EMPLOYMENT TRIBUNALS

Claimant: Mr. U Musella

Respondent: SPS Aerostructures Limited

Heard at: Nottingham **On:** 28 29, 30 September and 1 and 2, 8, 9 and 16 October 2020.

Before: Employment Judge Rachel Broughton with Non-Legal Members; Mr A. Blomefield and Mr A. Greenland.

Representatives

Claimant: In Person
Respondent: Ms Duane – counsel

RESERVED JUDGMENT

The Judgement of the Tribunal is that;

(1) The claimant's claim that he was automatically unfairly dismissed pursuant to section 103A Employment Rights Act 1996 is not well founded and is dismissed.

(2)The claimant's claim that he suffered detriments on the grounds of public interest disclosures is not well founded and is dismissed.

(3)The claimant's claim for wrongful dismissal is not well founded and is dismissed.

(4)The claimant's claim of unfair dismissal pursuant to section 94 and 98 Employment Rights Act 1996 is dismissed on withdrawal.

REASONS

The Claim

1. The claimant was employed by the respondent as an Assembly Fitter from 18 March 2017 until his dismissal on 6 March 2019.

2. The claimant issued a claim in the Employment Tribunal which was presented on 14 June 2019 following a period of Acas early conciliation from 5 April 2019 to 15 April 2019.

3. The claim as initially presented included complaints of;

3.1 Unfair dismissal pursuant to sections 94 and 98 of the Employment Rights Act 1996 (ERA).
3.2 Automatic unfair dismissal pursuant to section 103A ERA.
3.3 Detrimental treatment pursuant to section 47B ERA.
3.4 Wrongful dismissal
3.5 Unlawful deduction from wages pursuant to section 13 ERA/breach of contract claim; for unpaid salary during the period of suspension and unpaid holiday pay.

4 Aside from the claim for unpaid wages, the respondent defended the claim in full.

The Issues

5 Following a case management hearing on 20 November 2019, a judgement was issued on 14 February 2020 by Employment Judge Heap dismissing the complaints of unlawful deduction from wages during the period of suspension and failure to pay holiday pay, following the withdrawal of those claims by the claimant. The judgement expressly provides that the complaints of late payment of suspension pay and holiday pay would however proceed as separate complaints of detrimental treatment pursuant to section 47B ERA.

6 A further case management hearing took place on 23 July 2020 to consider issues including the claimant's application to introduce into evidence covert recordings he had made during his employment. An order was made that if the claimant wanted to rely on voice recordings he must by 13 August 2020 provide them to the respondent together with a verbatim transcript of each conversation with no redactions. The transcripts were to be placed in a separate bundle for the hearing.

The Final Hearing

7 The claimant had the benefit of legal representation prior to the final hearing however he represented himself at the hearing. The claimant who is Italian, was assisted by an interpreter throughout the course of the hearing.

8 The hearing was conducted remotely via a cloud video platform and although listed initially for 5 days it required a further listing of 2 days with a further half a day for oral submissions.

9 At the start of the hearing, we first addressed the claim of ordinary unfair dismissal. The claimant confirmed that he understood the requirement for two years continuous service under section 108 (1) ERA and confirmed that he did not have the required period of service. The claimant explained that he had worked for the respondent through an employment agency initially and accepted that his employment started on the date as set out in its response to the claim, namely on 18 March 2017. The termination date of 6 March 2017 was agreed between the parties. The claim of unfair dismissal pursuant to section 94 and 98 ERA was withdrawn and is dismissed.

Covert Recordings

10 The claimant made an application to admit into evidence covert recordings of meetings and various discussions with his colleagues. The respondent had reviewed the transcripts and heard the recordings and agreed their content as accurate however the respondent objected to the admission into evidence of the recordings.

11 We heard representations from both parties and after determining the application we

admitted into evidence a number of the transcripts subject to redaction agreed between the parties**.** The transcripts were set out in a separate transcript bundle which includes 8 transcripts.

Issues

12 The issues were discussed at some length and agreed between the parties and are as follows;

Qualifying Disclosure

1. Did the Claimant make a disclosure of information?

2. The Claimant seeks to rely on the following as protected disclosures:

- *a) During a verbal meeting with Mr Richard Merriman (Supervisor) in 4 December 2017, which the Claimant asserts amounted to a breach of a legal obligation/breach of health and safety;*
- *b) In an email (only) to Ben Crunkhorn (Quality Director) on 8th December 2017, which the Claimant asserts amounted to a breach of a legal obligation/breach of health and safety;*
- *c) Verbally to Mr Merriman in July 2018, which the Claimant asserts amounted to a breach of a legal obligation/breach of health and safety and concealing information;*
- *d) By email to Deborah Winnard (HR consultant) dated 2nd August 2018, which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information;*
- *e) By email to Aron Riley (manufacturing engineering) dated 3rd August 2018, which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information;*
- *f) By email to Nick Jenkins (Interim Operations Director) dated 3rd August 2018, which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information;*
- *g) By email to Indy Rattu (General Manager and Vice President) dated 4rd August 2018, which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information;*
- *h) In a letter from the Claimant Solicitors (Fraser Brown Solicitors) to the Respondent dated the 10th January 2019, which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information;*

i) *Verbally to Mr Merriman and Russ Allcock (Supervisor) on the 17th August 2018 which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information;*

j) *During a meeting with Jas Sanghera (HR Manager) and Jason Dobbins (Operations Director) on the 18th January 2019 which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information;*

k) *During a meeting with Jas Sanghera and Jason Dobbins on the 29h January 2019 legal obligation and concealment of info;*

l) *By way of a grievance on 1 February 2019 which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information;*

m) *In an email to Jas Sanghera dated the 4th February 2019 which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information;*

n) *During the grievance hearing on the 21st February 2019 which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information; and*

o) *During the grievance appeal hearing on the 19th March 2019 which the Claimant asserts amounted to a breach of a legal obligation and/or concealment of information.*

3. *The Respondent denies that the aforementioned incidents amount to a disclosure of information individually or collectively, in that either a number of the incidents relied upon did not occur and/or that the Claimant has failed to clearly convey the facts and the ramifications of his concerns which he now seeks to rely on.*

4. *Did the Claimant reasonably believe that these (alleged) disclosures were made in the public interest and that the information tended to show that:*

a) *a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (s.43B(1)(b) ERA 1996);*

b) *the health or safety of any individual has been, is being or is likely to be endangered (s.43B(1)(d); and/or*

c) *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 (s.43B(1)(f).*

5. *The legal obligation(s) that the Claimant seeks to rely upon are as follows:*

a) *duty to provide conforming parts and notify of non-conforming parts to the customer Airbus via a Notice of Escape ("NoE"); and*
b) *breach of Part 21 EASA Regulation.*

6. *The Respondent accepts that there is a contractual obligation to ensure that its parts conform to the specification dictated by its customer Airbus. The Respondent asserts that there is a clear procedure for dealing with NoEs, which results in a notification to the customer where there is confirmed non-compliance. The Respondent contends that it has evidence of numerous occasions where it has made customer disclosures, but only once this has been verified by quality or engineering that there is a non-conformance which would impact historical deliveries. The Respondent denies that the concerns raised by the Claimant in this case amounted to non-conformance giving rise to a NoE.*

7. *The Respondent's contends that the process for notifying a customer of a Notice of Escape is as follows:*

a) *An internal non-conformance is identified;*
b) *An engineer will be appointed to investigate any concerns and will determine whether the equipment/tools etc. conform or if they are non-conforming;*
c) *If the equipment/tools etc are conforming no further action will be taken;*
d) *If the equipment/tools etc are non-conforming then the concerns will be escalated to the customer (i.e. Airbus) and they will then liaise with the Respondent to determine its options i.e. concessions, variations to parts, production stop etc.*

8. *The Respondent denies that Part 21 EASA Regulation applies to its business. The Respondent contends that it holds the AS 9100 accreditation and is not legally obliged to have a Part 21 EASA. The Respondent asserts that this legal obligation is required of the customer, not the Respondent.*

9. ***Did the Claimant have a reasonable belief** that the information disclosed tends to show one of the relevant failures? The Respondent asserts that the Claimant cannot have held a reasonable belief that the concerns disclosed showed one and/or more of the relevant failures as the Claimant has failed to outline any purported breach of a legal obligation/health and safety breach and/or concealment of information, the source of the purported obligation and/or the ramifications of any purported failings.*

10. ***Were the alleged disclosure(s) in the public interest?*** *The Respondent denies that the Claimant's purported disclosures were within the public interest as the Claimant has failed to raise more than a mere observation in respect of the concerns raised.*

11. *Were the alleged disclosure(s) of information made in accordance with s.43C of the Employment Rights Act 1996 in that it was a qualifying disclosure made to the Respondent or to any person falling within s.43C(1)(a), (1)(b) or (2)?*

Dismissal due to a Qualifying Disclosure (automatically unfair)

12. *Was the making of any proven protected disclosure(s) the principal reason for the dismissal?*

13. *Has the Claimant produced sufficient evidence to raise the question of whether the reason for the dismissal was due to the alleged protected disclosures?*

14. *Has the Respondent proven its reason for the dismissal, namely conduct?*

Detriments on the grounds of a Qualifying Disclosure

15. *Did the Claimant suffered any detriment, because of an alleged protected disclosure, by way of the following:-*
    a) *Mr Merriman ignored a holiday request submitted by the Claimant in July 2018 for 20th to 22nd July 2018. The Respondent denies this allegation and contends that the Claimant has failed to adduce any evidence to support this assertion;*
    b) *Mr Merriman made a comment to the Claimant on the 17th August 2018 referring to him as a "fucking idiot" for emailing the General Manager about the non-conforming part and "I don't give a fuck about the bolt." The Respondent denies this allegation and contends that the Claimant has failed to adduce any evidence to support this assertion;*
    c) *Mr Merriman moved the Claimant to another section in August 2018. The Respondent asserts that the Claimant was moved to another workbench, not another department in order to carry out necessary upskill and training required for the Claimant's role, not due any alleged protected disclosure;*
    d) *Mr Merriman reprimanded the Claimant regarding the use of the air blower in October 2018. The Respondent asserts that despite the Claimant being advised that he should not use the air blower, as this is a potential health and safety breach, the Claimant proceeded to do so on a subsequent occasion. The Claimant was therefore informally reprimanded for his conduct;*

e) *Mr Merriman reprimanded the Claimant about the use of his mobile phone in October 2018. Mr Merriman asserts that the Claimant's peers Sam Butler and Tom Smith were also spoken to about their use of their mobile phones on the shop floor;*

f) *Was Mr Merriman hostile towards the Claimant during the incidents complained of at 15(b), (d) and (e). Mr Merriman denies that he acted in a hostile manner towards the Claimant;*

g) *That Mr Merriman and/or the Respondent tried to conceal information about how the Claimant's concerns and how they would be rectified. The Respondent denies this allegation in its entirety;*

h) *Mr Merriman made complaints about the Claimant's performance during a meeting in July 2018. The Respondent is entitled to address minor performance issues with its employees and denies that this amounts to a detriment;*

i) *The Claimant was not provided with Overtime from July 2018. The Respondent denies this allegation. The Respondent introduced the Working Hours Regulation Compliance Policy on 29 May 2018 which affected the overtime offered to all employees, including the Claimant. The Respondent denies that the Claimant was placed at a detriment because of his protected disclosure;*

j) *The Claimant lost 3 hours of annual leave because this was not approved by Mr Merriman in December 2018. The Respondent contends that despite the Claimant's failure to provide 4 weeks' notice of his intention to take almost 3 weeks leave (as required by policy) the Respondent sought to accommodate the Claimant's annual leave by permitting two weeks leave at short notice. Due to the Claimant's failure to punctually submit his leave request, the Respondent was unable to accommodate the initial 3 hours of his request; and*

k) *The Respondent's failure to pay the Claimant during the period of suspension from the 8th February 2019 to the 6th March 2019. The Respondent asserts it always intended to pay the Claimant during his suspension, however this was overlooked due to a genuine oversight by the Respondent's payroll department. The Respondent confirms that it has since paid all monies due to the Claimant.*

16. *The Respondent denies that the Claimant was subjected to a detriment(s) as a result of the Claimant raising purported protected disclosures.*

Breach of contract

17. *Can the Respondent prove that it was entitled to dismiss the Claimant without notice because the Claimant had committed an act of gross misconduct in that he had worked on part deemed scrap after being instructed not to? The Claimant contends that it is up to the Tribunal to determine whether the Respondent provided relevant evidence to show that such an order was given, what the Claimant's degree of liability was in that circumstance and whether the Claimant's conduct actually prevented the Respondent from processing the product safely. The Claimant asserts that he never agreed that he had disobeyed a strict order.*

18. *Was the Claimant entitled to one weeks' notice?*

Remedies

19. *If the Tribunal finds that the dismissal was procedurally unfair. What are the effects of Polkey v AE Dayton Services Ltd [1987] ICR 142 on the dismissal and quantum thereon?*

20. *Did the Claimant's conduct contribute to his dismissal and should any award be reduced to reflect this?*

21. *Would the Respondent have had cause to dismiss the Claimant at a later date because of the Claimant's conduct in taking covert recordings of various conversations with his work colleagues and management? Also, in the Claimant's disclosure of confidential technical drawings and information to a third party by way of his disclosure to the EASA.*

22. *Does the closure of the department that the Claimant was employed in (TTI Department) in December 2019 have an impact on any award?*

23. *If the tribunal finds that the Claimant did make a qualifying disclosure, was this made in bad faith and thus should any award be subject to a deduction of up to 25%?*

Further Issues

13 Despite the parties having agreed the above list of issues, it became apparent during the hearing that the claimant was also seeking to allege that the decision to dismiss and the rejection of his appeal against dismissal, were alleged to be further acts of detriment pursuant to section 47B (1) and 47B(1A). Although not contained within the list of agreed issues, the respondent accepted that those claims were contained within the claim form. The respondent had no objection to inclusion of those claims and thus those were included in addition to the issues as set out above, for determination by the tribunal.

14 There was some discussion about whether the claimant was alleging that the grievance appeal outcome was an alleged detriment (although not identified in the list

of issues at the outset). The claimant confirmed however that he did not understand his claim to have included that as a complaint and he accepted that he had not included evidence about this complaint within his witness statement. The claimant informed the tribunal that he did not want to make an application to add this complaint and/or to introduce further evidence.

Documents.

15 The tribunal had an initial agreed joint bundle comprising 333 pages of documents. Further documents were included over the course of the hearing by way of late disclosure from both parties, bringing the amended index to 535 and a supplementary bundle index numbering a further 9 pages.

16 We heard oral evidence from the claimant who had prepared a witness statement setting out his evidence in chief. The claimant was cross-examined by the respondent.

17 On behalf of the respondent we had witness statements and heard evidence from; Richard Merriman, Supervisor, Trevor Kilcullen, Assembly Operations Manager, David Abraham, Technical Director and Jas Sanghera, Senior HR Manager. The respondent's witnesses were cross-examined by the claimant.

Evidence

18 In addition to the witness evidence, we also had regard to the documents in the bundle and the oral submissions of both parties. Counsel for the respondent also set out her submissions in writing.

Findings of Fact

19 The respondent produces structural components for aircraft. The respondent is part of a global group of companies. The parent company is PCC Aerostructures (PCC). The respondent at the relevant time was the supplier to Spirit Aerosystems (Spirit).

20 The claimant was employed at the respondent's site in Nottingham and was assigned to the TTI department**.** The claimant's role was essentially to drill and assemble track rib leading edges for specific Airbus aircrafts (the front structure of a plane wing).

21 The claimant was issued with a statement of terms and conditions of employment (p.56) which includes the following relevant provisions;

6. Annual leave

…

Holidays must be booked in advance through your supervisor. The rules for booking holiday can be found in the Employee Handbook.

14. Confidentiality of information

Your employer regards as confidential any personal details concerning the identity and affairs of customers and all other information about the company on which it relies to compete independently market which is not been made public.

It is the breach of your contract of employment to make use of confidential information for your own purposes or to disclose confidential information to anyone else otherwise in the proper course of your employment, or within 12 months after termination of your employment (for whatever reason). Such a breach could lead to your dismissal

15. Fidelity clause

The contractual relationship between the organisation and its employees is founded on trust. Any breach of this trust by an employee, such as the unauthorised disclosure to a third party of confidential information about the business, will render an employee liable to disciplinary action. In addition, civil proceedings may be instituted to restrain an employee from disclosing the information to a third party, making personal use of it without authority from a director, or for damages for loss to the organisation results from unauthorised disclosure.

22 The claimant signed a document on 18 March 2017 headed 'Employee- UK Citizen-Non-Disclosure Statement' (p.62). This document refers to the claimant acknowledging and understanding that any technical data related to defence articles in the US Munitions list to which he had access and which was disclosed in the course of his employment, is subject to export control. It also provides;

"I *[the claimant] certify and understand that any data to which I have access or which is disclosed to me in the course of the contract with SPS Aerostructures will not be further disclosed, exported, or transferred in any manner to any foreign national or any foreign country without prior written approval of Precision Castparts Corp. I further understand that I may not inspect, photograph, or record any materials within the SPS Aerostructures facilities, unless approved by this Facility's Compliance Manager."*

23 The claimant signed a further document on 18 March 2017 headed 'Confidentiality and Innovation Assignment Agreement' (P.63). This document states that the respondent owns, develops and acquires proprietary information, which may include information that the claimant acquires, develops or discovers as a result of his employment with the respondent. The claimant agreed that he would not;

"*During and after my employment (i) I will not disclose any proprietary information outside the Company, and (ii) I will not use any proprietary information except as necessary in connection with my work for the Company." Companies defined as the respondent. Proprietary information is defined within the agreement as information, of any nature and in any medium, that derives actual or potential independent economic value not being generally known to the public will to people who can gain economic value from it and any information that Company is obligated to keep confidential"*

24 The respondent also has a policy entitled; 'Policy on Fair Treatment'. (p.78). The policy includes the harassment, grievance and disciplinary procedures. Within the document it sets out at Appendix B (p.93); Guidelines to unacceptable performance, general misconduct and gross misconduct. In relation to gross misconduct it refers to gross misconduct including but not limited to the following;

c) Unauthorised possession of Company property

d) any serious neglect of normal safety or security procedures
…
j) any conduct which seriously flouts rules or standards set down by the Company

k) any act of gross insubordination.

25 It is also not in dispute that the claimant signed, on 18 March 2017 a further document headed; "Confidentiality and Innovation Assignment Agreement" which includes the following provisions;

"*1. Definitions*

"Proprietary information" means information, of any nature and in any medium, derives actual or potential independent economic value from not being generally known to the public… And any information that the Company is obligated to keep confidential. I will confer my supervisor if I am unsure whether particular information is Proprietary Information"

"Innovations" means all processes, machines, manufactures, compositions of matter, combinations, discoveries, algorithms, programs, formulae, techniques, improvements, inventions…

2. Proprietary Information. The Company owns, develops and acquires Proprietary Information, which may include information that I acquire, develop, or discover as a result my employment with the Company ("Employment"). During after my employment (i) I will not disclose any Proprietary Information outside the Company…

3. ***Returning Company Materials. When my Employment ends, or when the Company requests, I will destroy or deliver to the Company as instructed, all materials furnished to me by the Company and all copies of materials containing Proprietary Information… [our stress]***

26 The respondent also has a document referred to as a company briefing on the use of mobile phones and personal headphones which provides as follows (p.94);

"All PCC employees are not permitted to have or use personal phones in production areas of the facility. This includes charging phones or having them out when not in use.

- *Employees may use the mobile phones during their breaks while in designated brake areas*
- *Employees must not walk around using their mobile phones for any purpose"*

Deviation Reporting Process (DRP)

27 The respondent's Deviation Reporting Process (DRP) (p.95) sets out a procedure which provides an overview of the control and verification of non-confirming products in accordance with customer and industry requirements.

