EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101198/2020

Held on 29 and 30 March 2021

Employment Judge J Hendry

Mr Bev Parkinson	**Claimant** **Represented by: -** **Mr J Anderson,** **Counsel**
Morrison Facilities Services t/a Mears Facilities Management	**Respondent** **Represented by: -** **Mr C Edward,** **Advocate**

Judgment

The Judgment of the Tribunal is:

(One)That the claimant was unfairly dismissed in terms of Section 103A of the Employment Rights Act 1996;

(Two) That the claimant was in any event unfairly (constructively dismissed) in terms of Section 94 the Employment Rights Act 1996.

(Three) That the respondent shall pay the claimant the sum of Eight Thousand Nine Hundred and Twenty Four pounds and Eighty Five pence

(£8924.85) as a monetary award made up of a basic award of £1076 and a compensatory award of £7848.85.

Reasons

1. The claimant in his ET1 advanced two principal claims, firstly that he had been unfairly (constructively) dismissed from his employment and secondly that the dismissal was automatically unfair under section 103A of the Employment Rights Act 1996. He also made a claim for accrued but unpaid holiday pay.

2. The respondent company denied that they had given the claimant cause to resign (there had been no fundamental breach of contract in their view entitling the claimant to resign). In relation to the section 103A claim this had been allowed by amendment on the 30 September 2020. In response to that claim the respondent's position was even if the claimant did make a protected disclosure, which was denied, section 103A of the 1996 Act was not engaged as the claimant was not dismissed by the respondent for making that disclosure. If, which they did not concede, the claimant had made a protected disclosure the principal reason for dismissal was not that the claimant had made such a protected disclosure but his conduct. Their position was that a report issued by the claimant was wrongly released ''without the correct process of authorisation'' and that it had brought the company into disrepute.

Issues

3. The broad issues for the Tribunal to determine were firstly the proper factual context surrounding the claimant allegedly making protected disclosures to Highland Council and to Alpha Schools and the subsequent launching of disciplinary action by the respondent and whether the respondent's actions amounted to a material breach of contract giving the claimant cause to resign. The Tribunal required to identify the alleged Protected Disclosures

and ascertain if the making of the disclosures was the reason for the respondent's actions. The Tribunal also had to determine whether the claimant as entitled to be paid for working public holidays.

4. The claimant's Counsel had helpfully set out the more detailed issues that the Tribunal had to address in considering the various reasons that the claimant founded upon to justify his resignation.

1. Without reasonable and proper cause, did the respondent act in a manner calculated or likely to destroy the implied term of trust and confidence by:
   a. Suspending the claimant
   b. Pre-judging the matter
   c. The contents of the investigation document [pg. 293-299]
   d. Inviting the claimant to a disciplinary hearing -23 November 2019
   e. Failing to provide information to enable the claimant to prepare his defence
   f. Providing the claimant with only 24 hours notice of the disciplinary hearing and informing him that it would not be re-arranged.

2. Following the above:
   (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
   (2) Has he or she affirmed the contract since that act?
   (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
   (4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation)
   (5) Did the employee resign in response (or partly in response) to that breach?

3. If the Claimant was dismissed:
   a. Was the claimant dismissed for a potentially fair reason? (s.103A ERA 1996 to be considered first)
   b. Was the dismissal reasonable within the meaning of s.98(4) ERA 1996?

Evidence

5. The Tribunal heard evidence from the claimant and from Tom Griffin, the Respondent's Regional Manager and Dawn Kidd, Respondent's Head of Finance.

6. The Tribunal had the benefit of witness statements from the three witnesses and reference was made to a Joint Bundle of documents lodged prior to the hearing (JB p1-340).

Facts - Parties

7. The claimant was employed by the respondent as a Contracts Manager. He was issued a Contract of Employment dated 16 October 2017 (JB p97-108).

8. Prior to working with the respondent the claimant had worked for Highland Council as a Facility Assistant Manager.

9. The claimant's role with the respondent was to ensure that the facilities he managed (schools) met the appropriate service delivery requirements (were clean, safe and properly maintained). This included being responsible for the completion of statutory and non-statutory and reactive works and ensuring the overall management of the water management contract within budget.

10. The schools were held in a public private partnership. Alpha Schools was the holding company who owned the assets (schools) and Highland Council were the users of the facilities as the Education Authority.

11. The claimant was given a job description (JB p108A-108G).

12. The respondent business forms part of the Mears Group Plc that provides managed outsourced services to the public and private sectors. The respondent company alone employs 261 employees. They have a dedicated HR department. Another company in the group had designed and built the schools some years earlier.

13. There was a tripartite working relationship between Alpha Schools, Highland Council and the respondent company. Transparency was encouraged and parties discussed issues between themselves in an open and frank way. The respondent's managers were aware that irrespective of the strict legal relationships Highland Council were the most important ''stakeholder''.

14. The claimant's salary was £46,000 gross and £28,800 net.

Background

15. The schools in the partnership had hot and cold water supplies which if not properly managed had the capacity to create an environment where Legionella bacteria could develop. This was where water became stagnant and warm. The bacteria is a dangerous health risk causing pneumonia type symptoms. It can be fatal. These were widely recognised risks in the building industry sand in maintenance.

16. Following the claimant's appointment he received a day's training in Legionella awareness.

17. In October 2017 the Highland Council started an audit into water management compliance. It quickly became apparent that there were significant compliance issues in the schools. These related broadly to both design and operation of the systems.

18. Soon after his appointment in October 2017 the claimant had a meeting with Mark Whiteman (Concessions Manager) and David Ewan, representing Alpha Schools. During the meeting it became apparent that there were a number of issues of concern about the systems in place and areas of service delivery that required improvement. An Improvement Plan was drawn up.

19. The Improvement Plan made reference to various changes required to improve matters. This also included a recommendation for appropriate training for the claimant as a designated responsible person (RP) for water management in the schools. There had been some historic ambiguity as to who was to be the responsible person for water management purposes and for the HSE and it was agreed that the claimant should bear this responsibility.

20. Neither the claimant's Contract of Employment nor his Job Description had indicated that he would be the RP.

21. The claimant's Line Manager Tom Griffin reported to Kevin Woodcock, the Managing Director for the respondent's business.

22. The claimant emailed his Line Manager Mr. Tom Griffin on the 27 April 2018 (JB109) when he advised him that Highland Council wanted to discuss their initial observations into the water management system. He pointed out that they had raised the issue that there was "no trained or appointed RP and no written schemes". The claimant felt that he should receive specific training on this particular legal duty before taking over such responsibility. He was nervous because the Highland Council's investigations had disclosed

serious difficulties with the water management scheme in the schools under his supervision and for whom he would be responsible.

