. The fact that he did not, and that he later confirmed the claimant in post, demonstrated that there was no agenda.

39 At the reconvened disciplinary hearing, the claimant was informed by Miss Gallagher that the respondent was prepared to give him the benefit of the doubt as to his intent around the expense claim and his job was not in jeopardy. She said that he had breached the expense procedure, which the claimant accepted. The claimant confirmed he understood the respondent's expectations of him regarding reasonable expenses, and that he had nothing to add and just wanted to get on with the job and move forward positively. The disciplinary meeting came to a close and then Mr Lowndes asked about investigating the content of the claimant's second statement. The claimant said he wanted to forget about the statement and wanted to withdraw it [153]. The claimant did not complain about Mr Corley assaulting and abusing him at the Christmas party, despite the fact that it was only three days before. In light of that, we concluded that the claimant's account of the Christmas party was false. We noted that the claimant chose to withdraw the allegations he had made about Mr Corley in the second written statement. We concluded that his complaints about Mr Corley, which related to sales leads and/or expenses, not AML checks, had been used by him as a bargaining chip.

40 The claimant was given a stage 1 written warning, which he did not appeal [164], and sent a copy of the minutes, which he signed off as accurate. In the hearing before us, he suggested he had signed them under duress. That was an absurd proposition – they were emailed to him for approval and he did so by an email dated 17 December 2018 in which he stated: "Hi Sam. Thanks for sending those notes through and I would like to accept the findings. As discussed in today's meeting I would also like to withdraw my second statement" [163].

41 There are two undated allegations which relate to disability but are also put as detriments for making disclosures qualifying for protection. Strictly speaking it is unnecessary to make findings on them for those purposes because of our decision on the knowledge of disability point, and because of our decision that the claimant made no disclosures. In fact, that applies to all of the allegations, including the unfair dismissal claim (given that it is reliant on there being a disclosure). However, we because have heard evidence on them, we shall do so. The claimant alleges that on unspecified dates, Mr Corley referred to him as "deaf

bastard" and "deaf twat" (agreed list of issues paragraph 2(e)). In the hearing before us, the allegation had been embellished because the claimant said Mr Corley referred to him and Mr Cassidy as "the deaf twins". Mr Corley denied those allegations. He explained that he had been subjected to hurtful personal comments about his weight, and would not make insensitive personal comments about others. We accepted that. Further, given that he knew Mr Cassidy was deaf, and had made adjustments for it, we thought it unlikely he would have insulted Mr Cassidy.

42 The other allegation was that Mr Corley ostracised the claimant from the rest of the team by making him sit in a small room away from the sales team rather than the open plan office to reduce his performance (agreed list of issues paragraph 2(h)). The respondent's witnesses explained that the open plan office is used by a number of teams, and that the sales team is only in once or twice a month and hot desks rather than having designated work stations. On those occasions, to avoid disruption to others, they use offices at the back to make telephone calls. We accepted that.

43 In or around April 2019 the claimant successfully passed his probationary review, as did Mr Cassidy. As already noted, that was inconsistent with his case that Mr Corley was looking to get rid of him. The claimant was critical of Mr Corley and Mr Lowndes for not minuting the review meeting, but because he was given a letter confirming the outcome, we did not think that was a valid point. Insofar as the claimant sought to argue that there was no meeting and he was simply given the letter, we did not accept that was the case.

44 By this point, the claimant's view of Mr Corley was clearly very negative, reinforced by confirmation bias, by which we mean that he interpreted events to fit his narrative which was that Mr Corley wanted to deny him sales leads and to dismiss him. Viewed objectively and logically, his narrative made no sense whatsoever.

45 By contrast, Mr Corley told us that he thought he had a good working relationship with the claimant who he only saw about twice a month, but did contact by phone and email. He invited the claimant to his wedding. He said that he was happy with the claimant's performance, but did start to have concerns that it was going downhill in June and July 2019. We accepted his evidence about those points because it was consistent with his actions at the time.

46 At some point in April 2019 there was a Sales Team meeting in Birmingham. The team were to go for a drink afterwards. The claimant asked if he could bring his wife and an old friend who he had not seen for many years. He arranged for his wife, his friend and his friend's partner to meet them in a pub after the meeting. They arrived first and had sat down with a drink when the sales team came in. Mr Downes did not introduce them because he went to the toilet or to the bar. This meant that the Sales Team did not know who they were. The Sales Team had a quick walk around the pub and left for another venue. When Mr Downes was informed of this, he believed they had been snubbed, but we though it likely that the decision to go to a different venue was

innocuous. Mr Downes texted Mr Cassidy to find out where the team was, and they met up at a different pub which is on a busy square in Birmingham.