28 The DRP provides that there will be a daily Material Review Board (MRB) meeting at each MRB/Hot Spot Bench to assess any non–conforming parts that have been placed on the department MRB/Hot Spot Bench. The review is carried out by personnel related to manufacture or control of the products as agreed with Operations, Engineering and Quality functions. There are 4 principles outcomes of that review (paraphrased and summarised as follows);

1. *Use As Is; the part confirms to the requirements.*

2. *Repair/Rework: the non – conformance can be rectified as per the decisions of the MRB/DR with no effect on design, structural or dimension requirements. The Planning Engineer must determine a suitable method of repair.*

3. *Scrap; when material is dispositioned as scrap the Quality Engineer must justify within the Deviation Report Process why the product is not – rectifiable per specification. It states that;*

   "*Prior to their disposal products are to be clearly labelled and mutilated in such a fashion as to render them unusable… Parts dispositioned as scrap are to be*

disposed of by the Quality Engineer in a timely manner to the scrap procedure…" [our stress]

4. *Concession: where the part may still be suitable for service, a Concession shall be applied for from the customers – the customer gives authority to use the part via an approved concession.*

29 The DRP sets out at paragraph 4 the responsibilities of those involved;

i. *"Personnel (this can be anybody) who identify a non – conformance or potential non – confirming product shall ensure that the affect product (s) are immediately segregated from conforming products and clearly identified as non-conforming.... this is achieved by attaching a Products Status Label QA/555. a [sic] Detailed Deviation Report and reference on the work card shall be used as identification. A Deviation Report Form is then raised to document the non – conformance."*

ii. *It is the responsibility of the supervisor/inspector to ensure that nonconforming products have been identified and segregated from conforming products (placed onto a Hot Spot/MRB Bench until this position which is agreed at the MRB meeting and recorded on the products work card highlight and non-conformance within the system." [our stress]*

Cardinal Rules of Quality

30 The respondent has a further policy called the Cardinal Rules of Quality which applies to all employees of PCC owned companies. The claimant signed a copy of this policy on 16 September 2018 (p.110). The document refers to the reputation and success of PCC depending in large part on integrity and quality of the products and because they manufacture complex, technically advanced products "***we must always act with the highest degree of competence in personal integrity. All PCC employees contribute to product quality and safety and are expected to adhere to these Cardinal Rules each day, in every instance."*** [our stress]. There are 13 Cardinal Rules the most relevant of which for the purpose of these proceedings are as follows;

7. Accurately complete all product records. ***Only work on products that have the earlier required operations properly completed and signed.***

8. Do not accept poor quality from suppliers or internal prior manufacturing steps, ***nor pass on nonconforming material.***

31 The claimant accepted under cross examination, that he had been aware of the Cardinal Rules from 2017 and that he had received training on quality and safety.

Part 21: **European and Aviation Safety Agency (EASA) Certification – Part 21**

32 The claimant's case is that he made disclosures about wrongdoing including not only breaches of the duty to provide conforming parts and to notify Airbus of non-conforming parts via a NoE but breaches of Part 21 of the EASA regulations.

33 The claimant identified for the purposes of the list of issues on the first day of the tribunal hearing, that the applicable legal obligation which he believed had been breached when making the putative disclosures, includes Part 21. He was not able initially to confirm what regulatory framework Part 21 was a part of, however on production of some training documents on day 6 of the hearing about Part 21 (which he had found on the internet), the tribunal understands Part 21 to form part of the certification requirements for EASA; an agency of the European Union with

responsibility for civil aviation safety and carries out certification, regulations and standardisation, investigations and monitoring.

34 The claimant referred to pages 65/66 of the part 21 training documents he had located, which set out the provisions he explained he was relying upon as setting out the relevant obligations and in particular GM No.2 to 21A 165 (c);

Individual configurations are often based on the needs of the customer and improvements or changes which may be introduced by the type certificate holder.

There are also likely to be unintentional divergences (concessions or non-conformances) during the manufacturing process

All these changes should have been approved by the design approval holder, or when necessary by the agency [our stress]

35 It is not disputed that the 'design approval holder' for the purposes of these proceedings and the alleged non-conformance with the Track Rib Leading Edges, would be Airbus and therefore the claimant's case is that any non-conformances should have been disclosed to Airbus and they should then have the option of whether or not to accept the changes/non-conformances.

36 The document produced by the claimant defines Part 21 as;

… *The requirements and procedures for the certification of aircraft and related products, parts and appliances, and of design and production organisations annexed to this Regulation*

37 The Regulation referred to is the Commission Regulation (EC) No. 1702/2003 amended by Regulation (EC) 287/200. The document refers to article 1 of the regulations as laying down common technical requirements administrative procedures for the airworthiness and environmental degradation products, parts and appliances specifying; (f) the identification of products parts and appliances (g) the certification of certain parts and appliances (h) the certification of design and production organisations (j) the issue of airworthiness directive.

38 The respondent denies that Part 21 applies to the respondent. Their case is that Airbus did not require them to have EASA Part 21 approval but as a supplier to Airbus they were required to have a Quality Assurance System for suppliers (A1500).

39 Mr Merriman in cross evidence was asked about whether Part 21 applies to the respondent or whether it is a specific Airbus certification however he felt that this was a question for Mr Abraham, he stated that he was aware of certain "elements necessary to do his job" but explained that it was his understanding that it was a legal obligation to request a Concession where parts are not confirming to the Airbus specification and that this legal obligation he believed arises from certification A5100 *"but there may be others but I do not get involved unless I am asked*".

40 We find therefore that even at the supervisor level there is an understanding of the general requirement around notification of non-conformance but not precisely what the legal framework for those obligations are outside of the respondent's own policies.

41 Mr Abraham, the Technical Director gave evidence that Part 21 is applicable to those who design and assemble aircraft however the respondent makes parts, the respondent does not assembly or sell aircraft and Airbus require the respondent to have A5100 approval and not Part 21. His evidence was that A5100 is a regulatory

requirement and the respondent cannot sell to Airbus without that approval. A5100 reflects some elements of the EASA regulations and A5100 requires customers to agree to accept a part if it is non-confirming but if there is an issue with the manufacturing process rather than the part produced, a Concession from the customer would not be required. A5100 reflects some elements of the EASA regulations and A5100 requires customers to agree to accept a part if it is non-confirming but if there is an issue with the manufacturing process rather than the part produced, a Concession from the customer would not be required.

Whistleblowing Policy

42 The respondent has a policy entitled; "*We Raise Our Concerns*". This policy provides that if; "*you become aware of the situation that may violate this code, Company policy or the law, you need to report it".* The policy sets out a number of channels that can be followed to raise a concern which includes contacting the supervisor, HR, any division executive including the president and provides a telephone and email address.

43 The Cardinal Rules of Quality document also provides the same contact details and an 'hotline' email to Berkshire Hathway Inc (a company which acquired PCC in 2013).

Background events - 2017

44 The claimant is an experienced aircraft fitter having worked over 6 years for a number of other companies in this field since 2007, always working with jigs.

45 The claimant's line manager in the TTI department was Mr Richard Merriman, a supervisor who up to November 2018 reported directly into Mr Kilcullen, Assembly Operations Manager. Mr Merriman was supported by two team leaders; Russ Allcock and Anthony Allsop. The claimant's normal shift pattern was Friday to Sunday. Mr Merriman's normal shift pattern was Monday to Friday finishing at about 12 noon on Friday. Prior to July 2018 the claimant worked more frequently with Mr Merriman, when the claimant worked overtime in the week and Mr Merriman worked overtime at the weekends, however that changed from July 2018 onwards and from that point they had more limited contact.

46 At the weekend there were weekend shift managers including Mr Christopher Westerby.

47 By way of context to the claimant raising the putative disclosures, he alleges that during 2017 Spirit conducted a source inspection over the manufacturing process and parts produced by the respondent and that the Leading-Edge Track Ribs for Airbus A320 were found to be non-compliant due to the angle of the drilling which was outside the permitted tolerance; he alleges that the allowed tolerance was half a degree from the squaring. The claimant alleges that he was present and performed some of the drilling but that no amendments were made to correct the non-conformance. The method to assess the non-conformance was he alleges, the use of a .2245" gauge.

48 The claimant asserts that the respondents, General Manager, Mr Strangio and Mr Crunkhorn, Quality Director, held meetings with staff and instructed them to report any non-conformance issues and stressed that if further non-conformities were found on the products after January 2018, the customer would cancel the contract with the respondent. He alleges that Mr Strangio stated that there was a legal obligation to inform the customer of any non-conformance so that they would assess it and introduced the Cardinal Rules of Quality and General Manager Export Commitment Statement. The claimant alleges that Mr Strangio had stated any concerns could be raised with anyone including himself.

49 The evidence of Mr Kilcullen, Assembly Operations Manager employed by the respondent since May 1999, is that there was a source inspection in 2017 when Spirit checked the drilling process but he denied that there was any non-conformance identified but they did identity ways to improve the drilling through of assemblies. The evidence of Mr Merriman is that had there had not been such a source inspection identifying non-conformances however he recalled that there was a meeting with the General Manger who stressed importance of raising non-conforming products.

50 The claimant produced no evidence to support his account of this source inspection and the documents in the bundle do not support his account of the dates when further policies were introduced; in that the Cardinal Rules of policy documents in the bundle were signed off including by the claimant, and many other colleagues, in November 2018. The General Manager Export Compliance Commitment Statement, was signed off on April 2018 by the General Manager and Vice President, Mr Rattu.

51 We find on a balance of probabilities on the evidence before us, that there was a source inspection and there were meetings stressing the importance of raising non-conformance and later introduction of further policies to support the production of good quality parts, we do not find that the source inspection in 2017 identified the non-conformances that are the basis of the Claimant's alleged protected disclosures.

First Putative Disclosure

52 The claimant's evidence is that on 4 December 2017 he met with Mr Merriman and disclosed that parts being manufactured on the Track Rib assembly within the TTI department, did not conform with Airbus tolerance requirements, that in the presence of 3 other Assembly Fitters he tested a Leading-Edge Track Rib with a .2445 gauge which indicated that the assembled part was outside the permitted tolerance (ie the Airbus specification) and that this defect in the Rib was due to the unsuitability of the jigs.

53 As explained to the tribunal, jigs are devices which are clamped to the Leading-Edge Track Ribs during production to allow the ribs to be drilled securely and the holes made in the correct places. There were 24 jigs constantly in use.

54 The claimant's case is that he made Mr Merriman aware that the unsuitability of the jigs was leading to alterations in the flanges during the drilling and that all the parts produced by the faulty jigs were nonconforming with the customer's standards, that the load needed to install fasteners on the ribs was significantly higher because the bolts were being forced into misaligned undersized holes.

55 Where non-conforming products are being produced it is agreed between the parties that there are a number of options available to the respondent which include; requesting a Concession from Airbus, serving a NoE or scrapping part. It is not in dispute that the respondent was under a legal obligation to serve a NoE to Airbus in circumstance where a defective product had 'escaped' production and obtain a Concession to supply a part which did not conform with Airbus specification.

56 Within the claim form it is alleged that the claimant said to Mr Merriman that **all** the parts (para 6) produced by the faulty jigs were nonconforming with the customer and industry standards. The industry standards the claimant alleges he was referring were the provisions of Part 21. He alleges he made it clear in his disclosure that he believed this non-conformance posed **a very real risk** of breaching Airbus and regulatory standards and ultimately threatened the safety of the passengers and crew travelling on the Airbus aircraft to which the parts were fitted.

57 In his evidence in chief before this tribunal, the claimant did not give evidence about the actual words he used when communicating this information to Mr Merriman.

58 In a subsequent letter dated 10 January 2019 from the claimant's solicitors, they set out the allegations in respect of the discussion on the 4 December 2017. The letter alleges that the claimant had reported to Mr Merriman that he believed non-compliant parts had been produced and that the fault was caused by the way in which the parts were drilled, that he believed the fault was present in **the majority** of the parts produced. It is not alleged in this letter that the claimant had stated that the alleged defects were in respect of **all** parts produced by the jigs, it does not allege within this letter that he made it clear in this putative disclosure that he made any comments to Mr Merriman specifically about any health and safety risk or to Part 21.

59 In cross-examination the claimant conceded that during his alleged conversation with Mr Merriman he did not make an express reference to a breach of Part 21 and that he only mentioned a breach of Part 21 with Mr Dobbins on 29 January 2019. Further, he conceded that he had not stated the ramifications of the gauge showing that it was below tolerance because he alleged; "*no one in aerospace adds what consequences are* ***– just said is not complying".***

60 Mr Merriman denies that any such discussion with the claimant took place on 4 December 2017. His evidence was; "*I cannot recall any discussion and him showing me the gauge … he never showed me a non-conforming gauge".* His evidence was that it would have been his legal obligation to inform the quality department and everyone he felt it was reasonable to notify in order to rectify the problem. His evidence is that he would have documented the non-conformance in detail and sent to the quality department and it would have been acted upon immediately and production would have been put on an immediate stop. His evidence was that if the holes were oversized it would mean that the products may have been non-conforming. His evidence is consistent with his evidence given during the grievance investigation meeting with Mr Merriman on 13 February 2019 when he denied that the claimant had brought to his attention in December 2017, a problem with the jigs producing nonconforming parts

61 No witness statements were produced by either party from the 3 fitters it was alleged by the claimant were present during his discussion with Mr Merriman; Tom Smith, Tom IIkew and a contractor called Steve. The claimant had made no reference to these 3 fitters being present within his witness statement, his claim form or in the further and better particulars of his claim. The claimant explained that he did not consider they would be supportive of his account, because of their familial links to managers/supervisors employed by the respondent, Tom Smith for example it was not disputed, is the son-in-law of Mr Merriman.

62 Although not named in the claimant's evidence in chief, the claimant had identified those 3 individuals during a meeting on 1 February 2019 with David Osborne, Engineering Manager and Jas Sanghera, HR manager as recorded in the transcript of his covert recording of the meeting and in the minutes taken by Ms Sanghera.

63 However, although the claimant refers to raising the misalignment with the 3 colleagues he refers to only one colleague being actually present when he demonstrated the problem to Mr Merriman; "…*Tom Ilkew came close to me and he saw the issue together with me and Richard Merriman*." (p.103 Transcript).

64 At a meeting on the 1 February 2018 the claimant did not assert that he had told Mr Merriman that **all** products produced by these jigs were non-confirming; "…*I stated a* ***random presence*** *of the defect*…" The transcript does not record him mentioning that he had said to Mr Merriman that he believed this was a breach of the respondent's

contractual or regulatory requirement or that it presented a health and safety risk however, we find that given the evidence of Mr Merriman if the claimant had disclosed that the parts were **not conforming,** it was reasonable for the claimant to believe that this tended to show a potential risk to the health and safety of users of the aircraft without him spelling that out.

65 In the absence of the respondent having interviewed the 3 colleagues or their attendance at this hearing, we only have the direct evidence of the claimant and Mr Merriman about what was or was not said.

66 The claimant in response to questions from the tribunal about the likelihood of the risk he was alleging he disclosed; the claimant explained that he could not rule out there was a risk until he had a reply from the relevant department, that he could not have determined whether there was a significant risk, small risk or no risk at all only that it "*could constitute a risk*".

67 The claimant did not in his evidence in chief deal with why he considered his putative disclosure to be in the public interest. He was unrepresented and given the importance of this issue, he was invited to address this by the tribunal. His evidence was; "I *did not analyse what accidents could happen, I knew the importance of raising, chain of events that can cause accidents are complex and can happen 20 years after a mistake".* He referred to it being in the public interest to assemble parts in accordance with the designer's specification and the aviation authorities and that the public interest he relies upon is the risk to human life to those who fly on the aircraft, passengers and crew and that he relies on this in respect of all his putative disclosures.

68 When asked to comment on the potential health and safety ramifications Mr Merriman's evidence was; "*it could be a structural danger and ramification could be significant – that is just my guess- it could produce structural cracks. I'm an assembly fitter and not a structural designer so it is just my guess".* The evidence of Mr Abraham was that the parts worked on were not mission critical and would not affect the ability of the plane to fly, that the defective part would not result in loss of life or injury but would cause disruption.

69 The claimant accepted in cross-examination that despite two subsequent investigations into his concerns, on or around 6 August 2018 and one or around 8 February 2019, there had been no stop on production, no issuing of NoE, no request for a Concessions by the respondent or any consequential variation to the products. When it was put to the claimant that neither Spirit or Airbus challenged the 1000s of part produced on the jigs during the 9 months while he was raising these issues, the claimant mentioned for the first time that there was an article about an aircraft crash where there was an issue with airbus and they realised all the jigs were non-conforming and leading to cracks. The claimant did not produce this article and conceded in cross examination that he could not link this to the respondent and therefore we attach no evidential weight to that part of the claimant's evidence.

70 The claimant however does not accept that the lack of a Concession or production stop means that there were no errors, he argues that the parts were not necessarily notified to Airbus as non-compliant via a NoE when they should have been and that following his disclosures, the production process was changed to make sure the products were compliant going forward. The claimant's evidence under cross examination was that changes continued to be made following his putative protected disclosures. What is relevant is the claimant's belief at that time, whether that belief continued to be reasonable in the absence of any Concessions or stops on production, is not relevant to his belief then of course and he does not allege that this had been going on for any specific length of time by this stage.

71 We have considered events immediately after this alleged conversation took place to consider what inferences may be drawn from those and in particular the circumstances around the Second Putative Disclosure which was documented and which was made only a few days after this alleged First Disclosure to Mr Merriman and deals with the same issue.

Second Putative Disclosure

72 The claimant's evidence is that he was concerned by the lack of any action by Mr Merriman's response to the issue he raised with Mr Merriman and therefore he escalated his concerns via an email to Mr Crunkhorn, the then Quality Director. We have therefore considered how consistent the information contained in that email is with the alleged First Putative Disclosure and the claimant's belief about what his alleged demonstration showed;

73 The email was sent to Mr Crunkhorn on 8 December 2017.The email makes no reference whatsoever to the claimant having already allegedly raised these same concerns with Mr Merriman. The claimant does not allege that he informed Mr Merriman that he had contacted Mr Crunkhorn or that he was intending to do so.

74 The claimant refers in the opening to the email, to writing because he has a;

"a ***doubt*** *about the leading-edge track ribs drilling". [Our stress].*

And;

"*what worries me is the gap between the failsafe drilling fixtures and the track ribs"* and when the drilling fixtures are removed and the ribs are back to the original shape it; "***may r****esult in holes misalignment between failsafe and ribs*". *[Our stress]*

75 Nowhere within that email does the claimant expressly refer to the respondent producing parts which are not conforming and/or has been or is in breach of regulatory or contractual standards and that an NoE should be issued. Nowhere within that email does the claimant expressly refer to the risk this alleged issue presents to the health and safety of any individuals, whether in the past, currently or that it is likely to.

76 The claimant's account of the discussion that he alleges he had with Mr Merriman on 4 December 2017, is not we find consistent with the information that he provided to Mr Crunkhorn within this email. It does not state that there are defects in **all** the parts or the **majority** of parts being produced or indeed random defects, indeed it does not say that there are defects at all, he raises a doubt about whether the issue with the jigs "*may*" result in misaligned holes.

77 In response to the email, Mr Crunkhorn responds very promptly. The email from the claimant was sent at 20:03 on 8 December 2019 and Mr Crunkhorn replies at 9.56am the following morning (p.128). He thanks the claimant for contacting him and asks him to come and speak to him;

" … please can you come and find me on Monday to explain in more detail your concerns? I can then task a QE to investigate this and resolve any issue found."

78 This is certainly not a dismissive email from Mr Crunkhorn however, given how the serious wrongdoing the claimant alleges he believed this information disclosed at this time, it is not in dispute that the claimant neither replied to this email nor did he make any attempt to contact Mr Crunkhorn to follow up his concerns as he was asked to do.

79 We find that on a balance of probabilities, either the claimant believed this issue gave rise to a serious health and safety risk but that regardless of this he did not follow this up with Mr Crunkhorn or, he did not do so because he did not actually believe at this time that what he was disclosing tended to show the alleged wrongdoing.