23. From December 2017 to April 2018 Mr. Warren Bradshaw, representing Highland Council, attended some of the schools with the claimant to undertake the water management audit as part of his role with Highland Council. Mr. Bradshaw identified various failings in the water systems and how the water systems had been managed/designed and built. As part of the audit Mr. Bradshaw took water samples which showed some of the schools to have dirty water. He also conducted an audit of the water and recorded his findings (JB112-117). His inspection notes are referred to as "V1".

24. The claimant kept Mr. Griffin and Mr. Woodcock informed of the water management meetings and Mr. Bradshaw's findings. Mr. Griffin felt that Mr. Bradshaw was being overzealous. But he was not directly challenged. The claimant did not receive any guidance in relation to curing the water problems other than Mr. Griffin's advice which was to tell staff to run the water taps at the schools as this would clear the dirty water. The claimant was concerned about the adequacy of this response. He did not sense any urgency from his employers to have the issues resolved quickly. He was concerned that these failings should be addressed by higher management as it might involve replacing some of the pipework. There was an unresolved issue as to who would have to pay for any remedial works. He thought that his line manager should be attending the water management meetings to gain a full understanding of the problems and to authorise remedial work. Meantime he was concerned that he was the RP.

25. As a result of the issues found in the schools it was decided to hold a water management meeting on the 26 May 2018 between all the parties. It was attended by Mr. Whiteman on behalf of Alpha Schools. The claimant attended on behalf of the respondent. Mr. Bradshaw attended with a

colleague from Highland Council. Mr. Griffin had been invited to the meeting but did not attend.

26. At the meeting an Action Plan was put together to deal with the faults which had been highlighted by the audit. The Action Plan was recorded as "PP2 Inspections Water Hygiene Inspection Notes" ("V2"). Mr. Bradshaw emailed these to the claimant (JB p120, 122-125).

27. The results of the audit had also indicated specific failings with the water testing regime, inadequate staff training as well as inadequate policies and procedures required to meet legal requirements. This also included a judgement that there were inadequate Legionella Risk Assessments in place. Mr. Bradshaw believed that a different company should be used to carry out the LRA (Legionella Risk Assessments) as the LRAs had been conducted by a company favoured by the respondent called IWS and they found to be inadequate.

28. The claimant relayed the Action Plan to Mr. Griffin in May by telephone. Mr Griffin was unhappy that the Highland Council was insisting on a different company doing the LRAs. The claimant obtained quotations from other companies for carrying out the new LRAs (JB 126, 127). Mr. Griffin and Mr. Woodcock refused to use a different water company to carry out the LRAs. They considered it to be too expensive to use other providers. Mr. Griffin also believed that Mr. Bradshaw was asking for too high a standard of water management than the standard contracted for.

29. On 6 September 2019 the claimant told Mr. Griffin that the company did not appear to be complying with relevant legislation in relation to their water management system in the Alpha schools and that Government Health and Safety Regulations required adequate Legionella risk assessments and water testing which was not in place. The contents of V2 were discussed.

30. In September Mr. Griffin indicated that he believed that what was in place was compliant and within contract requirements. His opinion was that anything additional would have to be paid for by someone else. A dispute had arisen as to whether or not each school should be given relatively generic water management documents or if they should be tailored to the school's particular needs. In discussing the issue with the claimant Mr. Griffin's position was that the principles were the same and that it was better to have something in place than nothing.

31. Mr. Bradshaw was not keen for the previous providers ''IWS'' to carry out the new LRAs because of the deficiencies in the initial LRA's prepared by them. The claimant took up the continued use of the company by emailing Mr. Griffin and Mr. Woodcock to make them aware of the enquiries being made by him (JB162-169A-169B). He was instructed to ask IWS to carry out another LRA. Mr. Bradshaw was unhappy at this decision.

32. In early 2019 the claimant was allowed to give authority to Highland Council to carry out an LRA at the same school which IWS would test. The Highland Council would compare the results. Mr. Bradshaw carried out his LRA analysis over the course of several weeks and required various documents from the claimant such as policies and procedures in order to establish if the respondent had adequate policies and procedures in place.

33. The claimant was disappointed at the use of IWS and believed that they were being used because they were cheaper and that they were "cutting corners". He was concerned that his employers were willing to compromise safety in the schools.

34. The second LRA carried out by IWS was passed to Mr. Bradshaw who advised the claimant that it was in his view grossly inadequate.

35. The claimant arranged for the respondent's staff to have training in how to take water samples and water systems. Some of the water samples taken tested positive for Legionella in April 2019. The other schools were then

tested and four of these schools (4/9) tested positive for the presence of the Legionella bacteria.

36. The results concerned Highland Council. The claimant updated Mr. Griffin who appeared unconcerned. Mr. Griffin's position was that it was normal to get positive results from time to time. Highland Council recommended that a second specialist water company ''G&A Barney'' redo the LRAs for the schools. This was finally agreed by Mr. Griffin in or around April 2019. There was a significant cost involved which was borne by the respondent.

37. Following the positive Legionella results the claimant issued updates to stakeholders (Alpha Schools and Highland Council) containing information about the corrective actions that were required. Following a meeting on the 23 of August 2019 Mr. Andrew Dick, Contracts Manager from Alpha Schools requested that the respondent prepared a report on what lessons had been learned from the positive Legionella results. He asked the respondent to work with Highland Council to prepare a report. Mr. Griffin took the view that the report should not involve Highland Council because they were expecting too high a standard so he prepared a report himself (JB146 to 147). Mr. Griffin sent the report to Alpha Schools. The claimant was asked if he could send it to Highland Council and this was allowed (JB139-145).

38. Highland Council expressed unhappiness with the contents of the report. Their position was it did not appear to be a document from which lessons could be learned. They also had difficulties with the terms of the report (**JB159**). Mr. Bradshaw wrote: *''The current report is technically incorrect, sequentially out of sync with the events that took place and poorly constructed. Therefore it portrays things in the wrong light, It is contradictory and does not lend itself to being a document that can be learnt from. I am keen we sit down and look over this together and forge a way forwards. I think that we all need to do this quite quickly so we can close items out and move forwards in the right way''*.

39. Mr. Dick asked Mr. Griffin to redo the report on the 24 September 2019. The council invited Mr. Griffin to meet them and discuss redrafting the report. He did not attend any meetings with Highland Council but asked David McWilliams one of the respondent's managers who had more specialist knowledge in water management to attend on his behalf. Mr. McWilliams was asked to be the lead on the production of the second report (JB155-159) although he had no previous history of involvement.

40. Mr. McWilliams refused to prepare the report as he had only been in the business for a short time and did not know the full history. The claimant was asked to prepare the report and he agreed to do this.

41. The claimant notified Mr. Griffin that he would be doing the report on 8 October. Mr. Griffin raised no objections.

42. On 17 October the claimant received an email from Mr. Griffin inviting him to a performance review meeting. The claimant responded that he was unable to attend on the stipulated date because he was due to review and deliver the report with Highland Council (JB159B-159C).