47 At some point a number of the group went outside for a cigarette. Mr Corley was chatting to Mrs Downes. He asked if she would be attending his forthcoming wedding, but she said she was unable to go. By way of explanation, Mr Corley had invited the claimant and his wife to his forthcoming wedding, but Mrs Downes had already formed an adverse view of him (despite not having met him), and had decided she did not want to go.

48 Mrs Downes then asked Mr Corley how the claimant was getting on. Her account is that he replied: "He's full of shit!". Mr Corley's account is that he explained that the claimant was enthusiastic about his job and was: "Full of it!". We concluded that Mrs Downes had misheard what he said. They were outside in the beer garden and it was noisy. In reaching that conclusion, we took into account the fact that Mrs Downes had an adverse view of Mr Corley, no doubt as a result of what the claimant had told her about work; whereas, Mr Corley had no problem with Mr Downes, and thought they got on well.

49 The claimant decided that he would go to Mr Corley's wedding notwithstanding his otherwise negative view of him. That was surprising because Mrs Downes had decided not to go. The claimant and his wife explained that his reason for going was that he felt that he would be criticised if he did not. We found that difficult to accept because it is very easy to make a polite excuse not to attend a social event, such as another engagement. We inferred from evidence from Mrs Downes, that the claimant would not be talked out of going despite the fact that there was no need to.

50 The wedding took place on 18 July 2018. The claimant was invited to attend the evening reception. It was in Cambridge which meant that he had to book into a Bed and Breakfast for that night. There was a dispute about whether the claimant was already inebriated when he arrived at the reception. Inappropriate comments were made and there were some heated moments amongst the claimant and other guests who were work colleagues. The claimant's case was that he was not responsible for this behaviour and was the victim of it. The respondent's case was that concerns were raised about the claimant's behaviour after the event by a number of attendees, who had reported that the claimant had behaved badly because he was drunk.

51 In evidence to us, one of the issues the claimant raised was that he had given Mr Corley a cigar and he just put it in his pocket without thanking him. Mr Corley said he did not really register who had given him the cigar but he recalled receiving one. He explained that he had had a few drinks by this point and was talking to a lot of people. That was understandable, given the circumstances. We concluded that he had not intended to offend the claimant. It was quite apparent that the claimant took Mr Corley's perceived snub over the cigar very badly. By this point it was clear to us that viewed objectively the claimant was reading too much into inconsequential matters and taking things very personally.

52 The claimant also alleged during the course of the reception he was talking to a relative of Mr Corley's new wife when Mr Corley interrupted and said something derogatory about him. Frankly, we have no way of knowing whether that happened or not, but if it did it clearly was not as a result of a protected disclosure. We were mindful that on the one hand Mr Corley's recollections of the wedding reception were understandably vague; but on the other hand, by this point the claimant was overly sensitive to perceived slights by Mr Corley.

53 There was a further incident at the wedding involving one of the claimant's colleagues called Lisa Waller. In summary, a few days previously the claimant had congratulated her on being pregnant. He said that Mr Corley had informed him she was. In the event, she was not pregnant and took the comment very badly, asking if he was calling her fat. It appears that Miss Waller with another colleague called Katie tackled the claimant about this at the wedding and there was a heated exchange. The claimant went outside, having realised the situation had become tense and difficult. He telephoned his wife. She told him that he should not go back inside and should return to the Bed and Breakfast which he duly did.

54 A number of concerns were raised about the claimant during the next few days. By way of example, the respondent's owner, Mr Mike Price, told Mr Lowndes that he had a conversation with the claimant during the reception and was concerned that during it the claimant had made sexually inappropriate comments. The claimant's account to us was that a good conversation with Mr Price, but that Mr Price had made sexually inappropriate comments about a younger female colleague. Mr Corley told us that after he returned from honeymoon, a colleague told him that the claimant was making derogatory remarks about him, and that they had challenged him by questioning why he had attended the reception if he held those views.

55 On 23 July 2019. Mr Lowndes sent an email to Miss Gallagher concerning the claimant's alleged behaviour at the wedding. He said that he had some direct reports of unacceptable behaviour from Mr Price which concerned his conversation with the claimant and the incident with Lisa and Katie. He said he would welcome coaching on the process before engaging with the claimant about what had occurred.

56 A meeting had already been arranged between Mr Lowndes and the claimant to discuss sales pipeline. Mr Lowndes decided to use that to have an informal discussion about the allegations. The claimant was not informed about this. The claimant's case was that this demonstrated there was a conspiracy against him.

57 In summary, by this point the evidence was that a number of people complained about the claimant's behaviour at the reception, which Mr Lowndes felt obliged to investigate; and the claimant's belief was that he was the victim of a conspiracy.