80 The claimant provided inconsistent and unsatisfactory explanation for not following up his email with Mr Crunkhorn. During cross examination he alluded to it being a 'sensitive' issue because he had escalated this above his immediate line manager but also that he felt he had raised his concerns and did not need to take further action and that it was near Christmas and people were starting to be absent. He also gave as a reason that he felt Mr Crunkhorn had replied in an in appropriate manner. The claimant did not seem able to settle on one explanation and none of those he gave we consider were compelling explanations given the alleged gravity of the information he had disclosed.

81 In his evidence in chief the claimant alleged that; "*it is rather evident that he [Mr Crunkhorn] did not even believe it was possible that I could raise an issue to pay attention to. Although we did not understand what the problem was, had already suggested a possible solution."* In cross examination when it was put to the claimant that those statements seemed to imply that Mr Crunkhorn, wanted to 'brush under the carpet' the issues raised by the claimant in his email, the claimant stated that Mr Crunkhorn; "did *not want to hide it - the truth is he wanted to listen."* When asked by the tribunal to clarify his reason for not contacting Mr Crunkhorn when requested to do so, his evidence was that he did not raise the issue with the jigs again because at this time he did; "*not doubt the integrity and ethics of the people around him*".

82 We therefore had difficulty understanding what the claimant's genuine reason was for not contacting Mr Crunkhorn but we also take into account that he would not raise this issue again for another 6 months while he continued to work on the jigs (which he estimated accounted for 98% of his working time).

83 The claimant had covertly recorded a conversation with a colleague Mr Seb Wojtasik (SW) on 6 August 2018 (transcript one), in which SW is recorded as saying; **.. "***I said you found the problem, you told him in December, they don't do anything… And you sent this to… to higher"* and *"They call me downstairs to the office, they call me face-to-face, they asked why have done like that but… I said to him, you spoke to him last December, they don't do anything so you wanted to go higher".* The claimant insisted that SWs comments supported his account that he had discussed this issue with Mr Merriman in December 2017. However, the claimant does not allege that SW was present during the discussion with Mr Merriman and therefore we find that SW did not have direct knowledge of the discussion on the claimant's own case. Further, the claimant did not confirm how SW was aware of this discussion, from whom (ie whether this was something the claimant had told him and when.) We therefore attach little evidential weight to this comment by SW about what was said in December 2017.

84 The evidence of Mr Merriman is that there were regular 'Toolbox Talks' in the morning where any issues such as this could be raised. Mr Merriman would conduct them or at the weekend his Team Leaders would do so. The claimant appeared to dispute that Tool Box talks took place however, during his evidence around an incident with an air blower he would concede having been told about this health and safety issue at a Tool box talk. We find that such meetings did take place and he could but it is not in dispute, did not, raise the issue with the jig at those meetings. The claimant provided no explanation for not doing so.

85 We find on the balance of probabilities, taking into account that the claimant had referred consistently during the grievance and appeal process, to witnesses to his discussion with Mr Merriman and that he had a few days later raised this issue with Mr

Crunkhorn (although in less definitive language than he alleges he used when raising the issue with Mr Merriman) and that Mr Merriman waivered from an outright denial that this conversation took place to a lack of recollection when giving evidence before the tribunal, that the claimant did mention an issue with the jigs on the 4 December 2017 to Mr Merriman.

86 However, we have then gone on to consider what was said during that conversation and the email to Mr Crunkhorn we find is evidentially very important because it was written by him only a few days after his discussion with Mr Merriman. The claimant's evidence about what he said to Merriman is inconsistent, both within his pleadings and in terms of his evidence in chief and evidence under cross examination.

87 While therefore we find on a balance of probabilities that a conversation took place with Mr Merriman about the jigs on 4 December 2018 and that the claimant demonstrated something with the gauge, we do not find on a balance of probabilities, that he referred expressly to the health and safety of any individuals being at risk or expressly to any breach of the contractual relationship with Airbus or breach of any regulatory standards when doing so. We do not accept the evidence of the claimant to be credible with respect to his description of what he had disclosed to Merriman. The claimant's account of discussions involving Mr Merriman we find is generally unreliable and we address this as set out below in respect of a number of other allegations against Mr Merriman.

88 Had the claimant showed to Mr Merriman through the physical demonstration and/or what he said, that the majority or all of the parts produced were ***not confirming*** and were defective we would expect that to have been repeated in the email to Mr Crunkhorn, he does not nor does he even alludes to such serious concerns within that email, the language is that he has *'doubts'* and that there '*may'* be misalignment.

89 At a subsequent meeting with the respondent on 18 January 2019 with Jason Dobbins Operations Director, the claimant discussed the issues he raised with Mr Crunkhorn. During cross examination the claimant was asked whether any of his colleagues had raised concerns about the same issue and he replied that *"they did show some concerns*", the claimant alleges that that this answer had not been captured in the minutes of the 18 January meeting. However, not only did he not identify in his alleged answer which colleagues had raised concerns, about what and when, the transcript of the claimant's own covert recording of the meeting of 18 January records him being asked specifically whether the concerns he raised were shared by any of his peers to which he replied at this stage; *"No, no".*

90 We therefore find the claimant's evidence about whether other colleagues shared his concerns is not reliable. The respondent alleges that no one else raised any concerns and we accept on a balance of probabilities the respondent's evidence that no one else working on those jigs raised the concerns which the claimant raised.

91 The claimant does not dispute that he did not refer to any specific parts which had been rejected as being non-confirming at any point in any of the alleged protected disclosures he made. He could not point to one nonconforming part which had been produced due to any alleged nonconformity at any point during the period December 2017 through to February 2019 when he was suspended.

92 We find that on a balance of probabilities that what the claimant disclosed to Mr Merriman on 4 December 2017 was consistent with what he disclosed to Mr Crunkhorn in his email to him only a few days later.

93 The evidence of Mr Merriman is that he was not aware of the email from the claimant

to Mr Crunkhorn until early 2019 during the meeting with Ms Osborne (who was investigating the Claimant's grievance) but he was aware at the time in December 2017, that there was an investigation by Mr Crunkhorn carried out into whether the bolts were in line with the ribs but that no issues was identified.

94 The respondent's position as set out in its grounds of resistance is that Mr Crunkhorn investigated the claimant's concern. Mr Crunkhorn is no longer employed by the respondent. Mr Abrahams evidence was that he had checked but could not locate any records in relation to this investigation however he explained that Mr Crunkhorn may have kept a record on his personal desktop. In the absence of any evidence to rebut Mr Merriman's account, we accept on a balance of probabilities taking into account that the respondent would respond to other concerns raised by the claimant by undertaking prompt investigations, that there were some checks into the jigs carried out as a result of the email to Mr Crunkhorn which did not reveal any problems. This was not however communicated to the claimant.

Detriment a) and h): Holiday Request Ignored and criticism of performance issues at July 2018 meeting

95 The claimant raises no concerns about the treatment from Mr Merriman during the period from the date that he made the First and Second alleged protected disclosure until six months later in July 2018.The claimant then complains in July 2018 that Mr Merriman began to treat him with hostility because the respondent knew that the claimant was aware of the non-compliance of the jigs.

Detriment a) – Holiday July 2018

96 The claimant complains that a request for holiday on the 20, 21 and 22 July were ignored by Mr Merriman. The claimant has not produced evidence of his request for annual leave. The only direct evidence is the claimant's oral evidence. The allegation is denied by the respondent and in particular by Mr Merriman.

97 The claimant raises this issue in the grievance meeting on the 1 February 2018 and describes the circumstances as follows;

"*Well, I asked well, not clearly asked. I had a problem with my car in July, and I could not come in for 39 hours, then all the weekend. And I told about this problem to Rich, he did not reply me at all. And I found out the day I've been back to work that he did not book holiday for me."* [our stress]

98 Within the letter from the claimant solicitors dated 10th of January 2018, is a list setting out the allegations regarding the behaviour Mr Merriman toward the claimant on the grounds of his alleged putative disclosures. It refers to the claimant's relationship with Mr Merriman deteriorating following his initial reports in December 2017 and further, more significantly following discussions about the rectification to the jigs which he alleges he found out about in July 2018.The letter not only fails to include any allegation about the booking of holidays in July 2018, the letter specifically provides as follows;

"*During December 2018 our client experiences difficulties and hostility from Mr Merriman when trying to book holidays.* ***Our client had previously had no issues taking holidays and liaising with Mr Merriman, as required in order to book the same****". [Our stress] [p.136]*

99 This allegation that the treatment of the claimant and his holiday requests in December 2018 was different to how his holidays have been treated prior to that, directly contradicts the claimant's allegation about how his holidays were treated in

July 2018. At no point within the claimant's evidence in chief does the claimant assert that the letter from his solicitor did not accurately reflect his instructions.

100 It is alleged that this incident with his July booking of holiday occurred prior to the claimant noticing an alteration on the jigs and mentioning this to Mr Merriman. The claimant could not explain why Mr Merriman would have started to treat him with hostility 6 months after his alleged December 2017 disclosures and prior to him asking again about the jigs.

101 The claimant accepted that pink slips are normally provided where leave is requested but that he had not been given a pink slip and therefore could not produce one to evidence a request had been made. We have also taken into consideration evidence relating to the annual leave requested in December 2018 where we find, Mr Merriman accommodated and authorised most of his leave at very short notice despite the claimant failing to comply with the annual leave policy. That Mr Merriman we find, went beyond what he was required to do under the respondent's policy to accommodate the claimant, is not consistent with the picture the claimant is attempting to present of a line manager who was hostile towards him and had refused to deal with an earlier holiday request**.**

102 On the balance of probabilities and on the evidence available to the tribunal, we do not accept that the claimant made an application for leave which was rejected in July 2019 by Mr Merriman as alleged.

Detriment h) Issues with his performance raised in a July meeting

103 The claimant alleges that on 27th July Mr Merriman began making complaints about his performance which were *"minor and trivial*" and never formalised. The claimant however does not within his evidence identify what the alleged complaints were which he objects to.

104 According to the Claimant's witness statement, this meeting appears to have taken place prior to him asking Mr Merriman about the alleged alteration to the jigs and certainly prior to his email to the General Manager on 4 August 2018 when he makes a further alleged protected disclosure. Again, the claimant fails to explain why Mr Merriman had waited circa 6 months after his alleged protected disclosure in December 2017 to start making complaints about his performance if the reason for this was linked to those disclosures.

105 The claimant in cross examination stated that the discussion about his performance, took place on the shop-floor. The claimant was taken to the disciplinary procedure which provides at paragraph 6.2 that; "*In keeping with SPS Aerostructures Ltd's desire to promote a co-operative working environment and excellent employee relationships, there is a deliberate provision for informal discussion of minor instances of below standard performance and/or conduct prior to the instigation of Stage One…"*

106 The claimant conceded in cross examination that he was not suggesting that Mr Merriman in speaking to him informally, was acting contrary to the respondent's procedures and accepted he did not raise any grievance at the time. It is evident from the evidence we have heard, that the claimant was prepared to express his opinion if he felt an instruction he had been given was not reasonable in the workplace, he challenged instructions and would escalate concerns as he later did in August 2018 about the jigs. The claimant does not allege that he raised any complaint or grievance at the time about the alleged issues raised with his performance.

107 Mr Merriman's evidence was that on occasion he had cause to speak to the claimant about his attitude on the shop-floor but he could not recall specific occasions outside of those specific incidents set out below (which relate to separate complaints in relation to the mobile telephone and air-blower). The claimant provided no evidence about what the alleged discussions were about and did not put the allegations to Mr Merriman, he also did not refute that Mr Merriman had causes to speak to him and thus it is difficult to understand what this complaint actually is. We find on a balance of probabilities that if issues were raised with him on the shop floor in an informal manner, that this was reasonable and there is no evidence that this was influenced by any putative prior disclosures.

Third Putative Disclosure

Verbally to Mr Merriman in July 2018

108 The claimant's case is that he made a further disclosure to Mr Merriman in July 2018. This was six months after he sent the email to Mr Crunkhorn.

109 The claimant's case is that Part 21 does not apply to this alleged disclosure. We understand that this is this is because the claimant is not alleging that he made a disclosure that nonconforming products should be disclosed to Airbus but about a modification to the jigs to prevent the non-conformance which he alleges was carried out to conceal previous non-conformances.

110 The claimant alleges that shortly after 22 July 2018 he noticed that an alteration had been made on the jigs and that "*he understood*" the alteration was in response to his report but; "*could not rule out it was also in response of the non-conformance found by the Respondents customer during the source inspection in 2017."*

111 The claimant alleges that he raised his concern again with Mr Merriman and enquired if the alteration was in response to the issue that he had raised in December 2017. He asserts that Mr Merriman told him that there had been no alteration to the jigs other than they have been cleaned. He asserts that he later raised; "*the issue of the jigs angles alterations with my colleague's present, I was surprised to find out that no one had the slightest idea of their geometry relevance".*

112 The alleged protected disclosure on this occasion is alleged to be a verbal disclosure only. The claimant does not allege that when speaking to Mr Merriman he referred to the production of non- conforming parts, failure to issue an NoE, health and safety risks or to the concealment of any information tending to show such wrongdoing. The claimant explained that what was said was;

"I realise [sic] modification had been made, I asked him ***how come,*** *he replied in an inappropriate manner so I contacted the general manager".*

113 During cross examination the claimant conceded that in July 2018 he had only asked Mr Merriman if a modification to the jig had been made, this was not consistent with his evidence in chief where he alleged that he had asked if this was a result of the issues he had raised in December 2017.

114 The evidence of Mr Merriman is that in July 2018 the respondent was preparing to send photographs of the jigs to a company in China. The PRC substance (a tar like consistency on the jig) was cleaned with Scotch brite for the purpose of the photographs and not because of any issue related to any alleged disclosure by the claimant. Mr Merriman denies that the claimant raised with him any concern about non-conforming parts at the end of July 2018 but he accepts that he did inform the

claimant that the jig had been cleaned for the purposes of the photographs. This is corroborated by Mr Kilcullen whose evidence is that he had personally taken those photographs of the cleaned jigs and that a representative from Spirit was on site assisting them, it was he alleges one of Spirit's engineers who had made them aware they needed to be cleaned.

115 We find, on a balance of probabilities, that the extent of the discussion with Mr Merriman on this occasion in July 2018, consisted only of an enquiry by the claimant about whether there had made any mention of the production of nonconforming products, any health and safety risk or the concealing of information. He simply asked a question; "*how come?".*

Detriment i) Overtime – July 2018 onwards

116 The claimant complains that he was not provided with overtime from July 2018 and complains that this is on the grounds of one or more of the alleged protected disclosures.

117 The respondent's case is that it introduced the Working Hours Regulations Compliance Policy on 29 May 2018 which affected the overtime offered to all employees including the claimant. There is email from a Ms Randle in HR dated 29 May 2018 to "All users" asking that the attached policy is cascaded. The subject header on the email refers to the policy. The policy does not deal expressly with overtime and while employees on joining have agreed to opt out of the restriction on the 48 hours average rule, it provides that;

"*Managers and supervisors are responsible for ensuring the adherence to the guidelines in their areas of accountability. It should be noted that although an employee/worker has chosen to opt out, managers and supervisors must ensure employees/workers was still working within a safe and acceptable range of hours…"*

118 The claimant under cross examination gave evidence that he was never allowed to do more than 36 hours, not the 48 hours set out in the policy and he disputed ever having received a copy of the policy attached to the email.

119 The claimant in cross examination alleged that Mr Westerby told him that the policy had come into force and that there was to be a maximum number of hours worked per day and that his working hours then changed from 6:30am to 6pm however he alleged that this communication around a change in policy was not until later on 29 October 2018 but that he complaints that from July 2018 he was not permitted to work in the week.

120 The claimant did not identify any other colleagues who continued to receive overtime in the same way after July 2018 when the respondent states that the Working Hours Regulations Compliance Policy had been introduced.

121 The claimant did not raise a grievance about the lack of overtime during the grievance process.

122 The claimant's solicitor in their letter In January 2019, refers to the issue over annual leave in December 2018 however makes no reference to alleged failure to give him overtime. As a result of the December annual leave issue the claimant was not able to take 3 hours leave, this would seem to be far less important in terms of its financial consequences than a practice since July of not giving the claimant overtime and yet no mention is made of the overtime issue.

123 The claimant despite a number of meetings with the respondent throughout January 2019 and February and March 2019 when his complaints about Mr Merriman are dealt with and despite being invited to cite all his complaints, never raises this as an issue.

124 The payslips produced by the claimant do show a reduction in his average monthly salary however, the first drop in salary appears to be from 1 June 2018, which would be consistent with a change in policy from the end of May 2018. There is a significant difference in payment on 25 May 2018 of £854.86 falling to £598.26 on 1 June 2018. Although there is a more significant payment of £961.66 on 15 June 2018 there is a fairly consistent payment of circa £598 throughout the rest of June 2018 and on into the rest of the year. There does not appear to be a pattern of continued higher payments until July 2018 which is the allegation, but rather a change throughout June 2018.

125 The claimant produced no evidence to corroborate his account that Mr Merriman was not giving him overtime because of any alleged protected disclosures; he did not identify specific dates when he had requested it, when others had been given it or any issues he had queries or complaints he had raised about it.

Fourth Putative Disclosure

Email to Deborah Winnard: 2 August 2018

126 The claimant's case is that he carried on with his duties as usual using the jigs which he alleges had now been altered and that he;

"*I now noticed defects in the parts produced due other cause not addressed measuring the errors in non-compliance of the parts using the plug gage and making my own observation [sic] . I became aware at that point that the evidence of nonconformities was not entirely buried and that there was for the respondent lot to do to resolve the situation."*

127 The claimant alleges that he attempted to raise the matter via the parent company website but received no reply. This is not refuted by the respondent however the claimant does not rely upon this as a protected disclosure. It is the undisputed evidence of the claimant that he called the respondent asking to speak to the General Manager and Vice President Mr Rattu, and was directed to the respondent's HR Business Partner, Deborah Winnard and he then sent her an email.

128 A copy of the email is contained in the bundle (p.334). The email is dated 2 August 2018. The email asks Ms Winnard to forward it Mr Rattu. The email includes the following paragraphs;

"*Following the drilling Fail Safe and Track ribs, in some cases the holes on the FS* ***may*** *be misaligned from those on the ribs. The drilling of these part may seem perfect as long as the FS is held in place by the drilling jig and clamped on i.e. if you test at this stage with gauge .2445" no problem will occur.*

Instead if the drilling jig is removed, you will not only be possible to check the perpendicularity of the drilling (as verified during the source inspection in 2017) but if the test is repeated holding the FSS in the final position in which it will be installed, the gauge .2445" will not be able to go through or some holes, giving as result their ***misalignment.***

Both the above-mentioned effects (missed perpendicularity and misalignment) are

*due to an **unsuitability of the rigs.***
The missed perpendicularity is caused by;

the drilling jig is no parallel to the ribs;

locking of the FS by means of clamps (op 68/70) which however in the presence of a gap results in a momentary deformation of the ribs;

The misalignment is caused by

locking of the FS by means of clamps (op.68/70) which however in the presence of a gap results in a momentary deformation of the ribs

*if the missed perpendicularity of the holes been accepted by Spirit Aerosystems (after the source inspection 2017 I have not personally noticed any corrective action) because within tolerance of the Airbus specifications, **if** a misalignment occurs **may** be not within tolerance.*

***Even if the recent rectification (grinding)** of the angles whether drilling jig is fitted on the jigs1, 2, port and starboard, **that I noticed recently**, **greatly improves this condition** but it is advisable that further test carried out by engineering to reduce the risk to zero*

Furthermore, failure to train personnel the use of the clamps, i.e. how much to tighten the top ones are now much to tight the bottom ones, can still lead to a random presence these misalignments. Anyways a prescription on the use the clamps is not safely like an error proof procedure which is easy to find for such drilling [sic] …"

129 It is not in dispute that this email was received by Ms Winnard of the respondent.

130 The claimant's case is that he had disclosed information in this email tending to show; a breach of a legal obligation (namely production of non-conforming parts), failure to provide a NoE to Airbus, breach of Part 21 and/or information tending to show that such wrongdoing had, was or is likely to be concealed.