43. The claimant began looking for a new job.

44. The claimant worked with Warren Bradshaw to put together a second report. The report was completed towards the end of October.

45. On the 31 October 2019 a meeting took place between the interested parties to discuss the report that had been prepared. Mr. McWilliams and Mr. Ewan attended. The meeting was minute and it was agreed that the report would be delivered to all stakeholders (JBp176-185). The report was then completed and delivered. Mr. McWilliams was not noted as having made an individual contribution in the Minutes, objected to the terms of the report or disagreed that it should be released to Alpha Schools.

46. The report (JBp204-221) criticised the way the water systems had been built in schools and stated that their design had led to 'dead legs' making the likelihood of Legionella occurring more likely. The executive summary stated (JBp206):

> *''The design of the buildings water systems and specification of products led to potential hazardous areas for bacterial proliferation being created. Design and project risks were not identified during the design or construction phases and therefore the Health and Safety File did not identify hazards that had been caused or how to manage them.*
> *Morrison Facility Management MFM who ran the building from hand over had not identified through risk assessment, issues with the building. Mears Group took over MFM and the Hard and Soft services in 2013 as an ongoing concern. Although risk assessments were instructed by Mears Group FM, they were not audited to ensure there efficacy. Written schemes were incomplete non-site specific and technically incorrect.*
> *Meats Group Policies and procedures were technically incorrect and this led to issues surrounding staff competency. Method statements and risk assessments were incomplete and incorrect. Staff were inadequately trained for the tasks they had been allocated. This led to a lack of competence surrounding the management and maintenance of the water system''*.

47. The claimant believed that the preparation of the report had been delegated to Mr. McWilliams and himself. He was asked to attend a performance plan meeting on 1 November. He emailed Mr. Griffin in response (JBp242-245).

48. Ms. Dawn Kidd Head of Finance from Mears was tasked by Kevin Woodcock with investigating how a report that was critical both of the respondent and associated companies could have been written by the claimant. Ms. Kidd was advised that he had not been given permission to write the report and that the company had been unaware of it's contents until it was published.

49. Ms. Kidd took advice from the respondent's HR who advised her that it was usual or customary to suspend an employee in such circumstances. Ms. Kidd did not consider whether there were good reasons to suspend or if it was necessary in the circumstances. Ms. Kidd read the report and concluded that it was detrimental to Mears (Witness Statement para 6). She telephoned the claimant and told him he was suspended. She told him that

there was to be an investigation and that she required the claimant to hand over all Mears property and for him to leave the building. Ms. Kidd indicated to him that he was being suspended because he had brought Mears into disrepute by writing the report and delivering it to the client which actions could amount to gross misconduct.

50. The claimant received a letter dated 1 November 2019 (JBp246) confirming the suspension. The letter contained the allegation of bringing the company into disrepute. The claimant then received a letter on the 2 November dated 1 November (JBp251/252) setting out the disciplinary charge of bringing the company into disrepute and inviting him to attend an investigation meeting on 6 November 2019.

51. The claimant reported the respondent company to the HSE on the 3 November 2019.

52. On the 12 February 2020 the HSE wrote to the respondent company referring to positive Legionella samples at Kinlochleven High School and intimating that they had identified contraventions of health and safety law. These included the longstanding issue of having no site specific risk assessments in place. Problems with the design of the systems and lack of a sampling plan were also identified as problems with the water management system.

53. On the 5 of November 2019 the claimant objected to Ms. Kidd being the Investigating Officer alleging previous friction between them. He requested that an alternative Investigating Officer should be appointed. This led to further correspondence with the respondent's management. They refused to change the Investigating Officer.

54. The claimant was unhappy at being suspended and disciplined for, as he saw it, preparing an accurate report on the longstanding problems with the water management system.

55. The claimant wanted further time to prepare his defence He raised these matters with HR. The hearing for the 6 November was postponed.

56. On 7 November the claimant sent an email to the respondent's HR Department stating that he was not happy that Ms. Kidd had his personal details and that she remained Investigating Officer. He asked for another Investigating Officer to be appointed and for a different location to be arranged for any meeting.

57. During the claimant's suspension another water management meeting had been held which Mr. Griffin attended. The contents of the report were accepted at the meeting by the respondent.

58. The claimant raised a grievance on 8 November about the passing of his private email address to Ms. Kidd (JB267). He was advised that there was no breach of the GDPR and Ms. Kidd was to remain as the Investigating Officer.

59. On 11 November the claimant received a letter from Ms. Kidd dated 8 November that he had to be available during his suspension and that she believed he had breached this as she couldn't get a hold of him by telephone. Ms. Kidd said that if he could not attend the investigating meeting he could instead submit a written statement. A new date was fixed for the 13 November (JB269-270).

60. The claimant sent an email to the respondent's HR department on the 11 November 2019 asking for another Officer to be appointed. The claimant was aware that another water management meeting had been held in which senior management had attended and accepted the various failings (JB277-281). It had been minuted: *"MFM (Morrison Facilities Management) acknowledged that the previous maintenance regime across the project was not perfect for a period of time with inadequate training provided and a lack of consistency in delivery across the different sites. With the introduction of*

DM to the business of MFM working in junction with WB of THC and with G&A Barney, MFM explained that they are fully committed to doing whatever is required to ensure the water management system is comprehensive and correct. DM confirmed that he will personally be working (commencing w/c 18th of Nov (on the revised policies and procedures for MFM on the Highland Schools Project. This along with the risk assessment will feed into the creation of a new written W Scheme for each project facility."

61. The claimant did not know why he was being disciplined for preparing the report especially as the company had accepted it's terms. He believed he was being 'scapegoated' in some way and blamed for delivering the report. He had not been told that the report should be confidential and only disclosed to Alpha Schools or shown to Mr. Dick before being delivered. He was aware that there had been transparency between the various stakeholders in relation to these matters. He was aware that Highland Council, although strictly not the client, were the Education Authority responsible for the safety of the staff and pupils at the schools. Mr. Dick had been aware that Mr. Bradshaw as the Highland Council representative had been closely involved throughout. The report had been disclosed by him to the same people who had been included in Mr. Dick's email when it was agreed that the respondents should redraft his report with Highland Council. The claimant was very upset that his employers had in his view rushed to suspend him for looking at the reasons why the report had been sent to the people who had received it. He could not understand how he had brought the company into disrepute as the report was accurate and had been accepted. He was also upset that he had been the only member of staff suspended.