58 On 25 July 2019 Mr Lowndes sent an email to Mr Corley to inform him about the situation relating to the claimant. Mr Corley did not receive the email until his return from honeymoon some days later. The email said:

"On Tuesday afternoon Mike Price informed me of some unacceptable behaviour by Dan (the claimant) to some female staff, and to Mike himself in conversation, during the evening of the wedding reception. I have subsequently met with the people who are the subject of these conversations and I have gathered additional information from them. This information relates both to those interactions and previous occasions going back to the Advanced Engineering Show last year. I have a meeting scheduled with Dan and Samantha Gallagher on Monday morning at 10.30 a.m. I have not informed him of the content as I had already asked to discuss his Sales Pipeline. This note is to keep you in the loop; you don't need to take any action" [187].

59 It is material to note that a colleague called Nigel Urquhart sent an email to the claimant on 29 July 2019. This was not copied to anyone else and the subject heading was "A follow up to our conversation last week"; and the sensitivity level was identified as "private". He said: "Hi Daniel I just wanted to pick up on something you said on Wednesday 24 July 2019 following my call to Nick Hall from Orthos Project. When we were discussing how the face to face meeting went with Nick on 19 July 2019, you commented, "Not one of my finest moments as I was hungover from the night before…." I have thought about this and it is bothering me on two levels. Firstly, you were meeting a client with the aim of securing new business; and, secondly, you were risking your own safety (and licence) when driving to see the client". Mr Urquhart suggested that it was possible that an element of 'banter' may have been present in their otherwise positive discussion [194]. The meeting with the client had taken place the day after the wedding and therefore the email suggested that Mr Downes (contrary to his evidence to us) had been quite inebriated at the wedding. The claimant replied the same day saying that it should be taken as banter and that apart from a slight headache he was fine to drive and to undertake the appointment. He said the difficulty was with the potential client who was very difficult to engage with. It is notable that Mr Urquhart did not copy anyone into the email and sent it as a private expression of concern. The claimant received the email and replied to it just before his meeting with Mr Lowndes.

60 The meeting then took place. As already noted, the claimant thought the purpose was to discuss his sales pipeline, but it was used by Mr Lowndes and Ms Gallagher to informally raise the allegations. Miss Gallagher's account, which we accepted, was that their intention was to put the allegations to the claimant view to deciding whether there were grounds for instigating disciplinary action. However, as she explained, the claimant's reaction to the concerns raised about his behaviour was to: "Blow up in denial", assert he had done nothing wrong and to blame others. He said that it was Mr Price who had behaved wholly inappropriately and that it had made him uncomfortable; he also said that Lisa was responsible for the altercation about the pregnancy remark. Miss Gallagher said that the claimant was not concerned that he may have caused offence and took no responsibility for what had happened. She said they encountered flat denial and she described the claimant's stance as a 'victim mentality'. This assessment accorded with our conclusions based on the evidence we had heard.

61 The consequence, as described by Miss Gallagher, was that the meeting lasted for no more than 15 minutes because the claimant had become quite agitated. He said he would take further legal advice and she told him that he was entitled to do so. We asked whether there was any discussion about the allegation that the claimant had made disparaging comments about Mr Corley, and were informed that the meeting had highlighted the concerns raised by Mr Price and by Lisa.

62 Miss Gallagher said that because of the claimant's reaction, the meeting had to be abandoned. We accepted that.

63 By this point in time Miss Gallagher had been appointed Human Resources Director. A Board Meeting off-site was scheduled for the following day. Miss Gallagher and Mr Lowndes decided to report back on the issues about the claimant at that meeting. Apart from them, the other Directors who attended were: Mr Price (the owner), Mr Stephen Garrod (Managing Director); and Mr Chris Brear (Operations Director). She was there in her capacity as Human Resources Director. Mr Price is in fact the owner of the business.

64 Miss Gallagher's evidence was that she and Mr Lowndes reported the recent concerns raised about the claimant, and his reaction the day before. They also gave details of what had happened over the expenses issue. Her account was that at that point Mr Garrod said "Enough is enough – let's call time on this – let Dan go!". At that point rather than follow the disciplinary process, as originally planned, the Directors took a unanimous decision that the claimant should be dismissed. Mr Corley was not involved in that discussion or the decision because he was not a Director. Ms Gallagher explained that the consensus was that the claimant was causing problems and did not appear receptive to changing his behaviour, and that dealing with them was time consuming. She accepted that if the claimant had been employed for two years, the matter would have been dealt with differently because of the possibility he would claim unfair dismissal.