131 The claimant conceded under cross examination that within the email he did not provide any specific dates when nonconforming products had been produced. He does not identify any non-confirming parts and nor does he actually assert that nonconforming products had been produced.

132 The claimant alleges that he believed he had raised enough points within this email to convince the respondent that there was no chance to attempt a *"cover-up"* however, in cross examination he conceded that he had not expressly stated within his email that he believed the respondent had attempted to *"cover up*" a problem with the jigs.

133 It is not obvious from the email itself that such an allegation is being made. What we understand from the claimant's evidence is that he believed by referring to 'recent rectification' of the jigs and the 'grinding', he was letting them know that he knew the jigs had been altered and that therefore they could not cover this up. This presumes that the jigs had been rectified and that there was, had been or was likely to be a concealing of this to hide the alleged wrongdoing which had happened, was still happening or was likely to happen. Even if all those factors were in play, the email refers to the rectification of the jigs, it does not state that the respondent has denied that such rectification has taken place and why he asserts this is.

134 The claimant was we find attempting to deliberately present himself as aware of

what he believes to have been a grinding of the jigs while at the same time oblivious to any attempt to cover up the rectification and in doing so believes he is alerting them to the fact that he knows what has gone on without actually identifying that. In doing so, it is not reasonable for the claimant to hold the belief that he is in fact disclosing information which tends to show that there has been such concealment. The claimant on a number of occasions including later during the grievance process, would we find play 'cat and mouse' with the respondent, trying to catch them out by in his own words playing "dumb". i.e. pretending that he does not really know what is going on.

135 The claimant also accepted under cross examination that he makes no reference within this email to a failure by the respondent to ask for Concession or provide an NoE to Airbus. The claimant states that defects can be accepted only if they fall within the specification of Airbus however he does not assert that there have been or are being incidents of misalignment which have occurred outside of tolerance, only that this may happen; "***if** a misalignment occurs **may be not** within tolerance."*

136 The claimant we find describing the possibility of such a situation occurring; **if** a misalignment occurs, it **may** not be within tolerance.

137 The claimant did not receive a response from Ms Winnard until 7 August when she confirmed that she had forwarded on his email to Mr Rattu.

Fifth, Sixth, Seventh Putative Disclosures.

Email to Aron Riley, Nick Jenkins and Indy Rattu

138 The claimant sent to Mr Riley on 3 August 2018, the same email that he had sent to Ms Winnard. The claimant later located the details for the Interim Operations Manager Nick Jenkins and forwarded the exact same email to him also shortly thereafter on 3 August.

139 On 4 August 2018 it is not in dispute that the claimant sent a copy of the same email he had sent to Ms Winnard, Mr Riley and Mr Jenkins, to Mr Rattu the General Manager (p132). He did not request a response however Mr Rattu reply by email of 8 August 2018 as follows; "*your concern has been investigated and I confirm the assemblies to be compliant."*

140 The claimant does not allege that the respondent did not take his concerns seriously, his evidence is that; *"on Monday, 6 August 2018 the investigation took place. The effectiveness of my disclosure exceeded my expectations indeed the respondent understood so deeply its relevance, that entrusted [sic] the investigation directly to Airbus and Spirit Aerosystems representatives*

141 It is not in dispute between the parties that the claimant was not present when the investigation was carried out by the respondent on the shop floor.

142 The claimant relies upon a telephone call with SW on 6 August 2018, in which he is recorded as informing the claimant that in the morning someone from Spirit Aerosystems working for Airbus and Richard Merriman, another employee Anthony, had checked the jigs while SW had drilled and SW informs the claimant and that "*everything is ok*" (Tanscript 1). The claimant alleges he was told by SW that there was someone from Airbus and Spirit however the transcript records SW referring to a third person being from Spirit and then appears to correct himself to say he was from Airbus, however it appears from the transcript that there were three people

present along with SW.

143 The transcript records SW informing the claimant that; "*Rich is not happy about you."* … "*but don't worry. nothing happens, maybe they only give you a warning you know, something like; why don't you follow the process*…"

144 The claimant alleges that a further investigation into the jigs was carried out on 8 August 2018 however we find that there was on a balance of probabilities only one investigation. The respondent's case as set out in its grounds of resistance is that the investigation was carried out on 8 August 2018 when it found that there were no issues with the manufacturing process of the Track Ribs Leading Edges for Airbus and that they were satisfied that there were no defects with the manufacturing process or the relevant part.

145 Within the bundle is an email from David Abraham, Technical Director, to Tom Taylor and Stephen Richardson with Nick Jenkins copied in dated **4 August 2018.** It states;

"The customer has asked me to investigate an A320/A321 which came from customer oversight checks earlier this year which I am not sure we have fully closed yet. Please can you have a look on Monday or at the earliest convenience to view the process and let me know the outcome, and tasks/actions required"

146 Mr Abraham within his email then paraphrases the concerns raised by claimant. There is then a response by email of 8 August 2018 from Tom Taylor to David Abraham which refers to on Monday having; "*walked the process on TTI with one of the operators."* He refers to the operator carrying out what the route card instructed him to do, with the necessary tooling fixtures provided. His findings were*; "The holes in question are drilled with a metal template which is slave pinned to the structure. There is no way these hole [sic] cannot be produced perpendicular, as they follow the profile of the structure. We also placed a plug gauge into the holes and offered up an engineer's square to see if there was any gaps between the gauge of the square. In the last check we did carried out was when the bolts were fitted, all bolts were with the specification…"*

147 The claimant alleged in cross examination that the emails of the 4 and 8 August were not genuine and had possibly been produced for the purposes of this tribunal hearing. When asked during cross examination whether he was alleged the respondent had fabricated evidence for this hearing his response was that; "*I can't say yes or no."* His only grounds for alleging this was he said because he had not seen the emails at the time. The Monday which preceded the 8 August, was the 6 August and that this was the date when the investigation was carried out is consistent with the recorded discussion with SW. The claimant does not normally work on Mondays.

148 We find on a balance of probabilities, that there was one investigation and that it took place on the 6 August 2018. Mr Merriman denied in his witness statement being present at this investigation and stated that he only became aware of it during the grievance hearing in February 2019 however, in cross examination his evidence was that he had been involved in a test of the jigs and that he had not known at the time that this was the investigation into the claimant's email to Mr Rattu. Mr Merriman's evidence was that he supervised a big department and there are regular checks and changes instructed by the supplier.

149 The evidence of Mr Abraham, Technical director, was that no one from Spirit or Airbus was present at his investigation, it was carried out by Tom Taylor and Steve Richardson. His evidence was that if Airbus were to come on site there is a strict policy to follow and a meeting would have been arranged and any technical visit

would come from the engineering department. His evidence was that the identity of the claimant was protracted in accordance with the "We Raise our Concerns" policy and he did not mention that the issue had come from the claimant to the engineers he sent to investigate, but from a customer. However, the evidence of Mr Kilcullen was that Mr Jenkins had told him in August 2018 about the issue raised by the claimant and that he had told the engineers. Despite Mr Merriman being the supervisor on that shift, Mr Kilcullen's evidence is that there was no issue arising from the investigation and thus he did not consider there was any need to cause concern and raise it with Mr Merriman.

150 The evidence of Mr Abraham is that he followed up with the investigation team and he was satisfied they had done a 'deep' investigation and he was comfortable that it did not manifest as a non-compliance. His evidence was that it was not clear from the claimant's email how the issues he raised would result in a noncompliance in the final assembly and final component.

151 The undisputed evidence of the claimant is that on 12 August 2018 he decided to run another test on the assembly. He alleges that he was told by SW and another Assembly Fitter not to carry out a test because the respondent had already tested the jig but proceeded to do so. He alleges that the gauge showed that the part was not complaint with the tolerances specified by Airbus. However, in terms of the credibility of his account of what he found, we have considered what he said *d*uring a subsequent meeting on 18 January 2019, with Mr Dobbins, Operations Director, when discussing the issues raised in the email to Mr Rattu, The claimant informed Mr Dobbins, that no parts had been rejected because of the issues that he mentioned and he was not aware of the customer rejecting any of the parts. The claimant was then asked with regards to non-conformance of the product, what specification of the clients was he alleging had not been complied with. The claimant does not identify any specification which the respondent had not complied with. He states;

"… *as I stated in this email, if you can see, I haven't told that it's not acceptable**, it might be acceptable** if not inspect, or if not make sure."*

There is then the following follow up exchange;
(p.33 of the transcript);

*Claimant: "…the problem was about a misalignment of the parts, of the drilling, so **I don't know if this is within tolerance or not**." [our stress]*

*Jason: Right. So, **there's no specification and there is no tolerance that you're referring to?***

Claimant: Yes

Jason: so, how do you know that it was a concern? What made you feel think that was a concern?

*Claimant: **The best I can do, I can say it's misalignment if I do a test, how much is the misalignment I cannot know with the tools available or not**. [our stress]*

Jason: so, how could you confirm whether it was non-conforming or not if you've got no specification referred to and you've got no tolerances to refer to?

*Claimant; **No. I am asking if this is acceptable or not.***

Claimant: it's just like I remember specification about the mis-perpendicularity was half degree at source inspection 2017. So, it's a tolerance, nothing about a

misalignment.

Jason: okay, so there's nothing about a misalignment.

152 This exchange by the claimant, does not support his allegation that he carried out a test and using the gauge it showed the part was not compliant, his evidence to Mr Dobbins was that he could not establish with the gauge that it was outside the acceptable tolerance. He does not refer again to any specification he was measuring it against. He says he is asking whether it is acceptable or not.

153 On 13 August 2018 Mr Jenkins responded to the claimant's email;" *I have been informed that you have received a response to your query. If you have any further concerns, please do not hesitate to raise though [sic] your supervisor, manager or directly with myself."*

154 It is not in dispute the claimant did not respond to Mr Rattu, he did not seek any further information from him or Mr Jenkin's about the issues in his email.

155 On a balance of probabilities, we accept the claimant's evidence that he carried out a further test with the gauge on 12 August but we do not find on a balance of probabilities that it showed any non-conformance. We take into account not only what he said to Mr Dobbins but on the 14 August 2018, he responded to Mr Jenkins stating; "*Yes, I received a response to my query, thanks for your attention."* He makes no reference to the test or any alleged residual concerns.

156 The claimant in his evidence in chief, alleged that he responded in this way to Mr Jenkins because he was "*pretending to be dumb"* and that regardless of the words used by Mr Jenkins; "*his question was implicitly what my position was regarding their total solidarity with their code of silence ...I understood the destructive potential of further possible complaints."* However, in cross examination he stated that he did ask for further information because *"it was all clear*" to him and he; "*did not consider it necessary".*

157 The response from Mr Jenkins we find was perfectly reasonable and invited the claimant not to "*hesitate*" to raise further concerns. The claimant's own evidence was that the effectiveness of his disclosure to Mr Rattu had "*exceeded his expectations".* Further, despite alleging that in July 2018, after noticing the alleged rectification of the jigs, the respondent was trying to dismiss him, he had nonetheless then took the step after that of emailing a number of senior managers and even the General Manager and Vice President, and we find that he was clearly not deterred by any such alleged concern. We therefore find on a balance of probabilities, that the claimant was content at that stage with the response he had received to his email.

158 The claimant under cross examination, alleges that Mr Jenkins and Mr Rattu had given instructions to Mr Merriman to get rid of him. He however conceded that he "*could not say for sure*" but that this was "*most likely*". The claimant in cross examination alleged that the main evidence in support of his assertion included the comments made by colleagues 5 months later on 12 January 2019 and an allegation by the claimant that he had been moved to another section within the TTI Department and had been 'banned' from drilling, an allegation which we deal with separately further below but for the reasons set out, we do not find that the claimant was "banned" as he alleges.

159 Dealing first with the conversation with his colleagues on 12 January 2019, (transcript 11); the respondent had objected to the inclusion of this transcript which contains without prejudice discussions however agreement was reached between

the parties that while the transcript is not admitted into evidence, the claimant considered the key part of it was contained in an extract set out in paragraph 71 of his witness statement and the respondent had no objection to that extract being accepted into evidence. The extract records part of a conversation between the claimant, SW and another assembly fitter Nas Cot (NC) on 12 January 2019. The conversation took place following the letter from the claimant's solicitors on 10 January 2019 to the respondent and although the tribunal are not aware of the detail, the claimant refers in his evidence to a request by him for a settlement agreement. The claimant refers to both his colleagues confirming that rumours were spread easily on the shop floor and that SW had himself spread "*confidential and uncomfortable rumours".* The extract then includes NC alleging that Mr Merriman had asked him whether the respondent should keep the claimant on to which NC alleges he responded as follows;

"Of course we keep him, we're not going to get rid of Ugo [claimant], he is not going anywhere, he is an idiot but is a good worker" and ; "Yeah they wanted to get rid of you as well" they could have. Easily. I asked; "Easy? Why? Why?" Did he tell why? And he responded ; "Do you know that fucking stupid argument with Merriman? That jig argument, whatever, the problem."….

"Ugo you were that close you know, seriously you would have gone out of the door, sending email about management whatever… then arguing with supervisor… He is right Merriman is wrong Merriman told you specifically "Ugo we pay you to drill !"

160 Other than the alleged question Mr Merriman asked NC about whether the claimant should be retained, the remainder of their discussion appears to be their personal opinion and conjecture, and we find amounts essentially to "*shop floor gossip."* NC does not in the extract quoted by the claimant, identify the date when the allege question was asked by Mr Merriman, although the implication appears to be that it was after the claimant had sent the emails in August 2018. Mr Cot was not called as a witness by the claimant and therefore the respondent was not in a position to cross examine him about the alleged comment made by Mr Merriman which Mr Merriman denies. We have been presented with only an extract of the discussion, the individual Mr Cot did not give evidence and the claimant's own evidence is that *rumours* spread easily on the shop-floor. Mr Merriman denies any such conversation took place and we find on a balance of probabilities find that Mr Merriman had not asked Mr Cot whether to retain the claimant in the respondent's employment in August 2018.

161 We deal with the allegation of the claimant being banned from drilling below, and for the reasons set out do not find on a balance of probabilities that this happened. We therefore do not find on a balance of probabilities any evidence to support the allegation that Mr Merriman had been given instructions to 'get rid of' the claimant after his email to Mr Rattu in August. Had the Vice President and General Manager given such instructions, we do not find it credible that Mr Merriman would have asked the opinion of one of the claimant's colleagues on the shop floor whether or not he should.

8th Putative Disclosure

Verbally to Mr Merriman and Ross Allcock 17th of August 2018

162 The claimant alleges that on the morning of the 17 August Mr Merriman attempted to find fault with his conduct highlighting his refusal to carry out an order from Mr Allsop with respect to replacing bolts from an assembly and that when the claimant said that in doing so he was being asked to carry out illegal work, Mr Merriman

became angry with him and that he made a further disclosure during this discussion. The claimant alleges that he asked Mr Merriman to review his email to Mr Rattu about the faulty jigs because the jigs were still faulty, that Mr Merriman replied with "*contempt"* that he did not need to do so. The claimant asserts that although Mr Merriman had been charged to deal with the issue about the jigs he had been; "*forbidden to read the email in retaliation for failing to preserve senior management involvement".* The claimant alleges that Mr Merriman then ordered him to work on another section to prevent him from demonstrating non-conformance of the parts.

163 The claimant alleges that later that same morning, at about 11:30 am again accompanied by Mr Allcock, Mr Merriman returned to speak to him and that Mr Merriman had now read the email to Mr Rattu and came back on the shop floor to discuss the email with the claimant. The claimant alleges that Mr Merriman was rude and informed him that the respondent had approval to remove the bolts, but did not show it to him and that the next time he refused to carry out an order from the supervisor this would lead to serious trouble.

164 The claimant alleges that he had told Mr Merriman that they should run a test to prove that even if the respondent had an approval issued by Spirit, after removing the bolts any assemblies outside of Airbus accepted tolerance should be raised with the customer. Further he alleges that he told Mr Merriman that he should have raised with the customers all the previous assemblies which included such rework and let them assess the non-conformance. The claimant complains that Mr Merriman became upset, threw the bolts away and shouted at the claimant that the holes were not oversized after the bolts had been replaced and that the claimant was a "*fucking idiot"* for sending the email to Mr Rattu. In his evidence in chief the claimant alleges that Mr Merriman had also stated that;*" …the General Manager earns a lot of money and didn't give a fuck about a bolt".*

165 It is also alleged that Mr Merriman told the claimant again that the jigs had been cleaned, that he did not have to give the claimant any feedback about how the problem had been solved and that quality and safety were not the claimant's business. It is alleged Mr Merriman said the claimant had to prove the presence of non-conformance and the claimant would not be back to work on the jigs.

166 The claimant had covertly recorded the first conversation on 17 August between himself Mr Allcock and Mr Merriman (transcript 3). The claimant confirmed that this is the only record of the conversation on 17 August. It does not capture a follow-up conversation which the claimant alleges took place later that morning at around 11:30 am. The tribunal considered given the claimant's allegations regarding the tone and manner of how he had been spoken to, that it would assist the tribunal in making its findings, to listen to the recording. Neither party raised any objection.

167 The following are extracts from the transcript of the discussion;

Rich: I am now down in quality, if you have any quality issue…
Claimant: I call you
Rich: come and see me
Claimant; ok

And;

*Rich: just be **very, very** careful on what you say, the way you say, and how you come across people the way you say things, when somebody ask you to [**politely]**, to do something, you don't think it is right…*

*Claimant; **what I can recommend is read again my email***

Rich: I don't need to read your email

…

Rich: this is not about email now, this about a conversation you had with somebody else primarily Anthony Allsop (supervisor), Ant Alsop ask you to remove two bolts from a rib and you went: "no, I am not doing it"

Claimant; ahh ok ok

*Rich; you cannot refuse a [**reasonable request…]***

Claimant; no, no, I can refuse to do any illegal action

Rich: yeah that's okay, don't worry about that

Claimant; That's okay? Show me your approval to remove bolts , do you have any approval to remove bolts?

*Rich: Yeah we got approval to remove faults, [**we have a spec]** it is downstairs*

Claimant; I do not agree to remove bolts

…

*Claimant; I do not agree to **remove** bolts. What you do, what you have done until now, you remove bolts 6.37mm from homes reamed to 6.22 mm, you know what that means? That means that after you remove a bolt…*

Rich: Ugo listen

Claimant; hole is oversized

Rich: Ugo, Ugo listen pack your stuff...

*Claimant; means that after you **remove** bolts*

Rich: Ugo, Ugo

Claimant: the red gauge (<u>the gage that if goes into the hole the assembly is unacceptable)</u>

Rich: Ugo listen

*Claimant; okay. I reported to you just now a quality problem, so take any bolts **removed** and check with the red gauge…*

Rich: I've already looked into your quality problem

Claimant; OK

Rich: regarding to your quality problem, what you have got and what you have: myself, Ross, Fred Rushmere, Paul Miles and Tom Taylor from engineering

Claimant; okay

Rich: all came upstairs to look into what you raised to have to come at a decision on all came at the conclusion that there was no issue

168 The emboldened words above are those we heard clearly from listening to the transcript and had not been included in the transcript. The transcript had also included in round brackets the words; (*<u>the gauge that if goes into the hole the assembly is unacceptable</u>),* however, these words we find had been added by the claimant, they are not on the recording and we find therefore on a balance of probabilities, had not been said.

169 We find Mr Merriman adopted at the start of this conversation, a perfectly calm and professional tone with the claimant. The claimant at times spoke over Mr Merriman and continued talking when Mr Merriman was attempting to speak. Mr Merriman's tone did not become aggressive or hostile or angry at any point but did became firmer when he insisted that the claimant follow Mr Merriman's instructions and move to Sub Assembly.

170 It was also clear that Mr Merriman when explaining to the claimant that he should be careful what he says when given an instruction, referred to how he should respond when asked "*politely to do something*…". Further, and which was not included in the transcript, Mr Merriman explained to the claimant that he cannot refuse *a "reasonable request*", in response to which the claimant states he can refuse to carry out an illegal action, which Mr Merriman does not refute. The claimant did not we find, state that the removal of the bolts was specifically illegal.