62. The claimant received a copy of the investigation report from Ms. Kidd (JB292-299). He was concerned that she had not carried out a proper investigation. In particular she had not focused on whether the terms of the report were true or not. She had not referred to previous water review meetings and the agreed approach set out at the meetings. She had not referenced the meeting that had taken place on 7 November at which the

respondent has accepted in full the terms of the report. There was no reference to the meeting on 12 November 2019 (JB277-281) at which Mr. Dick from Alpha Schools had referred to the current Legionella results at Kinlochleven school. He described the purpose of the meetings as *'' the purpose of the forum was to ensure all parties were fully aware of the concerns and to use the forum as means of being totally transparent about the required actions'' At the meeting it was recorded: MFM acknowledged that the previous maintenance regime across the project was not perfect for a period of time with inadequate training provided and a lack of consistency in delivery across different sites …MFM explained that they were fully committed to doing whatever is required to ensure the water management system is comprehensive and correct''*

63. Ms. Kidd in her report concluded that the claimant had exaggerated the problems. She took exception to the use of the phrase lack of competence applied to Mears staff where the Water Hygiene Inspector had written about a lack of training and understanding. She did not like the use by him of the word 'death'' in the report. He had written about Legionella (JB208) '' if contracted via respiration or aspiration could cause death in the most extreme case flue like symptoms would have been the most likley'' She wrote that *''I believe Bev Parkinson's report is not supportive of Mears and does not show them in a positive light, given Bev Parkinson is the Contract Manager for this contract I believe it would be his responsibility to look to rectify these issues and to show Mears in a positive image rather than accusing Mears of being incompetent. Given these detrimental comments that are clearly aimed at Mears and its employees I believe that Bev Parkinson is guilty of bringing the company into disrepute potentially severely damaged our reputation with Mears FM's largest client''*.

64. The claimant received a letter from Ms. Kidd dated 23 November 2019 inviting him to a disciplinary hearing on 28 November chaired by Gary Jamieson, Head of Operations. The disciplinary allegations were (1) bringing the company into disrepute; (2) breach of the acceptable use

policy; (3) serious breach of trust and confidence between employer and employee.

65. The claimant's Trade Union representative was unable to attend the meeting on the 28 November. The claimant began to suffer from stress and anxiety and was unable to attend the meeting. He was signed off ill with stress. The claimant received a letter dated 28 November 2019 inviting him to reschedule the disciplinary hearing on the 6 December (JBp304-305).

66. The claimant believed that correspondence between himself and Mr. Woodcock and Mr. Griffin as well as emails between himself and Alpha had been omitted from the report. He believed that the correspondence would confirm his understanding of events particularly that the contents of the report reflected information already in the hands of the water management participants including the client, Alpha Schools. On the 2 December the claimant sought that this additional information should be provided (JBp306, 307A).

67. The claimant was provided with four emails in a letter dated 6 December (JBp308). He did not accept that this was a full disclosure of the emails he had sought. The Disciplinary Hearing that was due to take place on the 6 December was rescheduled to 12 December and finally to17 December.

68. The letter sending the claimant the rescheduled date was received by him on the 16 December. He immediately brought this to the respondent's attention (JB312). Given the short claimant was unable to arrange for his Trade Union representative to attend. The letter from the respondent had indicated that the meeting would not be rescheduled.

69. On 6 December the claimant submitted his resignation with immediate effect.

70. Following the claimant's resignation he was offered and accepted a post on the 19 December with the Ministry of Defence. He started new employment on the 6 January 2020. The claimant's weekly wage at termination was £884.62. During his employment he had been entitled to private health insurance which he valued at £500 per annum.

Witnesses

71. I found the claimant to be a generally credible and reliable witness who gave his evidence in straightforward manner although I had some reservations as to whether or not be was as seemingly naïve about the consequences of authoring the report he had without at least prudently discussing it with his line manager as he seemed to suggest he was.

72. In relation to Mr. Griffin I accepted some of his evidence but preferred the claimant's where there was dispute particularly over the claimant's right to release the report himself. Mr. Griffin rather surprisingly seemed to have taken little interest in the report despite being aware that it could be damaging. Mr. Griffin is an experienced and able person and one who has a good recall of events in general. This made it difficult to accept that for some time the claimant, who he managed, had been failing at his job.

73. It is often tempting to portray an employee who has fallen out of favour as one who was in reality a poor employee whose time with the employer might have been coming to an end anyway. But there was an absence of evidence of the sort of routine management that might be expected if such a situation was true. There were no emails setting targets/deadlines or that were critical of the claimant's performance, offering advice for example, warnings or minuted meetings to discuss shortcomings.

74. Overall I was left with the impression that there was a surprising lack of urgency on the part of Mr. Griffin and the respondent's management to address these important water management issues and a seeming

acceptance that matters should be allowed to drift on. I did not get any sense from Mr. Griffin that the Legionella results caused him any concern or should lead to prompt action.

75. I found Ms. Kidd generally a reliable and credible witness who gave her evidence in a clear and professional manner. She seems to have been badly let down by the advice she was given over the claimant's suspension, which she thought was routine, and was unable to explain why it was necessary to suspend the claimant in the circumstances that pertained here. She was also unaware that what was in the report could amount to Protected Disclosures or what the legal significance of that would be. Ms. Kidd did not seem to appreciate that an important issue was whether the report was accurate irrespective of whether it was potentially damaging.

Submissions

76. Mr. Anderson reminded the Tribunal that the claim for constructive dismissal was not dependent upon the claimant establishing that he had made a protected disclosure. The relevance of establishing a successful protected disclosure claim was that it removed the need to consider s.98(4) of the ERA 1996, however in practice, this he suggested rarely arises in a successful claim of constructive dismissal and it also removes the statutory cap in respect of remedy.

77. The Tribunal was asked to note the absence of Mr Woodcock despite his role in events particularly in commencing the investigation. In addition, the respondent had not called witnesses who could have been cross-examined in relation to matters within their knowledge. In particular, the absence of email documents that would have established the level of contact between the claimant and Mr Griffin.

78. Turning to the question of Protected Disclosures the starting point was, he submitted, the wording of the legislation. The headline submission was that the legislative language was at odds with the approach of the respondent to

this case. Whether the claimant brings the respondent into disrepute was immaterial. Many disclosures would have this effect. What matters is the statutory language. The claimant readily falls within the statutory language in his submission.

Disclosure of Information

79. The fact that the claimant disclosed information does not appear to be in dispute. Indeed, that was why the respondent took the action that it did. Whether the respondent was aware of the information or not already was not material to the statutory test. The claimant was entitled to do what he did and the acceptance of his report and the terms of the later HSE report establishes that he had a reasonable basis for acting as he did.

80. In terms of the other provisions in s.43B ERA, it was submitted that the disclosures related to the health and safety of the public and/or the respondent's legal obligations in so far as they related to the public and its employees. In these circumstances, a disclosure was self-evidently in the public interest. Mr Anderson then turned to examine S43F of the ERA. The HSE is a prescribed person. The claimant made disclosures to the HSE. He reasonably believed they were true, and his criticisms were accepted by the HSE.

81. The claimant's position was that the information disclosed to the employer was sufficient to engage s43H of the Act. The HSE report's findings cannot be reconciled with Mr Griffin's evidence. Their finding of contraventions of health and safety law is sufficient to establish 'exceptionally serious failure'.