65 On 30 July (the day of the Board Meeting) Mr Downes emailed Mr Lowndes. The email was quite strangely structured given the context i.e. that it was sent the day after the investigation meeting. The first two paragraphs concerned sales leads. From reading those paragraphs, and absent any context, it could be inferred that nothing unusual had occurred the day before, and that is was business as usual. It is possible that the claimant was in denial about the allegations, or thought they would come to nothing.

66 However, he went on to say: "This feeling may come across as paranoid but after I was asked to attend the office on Monday for a pipeline review I felt ambushed with a warning about unfounded comments that I was supposed to have made at Peter's wedding and am now worried if there is a different agenda for Thursday [this related to a proposed sales meeting with Mr Corley]. Just prior to Monday's meeting I received a rather strange email from Nigel Urquhart questioning my ability not only to undertake a meeting but my ability to drive to the meeting as well". The claimant offered to forward that email and subsequently did. His email went on to say: "There seems to be a dark

underbelly of group intimidation towards me which I genuinely feel is bullying and harassment". The claimant also said that following the expenses 'farce' in December he had not been able to relax at work and it had affected his performance and his physical mental well-being. He talked about not having slept and attending a meeting with a client that day although his wife (who is a nurse) had told him he was too unwell and should go to the doctors instead. He also referenced to panicking when driving to the appointment because he had a big van tailgating him. He said he was feeling very stressed. The email concluded by saying: "If I was to highlight all the numerous incidents and grievances and character assassinations since my employment began I feel it would make my position untenable and my intention always was and always will be to have a harmonious employment with the MPA Group. I am now at a point when I have to consider what to do as the thought of coming into the office now fills me full of dread". He asked for Mr Lowndes' advice [196].

67 By this point the claimant was not mentally well. His perspective of the situation was demonstrated by phrases such as: "The dark underbelly of group intimidation towards me". When questioned about why he had sent this email to Mr Lowndes, given the chronology and his belief that he had been 'ambushed' at the meeting, the claimant said that despite asking him for advice, he did not trust Mr Lowndes – he just wanted to put his views on record.

68 It was quite difficult to accept that explanation. There was a mismatch between what the claimant said in writing at the relevant time, and his case before us. As noted, some of the emails he sent at that time were 'business as usual', at least in part. The respondent's case was that this demonstrated that the claimant was in complete denial about his behaviour and was seeking to deflect from it. It appeared to us that on the one hand the claimant was desperate to retain his job, hence his reference to wanting to have a harmonious relationship with the respondent; and, on the other hand, his view that he was the victim of a wide ranging conspiracy.

69 Mr Lowndes did not reply to that email, which was understandably upsetting to the claimant. Miss Gallagher explained that this was because the Board had already taken a decision to dismiss him with pay in lieu of notice because of their collective view that his behaviour was damaging and a drain on resources.

70 On 31 July 2019 the claimant (who had set off to visit a client) returned having suffered a panic attack. Mrs Downes said that she took a reading of his blood pressure and that it was "sky high". On her advice he went to see the GP the following day. She contacted Mr Corley first thing in the morning on the 1 August 2019 to explain that the claimant would be going to the doctor, to which he replied "OK". She later sent a screen shot of a fit note from the claimant's GP signing him off as unfit for work.

71 It had been the respondent's intention to personally inform the claimant of the dismissal decision and then hand him a letter confirming it on 1 August. This was not possible because he went off sick. A letter was sent to him to inform him he was dismissed, which he received the

following day. The letter was signed by the Managing Director, Mr Garrod, and stated: "Due to circumstances beyond our control we have been unable to speak with you today to advise you of the termination of your employment effective immediately. Your continued employment is not sustainable due to a fundamental breach of trust in confidence in the employment relationship.". Mr Garrod explained that the claimant would receive one month's pay in lieu of notice, was not required to work, and would also be paid any accrued holiday pay [199].

72 Following his dismissal, the claimant produced timeline of events [200A–H]. The first part of the document was the same as the documents the claimant produced in relation to the expenses issue. However, then and for the very first time, i.e. following his dismissal, the claimant asserted that a protected disclosure had in fact been made. He said: "The reason I asked to speak to the MLRO back in December was because I had become aware that Peter [Corley] has bypassed the anti-money laundering systems to on-board new clients. I myself did not get access to the system until March and prior to March Peter would put my "wins" on the system and bypass the anti-money laundering check which I once witnessed and said to Peter at the time I felt uncomfortable with. Peter simply replied don't worry about it we do it all the time. This was said in front of another staff member". It is notable that even at this point the claimant's account of what he said to Mr Corley arguably might not (as a matter of law) constitute a disclosure qualifying for protection if it had been said, because it was limited to saying that he had told Mr Corley that he felt "uncomfortable" with the way that new clients were being entered onto the system. If he had said something along those lines (which we did not accept), Mr Corley's alleged reply i.e. "Don't worry about it we do it all the time" was entirely consistent with the fact that the directors had approved the practice on a temporary basis. This was common knowledge in the Sales Team, and the claimant would have become aware of the practice at some point.