171 The claimant does not we find, provide a reliable and reasonable account in his witness statement of the conversation and in particular the manner in which Mr Merriman spoke to him.

172 The claimant also alleges that he asked Mr Merriman to review his email again because the jigs were still producing faulty parts however, although the claimant referred to an email during the conversation he did not identify which email and even if Mr Merriman understood he was referring to the email to Mr Ratti, the claimant did not explain to Mr Merriman why this was relevant to the issue they were discussing about the bolts. The claimant also did not in this conversation suggest he read the email because the jigs were still producing faulty parts. We find that the claimant is again embellishing on what he had actually said at the time

173 The claimant also alleges that Mr Merriman was very annoyed at the start of the conversation and that when telling the claimant that Mr Merriman was now working in the quality department, he told the claimant that he could not raise any quality issues above him. That however it clearly inaccurate and as the claimant has a recording of the discussion, there is no satisfactory explanation for misquoting Mr Merriman on such a material point. Mr Merriman informs the claimant that he is now working in quality and simply tells the claimant very calmly that if he has any quality issues to; "*come and see me*". He is not annoyed, he sounds perfectly pleasant and he does not tell the claimant that he cannot raise quality matters above him. That the claimant would so fundamentally misrepresent Mr Merriman's tone and the content of the conversation, undermines we find the reliability of the claimant's account of events. The claimant is not relying upon his recollection of events, his account is at odds with his own covert recording of that discussion.

174 The claimant confirmed during cross examination that his case is that he complained during this conversation about the *substitution* of bolts which he alleges constituted a structural change making the parts non- conforming. The claimant clearly refers to the hole being left after a bolt has been removed, being oversized and refers to use of the red gauge and to a quality problem.

175 The evidence of Mr Merriman is that he had spoken to the claimant about the fact he had drilled a A321 Neo track rib and fitted a A320 bolt. He was asked to *remove* the bolt as it was not the correct one. He had refused. Mr Merriman's evidence is that there was a specification allowing the removal but that when it is removed it is checked with the gauge, if the no- go gauge went through then the respondent would ask for a Concession from the client to fit the larger bolt (ie before supplying the part) otherwise the rib part would be scrapped. However, the bolt had to be first removed to assess it but that the claimant refused to remove it.

176 Mr Merriman in his evidence to the tribunal, referred to a document which he alleges sets out the necessary approval to remove bolts (process specification ABP 2-2075). The document has a section on the removal of bolts and refers to submitting the assembly to the inspection function to confirm that the hole is satisfactory before installation of a new bolt.

177 We accept on a balance of probabilities the claimant's evidence that he believed at the time that he had this conversation with Mr Merriman that the removal of the bolt would leave the hole oversized however we also find on a balance or probabilities, that the instruction to the claimant was not to put in a substitute bolt but remove the incorrect one. The claimant did not dispute the evidence of Mr Merriman that the specification allows the removal of the bolts and therefore we accept that the specification allows removal and then a safety check before installation of a new bolt. The claimant does not allege that he was being instructed to take out and replace the bolt without that safety check. Mr Merriman's undisputed evidence is that the claimant as is normal practice, had a work card setting out what he had to do and this would refer to the relevant specifications which applied to the job and the claimant would know to check the specification for any job he was doing.

178 The claimant did not during this first conversation on 17 August, with Mr Merriman refer to this as a breach of the duty to provide conforming parts or to produce an NoE. He raises that the bolts are oversized and this being a quality problem but does not make any reference to information being concealed which would show wrongdoing as pleaded.

179 In the further and better particulars of his claim, the claimant alleges that he mentioned that removing the bolts was illegal and that he; "*added that the assembled parts did not conform to the required tolerances, rendering the assembly totally unacceptable as it failed to comply with the required quality standards for the assembled parts*". However, the claimant we find did not say what is alleged and again embellished to a significant degree what he had said.

180 When the claimant refers to this issue with the bolts later in a meeting with Mr Dobbins on the 1 February 2019, he does not identify any health and safety issue an oversized hole may give rise to. In his solicitor's letter of the 10 January 2019, it refers to this issue with the bolt but there is no reference to the claimant believing that this putative disclosure regarding the bolts was in the public interest, it does refer to his *concerns* about noncompliance with the client specification however it does not state that he believed at the time that there had been a breach in terms of providing non-confirming products or the issuing of an NoE and nor is there any reference to breach of Part 21 regulations.

17 August 2018: second conversation

181 The claimant alleges that Mr Merriman and Allcock returned to speak to him 11:30am later that day to discuss his email to Mr Rattu and the issue with the bolts. He alleges in his evidence in chief that Mr Merriman became aggressive and swore at him when he stated they should run a test and the respondent should inform the client about the non-conformance of all previous assemblies which include this rework.

182 The allegation that Mr Merriman threw the bolts and swore at him is of course a serious allegation and is denied by Mr Merriman. The claim form while referring to this conversation on the 17 August, does not refer to there being two conversations on the 17 August, it also makes absolutely no mention of being sworn at or of bolts being thrown.

183 The claimant however produced further and better particulars of the claim following an Order from Employment Judge Blackwell on 20 November 2019, which deals with the discussion on 17 August and being sworn at is now set out in that document but it does not allege as he does in his evidence in chief, that Mr Merriman had read the email to Mr Rattu and returned to discuss the email nor that Mr Merriman had told him that quality issues were none of his business. The claimant however did return to work on the jigs. It is not in dispute that he only worked on the Sub-Assembly for 2 or 3 weeks. Either therefore the threat about him not returning to work on the jigs was an empty threat or the threat was not made.

184 The incident on 17 August 2018 is referred to in the letter which would be subsequently sent by the claimant solicitors to the respondent on 10 January 2019. The solicitors refer within this letter a disagreement regarding the removal and replacement of bolts and the claimant's concern about non-compliance. It is alleged within that letter that Mr Merriman's response was to remove the claimant from the section and require him to work in a different section. The letter does not assert specifically that the claimant had disclosed information tending to show a breach of legal obligation although it does refer to the claimant having ***concerns*** about non-compliance with the client specification. It also does not allege that the claimant disclosed any information tending to show the concealment of information regarding alleged wrongdoing. There is also no reference to information being disclosed about a breach of part 21.

185 The solicitors letter which was written only a few months after this incident, makes absolutely no mention of Mr Merriman swearing at the claimant or throwing bolts, it expressly states that Mr Merriman's response to the claimant raising; "*concerns about noncompliance*" was to remove him from the section. It alleges that Mr Merriman had referenced being "*displeased"* that the claimant had raised the issue of the jogs direct with Mr Rattu, it does not allege that Mr Merriman called him a *"fucking idiot".*

186 The solicitors letter 10 January 2019 makes no reference whatsoever to Mr Merriman swearing at the claimant on 17 August 2018, this is despite the fact that the letter goes on to set out allegations about Mr Merriman's conduct towards the claimant including with regards the claimant's use of the mobile telephone (see below) and the air blower (see below). While addressing those incidents no reference is made to Mr Merriman allegedly calling the claimant a "*fucking idiot"* which given how relatively serious that allegation is, is surprising.

187 We have taken into account the claimant's unreliable account of the first conversation on the 17 August and we do not accept the claimant's account of a second conversation on the 17 August. The claimant's account of a second discussion later that morning, is inconsistent with his claim form and the solicitor's letter of the 10 January 2019. We also find his account of what was discussed during that alleged second discussion. Had he been sworn at as described this we find (not least given that arguably more minor issues such as being told about his mobile phone were mentioned), this would have been raised in his solicitor's letter of the 10 January 2019. Further, he does not mention that he was sworn at by Mr Merriman at the grievance hearing with Mr Osborne on the 1 February 2019 although he complaints about Mr Allcock on another occasion telling him to "shut up".

188 It was nonetheless put to Mr Merriman at the grievance hearing that he had mentioned to the claimant, as alleged in the solicitor's letter that he was displeased that the claimant had raised his concerns about the jigs with management and he denied he had done so because he was not aware of what the concern was that the claimant had raised.

189 Mr Merriman's evidence is that he did not know that the claimant had sent the email on the 3 August 2018 to Mr Rattu and had only become aware of this some months after the claimant's dismissal. He alleges further that he was not aware of the reason for the investigation on the 6 August.

190 The evidence of Mr Abraham, Technical Director was that he did not disclose the name of the claimant when he asked for this to be investigated and did not copy Mr Merriman into the emails. However, Mr Kilcullen confirmed that he was aware of the email from Mr Abraham although he could not recall mentioning it to Mr Merriman his direct report and supervisor within that department.

191 The claimant's own evidence is that he did not believe by the time of his conversation with Mr Merriman on the 17 August prior to 11:30am, Mr Merriman had been shown the email (although he alleges he looked at it that day and discussed it with him during the alleged second conversation later that morning).

192 We accept the undisputed evidence of Mr Merriman that he was not privy to the emails about the investigation and did not understand the purpose of the August investigation at the time. We do find however on a balance of probabilities that Mr Merriman would have been aware that the claimant had raised a quality issue about the jigs with senior management given how open the claimant was about this and this would explain why Mr Merriman did not ask the claimant what email he was referring to when the claimant raised it during this discussion. Mr Merriman's explanation that he expected the claimant was going to send him an email does not appear credible in that the claimant states "read again my email". While we accept Mr Merriman may not have seen the email to Mr Rattu, we find it unlikely that he did not have some awareness that the claimant had raised a quality issue with Mr Rattu.. We do not find on a balance of probabilities however that Mr Merriman raised this with the claimant on the 17 August 2018 and we do not find that he swore at him as alleged or indeed that there was any second follow up conversation on the 17 August.

Detriment b) and c): August – detrimental acts

193 The claimant alleges that Mr Merriman moved him to another section in August 2018 and that he was "*banned from drilling".* The respondent's case is that the claimant was required to undertake training, still within TTI but on another work bench.

194 The claimant alleges that on the 24 August 2018 he was about to start some drilling work when he was told by SW not to do the work because Mr Merriman had given orders that he was not allowed to perform drilling tasks. The discussion with SW was covertly recorded by the claimant (transcript 14). The relevant entries are;

SW; "Ugo ! Don't drill you are not allowed ! Rich said don't fucking drill!
Craig; Why?
SW: He is not allowed to drill.

SW: Rich said he is not allowed drilling.

SW: He's now allowed, Ugo got banned, I cannot tell you, this is private.

195 It is not in dispute that the decision about where the claimant was to work for the few weeks in August was taken by Mr Merriman and that SW was asked to implement it. It was put to the claimant that the recorded conversation was '*banter*' and that SW was joking. There is evidence that there was 'banter' and joking between the claimant and SW in their conversations as recorded (for example in transcript 1)

196 The claimant accepted that he was moved to the Sub-Assembly for only 2 to 3 weeks and then returned to work on drilling on the jigs. The undisputed evidence of Mr Merriman is that the claimant had not been trained on Sub-Assembly and that this was part of the claimant's training matrix as there was a requirement for all staff to be cross trained. The evidence of Mr Merriman is that the claimant was the only track rib driller who had not yet been fully trained. The claimant does not identify any other track rib driller who had not undertaken this training.

197 The transcript of the conversation on the 17 August 2018 starts by Mr Merriman stating; " …*is Ugo still on training ?..."*

198 The only reason it appears, that the claimant believes that this period of training was a *'ban'* was because of the comment made by SW. We do not find that the claimant was told by Mr Merriman on the 17 August 2018 that he would "*not be back to work on jigs*" and indeed he was back working on the jigs within 2 or 3 weeks. The claimant does not dispute that during this period he received training.

199 We find on a balance of probabilities that the claimant was required to carry out a short period of training over a few weeks and that this had nothing to do with any issues he raised about the jigs or the bolts.

Detriment d): 5 October 2018

200 The claimant complains that Mr Merriman reprimanded him for the use of an air blower and that he acted in a hostile manner towards him when doing so. The industrial air blowers are used to clean the swarf/shavings of aluminium away after drilling. It is not in dispute that they should not be directed toward a person and that there is a health and safety risk in doing so. The respondent's undisputed evidence is that PCC had issued a health and safety instruction for the air blowers not to be used for blowing off aluminium swarf from clothing and the jigs and that this was communicated via a 'Tool Box' talk.

201 It is the evidence of Mr Merriman and Mr Kilcullen that prior to this incident on 5 October 2018, Mr Kilcullen had caught the claimant using the air blower and checked that he knew he should not use it in this way. Mr Kilcullen then alleges that he confiscated the airpower from the claimant and took it to Mr Merriman and instructed him to ensure all his team know how not to use it. The claimant denies that Mr Kilcullen had spoken to him previously and warned him not to use the air blower on himself.

202 During the meeting on 18 January 2018, which is an informal meeting before the start of the formal grievance investigation, the claimant confirmed that he understood that using the air blower in this way is a health and safety risk and the claimant accepted that he understands that it is. The claimant however goes on the complain about the way he was spoken to by Mr Allcock. Mr Allcock had told him not to use the air blower and the claimant confirms that when Mr Allcock had asked him to sign the training form to confirm he understood he should not be using it this way; "*Russ told me, shut up and sign the form couple of time. And I didn't like it".*

203 The Claimant confirms to Mr Dobbins that he had been told about the use of the air blower at a Toolbox Talk and then denies using it in the prohibited manner i.e. he alleges he was not blowing himself down with it but blowing debris from the bench, however when Mr Dobbins points out to him that this presents just as much of a risk because it is not possible to control where the debris may be blown, the claimant accepts that he understands this also. The claimant we find, was evasive in his discussion with Mr Dobbins.

204 The following is an extract from grievance meeting notes;

Claimant ; 0;28:58] Oh okay okay , I am reminding what happened that day. Okay, I was blowing down and Tom Smith and Russ they were close to me.

JD: Yeah
Claimant: And they warned me to not blowing down .Then, I said "Okay , no problem ,at all" But anything happens, anything changed? And Russ said " No, you should know. You even signed a form. You should know. You're not allowed to blowing down." And he went away straight away , to demonstrate this. I asked Tom, " Have we signed any forms recently?

205 Rather than simply accept that he should not have used the equipment in the way he had, he was challenging what he was being told and whether he had signed a form. Mr Allcock clearly felt that he needed to locate the form and prove to the claimant that he had been told about the air blower. He had not located a signed form and we accept that claimant's undisputed evidence that Mr Allcock had told him to "*shut up and sign the form*". This is not to condone the response of Mr Allcock, however the context we find on a balance of probabilities reflects a pattern of the claimant being evasive and obfuscating when challenged and while challenging an instruction is perfectly legitimate where he has genuine concerns, the claimant accepts that he knew using this equipment in the way he had was prohibited but still pushed back when spoken to about it about whether this had been documented.

206 We find on a balance of probabilities that the most likely explanation is that Mr Allcock was frustrated by the claimant's apparent challenge over this instruction in circumstances where the claimant accepts he knew it was a health and safety risk and he had been told this.

207 The claimant then alleges that there was a meeting on 13 October 2018 with Mr Merriman when he was informed that his insubordination toward Mr Allcock had been reported to Mr Kilcullen, who was also present. He alleges that he was warned about the use of the air blower and that further performance issues "*could lead to dismissal*" however does not allege that there was during this meeting, in fact any discussion about the quality issues that he had raised and of this being in breach of company policy.

208 The alleged detriment however as set out in the list of issues, is not what was said by Mr Allcock but Mr Merriman reprimanding him for using the air blower.

209 The claimant alleges that Mr Merriman refused to deal with this complaint when it was reported to him on 6 October and Mr Merriman referring to the claimant's breach of company policy in reporting quality issues as he had in August, is not consistent with what the claimant said a few months following the discussion on the 5th October during the meeting with Mr Dobbins on 18 January 2019. At the January meeting he alleges that he had contacted Mr Merriman and complained about the incident and that Mr Merriman had said that he **would** investigate; "I *repeated him yes, I understood that blowing down is not allowed, I was complaining about Russ's behaviour*". The claimant complains that Mr Merriman did not however take any action regarding how the supervisor had spoken to him.

210 It is not in dispute that the claimant did not raise the issue with HR or otherwise raise a grievance in the circa three months following the October incident.

211 The claimant does not allege in this 18 January meeting that Mr Merriman was aggressive with him, his only complaint he raised about aggressive behaviour is the use of the words; "*shut up."* He does not allege that Mr Merriman spoke to him in a hostile manner during the meeting on 6th October 2018.

212 We accept that Mr Merriman did not take any action regarding Mr Allcock telling the claimant to "shut *up".* While not condoning the behaviour of Ms Allcock we are also mindful of the working environment and the particular circumstances and do not consider that any inference can be drawn that his decision not to take action against Mr Allcock was influenced by any of the alleged protected disclosures. SW who was not a supervisor but it is not in dispute had 'acted up' on occasion and performed supervisory duties in the absence of the weekend shift supervisor, Mr Westerby, employs in his discussions with the claimant swearing, an example is set out in transcript 1;
"*SW; "All the fucking Mongols (laughing) Today [x] scrapped the rib (laughing Claimant: (laughing) [x] scrapped the rib?...*

213 The claimant then refers to the issue over booking of holiday over Christmas 2018 and been spoken to about his use of the mobile phone on the shop floor, he confirms that there are no other complaints about Mr Merriman's behaviour towards him. The claimant does not allege during this hearing that Mr Merriman had sworn at him on 17 August 2018, that he had had his overtime stopped, that he had had a holiday request ignored in July 2018 or refer to any complaints made about his performance at a meeting in July 2018. The only complaints that he raises about Mr Merriman's behaviour towards them during this meeting in January 2019 relate to the incident with a mobile phone and with the air-blower.

214 We find on a balance of probabilities that Mr Merriman did nothing more than speak to the claimant on the 5 October 2018 about the air blower. The claimant could have been issued with a formal warning but we find that he was simply informally rebuked by Mr Merriman for using the air blower in the way that he did. Had Mr Merriman had some sort of vendetta or instruction to get rid of the claimant, this could have we note, been an opportunity to take formal disciplinary proceedings. No formal action was taken.

Detriment e): 19 October 2018

215 The claimant alleges that Mr Merriman reprimanded him for the use of his mobile telephone and behaved in a hostile manner when doing so and asserts that this was done on the ground that he had made one or more of the Putative Disclosures.

216 The claimant's evidence in chief is that he had his mobile telephone on his workbench, Mr Merriman saw this and told him to put it away. He alleges that "*many of the others*" had their phones on their benches but that when he pointed that out to Mr Merriman he told him that it did not matter what anybody else did. The claimant had raised this as a complaint during his meeting with Mr Dobbins on 18 January 2018. What he said at the time was recorded in the transcript; (p.48) "*.. **I had my phone in the toolbox**, just like anyone else used the phone to listen to music with speakers… Rich told me; "take your phone away" and I was trying to show him all of the others having the phone on the bench…" [our stress].*

217 In the letter of the 10 January 2019 the claimant's solicitor complained on his behalf that Mr Merriman had spoken to him in a "*rude"* manner. The claimant had covertly recorded this discussion with Mr Merriman. We considered that it would be helpful given the allegations about the manner in which Mr Merriman spoke to the claimant and the ongoing allegations his hostility toward the claimant, that we listened to the voice recording. There was no objection raised by either party.

218 We find after listening to the recording, that Mr Merriman adopted a firm but professional and polite tone with the claimant throughout this discussion, he was not

agitated, did not raise his voice and he was not rude.

219 The respondent has a policy on the use of mobile phones and personal headphones, a copy of which was within the bundle. The claimant does not dispute that he was aware of the company policy. It provides that all *PCC employees are not permitted to have or use personal phones and production areas of the facility.*

220 We find that the instruction from Mr Merriman for the claimant to put his phone away was a perfectly reasonable one and that he expressed concern that having the phone on the bench rather than in the claimant's pocket or in his toolbox, risked the phone being damaged. The transcript does not capture whether Mr Merriman went on to discuss with any other colleagues their phones being on the work bench however Mr Merriman's evidence is that he did speak to two other fitters that morning about their phones.