82. In Mr Anderson's submissions in respect of causation the Tribunal should have regard to the respondent's own words:

"The contents of a report on LRA written by yourself and distributed to the client, other external sources and mears senior management (on 31st

October 2019) which contains damaging information against Mears, its employees and subcontractors."

83. The reference to 'damaging information' was express. The investigation report contained statements that the report was not supportive of Mears and did not show them in a positive image. (JB297-298). Paragraph 6 of the Ms Kidd's Witness Statement was further support for what was an admission by the respondent on this point.

84. In the allegations against the claimant, the respondent relied upon the implied term of trust and confidence. The implied term is conceptually drawn as an implied term of the contract of employment. It is important to highlight that contractual matters cannot interfere with whether or not something amounts to a protected disclosure: s.43J ERA 1996. "Any provision…" would include an implied term. The evidence and indeed the respondent's whole approach to this matter was incompatible with the statutory language and/or purpose of the Public Interest Disclosure Act 1998 as incorporated into the Employment Rights Act 1996. In Counsel's submission the evidence showed that the claimant was entitled to resign. There was no basis made out to suspend the claimant or take disciplinary action on the grounds of bringing the respondent into disrepute.

85. The letter of suspension (JBp246-247) was wrong as a matter of law. The letter describes suspension as a neutral act. This was expressly disapproved by Sedley LJ in ***Mezey v South West London & St George's Mental Health NHS Trust [2007] IRLR 244*** (Paras 11-13). In the recent case of ***London Borough of Lambeth v Agoreyo [2019] IRLR 560*** the Court of Appeal revisited this point at para 85 onwards. It rejected the opportunity to depart from Mezey in light of the withdrawal of a concession. Importantly, in the context of a constructive dismissal relating to the implied term of trust and confidence, it sought to focus the parties' minds on the question of whether the suspension was without reasonable and proper cause.

86. Furthermore, the letter stated the following:

"You are advised that these allegations are of a serious nature and if proven would constitute gross misconduct, which may lead to your dismissal from the Company."

87. The use of "would" was that of mandatory language. Whilst it was conceivable he suggested for suspension letters to discuss potential acts of gross misconduct, it is unacceptable for the classification of gross misconduct to be fixed at the point of suspension. That is ultimately a matter for a different person much further down the disciplinary process. This is relevant because:

    a. It is a further example of a position taken that is wrong in law
    b. It adds credence to the thread that this matter was being pre-judged. This sits with the contents of the suspension telephone call.

88. It is submitted that the letter of suspension falls exactly into the 'knee jerk' reaction identified in the authorities. The timing is immediate, it is in stark terms.

89. However, Counsel continued, it is possible to go beyond the issue of 'knee jerk'. The points made above regarding the respondent's admissions as to why it was taking the action that it was taking squarely puts the actions of the respondent into the 'without reasonable and proper cause' territory.

90. The investigation was inevitably flawed. It sought to gather evidence against the claimant. It was not balanced; it did not seek exculpatory evidence.

91. The claimant was asked about whether he had sought documents in these proceedings. The claimant indicated that he was unaware of his ability to do that. In any event, that isn't the germane point, the claimant had already made a Subject Access Request (SAR). The Respondents legal obligation to supply the claimant with the documentation was already engaged.

92. The following facts are in Mr Anderson's submission inescapable:

a. The claimant had 24 hours notice of the disciplinary hearing charging him with gross misconduct.
b. The letter expressly made it clear that the meeting would not be postponed again. The respondent seeks to rely on the fact that previous letters also said this and that those hearing were postponed. It is submitted that it is not open to a party to write in unequivocal terms and rely upon its past actions to say that a party should disregard what it chooses to put in those terms. The respondent is responsible for the content of its correspondence.

93. It was he said important to bear in mind that if the respondents position is that the claimant would have been dismissed at this meeting, the claimant has achieved nothing by resigning in advance of the meeting other than adding layers to the test to be applied by the Tribunal. An express dismissal in these circumstances, in response to the claimant completing the report would have been unfair.

94. In the event the Tribunal finds that the final straw does not amount to a breach of the implied term of trust and confidence this is not a case in which that is the end of the matter. ***Williams v The Governing Body of Alderman Davies Church in Wales Primary School (2020) UKEAT/0108/19/LA*** is authority for the proposition that where the Tribunal finds that the last straw is not a breach of the implied term, it does still need to consider each element of the test for constructive dismissal in respect of any breaches relied upon that are made out.

95. There is no basis for suggesting that affirmation applies in this case. The correct approach is that of Underhill LJ *in* ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833*** at para 55. The Tribunal is asked to adopt that sequential approach.

96. Furthermore, **Kaur** is authority for the proposition that there can be no real issue of affirmation in this case. Affirmation can only occur between the matter found to be the last straw and the resignation. The primary matters

relied upon by the claimant occur in quick succession, against his will. There is no identifiable gap between these events and the resignation letter, nor is there any positive act of affirmation on his part.

97. In respect of the resignation, the bar is a relatively low one. The claimant need resign only in part in response to the breach. It is submitted that this threshold is easily met in this case. The letter of resignation, the respondent's admissions as to why it was taking action against the claimant are more than sufficient.

98. In the event the claimant was dismissed, there was no real reason for dismissal and there is no basis upon which it can be said that the dismissal was reasonable for the purposes of s.98(4) ERA 1996.

99. In respect of holiday pay, the claimants evidence (para 81 WS) was that he was owed four days in respect of untaken leave. He relied upon his own records.

Respondent's Submissions

100. Mr. Edwards first of all indicated that he had no issue with the legal propositions made by the claimant's Counsel. He then addressed the claim for unfair dismissal and 'automatic' unfair dismissal. The claimant must, he submitted, resign in response to some breach and the evidence did not support his claim. The employers were entitled to take disciplinary action against him and he resigned because of issues around the investigation, and who carried this out. Pointing to the ET1 Mr. Edward observed that the suspension was not raised there as an issue although the claimant's Counsel had made much of it in his submissions. The case had not been presented as a 'last straw' case. The disciplinary process had never been concluded.

101. The role of Ms. Kidd was an investigatory one to find out what occurred and why the report had not been shown to the line manager. She was not a decision maker in the process but simply compiled the Investigation Report. The claimant accepted he had written the Report and had not shown it to his line manager. It was important to note that in the claimant's witness statement no where did he say he had raised these concerns and been ignored or that any of the issues were 'new'. He had accepted that although his name had been on the report it was not his conclusions. There was no suggestion he had leaked the report or was being disciplined for that.

102. Mr. Edwards submitted that there was no evidence Ms. Kidd was biased or was being manipulated in some way yet he resigned in response to the Investigation some considerable time later. The complaint that the claimant believed that disciplinary hearing would not be rescheduled has to be seen against the background of previous hearings being rescheduled by the respondent company when persuaded to do so. Mr. Edward referred the Tribunal to the recorded history. We heard no evidence that those in charge of the disciplinary process were biased against the claimant.