The Law

Protected disclosure

73 The claimant has insufficient service to claim unfair dismissal, so the sole dismissal claim is that he was automatically unfairly dismissed for making a disclosure qualifying for protection.

74 Section 103A of the Employment Rights Act 1996 ("as amended") ("the ERA") provides am employee shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) is that the employee made a protected disclosure. If follows that if the employee did not make such a disclosure, a claim under s103A cannot succeed.

75 Section 43A of the ERA states that a "protected disclosure" is a qualifying disclosure as defined by section 43B, which is made by the worker in accordance with any of sections 43C to H. section 43C is a disclosure to an employer, or other responsible person. In this instance the alleged disclosures were, on the claimant's case, made to the employer. The respondent disputes they were made.

76 Section 43B of the ERA defines disclosures qualifying or protection as follows:

"43B(1) In this Part, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the person making the disclosure, is made in the public interest and tends to show one or more of the following –

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

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

77 The alleged disclosures pertained to breaches of a legal obligation and/or the commission of a criminal offence, subject to the question of whether they were made, and, if so, whether the claimant had disclosed 'information'.

78 The question of what constitutes "information" has been considered in a number of appellate authorities, but has now been clarified by the Court of Appeal in Simpson v Cantor Fitzgerald Europe[1] which reinforced the earlier Court of Appeal judgment in Kilraine v London Borough of Wandsworth[2]. The Court of Appeal held as follows (paragraph 50 onwards):

> "When the present case was before the ET the case of *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 had not been decided by this court.
>
> We now know from the judgment of Sales LJ in *Kilraine* that it is erroneous to gloss section 43B(1) of the 1996 Act to create a rigid dichotomy between "information" on the one hand and "allegations" on the other. In order for a communication to be a qualifying disclosure it has to have "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)". Whether it does is a matter for the ET's evaluative judgment.
>
> Sales LJ said:
>
> > "30. I agree with the fundamental point made by Mr Milsom, that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations…. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other.
> >
> > 31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an

[1] [2020] EWCA Civ 1601
[2] [2018] ICR 1850 EWCA

allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.

32. In my view, Mr Milsom is not correct when he suggests that the EAT in *Cavendish Munro*[3] was seeking to introduce a rigid dichotomy of the kind which he criticises. I think, in fact, that all that the EAT was seeking to say was that a statement which merely took the form, "You are not complying with Health and Safety requirements", would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content. That this is what the EAT was seeking to do is borne out by the fact that it itself referred to section 43F, which clearly indicates that some allegations do constitute qualifying disclosures, and by the fact that the statement "The wards have not been cleaned [etc]" could itself be an allegation if the facts were in dispute. It is unfortunate that this aspect of the EAT's reasoning at [24] is somewhat obscured in the headnote summary of this part of its decision, which can be read as indicating that a rigid distinction is to be drawn between "information" and "allegations".

33. I also reject Mr Milsom's submission that *Cavendish Munro* is wrongly decided on this point, in relation to the solicitors' letter…. In my view, in agreement with Langstaff J below, the statements made in that letter were devoid of any or any sufficiently specific factual content by reference to which they could be said to come within section 43B(1). I think that the EAT in *Cavendish Munro* was right so to hold.

34. However, with the benefit of hindsight, I think that it can be said that para. [24] in *Cavendish Munro* was expressed in a way which has given rise to confusion. The decision of the ET in the present case illustrates this, because the ET seems to have thought that *Cavendish Munro* supported the proposition that a statement was either "information" (and hence within section 43B(1)) or "an allegation" (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment had to correct this error. The judgment in *Cavendish Munro* also tends to lead to such confusion by speaking in [20]-[26] about "information" and "an allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1).” ”

79 Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his

[3] EAT/0195/09

employer done on the ground that the worker has made a protected disclosure.

80 S103A ERA provides that an employee 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.

81 Disability is a protected characteristic (Section 4 Equality Act 2010 ("EA10"). The definition is as follows: "A physical or mental impairment [which has] a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities" (section 6 EA10). There are additional provisions in Schedule 1 EA10.

82 A long-term effect is one which has lasted for at least twelve months; is likely to last for at least twelve months; or is likely to last for the rest of the life of the person affected (paragraph 2 Schedule 1 EA10. "Likely", in the context of disability, means "could well happen" and is a lower hurdle than the balance of probabilities test – see SCA Packaging Ltd v Boyle[4].