221 The claimant in cross examination alleged that everyone uses their mobile phones and the policy against their use was not enforced, however he then later in cross examination gave evidence that he was; "sometimes *given verbal permission to use the telephone".* This is not we find, consistent with an alleged general failure to enforce and comply with the policy if he was at time asking and given express permission to use it.

222 We do not accept that this is an illustration of hostile behaviour by Mr Merriman. The claimant was aware of the phone policy and could have been issued with some form of formal warning, however he was not. Mr Merriman's tone we find was perfectly acceptable. We accept Mr Merriman's account as being more reliable and accept his evidence that he did not single out the claimant. We find on listening to the taped discussion, that the claimant cannot have reasonably perceived Mr Merriman as behaving toward him in a rude manner and the fact that the claimant maintained this allegation against Mr Merriman, we find undermines the claimant's reliability as a witness.

Detriment (j); holiday December 2018

223 The claimant complains that he lost three hours of annual leave because this leave was not approved by Mr Merriman in December 2018.

224 The claimant it is not in dispute, made a request to take his outstanding annual leave before the Christmas break in 2018. He made this request on Friday 7 December 2018 to Mr Westerby, the weekend shift supervisor who instructed him to speak with Mr Merriman the following day. The claimant wanted to take leave on Sunday 9 December 2018 (3 hours leave) and the following two weekends. It is not disputed that he had only given 48 hours' notice of the Sunday leave. The claimant complains that this holiday request was not dealt with quickly enough. It was approved on Tuesday 11 December and therefore he had to work on Sunday 9 December and as there was not enough time left before the end of the year to take further holiday, he lost those three hours of leave.

225 Mr Merriman approved the two weekends of leave.

226 The claimant accepted in cross examination that the respondent had to organise other workers to cover his weekend shifts. He did not dispute in cross examination that December is a busy period for the respondent.

227 It is not in dispute that the Company Annual Leave Policy requires employees to give 4 week notice if they want leave and the evidence of Mr Merriman is that he made every effort to arrange cover so that the claimant could take his leave. The

claimant produced no evidence in rebuttal or to establish that cover could have been arranged more quickly to cover his Sunday shift, he simply stated that this was "*Mr Merriman's opinion".*

228 We accept the undisputed evidence of Mr Merriman that he tried at short notice to arrange cover. The claimant did not give the required notice and had no explanation for failing to do so. The majority of his leave was accommodated. Had Mr Merriman been motivated by the desire to force the claimant to resign or otherwise had some vendetta against the claimant, he could have applied the policy strictly and denied the leave. We find the claimant's complaint that this was hostile behaviour to be an unreasonable complaint and not substantiated on the evidence. The claimant we note, makes no other complaint about annual leave arrangements after July 2018 and before December 2018.

9th Putative Protected Disclosure

Letter from Claimant's Solicitor :10 of January 2019

229 A letter was sent from solicitors instructed by the claimant to the respondent on 10 January 2019.

230 This letter referred to the claimant having reported to Mr Merriman on or around 4 December 2017 the fact that he believed non-compliant parts been produced and that the fault was caused by the way in which the parts were drilled and that he believed the fault was present in the majority of the parts. The letter then goes on to refer to the email to Mr Crunkhorn on 8 December 2017 but does not comment on the email other than to enclose a copy of it. The letter goes on to assert that the claimant had noticed on around 27 July 2018 that the production of the jigs had been altered slightly. It refers to the claimant asking Mr Merriman why the jigs had been altered and that he had been told they been cleaned. It asserts that the claimant was;

"…*concerned that* ***the alteration*** *was in response to his specific report but that* ***the company was not acknowledging the fault*** *and thereby taking no action with regard to the* ***potentially*** *non-compliant* ***parts produced prior*** *to the alteration or "cleaning" which took place at the end of July 2018.* ***Our client believed this was an attempt to avoid dealing with the potential prior faults and prevent our client demonstrating any prior non -compliance"*** *[our stress]*

231 An alleged concern therefore of the claimant, as raised in this letter is that *potentially* nonconforming parts had been produced prior to the alteration to the jigs, it does not disclose that noncompliant had been produced or are being produced or that they have been supplied to the customer without a Concession or NoE. There is no express reference to the industry regulations whether Part 21 or otherwise, or to any legal obligation regarding any supply of any noncomplying parts. The claimant does not allege a protected disclosure in terms of endangering health and safety but in terms of the public interest, there is no reference to the health and safety risks.

232 The letter goes on to state that the claimant remains unconvinced that the issue had been resolved and after carrying out a test himself considered that the issue had been only partially resolved and hence sent the email to Mr Rattu 4th August. The letter does not address the content of the email of 4 August but attaches it. Both this letter and the content of the email to Mr Rattu and the December disclosures which are referred to, we find need to be considered and whether read and considered together they give rise to a protected disclosure.

233 The letter goes on to address the alleged deterioration in the working relationship with Mr Merriman and ultimately there is a paragraph summarising the legal position but it is brief, it states only that the claimant has made protected disclosures further to section 43A of the ERA: The letter does not identify which type of wrongdoing within section 43B (1) ERA it is alleged to be engaged.

234 In cross examination the claimant conceded that if the jigs were producing nonconforming parts he would expect those parts to be rejected by the client however he asserted that of itself this does not prove the parts are not confirming as the respondent had "most likely" committed a fraud and passed non- confirming products onto the client. However, if the claimant had genuinely believed this to be the case at the time, he failed to report this alleged fraud, did not follow up the invitation from Mr Crunkhorn and continued to work on the jigs for the next 6 months without raising any further concerns. The claimant conceded however that no parts have been rejected by the client and no concession asked for by the respondent, and in cross examination the claimant conceded that his allegation that the respondent had been 'covering up' the production of defective parts within such tightly regulated industry was, *"improbable but not impossible*". This is a very serious accusation to make in circumstances where he himself views it as 'improbable' . This sort of attitude does raise concerns about his willingness to raise serious accusations which by his own admission, have no substance.

235 The claimant did not dispute that although these alleged events had taken place 2 to 3 years ago from the date of this tribunal hearing, no issues about non-conforming parts had come to light however the claimant referred to being informed by EASA of an investigation of the respondent on 8 May 2019 and that a few months later the General Manager announced the closure of the TTI department. The claimant alluded to a possible link with the production of non-confirming products however, he did not explain what if anything further EASA had disclosed to him. The undisputed evidence of the respondent, is that the reason the contract was ended was because Spirit took the function in house and that the audit in 2019 by EASA (which was meant to be in May 2019 but took place in September 2019), showed no non-conformances. We accept the undisputed evidence of the respondent that this audit was not as a result of the claiamnt's report to EASA but was an audit of Airbus who had in turn selected the respondent as one of its suppliers to be audited as part of EASA's check of Airbus. We find on a balance of probabilities that the claimant's alleged link between the closure of the TTI department and the alleged problem with the jigs is nothing other than further conjecture on his part and we accept the respondent's evidence.

10th Putative Disclosure

Meeting: Ms Sanghera and Mr Dobbins 18th of January 2019

236 Following receipt of the solicitors letter a meeting was arranged for the claimant with Mr Dobbins, who it is not in dispute joined the respondent in March 2018 and took over responsibility for the Assembly Area in circa December 2018.The respondent did not take minutes of this informal meeting, however the claimant covertly recorded this meeting.

237 During this meeting the claimant referred to having raised the issue of non-conformance with Mr Merriman initially. References is then made to the email that he sent to Mr Crunkhorn. Mr Dobbins (DW) asks the claimant whether he is aware that an investigation took place following his email to which the claimant confirms that he was not aware of this.

238 The claimant refers to the email to Mr Rattu and the claimant explains that; (p.32); " *…as I stated in this email, if you can see , **I haven't told that it's not acceptable, it might be not acceptable** if not inspect , or if not make sure"*

239 The claimant goes on to clarify that the problem is about a misalignment of the parts and that he does not know if this is within tolerance or not. DW enquires of the claimant how far out of tolerance was the misalignment, in response the claimant explains; "… *We have not any spec about misalignment tolerance".* In those circumstances the claimant is asked how therefore he knows it is a concern, he states;

"*the best I can do… If I do a test, how much is the misalignment **I cannot know** with the tools available or not".*

240 The claimant goes on to clarify that he is not saying that it is out of tolerance, he is ***asking the question*** whether the misalignment is acceptable or not.

241 The claimant confirmed in his evidence that in terms of his claim that he made a protected disclosure at this meeting, he is relying on his comment that ; "*it's just like I remember a specification about the missed perpendicularity was half degree at source inspection 2017…"* The claimant alleges that what he was referring to was that parts have to conform with a drilling angle of 90% and a range of tolerance was half a degree from 90% and that DW ignored this observation and went on to change the subject. However, he does not allege in this meeting or in any subsequent meeting, that DW had ignored this observation in an effort to conceal wrongdoing and it is difficult to see how this observation of itself, *tends* to show concealment of past wrongdoing or indeed taken with the rest of his comments, that this showed that non-conforming products had been produced and supplied to the customer in breach of the respondent's legal obligations.

242 The claimant then informs DW and Ms Sanghera, that he believes that the jigs had been altered; (p.34 transcript)

Claimant: The angle have been grinded to allow the drilling fixture, as you say, drilling fixture is…
JB; so, the angle have been ground on the tools?
Claimant: yes, to get the drilling jigs closer to the ribs.

243 There is then discussion about whether the claimant accepts that the jigs may have been cleaned and the PRC removed to which the claimant accepts that this may have happened (page 35 transcript);

JB;… Would the PRC have been removed then? Because PRC builds up over the passage of time when you're using PRC every day, I understand, yeah?

Claimant; yes probably yes, even removed the PRC. Yeah.

244 Nonetheless the claimant makes it clear that he also believes that the jigs had been altered;

JB: … So, what I be right in surmising that what the evidence you saw, the grinding, would have been the removal of PRC. Or do you believe that somebody actually alter the fixture and geometry of the fixture?

Claimant: I believe that the geometry has been altered.

245 The claimant was then asked if he had any evidence that the geometry had been

altered responds by stating that he would prefer to talk about this later, and that he *"may have some evidence".* After a not inconsiderable amount of evasion over the evidence, the claimant states that he will produce it later that day, however he does not do so. In cross examination the claimant we find was equally evasive when asked about why he had not been more forthcoming in this meeting: "*what I do, try to understand how genuine Mr Dobbins is - normally persons does not have to after evidence - it's malicious - why do I have to supported [sic] with evidence."*

246 There is then a second follow-up meeting that same day which the claimant had again covertly recorded (transcript p 50). The claimant during the second part of the meeting informs DW that he has been banned from drilling, from the inspection area after he sent the email to Mr Rattu. There is also discussion during this meeting about the jigs. DW explains to the claimant that he has checked and he now knows who cleaned the jigs of PRC and that it was Ian Armond and engineer. To which the claimant states; "okay. Okay" (p.51). Later in that same meeting there is the following exchange (p.54);

JB: … We can find no evidence that there is any quality escapes you know, some questions I asked you when you answered, we've had no customer escapes. The ICY pins and fixtures weren't. We've never had them returned. We've been building these since 2006 with no issue. So, nothing is fundamentally changed.

I know what happened to the fixture, the PRC's been cleaned off, it was for photograph to be sent to America…

Claimant: yeah, I do remember the picture being taken by Spirit. Areosystems.
JB; so, that's why that fixture was cleaned up.

Claimant: Okay.

JB; okay, so as far as we're concerned in that area, we're comfortable that everything is legal.

Claimant; okay

247 The claimant still failed in this meeting to identify any specific specification that has not been complied with or any tolerances. DW puts it to the claimant that the ribs have been built in the same way since 2006, and invites the claimant to explain what he thinks has changed; "*well, what do you think has changed? You're being very coy with me, you're not being forthcoming. Tell me what has chang*ed."

Claimant; I told you already the gap in between the drill jig and trips was too much, so squeezing with those clamps affect the result after drilling

JB; okay, so what on the jigs changed?

Claimant; the grinding of the drill angle
…
Claimant; also, I realised also the drill jig been grounded in the same point just to make them closer to the rib."

248 The claimant accepts in cross examination that he did not explain in this meeting the consequences of the problem with the jig however the claimant's case is that DW would have understood from what he was being told what the consequences could be.

249 The claimant is asked whether he knows who altered the jigs and the claimant

accepts in cross examination that he did not disclose what he knew, because he was; "*testing"*.

250 He relies in part specifically on a comment by Mr Dobbins near the close of the meeting when he is explaining to the claimant what action will be taken if they find an issue in the quality area as demonstrating that DW understood the respondent's legal obligations and the significance of what the claimant was saying p.64);

JD; [0.28:15) "… Should we find an issue in the quality area, we will obviously do with that issue, we will create an NOE… We then create it's called an NOE , so we tell our customer that we've got a non-conformance, an escape.

JD [0:28:41] … And then, they will advise the customer, the airline. They'll assess whether it is an issue or not. So, they'll make a judgement call in terms of engineering. And we'll deal with that that way…. If Richard is found to be guilty of some sort of infringement then we will deal Richard through the disciplinary process".

251 We have considered the cumulative effect of the information disclosed by; the claimant in his conversation with Mr Merriman on 4 December 2017, the email to Mr Crunkhorn on 8 December 2017, the email of the 4 August 2018 including to Mr Rattu, and what was disclosed during this meeting. We find that what the claimant is disclosing is a risk that there is a fault in the jigs and that that fault *may* be producing products which are out of tolerance and that there is a further risk that those non-confirming products may have been or are being supplied to the customer. He is not confirming that he believes that the products are out of tolerance or likely to be, rather he confirms that he is asking the question whether they are out of tolerance and informed DW that with the tools he has, he cannot know. He is not disclosing therefore that non-confirming products have been produced or that they are being produced and we not do we find that it objectively, it would be reasonable for him to believe that he is disclosing information which tends to show more than a potential risk that they will be or are being produced and will be or have been supplied to the customer.

252 Although the claimant does not refer to the respondent's legal obligation including Part 21, we find that it is reasonable that the claimant believed that when mentioning non-conforming products, that DW understood the implications of a nonconforming product being supplied to a customer in terms of the respondent's legal obligations the need to raise an NoE if that has occurred, and indeed he sets out what process would not to be followed if that happened.

253 With regards to the concealing of information; we find that the claimant has clearly raised the possibility of the jigs having been cleaned and that DW we find must have understood that what he was alleging was that the jigs had been rectified to address the potential fault and read with the solicitors letter of 10 January, we find that was being disclosed was an attempt to avoid dealing with *"the **potential** prior faults*" to prevent the claimant "*demonstrating any prior non-compliance".*

11th Putative Disclosure: Meeting Jas Sanghera and Jason Dobbins 29th of January 2019

254 There was any further meeting with JW and Ms Sanghera on 29 January 2019. The respondent did not take minutes of that meeting. However, the claimant had also made a made a covert recording of this hearing. The transcript was redacted by agreement to remove without references to prejudice discussions.

255 During this meeting the claimant refers to having been asked at the last meeting

whether he had any photographs to show the alleged problem with the jigs. He confirms that he had not taken photographs of the ribs when he raised the concerns previously, but more recently he had. The claimant however continues to be evasive we find during this meeting. Given that the claimant has told DW that the photographs have only recently been taken he is asked by DW whether there are still parts on the shop floor that he is saying are nonconforming, to which the claimant replies; "*What do you think?"* The claimant did not produce the photographs and in his evidence in chief states that it was "*not time to consider them*". The claimant was we were made aware having some discussions about a settlement agreement although we were not made privy to the details. There is no satisfactory explanation for the claimant declining to produce his evidence at this hearing, however we find that he is not forthcoming and even at times outright unwilling to cooperate;

"I *don't know why should I tell you? I Am going to leave this company, so why should I tell you if there is something wrong with the ribs?"*

256 DW explains to the claimant that when he raised his concerns with Mr Crunkhorn an investigation took place at that point and again informs the claimant that the jigs have not been altered and that no one is corroborating what he is saying. The claimant makes reference to voice recordings but remains evasive in terms of what recordings he has to support his continued assertion that the jigs have been altered and not cleaned. DW informs the claimant that the respondent is going to investigate his concerns.

257 The claimant also, mentions that he will probably raise the matter confidentially with EASA. Reference to EASA is mentioned and DW appears to understand this to be a threat. We find that DW is making an earnest attempt to identify the claimant's concerns and investigate them but that the claimant, for whatever reason is withholding information and yet, is mentioning the possibility of involving the regulatory body. Ms Sanghera advises the claimant that he should give the respondent an opportunity to deal with his complaints first. The claimant refers to not having to follow the respondents process and it unclear to us at this stage what it is the claimant is trying to achieve.

258 We find based on the transcript of this meeting, that on a balance of probabilities it is more likely than not, that the claimant is attempting to be tactical about what he discloses, what evidence he is telling the respondent and that this is more likely than not to be because the claimant considers this may assist him in any settlement discussions. He provides no other satisfactory explanation for this behaviour. This behaviour of the claimant is we find relevant in terms of what information he is disclosing and believes it tends to show.

259 DW appears to become frustrated with the claimant who he refers to as being; *"not very direct with us*". We consider that this is a fair comment because from the transcript it is we find apparent that the claimant is not being open about what evidence he alleges he has and what he is wanting to achieve, and DW explains that; "*we believe that for some reason you don't want us to fulfil our obligation to investigate this matter properly."*

260 The claimant then responds to a suggestion by Ms Sanghera that he shows DW the jigs and agrees to do so however DW explains that he considers that it will be more appropriate for someone independent carry out the investigation.

261 During this meeting the claimant asks what certification the company holds; "*I guess something about ISO standards? And what is EASA part 21 subpart G ?".* DW however does not confirm whether Part 21 applies or not but asks why that is appropriate to what they are discussing. DW refers to thinking that he knows what

is in the claimant's; *"head"* and suggests that the meeting is brought to a close. We find that the failure by DW to clarify what certification applies adds weight to the reasonableness of the Claimant's belief that Part 21 was the applicable certification.

262 In terms of a proposed investigation the claimant comments that;

"So*, at that time I get an outcome and* ***this time*** *the outcome might be different. I am not a crime consultant, so that I raise a complaint,* ***you make corrective action and then say, "No, there is no problem****." You get me?"*

263 The claimant is clearly insinuating that the issue he has raised may be investigated and if there is a fault, rectified and that he may then be told that the outcome is that there is simply no issue. We find that he is doing nothing more than insinuating that there *may* be a 'cover up'.

264 The claimant conceded in cross-examination that the transcript does not show that he had said in this meeting that the respondent was in breach of Part 21.

12th Putative Disclosure: Grievance Hearing: 1st February 2019

265 There is then a formal grievance hearing with the claimant on 1 February 2019 which is minuted by the respondent. This meeting is chaired by David Osborne, Engineering Manager with Ms Sanghera in attendance. The claimant elects not to have a companion at this meeting.

266 The claimant explained at this meeting that he had raised the concern in December 2017 with Mr Crunkhorn to '*investigate a defect after the results of drilling in fail safe strap with cracked ribs operation 68 airbus 320/320 Neo and operation 70 airbus 2'1..".* He refers to how in July 2018 he realised the alteration of the jigs and that he had checked the ribs and that the alleged rectification was partially successful and that sometimes on some ribs it was completely unsuccessful. He then explains how he then emailed the General Manager in August 2018 and that he is not content with the investigation carried out. He explains that he had been told that the assembly was compliant however his concern was also about the clamp and that even where the angle of had been ground on the jigs and the gap reduced, the clamps can still same type of defect. The claimant also refers to the investigation carried out on just one rib but that other ribs shod be tested as it can be a random defect.

267 The claimant again explains that he is not really interested in the respondent finding a solution to the problem; "*Because I am not really interested in you to find a solution to this, because I would raise the matter and got my reply in write. So, what's my advantage to be here today? Why should I be here?"*

268 The claimant refers again to believing the jigs had been altered but he states that he believes that there remains an issue with the track ribs. He accepts in this meeting however, that it is for the engineers to check if the misalignment is allowed i.e. within tolerance. Again, the claimant does not identify in this meeting any specific parts which have been produced which are not confirming and does not expressly refer to the respondent having at any point breached its pleaded legal obligations by supplying non-confirming goods or failing to issue an NoE. He makes no reference to any other way in which the respondent may have breached Part 21 as he understands it to apply.