103. Mr. Edward submitted that even if there were flaws in the Investigation these were not material and could have been rectified at a later point in the disciplinary process. Resigning because he feared he would be dismissed was premature and had no factual basis. He could not say what was likely to occur at the disciplinary hearing had it gone ahead. Counsel then took the Tribunal through the significant events and previous postponements.

104. It was open to the Tribunal to ascertain the true reason for the claimant's resignation and it was noteworthy that he had applied for other jobs in October before the report was published and had accepted a new job on the 16 December the day of his resignation.

105. In summary the claimant did not have the evidence to support his speculative fear that he would be dismissed and the submissions having

made a PID or PIDs was strong the onus was on him to show they were the reason for his dismissal.

106. The Schedule of Loss that had been lodged was agreed in relation to the basis of calculations but it's conclusions were not. It was not clear why the claimant took less paid work and seemingly has made no effort t obtain higher paid work. He asked the Tribunal to accept that the claimant had been fully paid for his holiday entitlement and was not entitled to the additional public holidays claimed. He had not demonstrated any entitlement to carry these over from one holiday year until another.

107. As a final matter Mr. Anderson observed that the burden of proof in relation to automatically unfair dismissal where it was not an express dismissal was not clear cut as Mr. Edward had seemed to suggest but was an issue before the Court of Appeal in England in **Kuzel v Roche Products Ltd** to which the Tribunal should have regard.

Discussion and Decision

108. The claimant has claims both for ''ordinary'' unfair dismissal and for automatically unfair dismissal under Section 103A of the ERA. I set out the legal framework for both starting with the latter claim and then turn to my more general observations the evidence.

109. A "qualifying disclosure" (sometimes called a ''whistleblowing disclosure'') is defined by section 43B Employment Rights Act 1996 ("ERA 1996"), which provides:

"***43B.***

Disclosures qualifying for protection. (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the

public interest and tends to show one or more of the following— (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, … (d) that the health or safety of any individual has been, is being or is likely to be endangered, … or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

110. There must be a disclosure of information. It may be made as a part of making an allegation (***Kilraine v London Borough of Wandsworth [2018] ICR 1850***).

111. A worker making the disclosure must have a reasonable belief that the information must tend to show one of the matters set out at paras. 43B(1) (a) to (f) ERA 1996. The disclosure must be made, in the reasonable belief of the worker at the time, in the public interest.

112. A qualifying disclosure becomes a protected disclosure because of whom it is made to. Section 43C ERA 1996 is in these terms:

"43C.— Disclosure to employer or other responsible person. (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure — (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to— (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person."

113. Section 43H relates to exceptionally serious failures.

"Disclosure of exceptionally serious failure.

(1) A qualifying disclosure is made in accordance with this section if—

(a). . . . . .

(b) the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made".

114. Employees such as the claimant are protected against being subject to detriment done on the ground that they made protected disclosures by section 47B ERA 1996:

"47B.— Protected disclosures. (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. … "

115. Employees are protected against being dismissed for making protected disclosures by section 103A ERA 1996:

"103A. Protected disclosure.
An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

Constructive dismissal

116. The starting point is section 95(1)(c) Employment Rights Act 1996. That section provides that there is a dismissal when:

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

117. At the point of resignation there must have been a fundamental or repudiatory breach of contract on the part of the employer. The employee must not have affirmed the contract thereafter, and the breach must have materially influenced the decision to resign.

118. All employment contracts contain certain well-established implied terms. In many cases, the employee relies on the so-called implied duty of trust and confidence. In the well-known formulation (***Woods v WM Car Services Peterborough Limited*** (1981) ICR 666 and ***Malik v BCCI SA*** (in liquidation) (1997) ICR 606), this is the term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If there is a breach then that will necessarily be a fundamental breach ***(Morrow v Safeway Stores plc [2002] IRLR 9***).

119. The question of the reason or principal reason for dismissal in such a claim was addressed in ***Eiger Securities LLP V Korshunova 2017 IRLR 115***. The test is not the same as for detriment, or in discrimination law, but to apply the statutory language and ascertain the reason or principal reason for the dismissal.

Disclosures

120. The respondent in this case pled that the matters raised by the claimant were not disclosures as the information provided by the claimant was already known. The word disclosure does suggest something new or revelatory but the statutory scheme is wider as is clear from the language used in the section and covers information which the person receiving the disclosure is already aware of. In effect it is bringing some matter to an employer's attention and often, as here, involves drawing conclusions from information that is already available.

121. The next matter is to examine what the claimant believed his protected disclosure were. The claimant's ET1 did not expressly contain a claim under Section 103A but one was lodged after amendment. The ET1 did mention sending a copy the report to HSE. It wasn't challenged that this was making

a Protected Disclosure(s) but it they did not have any impact on the claimant's resignation/dismissal but the HSE report does evidence the serious nature and validity of the claimant's concerns.

122. The disclosure to the HSE was not dealt with in any detail in evidence. Working back from the outcome (JBp232-234) it can be deduced from the fact that the issues picked up by the Inspector (relating to flawed design, lack of sampling and no tailored site specific risk assessments being in place) were, especially given that these difficulties were set out in the report prepared by the clamant (and being the subject of discussions between the claimant and Mr Griffin extending over many months) reflected the disclosures made both to Mr Griffin over some months but crucially when put together in the report. In summary the terms of the HSE findings are much more supportive of the claimant's position than the considerably more relaxed attitude Mr Griffin took. It seems to me that they support the claimant's position that these were exceptionally serious failures. The making of the disclosure(s) on the 3 November to the HSE led to no discernible detriment and are not founded upon. The claimant had, by this point, already been told he was subject to disciplinary proceedings and had been suspended.

123. The claimant in the application to amend stated that the protected disclosures were made to his line manager Mr. Griffin by email dated 27 April 2018 (JBp109) (no trained or appointed responsible person) and in subsequent discussions and emails relating to the state of the water management systems in the schools and the finding in late 2017 of Legionella. The claimant's Witness Statement and his evidence did not precisely identify the disclosures he was relying on or give a narrative of the history and his interactions with Mr. Griffin. For his part Mr. Griffin accepted that he had been told about the Legionella findings and the unhappiness of the Highland Council with a number of aspects of the water management systems in the schools but could not identify any particular occasion when these difficulties had been disclosed and no mention had been made to him

that the company was involved in any ‘‘wrongdoing’’. That is somewhat disingenuous as the respondent had this contract for some time and were responsible for ensuring the good management of the systems. The report in his view simply highlighted the claimant’s own failures to get the water management system up to scratch.

124. I did not accept that evidence as it is clear that the report catalogues various difficulties including problems with the design and build of the systems predating the claimant’s employment.