83 A "substantial" effect is essentially one that is more than *de minimis*. The word 'substantial' is not used in the sense of very large or considerable, but something that is more than minor or trivial. This was first established by case law but is now enshrined in statute – section 212(1) EA10 (General interpretation). The purpose of the epithet 'substantial' is to set a disability apart from the sort of physical or mental conditions experienced by many people but which have only minor effects. Paragraph B1 of the Government Guidance on the meaning of disability erroneously put a gloss on the statutory language – see Elliott v Dorset County Council[5].

84 Normal day-to-day activities are not defined, but case law has established that they can be work-related (see for example Paterson v Commissioner of Police of the Metropolis[6] which drew on ECJ case law on workplace activities and 'disability'). When considering adverse effect, the focus should be on what the person cannot do, or can only do with difficulty; not on what they can do. Elliott suggests that the adverse effect of an impairment on a person is to be compared with the position of the same person, absent the impairment, or with persons broadly similar to the Claimant, other than that they do not have the alleged disability. Elliott also emphasises the difficulty of applying the "adverse effect" test and "long-term test" without clearly identifying the nature of the impairment and the day-to-day impact.

85 Direct discrimination is defined in section 13(1) EA10 as "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

86 Harassment is defined in section 26 EA10 as: "A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of

[4] [2009] UKHL 37
[5] EAT/0197/20
[6] [2007] ICR 1522

violating B's dignity, or creating an intimidating, hostile, degrading, or offensive environment for B". If the conduct concerned is not with "the purpose of…" but is alleged to have "the effect of..", it is necessary to consider: the perception of B; the other circumstances of the case; and whether it is reasonable (i.e. objectively reasonable) for the conduct to have that effect.

87 Section 212(1) EA10 defines "detriment" as not including conduct amounting to harassment. Therefore it is necessary to consider whether an allegation amounts to harassment before considering whether it amounts to direct discrimination, because it cannot be both. Discrimination and harassment in the workplace are made unlawful by Section 39 EA10.

88 Section 136 of the EA10 provides that: "if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred". This provision reverses the burden of proof if there is a prima facie case of direct discrimination or victimisation. The courts have provided detailed guidance on the circumstances in which the burden reverses[7] but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred i.e. to focus on the respondent's explanation.

89 In summary, the EA10 provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. In addition to the statutory provisions, Employment Tribunals are obliged to take in to account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights. We were not referred to any specific provisions by the parties and we did not consider it necessary to make specific reference to it in our deliberations and reasons.

Discussion and Conclusions

90 This case failed on the facts, as can be seen from our findings. We shall start with the public interest disclosure claims. In summary, the first and second disclosures could not have been made, because at that point the client (Richter) had not been entered into the system and consequently the claimant could not have known of the procedure which the respondent was adopting to bypass anti-money laundering checks for new clients, albeit on a temporary basis. It was perfectly clear from the minutes of the meeting on 11 December 2018, which he approved and signed, that the claimant made no disclosure during that meeting. Consequently, the question of whether he was subjected to detriments, or dismissed, for making disclosures fell away completely i.e. those claims failed.

[7] Barton v Investec [2003] IRlR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA

91 However, since we had heard evidence in respect of all of the allegations, we shall set out our conclusions on all matters.

92 *If* the claimant had raised concerns with the respondent that bypassing AML checks was a breach of a legal obligation and could have serious consequences, such as action by the FSA, that would be a disclosure qualifying for protection, by reference to the definition and case law. He did not. *If*, the claimant had said to Mr Corley, that he was "concerned" about the way new client information was being input because it could have serious consequences, it is a moot point as to whether that would have been sufficient to amount to a disclosure qualifying for protection. In light of recent case law, such as Kilraine, the answer is probably it would if Mr Corley understood this was a reference to the potential regulatory consequences bypassing the AML checks. On our findings, the claimant did not even say that.

93 The reality is that the most the claimant did was hint that he might have information damaging to Mr Corley, without providing any detail. When asked (at the second expenses meeting) if he wanted Mr Corley to be investigated, he made it clear that he did not. The claimant used the threat of bringing allegations about Mr Corley as a bargaining chip in relation to the expense claim issue.

94 If the claimant had made disclosures qualifying for protection, he would have struggled to establish that any of the alleged detriments were "done on the ground that [he had] made a protected disclosure", or that the principal reason for his dismissal was that he had made protected disclosures. That is because the respondent was comfortable with bypassing the checks on a temporary basis. We do not condone that attitude – it is wholly wrong, nevertheless it is a fact that the Sales Team knowingly bypassed the AML checks because they were authorised to do so by the Board of Directors.

95 The first alleged detriment that the respondent had subjected the claimant to a false investigation into his expenses. That was clearly not the case. An investigation was warranted and resulted in a first written warning, which the claimant accepted at the time. Consequently, that allegation failed on the facts.