269 The claimant refers in this meeting to; "*just repeating whatever I already wrote"*

270 The claimant refers to sharing pictures with Mr Osborne that he took "*recently in*

2019". Mr Sanghera invites the claimant to produce whatever evidence he has at this meeting and he shows some photographs on his telephone and explains that the photograph shows the drilling operation, after the grinding of the angle. The claimant's undisputed evidence as set out in his witness statement is that the photographs showed Track Rib N2 Starboard, from inboard perspective, clamped onto the jig *showing the flange distortion*. Ms Sanghera's evidence is that she did not understand what the photograph showed and the evidence of the claimant was that he did not have to explain it because Mr Osborne understood. Mr Osborne did not give evidence for the respondent in these proceedings.

271 Mr Osborne asks the claimant in this meeting if he aware of the company policy on taking photographs and he confirms he is and he is told that he was not allowed to take the pictures. It is not in dispute and the claimant confirmed during this meeting that he was aware, that he had taken photographs in a restricted area (ITAR area). It is not in dispute that the permission of the customer is required to take photographs in that restricted area and as such the photographs are not accepted as part of the investigation. They were not produced before this tribunal.

272 The claimant refers to raising the misalignment of the drilling with other colleagues on 4 December 2017 and refers to Tom Ilkew, Tom Smith and Steve a contractor. When asked whether they shared his opinions that the ribs for not conforming, he replies; "Yes*, I showed. Well, they kept their position, Stephen Tom Smith. Tom Illke came close to me and he saw the issue with me and Richard Merriman".*

273 The claimant is also asked about his complaints concerning Mr Merriman's conduct towards him which he has described as hostile. In terms of the complaints that he raises it is notable that the claimant does not refer to the alleged incident of Mr Merriman swearing at him in connection with the issue of the bolts in August 2018 or the alleged failure to provide him with overtime from July 2018.

274 The claimant does not assert that the photograph he produced showed that nonconforming products had been produced but does we accept show a distortion of the flange.

Informal Meeting: Investigation meeting – 3 February 2019

275 On Sunday the 3 February 2019, Mr McClay a supervisor on the A550 Assembly held an informal meeting with the claimant and discussed the reason for the rejection of a part that had been scrapped when the claimant had worked the previous Sunday, the 27 January 2019. The claimant complains that he was not informed at the time that this was part of an investigation process.

276 There is a note made by Mr McClay which appears within the bundle headed informal meeting discussion 3rd April 2019. The note records that was apparent that the claimant was fully aware that this kind of re-work without an engineering work operation was not allowed and it refers to the claimant not having said that he had carried out any rework on the part. The claimant's evidence in chief is that the notes taken by Mr McClay at the meeting were different from those contained within the bundle however, he did not identify in what respect the notes differ or what was inaccurate about the record of this meeting which is in the bundle. We therefore find on a balance of probabilities that the notes accurately record what had been discussed with the claimant on the 3 February 2019.

13th Putative Disclosure: Email to Jas Sanghera: 4th February 2019

277 The claimant then sent an email to Ms Sanghera on 4 February 2019 which he asserts amounts to further protected disclosure.

278 The claimant refers in this email to having forgotten to add during the hearing on the 1 February 2018 that ; " … *after my disclosure, the information released by me was used to make further adjustments to the jigs to* ***the possible*** *end of* ***not having to be responsible for the parts previously provided."*** *[our stress]*

And

"*If for me it is not a mystery that the alterations have been made on the jigs, it is not a mystery to my colleagues that the spirit Aerosystem staff* ***has continued with such alterations in order to find the ideal positioning of the parts to prevent the drilling result I reported.*** *In a conversation to my colleagues, one told me; "Ugo you raised the problem for the right thing", another added: "they know they are wrong2, the first on continued; it's not our (SPS/PCP) fault is their (Spirit or Airbus) Fault".*

279 The Claimant mentions ***possibly*** revealing the matter to EASA and that; "*However, the parts* ***may*** *result damaged if tested outside of PCC or even on an aircraft*."

280 The claimant sets out what he refers to as an extract from his report for EASA. It is a technical description of the issue with the jigs;

"*The defect produced, mentioned above, is a result of the set of multiple circumstances at the time of assembly. When the EN 6114V4 fasteners are installed, the load, used their installation through holes slightly smaller in diameter, is diverted to the weakest part of the assembly, being able to cover two possible routes;*

- *If the fastener/whole interferences weaker than the L shaped structure involved in the assembly, then the L shaped structure retains shape, projection of the hall remained unchanged compared to the drilling movement, matching the parts (ribs and FSS) and the fastener, the load is applied entirely on the fastener, the fastener passes through the hole as expected, the conclusion is that the installation is successful;*

- *If the fastener/whole interferences stronger than the L-shaped structure involved in the assembly, the L shaped structure (which has a load-bearing capacity that varies in his every point) loses its shape ……. The load … Is diverted once again on the phalange of the L-shaped structure, the L-shaped structure bends even more … The projection of the holes is more misaligned … It is in any case difficult to establish how many times (all with how much intensity) this phenomenon triggers itself before the fastener can cross (tear) the whole …, "*

In summary claimant refers to the symptoms being;

- "*Excess load in the installation of fastener easy to perceive;*
- *alignment of the neighbouring holes, i.e. the inability to cross the holes with the gauge go not go.2445 as reported in the disclosure of August 2*
- *the phenomenon seems to particularly affect the weaker Rib, the N1*
- *a misalignment can be produced, during an incorrect drilling/positioning of the parts and/or to the installation of the fasteners."*

281 The claimant ends his email stating to Ms Sanghera; *"I hope you let me know when my commitment to this cause will be over, my perception is that we are negotiating too much on something that should not be negotiated…".*

282 Th email we find sets out more technical detail but does not assert that the risk remains anything more likely than he has indicated previously. It appears from his statement at the end of the email that the claimant is now using the possibility of a referral to EASA as leverage for a settlement and we find that as worded, this is likely to be at least the main reason behind this particular email.

Suspension: 8 February 2019

283 The claimant was called to a meeting on 8 February 2019 chaired by Ms Clements, with Ms Sanghera in attendance.

284 The claimant was informed of the meeting on 8 February that allegations had been raised against him by John Collins, TTI Production Manager during a recent routine review non-conformance. The allegation is set out within a document header suspension script (p.150);

"*On 27 January 2019 part D5744354902102 track rib 11 from work order 231 4423 was dispositioned scrap by the inspection team. You then reworked the part without any prior authorisation from the quality or engineering department2*

285 The claimant was advised that this is a serious breach of the Cardinal Rules of Quality and failure to follow the WI 13 Part 1 Deviation Reporting Process (DR).

286 The claimant's evidence before this tribunal was that on Sunday, 27 January he drilled an assembled part which was rejected on inspection by Mr Hulland and placed on the rework shelf where all the parts awaiting rework are put. Later that day he suggested to Mr Westerby that he could rework the part but that he was told it did not need to be reworked because it could be replaced. Neither the inspector Mr Hulland nor Mr Westerby the weekend shift manager, remove the part from the rework shelf.

287 The claimant alleges that SW was concerned that a replacement for the part may not be available before the end of the day and decided to attempt to rework the part left on the rework shelf, that he removed the doubler and proceeded to grind it and asked the claimant for his assistance refitting the doubler. His evidence is that they could see that there was no improvement and it placed it back on the rework shelf.

288 The claimant alleges that the respondent took the decision to end his employment in response to his email of 4 February 2019. The content of the email with the extract of the report to EASA did not raise any further issue, it only includes more technical detail about the issue with the jigs. The meeting with Mr McClay took place before he sent the 4 February email. It is not clear given the claimant denied reworking the part to Mr McClay how the link was made between the claimant reworking the part which then lead to his suspension. There is no record of any further investigation meetings before the suspension however, the claimant by his own admission had reworked the part in front of a number of colleagues and the most likely explanation we find, is that there was some discussion with those who had worked on that shift and the claimant was identified as the person who had reworked it.

289 However, the claimant does not allege that the threat of a report to EASA of itself was a protected disclosure. If the respondent took disciplinary action because it perceived his email of the 4 February and saw this as an implied threat that he may make a report to EASA, the making of an external report to EASA or the indication that he would make one, is not a pleaded protected disclosure.

Grievance investigation: 13th of February 2019

290 Richard Merriman attended a grievance investigation meeting on 13th of February 2019 chaired by David Osborne. The minutes of that meeting are contained within the tribunal bundle and Mr Merriman does not dispute the accuracy of those.

291 During this meeting Mr Merriman denied that the claimant had ever brought to his attention nonconforming parts in the TTI department relating to the Leading-Edge Track Ribs. Mr Merriman's evidence at this hearing is that the first time he had heard of this issue was when the claimant had raised it with management i.e. with Mr Rattu, although he could not recall when this was. He stated that it was not until this grievance that he found out what the alleged the non-conformance is.

292 During this meeting Mr Merriman is asked about the allegation that he moved the claimant to work in a different section, about the mobile phone and the allegation around the claimant's request for leave in December 2018. His responses were consistent with his evidence before this tribunal.

293 Mr Merriman is recorded in this meeting as complaining that no one had told him about the non-conformance issues within his department when they were first raised by the claimant.

Disciplinary Investigation: 15 February 2019

294 The respondent carried out a number of interviews from 15 to 18 February 2019 with those who had worked the shift on the 27 January 2018. The Investigating Manager is Chris McClay supported by HR representative Deborah Winnard.

295 The undisputed evidence of Mr Merriman is that he was not in work on the weekend the incident took place and was not involved in the investigation.

296 Mr Cot's evidence is that on Sunday 27 January 2018 Robert Hulland, a Quality Inspector informed him that he thought a part was scrap. The claimant and his colleague SW, were not present at that point. Mr Cot asked him to leave the part with him that he would try and arrange a replacement. Hs evidence was that he told Mr Hulland that he agreed that it looked like scrap but would let the claimant and SW look at they have been doing the job for a long time would know better. Mr Cot stated that SW agreed it was scrap but that the claimant said that he could grind the corner down to balance it. Mr Cot's evidence was that a replacement for the part was ordered but that the claimant decided to rework the part even though it had already been taken from the system and scrapped by inspection.

297 Mr Cot's evidence was that he had seen the claimant grinding the part down; *"[SW] was grinding but [SW] was trying to show [the claimant] it was still scrap."*

298 Mr Cot sets out his understanding of the process to rework a scrapped part which includes raising a DR and then engineering will set out what work can be carried out on the part to rework it and that everyone knows the process; "*it's standard practice."*

299 Mr Cot's evidence is that he had earlier in the day joked with the claimant that Mr Cot had informed Mr Merriman about the part being scrapped but that the claimant had reacted angrily swearing at him and slapping his shoulder so he did not approach him later or get involved when he was grinding down.

300 The evidence of another fitter, Mr Hughes is that on 27 January Mr Hulland had brought the part over and put it on the quarantine rack (the MRB rack) and told everyone that it was scrap; including SW, Mr Cot and the claimant. He alleges that the claimant checked the work card to see who had worked the part, took it off the

quarantine rack and began to rework it. His evidence was that SW had grinded it a little to show the claimant that it was still scrap. He alleges that the claimant continued to do something with it and put the doubler back on and then told Mr Hulland he had sorted it but Mr Hulland stated it was scrap. The evidence of Mr Hughes is that the process to follow to rework a part is to go to engineering, get a DR and a work card and that the claimant: "*I think he was just silly and impulsive on this occasion. Normally he would follow to the letter."* and; *" He'd been told at least 5 times by [SW], [Mr Cot] and Inspection. He was trying to cover it up in my opinion".*

301 The evidence of Mr Hughes is also that he understands the Cardinal Rules of Quality, and that they have had a lot of Tool Box talks in the previous 6 months since someone was suspended and; "there's *been a lot since I believe someone was suspended and then we had a stand down to say no matter what we must follow the process or you may face suspension and disciplinary etc so why put yourself on the line*"…;

302 The evidence of SW during his interview was the Mr Cot and the claimant told him that they had a part back from inspection. Someone asked him what he thought, he said it was scrap, the claimant said that he could do a little to grinding to sort it, SW states that he showed him it was scrap by drilling out rivets and in doing so dissembled it. SW states that he understands the process and the Cardinal Rules of Quality;… "*People do follow the rework process they get the paper raise the DR always. They knew to because if you don't you lose your job."*

303 An interview then to place on 18 February with inspector Robert Hulland. His evidence was that he was inspecting track 11 rib he believed to be nonconforming because the doubler was out of position, he went to see the senior fitter, Paul Daniels who confirmed it was non-conforming. His evidence is that the claimant told him the measurements were unacceptable so he labelled it as scrap and left it on the rack and told the claimant it was scrap and not to be reworked. His evidence was that the claimant later presented it back to him and told him that it was now good and that he was *"shocked"*, I said it needed a DR to be raised.". He stated that the claimant had not done anything like this before to this to this extent "but *usually does argue with your decision".*

304 The evidence of those witnesses is consistent in terms of the claimant reworking the part without a rework card or raising a DR and a general awareness the part was considered scrap. There are inconsistences in terms of whether the part was labelled by Mr Hulland as scrap. The part if scrap should also be placed on the quarantine shelf/MRB to await assessment however there appears to be a general understanding that at the weekends, with less people working, the process is not always followed as strictly in terms of where parts are put. The general consensus however amongst those witnesses, is that parts require a rework card in order to be reworked and a DR raised to track the work carried out on the part.

Disciplinary investigation of the claimant

305 A disciplinary investigation hearing took place with the claimant on 18 February 2019. During cross-examination the claimant on being taken to the deviation reporting process WI 13 Part 1; dated November 2017, denied having received a copy of it. He was taken to a training sheet headed PRIDE quality training (PRIDE is an acronym for; Personal Responsibility in Delivering Excellence), but denied that he had been shown copy of the DR policy document. He alleges that what he had been shown were a number of slides contained within the bundle.

306 The claimant during the investigation meeting denied having been told by Mr Hulland

that the part was scrap. The claimant's evidence during the investigation meeting was that Mr Hulland had put the part on the shelf for rework and had not said it was scrap. However, under cross-examination during this hearing, when it was put to him whether he accepted that the part had been rejected by Mr Hulland he confirmed that he had been. Further, when asked during the investigation hearing whether anyone else stated it was scrap the claimant's evidence was that Chris Westerby had said not to worry about it because they were receiving another replacement part. Under cross-examination the claimant's evidence was that he did not consider that what Mr Westerby had said to be a *"strict order".*

307 The claimant accepted during the investigation meeting that he had looked at the work card with the part and realised he had done the job previously.

308 When asked about his understanding of the rework process, his response was we find evasive; "I *think, not sure, many things may happen in the process*". However when asked about the process under cross-examination the claimant was quite clear in his understanding, when it was put to him by counsel for the respondent that it was necessary to raise a DR to be work a part , that it has to be taken to engineering who will determine what we rework can be done, he corrected counsel stating that the Quality Inspector does not have the discretion whether to rework a part or not, if a Quality Inspector feels that a part is nonconforming he has to position it on the MRB being and wait for an engineer to make that decision and attach the DR and label the part.

309 The claimant during the investigation hearing explained that he thought there was no time to deliver the replacement part so he and SW tried to rework it but within the hearing accepts the importance of in the aviation industry of recording all work carried out; "..*everything must be recorded so you can refer back to it if ever anything goes wrong"* .

310 The claimant is referred to the Cardinal Rules in this meeting and a document released which allows minimal repairs e.g. settling under 5 mm, changing rivets but not taught any shape of the component. When asked again during this meeting about his awareness of the Cardinal Rules he states; "*I don't know what to say. I have signed a lot of paperwork. I don't know when I have to get the work done...".*

311 The claimant alleges that he did not hand the part back to inspection but put it back on the rework shelf, that the part was not labelled as scrap and that SW had started the rework first and then left it to the claimant to refit the doubler.

312 An investigation meeting was held with Mr Westerby, the weekend shift supervisor on 21 February 2019. His evidence to the respondent was that he received a call from SW on 27 January informing him that they had a reject rib, he went to find out what the issue was and he saw SW, the claimant and Mr Hulland having a "heated discussion about the rib" which was on the rework bench. His evidence was that he could see straight away the part was no good and that he said that it was scrap. He asserts that the claimant said that he could rework it and that he told him that no, it was no good. He denies being aware that it had been reworked. Mr Westerby's evidence is that the rib was on the rework bench, that had not been labelled or dispositioned at the time but that he understood that Mr Hulland was about to that, and that was what the discussion was about.

Investigation: 7 February 2019

313 The respondent's evidence is that it undertook a further investigation of the jigs following the claimant's grievance in February 2019. The evidence of Mr Abraham is that he did not take part in that investigation, it was investigated by the engineering

team, Mr Osborne and Mr Ormond, but he was aware it was being carried out.

14th Putative Protected Disclosure: Grievance Outcome Hearing 21st of February 2019

314 The claimant alleges that he made a further protected disclosure during the grievance outcome hearing on 21 February 2019 which took place before the disciplinary hearing on 6 March 2019.

315 The grievance hearing was chaired by investigating manager David Osborne and Ms Sanghera in attendance.

316 During this hearing the claimant mentioned that he had voice recordings and photographs which he took after his meeting with DW and Ms Sanghera in January 2019, and wanted copies of confidentiality policies to understand what he could or could not do with them but he did not explain further what the recordings or photographs contained or disclose them at this meeting. The minutes of the meeting, record Ms Sanghera explaining to the claimant that the relevant policies are the Export and Compliance Policy and the ITAR regulations and she also refers the claimant having signed a nondisclosure agreement relating to those policies.

317 The claimant is then given the outcome of the grievance and informed that the original investigation into his concerns was conducted by the engineering team on 8 August 2018 which concluded that there were no issues. That a further investigation was conducted by the engineering team on 7 February 2019 which concluded that there were no issues with the tooling used for the Leading Edge Rib. Mr Osborne refers to being happy to share the content of this investigation with the claimant and the notes record the investigation from August 2018 and February 2090 are shared with him at this meeting however, the claimant in cross examination denied having been given copies of the investigation reports of August and February but accepted that he was shown the findings at this hearing. The claimant was vague under cross examination about what he had been shown, he could not recollect although he accepted one of the things shown to him was a photograph in the bundle showing the jigs apparently before and after they had been cleaned and the PCS removed.

318 The respondent's case is that the claimant was shown a report (pages 118 to 127) which includes the photographs he accepts that he was shown along with others of the jigs being tested. The respondents case is also that the reports he was shown included copies of emails including his email exchange with Mr Crunkhorn and Mr Rattu (pages 129 – 134) and copies of emails from David Abrahams to Tom Taylor on 4 August 2018 and the report back from Mr Taylor on the 8 August 2018. The claimant alleges that he was not shown all these documents.

319 On the balance of probabilities, we find the Claiamnt's evidence regarding what he was shown and when to be more credible. He questions one of the photographs in he later meeting with Mr Abraham which suggests he had not seen it before.

320 During this grievance outcome hearing Mr Osborne acknowledges that the findings of the investigation in August 2018 should perhaps have been shared with the claimant in more detail.

321 With regards the allegations against Richard Merriman, Mr Osborne explains what Mr Merriman's response is to those allegations and that Mr Merriman believes that it is the claimant's attitude to him which has changed and that the claimant is now hostile and rude towards him. We do find, that listening in particular to the voice recordings, allegations by the claimant of hostility toward Mr Merriman to be

unjustified. Mr Osborne suggests mediation to improve the working relationship.