125. The respondent’s position as I understood it was that even if disclosures had been made the respondent’s actions were justified and arose not from the disclosures themselves but from the claimant’s conduct in not having the report approved before sending it out to the client and to Highland Council the LA (Local Authority). This would have had more weight had the disciplinary charge consisted solely of this allegation but as I note later this is not the situation.

126. Mr Anderson dealt with the issue of what the protected disclosures were quite briefly in his submissions simply indicating that it did not seem disputed that there had been Public Interest Disclosures made in the report as that was the catalyst for disciplinary action.

127. Although I agree with that comment I regret that the matter cannot be left on this basis without a specific concession on the part of the respondent’s agents. The claimant in his evidence does not found on earlier discussions with Mr Griffin although it is notable that in one telephone discussion Mr Griffin indicates that he is aware that the company is not compliant with it’s statutory obligations. The claimant relies on his report which was given to Mr Griffin and to other ‘‘stakeholders’’ That report makes various disclosures. It draws together various issues and addresses the question that the stakeholders wanted answered which was what was the root causes of the situation which had arisen. I will examine one matter in a little

detail (although others such as the design of the systems and training of staff feature and are also Public Interest Disclosures made in the report in my estimation.) and that matter relates to the inadequacy of the Legionella Risk Assessments and policies both at the time of construction and reworking of the LRA's in 2017.

128. In the report he writes: *''Design and project risks were not identified during the design and construction phases…''* (JBp206), ''*Method statements and risk assessments were incomplete or incorrect…'',* ''*The policies for MEARS are confusing and technically incorrect. There was no emergency procedure in place to deal with positive incidents and no training…''* and *''Poor commissioning of LRAs from building inception to present day.''* There is also reference to the applicable statutory standards which should apply (JBp219).

129. The regulatory framework would clearly be appreciated by the stakeholders and the respondent's managers and those with knowledge of water management that the report concluded that the respondent company was in breach of the statutory obligations and possibly of it's contractual obligations to maintain and operate a statutorily compliant water management system. From this, given the clear public interest involved in ensuring safe water supplies in schools it is apparent that the report contained Public Interest Disclosures made by the claimant to his employers.

General Background and History

130. This is a case where I struggled to understand the respondent's position. They appeared to take pains to minimise what seems to have been serious and long-standing difficulties. If these problems were truly inconsequential, that belief does not sit comfortably with their suggestion that the claimant had brought them into disrepute by repeating those known problems in the report issued to stakeholders who were already aware of those problems. I

could quite appreciate that the claimant had become increasingly concerned about the situation and that his concerns had increased when it became clear that he was, as the Responsible Person, potentially someone who carried legal liability for the continuing state of affairs.

131. The respondent in the ET1 (paragraph 13) accuse the claimant of falsely recording his actions and in effect misleading Mr Griffin. This was not a matter that was part of the disciplinary allegations and there was no detail of these failings or corroboration in the form of emails and meeting notes to substantiate that position.

132. It is often the absence of evidence that can be significant when considering what actually occurred. The respondent says that the lack of progress was caused by the claimant's poor performance. The length of time it took for the respondent took to agree to instruct a new company LRA's seems to show a situation where it took some considerable time to persuade the respondent to instruct a new company to carry them out. This was a situation that was beyond the claimant's control as instructing the new LRAs and the cost involved was beyond his responsibilities.

133. As I have noted there appears to be no email traffic or meeting notes or correspondence to demonstrate this alleged longstanding concern just the belated performance review which was sought on the I November (JBp242) a day after the report was issued. The correspondence refers to no particular issues and it seems to have been treated as some routine matter.

134. There was nothing to demonstrate the level of contact one might expect in such circumstances between the claimant and Mr Griffin which would tend to show that the respondent was taking the matters seriously and which recorded how plans were being developed to address these problems, what those plans were and whose responsibility it was to deliver them within appropriate timescales. In short, I found little basis for the respondent's

position. It was apparent that if for no other reason the report pointing the finger of blame at another company in the group that had designed and built the systems in the schools would be most unwelcome as would the inevitable problem of who, in the group, was expected to pay to finally resolve the problems rather than just manage them through the maintenance budget.

135. There was some evidence of the interactions between Mr Griffin and the claimant. The claimant did record some telephone calls and the transcripts, which were not challenged, were produced. The manager although acknowledging the various issues that had arisen, which we can now see as being serious, seemed content for matters to drift somewhat. The seriousness of the issue of Legionella seemed to be epitomised by Mr Griffin suggesting it was normal or usual to get positive results and the schools should be advised to make sure they ran the water taps to clear them.

136. The claimant also recorded the view that putting out to schools some generic advice about water management would be better than nothing as site specific advice could only be written if an adequate Risk Assessment was in place and they were not yet in place. To be fair to the respondent Mr Griffin had set out in his report sent on the 18 September (JB139-145) both that new risk assessments were being planned and setting out various actions (p144) to bring the necessary documentation up to scratch and to put in place staff training. In his covering email (JBp149) he commented on the situation that had arisen by writing ‘‘there is no smoking gun in terms of one source of ‘‘blame’’.

137. This insouciant attitude seemed to alter markedly both after the submission of the report, and once the respondent’s managers were aware that the HSE were involved and that the problems might attract publicity. Their

position was not that it was all ‘‘in hand’’ and not particularly urgent but that difficulties would be urgently addressed.

138. At the meeting on the 12 November 2019 of the Water Management Review (JB277-281) there is a clear sense of urgency and acceptance by the respondent that *‘‘the previous maintenance regime across the project was not perfect for a period of time with inadequate training provided and a lack of consistency in delivery across different sites’’* (JBp278) To take one important issue referred to in the same minute they now confirmed that a new company was being brought in to prepare New Risk Assessments. The evidence shows that the report prepared by the claimant was a catalyst for change. Disciplinary Action.

139. After publication of the report the respondent moved quickly to disciplinary action. It is not clear who in particular was driving this process but it is apparent that Mr Griffin had complained that the claimant had not disclosed the report to him first. Presumably this was to Mr Woodcock who them tasked Ms Kidd to investigate. An employer is entitled to discipline an employee if there has been a breach of discipline in this case an alleged express instruction.

140. Mr Edward in his submissions argued that the claimant had made reference to his suspension in his ET1 or in his letter of resignation but first raised his response to the suspension in his witness statement. The evidence had not been objected to. However, Counsel’s position was that it called into question his credibility on the matter and his motivation for resignation. Considering the circumstances, it is true that at the time the claimant’s concerns appeared to be his belief that because of prior issues between them (these were not explored in any detail) Ms Kidd would be biased against him. The fact that this was a concern that he raised does not exclude the possibility that he was upset at his suspension or mystified that he was being disciplined at all. The issue of whether Ms Kidd should be the

investigator was an immediate and tangible concern for him. It was not his only concern. He narrates the sequence of events in his ET1 including his suspension and that he was a ‘‘scapegoat’’. Indeed, it is apparent he was upset that he was being disciplined at all but the fact that he did not specifically suspension as a reason for resignation in the ET1 is not fatal in my view to a claim based on what he regarded as being unjustly disciplined in the first place. His evidence paragraph 66 of his Witness Statement was that he was upset at the suspension*: ‘‘ I was very upset that Mears had rushed to suspend me before looking at the reasons why the report had been sent ….’’* .