96 The second allegation was that the claimant was required to attend fictitious appointments. Again, as we have found in our facts, that was not the case. It is right to say that the claimant twice attended appointments when he was not expected, the reason was that those appointments were generated by a third party provider i.e. Think. Mr Corley's evidence was that it was not uncommon for this to happen in respect of appointments booked for the Sales Team. Consequently, that allegation failed on the facts.

97 The third allegation related to the Christmas party on 14 December 2018, and was that the claimant had been subjected to a physical assault by Mr Corley. For the reasons set out in our findings of fact we concluded that did not occur.

98 The next allegation was rather general in nature and was that on the "14 December 2018 and April 2018 and throughout his employment" (sic) the claimant was subjected to assaults and abuse by Mr Corley. That is a very general allegation and as will be seen from our findings of fact there was only one instance where we could not determine whether or not Mr Corley had something derogatory about the claimant (the wedding reception). If he did, it was not because a protected disclosure had been made. Other than that, we concluded that Mr Corley had not done so.

99 Before we turn to the remaining specifically identified detriments we should briefly touch on the question of whether the claimant was a disabled person at the relevant time. Frankly we thought that the respondent's arguments on this point were totally without merit. The claimant has a hearing impairment. It is a lifelong condition. His hearing is deteriorating, and he has been advised that will continue. The medical treatment he has received (grommets and surgery) did not resolve the underlying impairment. It has a more than trivial effect on his ability to carry out normal day-to-day activities, such as swimming and having a bath (he cannot do either), showering with difficulty, and the ability to participate in conversations, particularly in social or work setting involving groups of people. The claimant was undoubtedly a disabled person as defined by the statutory legislation at the material time.

100 However, the argument that the respondent did not know, and could not reasonably have been expected to know, the claimant was disabled was not without merit. As can be seen from our findings of fact, we concluded that the respondent did not know the claimant was disabled, and could not reasonably have been expected to have such knowledge.

101 There were two allegations of direct disability discrimination, both of which were better categorised as harassment related to disability, given the subject matter. These were that the Claimant was referred to by Mr Corley as a "deaf bastard" and "deaf twat". In evidence, the claimant embellished these allegations by also saying that Mr Corley called him and Mr Cassidy "the deaf twins". We found as a fact that Mr Corley did not say those things, so the disability allegations failed. They were also put as public interest disclosure detriment claims, and fail because there was no public interest disclosure but, if there had been, would have failed on the facts.

102 The next allegations are public interest disclosure detriment allegations. The claimant alleged that Mr Corley made a derogatory comment about him to his wife following the sales meeting in April 2019. That allegation also failed on the facts because we concluded Mrs Downes had misheard what Mr Corley said to her.

103 It was alleged that Mr Corley made derogatory comments about the claimant during his wedding reception on 18 July 2018. We were unable to determine whether that had occurred or not, bearing in mind Mr Corley's recollection of his wedding reception was vague. We thought it unlikely that Mr Corley had deliberately insulted the claimant. In any event, and whether or not it occurred, the claimant had not made a disclosure qualifying for protection.

104 The final allegation was that the claimant was made to work in a designated area away from other members of the team. That also failed on the facts, because it was common practice to use the side offices to make phone calls in order not to disturb colleagues in the open plan office.

105 We shall lastly deal with the allegation that the claimant was dismissed because of making a disclosure qualifying for protection. That allegation fails because no disclosure was made. Further, and in any event, we were fully satisfied that the claimant was dismissed because of his conduct.

106 It does the respondent no great credit that the claimant was dismissed in the manner that he was. Because the claimant had insufficient service to claim unfair dismissal, it was open to the respondent to dismiss him without following any proper procedure and without giving a reason. Nevertheless, it is far from good industrial practice. We are in no doubt that if the claimant had two years' service, he would have succeeded with an ordinary unfair dismissal claim. Despite the respondent's actions being lawful, we think it right to express our disapproval of them.

107 We thought it very likely that the clamant has a justified sense of grievance relating to the manner of his dismissal. It is possible that this motivated him to bring a claim that he had made disclosures qualifying for protection in order to circumvent the two years' service requirement. By not following a reasonable process, the respondent made a rod for its own back.

108 For the above reasons, the claimant's claims were not well-founded and we dismissed them.

Costs application

109 After we handed down our oral reasons, the respondent made a costs application on the ground that bringing and pursuing the claim was unreasonable. The respondent pointed to various parts of our reasons in which we had said that the claimant's view of Mr Corley was not objectively warranted and his confirmation bias resulted in a belief in a wider conspiracy. The language used by the claimant was extreme and very emotive (for example, "dark underbelly"). It was the respondent's position that the claimant was unreasonable to bring a claim, which he knew to be without merit. The respondent's solicitors wrote to the claimant on 15 December 2020. The letter was, in our judgement, a proper costs warning. The letter stated the claimant had no evidence in support of his allegations, and gave details about why the claim was very likely to fail. At that point the respondent's costs were £7,500 plus VAT and at the point of the hearing they were £25,000 plus VAT.