141. The email that contained his resignation (JBp318) must also be seen against the context at that point which was that the claimant was unhappy that he had insufficient time to prepare his defence though accessing emails about the sending of the report and that it had been reiterated in correspondence that the new disciplinary hearing would not be rearranged (JBp310). The claimant’s response was that he had only received the letter on the 16 December (JBp312) for a hearing on the 17 December and had no time to arrange his Trade Union representative to attend and was still lacking information he had requested to prepare his defence. The claimant had prudently been seeking alternative work. He was unclear when he started searching job sites but by the 19 December he had been interviewed and accepted a post. This occurred after his resignation. It is noteworthy that the job was considerably less well paid and this is not a situation where he left for better employment.

142. In relation to the issue of causation Mr Anderson asked the Tribunal to look at the respondent’s own words as set out in the invitation to the disciplinary hearing (JBp300) where they state that the report *‘‘contains damaging information against Mears, its employees and subcontractors’’* Ms Kidd did not seem to have been alerted to the issue that she should have considered first of all whether the contents were true before considering any possible damage caused. The comments in the Investigative Report about the

claimant not being supportive and not presenting the company in a positive image are all suggestive of the company being unhappy at the disclosures contained in the report and failing to recognise that protected disclosures had been made and the protections that flowed from that. The criticism made of the wording of the report seem minor and there was no interest in whether they were true or were an accurate reflection of the position. The claimant has demonstrated that the actions of the employers were taken because of the protected disclosures and that he was entitled to resign in response.

Ordinary Unfair Dismissal

143. Even if I am in error as to whether section 103 is engaged the claimant also makes a claim for 'ordinary' unfair dismissal based on a breach of the implied term of trust and confidence. I accept the claimant's position that the suspension was wrong and a knee jerk reaction. (***Gogay v Hertfordshire County Council*** (2000 IRLR 703) CA). Although described in the letter of suspension as a neutral act (JB246/247) it cannot be regarded as such (***London Borough of Lambeth v Agoreyo*** (2019) IRLR 560). Ms Kidd in her evidence was candid that the claimant was suspended because that is what happens. When asked if, in hindsight, there were any reasons for his suspension she could not think of any. The suspension was carried out without reasonable or proper cause and constituted a breach of the implied term of trust and confidence.

144. The wording of the letter of suspension was rightly criticised but I put little weight on the matter and while it is suggestive of an attitude having already been formed about events it is as likely to be poor drafting.

145. The investigation process looked for evidence against the claimant rather than at a wider picture of whether the statements in the report were true or whether everyone knew of the problems anyway. This was a crucial matter.

Interestingly the evidence was that Mr Bradshaw of Highland Council had seen the report on the 31 October and been involved in its preparation (as one of the stakeholders) so it is difficult given the history of all the stakeholders working together in the past and sharing information that sending the report to Alpha Schools could amount to gross misconduct. Put bluntly if Mr Bradshaw knew about problems as the Highland Council representative then Alpha schools would be told.

146. The last straw was said to be the immediate events leading up to the proposed disciplinary hearing and the claimant's request for emails and so forth before that hearing. Mr Edward submitted that although the letter inviting the claimant to the hearing said that there would be no further postponements on previous occasions where there had been a legitimate request made they had been granted. While I have some sympathy with that submission it effectively asks me to ignore what was expressly said in the letter. If that was not the respondent's position it should not have been articulated in that way especially given the importance of the hearing for the claimant who was facing a charge of gross misconduct.

147. I heard argument as to whether or not there was a ''final straw'' constituted by the events immediately preceding the resignation. The question of what is a ''final straw'' has been considered in a number of case including that **London Borough of Waltham Forrest v Omaliju** [2004] EWCA Civ 1493 in which Lord Justice Dyson writes:

"

15. The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

> *"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of*

the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See Woods v W. M. Car Services (Peterborough) Ltd. [1981] ICR 666.) This is the "last straw" situation."

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application."

148. My conclusion is that against the background of very serious disciplinary charges the failure to provide the claimant with copies of emails (he had sought to show the history of the discussions/instructions he had with Mr Griffin), the very short notice of the hearing (which it must have been realised was likely to cause problems for the claimant), coupled with the express indication that a postponement would not be granted are singly and cumulatively sufficient to constitute a ‘‘final straw’’. They could not be described as trivial and insignificant. The claimant resigned in response these final difficulties. In these circumstances I would have held that he had been unfairly dismissed if I had not attributed his dismissal to the employer’s response to his protected disclosures.

Holiday Pay

149. In relation to this matter the onus is on the claimant to prove he is due holiday pay. It was not clear which days he said he had worked or if time bar operated against the claims made as unlawful deductions. He did not identify the dates in question or seek sought Payroll records to identify when payment should have been made but was not. In these circumstances I concluded that the claimant had not satisfied me that these sums were due.

Remedy

150. The claimant resigned from a well-paid job to take up a post on a little more than about half his previous salary. A Schedule of Loss was prepared (JB P329/330) The only issue that arose was that there was no evidence as, Mr Edward pointed out, that thew claimant had tried to minimise his loss by

applying for better paid employment. There is a reasonable duty on a claimant in these circumstances to mitigate their loss. It is in within judicial knowledge that by the end of March 2020 because of the Covid Pandemic there was a lockdown and that matters became very difficult in the job market from the end of March. However, I have no evidence as to the effect this had on the claimant's particular type of work. There was certainly no evidence that he had continued to look for better paid work. In these circumstances, it is inevitable that I must conclude that by the end of March 2020 he had not demonstrated that he had mitigated his loss. Looking at the matter broadly it might have taken for or five months in the Tribunal's experience of the more usual case to obtain alternative employment. I will therefore award continuing loss of wages for a period of four months from the date of his new post. His continuing weekly loss being £369 (£48,000 - £28,800/52).

151. The Tribunal will award the claimant the following sums in respect to the dismissal:

a) A basic award of £1076 (based on service weekly wage and age 1.5 x £538 capped).
b) A compensatory award of £2,653.85 made up of loss from date of termination to 6 January 2020 (3 weeks x £884.62).
c) A compensatory award of £4428 for a period of 12 weeks (12 x £369).
d) Loss of Statutory Rights £600.
e) Loss of Health Insurance £167 based on four months (£500/12 x 4).

Employment Judge **J Hendry**

Dated **25th of June 2021**

Date sent to parties **25th of June 2021**