110 The claimant's position was that he had brought the case in good faith. He also gave some evidence about his and his wife's income and outgoings. It is unnecessary for these purposes to record the detail of their income and outgoings, especially since these reasons will be published on a website which the public can access. In summary the claimant and his wife have very little disposable income. They do not

own a property. The flat they rent is being sold by their landlord which means that they will have to find somewhere else to live in the near future, which will inevitably incur expenses associated with moving.

111 Having heard the evidence on means, the respondent's representative submitted that a token award of costs should be made.

112 There is no equivalent in the Employment Tribunal Rules to the general rule in the civil courts[8] that the losing party will (subject to the discretion of the court) be ordered to pay the legal costs of the winner. "The [Employment Tribunal's] power to order costs is more sparingly exercised and is more circumscribed by the [Employment Tribunal] Rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the [Employment Tribunal] Costs Orders are the exception rather than the rule."[9] This reflects the policy that Employment Tribunals should be accessible, and the assumption that many Employment Tribunal cases will be dealt with satisfactorily without the involvement on either side of lawyers. "The employment jurisdiction is, for sound policy reasons, ordinarily a cost-free jurisdiction, and for our part we should not want to see that principle compromised or eroded".[10]

113 By virtue of Rule 76[11] an Employment Tribunal has a discretion to make a Costs Order where the Employment Tribunal considers that a party (or his representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings (or part of them) or in the way that the proceedings (or part of them) have been conducted. An Employment Tribunal also has a discretion to make a Costs Order where it considers that any claim or Response had no reasonable prospect of success.

114 If the Employment Tribunal considers that one of the threshold conditions in the Rules is met, it is required to consider making an Order, and may make one[12].

115 There is a discretion, which must be exercised judicially. In deciding whether to make a Costs or Preparation Time Order, or the amount of it, an Employment Tribunal may have regard to the paying party's ability to pay.[13] This is the only specific factor which is mentioned in the Rules.

116 In summary, the first question is whether there are grounds to make a Costs Order. If not, no Order can be made. If so, there is a discretion as to whether or not to do so. If the Employment Tribunal decides to make the Order, there is a discretion as to how much to award.

117 We decided that there were grounds to make a Costs Order. We were fully satisfied that the claimant was unreasonable in bringing his claim and

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[8] CPR Part 44.3 (2) (a).
[9] *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78 (CA) per Mummery LJ
[10] Per Sedley LJ in *Scott v Commissioners of Inland Revenue* [2004] IRLR 713 at paragraph 43. See also *Lodwick v London Borough of Southwark* [2004] IRLR 554 paragraph 26 (per Pill LJ)
[11] Rule 76 Schedule 1 Employment Tribunals (Constitution & Rules of Procedure Regulations) 2013 ("the Rules")
[12] Rule 76 (1)
[13] Rule 84

continued to be unreasonable following receipt of a proper costs warning letter, which made the likely outcome clear. In reality, the claimant has used the public interest disclosure provisions to circumvent the two year service requirement for an unfair dismissal claim. We think he did so because of the manner of his dismissal and because of his propensity to view any adverse circumstances (such as the legitimate investigation into expenses) in the worst possible light. Given that some of the allegations came down to who we believed, they were always going to be difficult to prove, but it would not follow that it was unreasonable to bring them unless the claimant had fabricated them (which, in some instances, we found that he had). By way of example, it was unreasonable for the claimant to allege he had made protected disclosures when he had not; and to allege a "false" investigation into the expense claim issue, when he had accepted at the time that he breached the policy and accepted a warning for doing so.

118 Having decided there were grounds to award costs, we decided that we should not do so. There are two reasons for this. The first, and most important, is that the respondent was in breach of its legal obligations by bypassing the AML checks requirement. That is a very serious matter, and arguably could constitute a criminal offence. We do not believe that this Employment Tribunal should endorse such conduct by awarding costs. The fact that the respondent chose to engage in such behaviour led to being exposed to a claim of this kind.

119 Furthermore, in our view, the claimant's wife has been through a difficult time because of this claim, and it was obvious to us that she was extremely worried about the financial consequences of a Costs Order being made. That was another factor which influenced the exercise of our discretion, but the primary factor was the respondent's own misconduct.

120 For the above reasons, we made no order for costs.

Employment Judge Hughes

Date 25 June 2021