322 On being asked if he has any questions about the investigation, the claimant is recorded as commenting; *"No, it does not make sense and if there was a problem you as a company have sorted the problem and there is now not an issue, but you have your opinion as a company and I have my opinion"*

323 The outcome of the grievance was confirmed in a letter dated the 21st of February 2019.

324 The claimant then wrote to Mr Sanghera by email of 25 February 2019. In his witness statement the claimant alleges that in his email of 25 February he disputes and corrects much of the content of the grievance outcome notes, he does not however within his evidence in chief identify what it is about the notes that he asserts are inaccurate or what has been omitted. The email of the 25 February itself is a restatement largely of his position and the chronology whilst also identifying some issues with the investigation process including the failure to carry out any interviews other than with Mr Merriman. However, in terms of the grievance against Mr Merriman, the claimant was asked at length we find (as recorded in his own transcript) at the meeting on the 18 January 2019 (transcript 13 page 62/63) to provide names of any witnesses and told they will be spoken to but the there is no evidence and the claimant does not allege, that he named any witnesses he wanted the respondent to interview.

325 In cross examination the claimant alleged for the first time that what he had said in his email of the 25th February 2019 was taken into account by the respondent when deciding to dismiss him because they then knew what his grounds of appeal about the grievance outcome would be. However, the claimant had never alleged that this constituted a protected disclosure and when asked to clarify he confirmed that he was not alleging that this was a further disclosure but that the alleged protected disclosure was made during the hearing on the 21 February and that his email of the 25 February 2019 is his account of what was discussed at the 21 February meeting because the minutes had been redacted. The issue for the tribunal is therefore to determine what was disclosed at the 21 February 2019 hearing and if this amounted to a protected disclosure.

326 The document of the 25 February 2019 is a difficult document to decipher. The claimant does not deal in his evidence with what he is alleging he referred to in that document which was missing from the grievance notes. He did not put it to Ms Sanghera during cross examination what it was in that document he alleges had been raised at the grievance hearing and omitted from the notes. The document of 25 February 2019 appears to be stream of consciousness in response not just to the grievance and its outcome but a restatement of the whole chronology of events. He has we find on a balance of probabilities, set out in this document his reflections after the event and provided what he describes in the document as 'feedback'.

327 We therefore find on a balance of probabilities, that the notes of the meeting on 21 February 2019 reflect what was discussed in that meeting and that the 25 February document is something he put together after the event and is not a reliable account of what is inaccurate or missing from the notes. The claimant alleges that he made a further alleged protected disclosure during this meeting on 21 February with regards to a breach of legal obligation and/or concealment of information however he does not address in his evidence what he disclosed in this meeting which amounted to a protected disclosure. There are very limited comments by the claimant during this meeting, the only comments which appear to touch on a disclosure is the following;

Claimant; "I disclosed what was the matter and the drilling issues and I stated in my email that I had not seen any corrective action. I was removed from the operation have not be being [sic] doing that job since. When the company thought the problem was sorted I was then allowed to go back."

328 The claimant appears to be restating the allegation that he was banned from drilling by Mr Merriman when he had asked about the jigs. He does not raise any further disclosures.

Disciplinary Hearing: 6 March 2019

329 The claimant was by letter of 25 February 2019, called to a disciplinary hearing on 28 February 2019. He is informed that the allegations he faces are threefold (p.194);

- *As a result of a review of non-conformances, there has been a breach that does not comply with the Cardinal Rules of Quality*
- *On 27 January 2019 you reworked a Part (track rib 11 - work order 231 4423) after it had been dispositioned as scrap by inspection (D 5744354901201) without authorisation from quality or engineering or the correct documentation (rework amendment to engineering routing) as per WI 13 Part 1 Deviation Reporting Process)*
- *You then informed inspection that you had rectified the part, however the part had been deemed to be still nonconforming to the correct standard.*

330 The claimant was sent all the witness statements prior to the hearing and sets out his account of events and alleged inconsistencies in the statements provided by the witnesses.

331 The disciplinary hearing took place on 6 March 2019 following an adjournment request by the claimant. The meeting was chaired by Trevor Kilcullen with Ms Winnard, HR Business Partner in attendance. The evidence of Mr Kilcullen is that he formed a reasonable belief that the claimant had a clear understanding that the relevant part was scrap after having been informed by inspection, that SW removed the doubler to reinforce the inspector's decision but that the claimant would not accept it was scrap and proceeded to try and rework it without authorisation or the correct documentation.

332 Mr Kilcullen's evidence before this tribunal was that he had actually taken the view that the part had been labelled however in his witness statement he had stated that it was accepted that the scrap part was not correctly labelled and had not been put on the MRB bench however his evidence was that in any event aside from the issue of whether the product had been labelled or not, he saw it as an honesty issue; the claimant had not accepted that he had reworked the product outside of process. He formed the view that the claimant was aware that the product was scrap and he did not have a rework authorisation from engineering but proceeded to rework the part. Mr Kilcullen, referred to the traceability of the manufacturing process in the aerospace industry being crucial, which the claimant himself had accepted in his evidence.

333 Mr Kilcullen confirmed that at the time of the disciplinary hearing he was aware of the issue raised with Mr Crunkhorn in December 2017. In August 2018 he explained that Nick Jenkins had made him aware of the issue raised by the claimant in the 4 August 2018 email but he was not at the time of this disciplinary hearing aware of the solicitor's letter of the 10 January 2019. Mr Kilcullen denied that the disclosures in December 2017 and August 2018 had influenced his decision at the disciplinary hearing.

334 During the disciplinary hearing the minutes which are not disputed by the claimant, the claimant argued that SW did not remove the doubler to show him the part was no good, his account of events is that SW took the doubler off to try and rework the part himself. We find that this was not supported by the witness evidence and the claimant accepted however that Mr Hulland said the part was scrap and he also accepted that Mr Westerby had said to leave it and don't touch it.

335 The claimant argues in the hearing that the respondent is appearing to make a decision that the claimant is guilty of misconduct and not SW, based on findings about their respective intentions i.e. that SW carried out work on the part to show the claimant it could not be reworked while the claimant is being taken through a disciplinary process because it appears his intention was to rework the part. The claimant states in his defence that; "I *didn't take full actions to refit as I didn't think it would be conforming either so I didn't try properly to right what was nonconforming".* The claimant therefore in making this statement concedes that he had in fact carried out some rework on the part.

336 Mr Kilcullen puts it to the claimant that he had informed Mr McClay at the informal meeting on 3 February 2019, that he was aware that the kind of work he was alleged to have carried out to the part was not allowed without engineering authorisation because he knew that FR had been suspended previously for the same thing and during this hearing, he confirms this. He had however with Mr McClay, which he does not dispute, denied that he had carried out this type of rework.

337 The claimant during the hearing refutes a statement by SW that the claimant will ask SW to obtain a DR for him, the claimant states that he recently obtained a DR from Engineering himself, which of itself confirms that he understand the DR process. When discussing the DR policy, he confirms further his understanding; ***"Yes, grinding is not allowed. Understand it's illegal*** *…"*

338 The claimant put it to Mr Kilcullen that the team would have been *"worried about the sale*" i.e. getting the part out to be supplied and sold that weekend and that the team were under pressure to 'make the sale', and while Mr Kilcullen accepts this, his evidence before this tribunal was that there was nothing unusual about the pressure the fitters were under that weekend.

339 Mr Kilcullen's evidence was that he formed the belief that everyone knew the part was scrap and that he believed that the claimant was trying to cover up that he had produced a non-confirming product and that the part could have ended up with a customer because it was not put on the MRB bench with a note of what he had done to it, but he returned it to the rework shelf. Mr Kilcullen's evidence was that what he considered to be fundamental was that the claimant had replaced the doubler but that when the doubler had been removed he should have *"walked away from it"* but he reworked it.

340 Following a short adjournment Mr Kilcullen informed the claimant of his decision and that his reasonable belief was that although some of the DR steps were not followed; "after *that second point where the part was dismantled and it was decided that it can't be fixed, you went to fit the part resubmitted it and that is in complete contravention of our quality process. It throws the integrity of our products into disrepute with the customer".*

341 The decision was confirmed in a letter of 7 March 2019; "*I had reasonable belief you were clear in the understanding that the part was scrap by being informed by the inspector, in the first instance. I believe that you did not accept the was scrap and that your colleague removed the doubler to reinforce the inspection decision. I believe that you then continued to rebuild the rib in an effort to pass it through*

inspection. You had made it clear to me that you acknowledged that you knew that the part was not conforming to continue down the wrong path."

342 The claimant put it to Mr Kilcullen under cross examination that Ms Sanghera had given him an order to dismiss him, which he denied. The claimant asked Ms Sanghera if she had given an order to dismiss him, her evidence was that her role had been only to support and advise. The claimant presented no evidence to support his claim that Ms Sanghera had ordered Mr Kilcullen to dismiss the claimant. It was not put to Ms Sanghera who it was in turn who had allegedly given her the authority to give such an instruction.

343 The claimant had referred to another employee, Mr Rushmer having previously reworked a part without the correct paperwork and that he was not dismissed but issued with a written warning. We explored with Mr Kilcullen how the respondent had dealt with Mr Rushmer and we were satisfied that the circumstances were different. The documents relevant to the disciplinary process with Mr Rushmer were produced by the respondent. Mr Rushmer was charged with gross misconduct for reworking a part and a hearing took place on 25 September 2018. The allegation was that Mr Rushmer had reworked a part without authorised documentation however the circumstances we can see from his documents were that he was given a part and asked to rework it which he proceeded to do, he was not told the part was scrap and he had only been aware of the DR process shortly before this incident, since August 2018. There had been recent changes in terms of practice and taking into account those circumstances, although charged with an offence of potential misconduct, he was issued with a warning and not dismissed.

344 We find on a balance of probabilities that the respondent treats the working of scrap parts without the proper paperwork as an offence of gross misconduct. We find that on a balance of probabilities that it was reasonable for the respondent to reach a finding on the evidence that the claimant had committed the offence.

345 Further, although evasive about the extent to which he had worked the scrap part and whether he knew it was scrap and what he had done with it, we find on a balance of probabilities that he knew the part was scrap, he had been told including by Mr Westerby not to touch the part but had ignored that instruction and proceeded to grind the part to try and rework it. The only reason for spending the time to rework the part would have been to try and put the part back through inspection. This was a part he had previously worked on. The claimant knew we find, that he needed engineering approval for this kind of rework but did not get it. He grinded the part then refitted the doubler without attaching any record or note to it, recording what he had done to the part. We find that the claimant was evasive during the hearing rather than admit to what he had done and this would not have provided any reassurance to the respondent about his approach to safety and the Cardinal Rules of Quality. We find that he did what he was alleged to have done and we find that it was within the band of reasonable responses to have dismissed for that offence. Although not concerned with reasonableness as such, had this sanction been unreasonable, that is a factor we may have taken into account when deciding what inference to draw.

15th Putative Protected Disclosure: Grievance Appeal Hearing 19th of March 2019

346 The claimant does not complain that the outcome of the appeal was a detriment but alleges that he made a further protected disclosure during the appeal hearing, as this post-dates the dismissal, the dismissal cannot be on the grounds of any protected disclosure made during this hearing however the disciplinary appeal did postdate this putative disclosure and he complains that the outcome of the

disciplinary appeal was a detriment.

347 With regards to the alleged protected disclosure the claimant made during this hearing, the claimant does not identify in his evidence what this is.

348 The claimant received the outcome of the grievance on the 21 February 2019 This letter refers to a further investigation into his concerns that the Leading Edge Track Ribs had been conducted by the Engineering team on 7th February 2019. The complaints against Mr Merriman are addressed and dealt with but not upheld. He had sent in the long email of the 25 February 2019 providing feedback and this is treated as an appeal, although his evidence is that he did not appeal. Nonetheless he attends the appeal hearing.

349 The claimant does not allege that the notes of the grievance hearing are inaccurate. He alleges in his evidence that anything "*inconvenient was omitted*" from the minutes. He does not address what those alleged omissions are. He had also not alleged any inaccuracies in the minutes of this meeting in his claim form or the further and better particulars of his claim. The claimant did not covertly record this hearing or if he had, he has not sought to admit that recording into evidence.

350 At the hearing the minutes record Mr Abraham at the outset running through the chronology of events and with respect to the investigation of the jigs carried out in February 2019 (following the concerns raised by the claimant), he refers to this having taken place on 8 February with a conclusion in Mid-February 2019. He later in the meeting however states that the investigation started before 8 February. In evidence before this tribunal his evidence was that it started prior to 8 February and as the claimant has not provided any evidence to rebut this, despite the inconsistency in dates, we accept the oral evidence of Mr Abraham that it started before 8 February 2019. He explained to the claimant that the investigation of the jigs had been undertaken by David Osbourne, Ian Almond and Mr Merriman and, that this took a number of days. He explains what the investigation involved.

351 The claimant accepted in cross examination that he was shown the 8th February 2019 investigation report at this meeting.

352 The grievance is essentially a brief recital of the previous complaints he had raised and the allegations against Mr Merriman. The claimant does not make any further disclosures of wrongdoing and nor has he identified in his evidence what if any further alleged protected disclosure he relies upon which he alleges he made at that hearing.

353 Mr Abraham accepts that the respondent could have communicated better and given the claimant more feedback after the August investigation of the jigs and he refers to the respondent having learnt lessons about feedback from this.

354 The claimant was given the opportunity despite not addressing it in his evidence in chief or pleaded case, to identify what the alleged disclosure/s were at this hearing. It was pointed out to the claimant that he had not addressed this. He was cross examined about this allegation that he had made a further disclosure but he still he did not identify what the disclosure/s were, he merely denied that what he said in this meeting amounted to nothing more than a summary of the issues he had already raised. The claimant went on in cross examination to complain that the grounds of appeal he had raised were not addressed but when it was pointed out that he had not included this in the issues or dealt with it in his witness statement, he made it clear that he did not want to add a detriment claim in connection with this appeal.

355 The claimant did not identify what the disclosure is that he is alleged to have made

during this meeting it is not for the tribunal to guess. It was not in any event obvious to this tribunal because what he appears to be doing in this hearing is largely summarising his previous complaints.

Disciplinary Appeal hearing - detriment

356 The claimant appealed the decision to terminate his employment by email of 13 March 2019. The grounds of appeal were that; The WI 13 Part 1 policy was not clear, the investigation failed to consider the Disposition and the Responsibility provisions of W1 13 Part 1, the investigation was not carried out in a timely manner, the investigation was unfair as others present were excluded from any responsibility and not suspended, no one else had been disciplined, the claimant did not want to hide the deviation but was only supporting the team.

357 The claimant also raises a number of other additional points for consideration at the appeal which in summary and essence were that the individuals present denied responsibility and made allegations to implicate the claimant, Mr Collins had concluded that the claimant had reworked the part prior to conclusion of the investigation, Mr Kilcullen had stated the opinion of Mr Daniels was sufficient (regarding whether the part should be scrapped) but that this is in breach of the DR policy in any event, the evidence of Mr Cot had been that Mr Hulland was not sure about what to do the part (and had waited for the claimant and SW to have a look the part which is in any event also not compliant with the DR policy), there were inconsistencies in the evidence.

358 The appeal against the dismissal and the appeal against the grievance outcome were both heard on the 19 March 2019 by Mr Abraham with Kate Durrant in attendance. The evidence was that there were limited people available to conduct the appeal and the disciplinary hence Mr Abraham dealt with both. The claimant however does not take issue with that.

359 The minutes of the appeal hearing which were taken by Ms Durrant, are contained in the bundle. The claimant in his evidence in chief did not allege that the minutes produced are inaccurate but he does allege that things had been omitted; *"Minutes of hearing give a rough idea of what had been discussed ... as usual anything inconvenient was omitted".* The claimant did not however in his evidence, identify what had been omitted.

360 During cross examination when he was taken to an entry in the minutes of the disciplinary appeal meeting which records him having conceded that he had told Mr Abrahams that he had reworked a part without an instruction from the engineering department, the claimant denied that he had admitted this and for the first time alleged that the minutes had been *"altered".*

361 The claimant has prepared a detailed witness statement and gone into significant detail on the factual background and allegations. Nowhere had he alleged within his evidence in chief, or indeed his quite expansive claim or further and better particulars of his claim, that the minutes had been altered by the respondent. Such an alleged inaccuracy in the notes is fundamental however he made no reference to this until this specific admission was put to him in cross examination. Further, this allegation is not consistent with his evidence in chief on this point which is that there were omissions, not that there were alterations.

362 The claimant was sent the outcome of the appeal and the minutes by letter of the 20 March 2019. The minutes record the claimant has stating that he will let the respondent know when he receives the notes if he considers they have not answered his grounds of appeal. The claimant does not allege they he challenged

the accuracy of the notes when he received them. It was not put to Mr Abraham by the claimant that the notes had been altered to include this admission and the claimant did not identify *any further alleged alterations.*

363 We therefore on a balance of probabilities do not accept that the notes were altered and therefore accept that at this appeal hearing the claimant did accept that he had reworked a part without engineering authorisation. However, the claimant had maintained that he did not know the part was scrap;

Mr Abraham;…"You didn't feel that you did anything wrong as you didn't know it was a scrap or a part *that was rejected".*
Claimant: "Yes, that is what all the people say even if they are quite confused".

364 However, he later in the meeting admitted to knowing to that he had reworked a part without engineering instruction and he had at the disciplinary hearing confirmed that Mr Westerby had told him it was scrap and not to touch it;
Mr Abraham: let me be clear, you have told me you have reworked part without engineering instruction
Claimant: Yes.

365 With regards to whether the part had been labelled or not, the evidence of Mr Abraham is that Paul Daniels has said that he had labelled it up and Mr Hulland had said he had labelled it as scrap. He accepted that it was difficult in retrospect to determine whether it was labelled given the inconsistent evidence however what was clear to him was that the part had been reworked regardless of whether the part had been on the rework or MRB bench and whether labelled or not, and the rework had been done without an engineering rework instruction.

366 During the hearing the claimant also initially denied having seen the Cardinal Rules Quality before 26 March 2019 and is then provided with a copy with his signature dated 16 November 2018. He then accepts that he had seen them on the 26 November 2018. Mr Abraham refers him to the rules and in particular the provision which provides that at rule 5 that "*Any deviation from the written instructions must be documents and signed by authorised personnel."*

367 Mr Abraham gave evidence regarding the importance of parts only being reworked with clear instructions from engineering who will prepare the rework instructions with reference to the specifications of Airbus. He gave evidence regarding the consequences of not doing so. He gave evidence which was not disputed that these parts that are fitted to the wing of an aircraft, whenever the plane is in take-off or landing mode the wing has to change geometry to lift, the wing takes a significant load and the components therefore need to stay intact and structurally carry the load as part of the criticality of the wing.

368 The claimant did not seek to argue that the consequences of a part being reworked outside of specification could have serious consequences and indeed of course that is the basis on which he asserts he held a reasonable belief that his alleged protected disclosures were in the public interest.

369 The claimant put it to Mr Abraham that Mr Merriman had returned to work in the TTI department after his time in the quality department to force the claimant to leave. Mr Abrahams denied this and his undisputed evidence is that Mr Merriman had not left his role as a supervisor in TTI but simply supported the quality department for a period to help it identify ways to reduce scrap. The claimant did not allege that Mr Abraham had any part in such alleged conduct by Mr Merriman or any plan to force the claimant to leave. There is we find no substance to the accusation that Mr Merriman was given an instruction to force the claimant to leave and we find that the

behaviour of Mr Merriman toward the claimant does not support that.

370 The claimant near the close of the hearing identifies one matter he feels has not been answered and this is regarding Mr Collins and how he had arrived at the conclusion that the claimant had reworked the part before he was suspended. Mr Abraham is not able to answer why at the suspension stage the claimant was identified as potentially culpable. There is no report from Mr Collins which is a gap in the paperwork. We do not however draw any inference from the absence of a report from Mr Collins in the circumstances where the claimant accepts that he had committed the offence and where it is not disputed that he had been seen reworking the part by a number of his colleagues on the shop floor.

371 The evidence of Mr Abraham before this tribunal was that the claimant did not produce any new evidence for consideration at the appeal.

372 The claimant complained that he had been treated differently from others and Mr Abrahams explained that they were carrying out investigations however his evidence before this tribunal was that he did not consider that disciplinary action was warranted against SW, the conclusion the respondent had clearly arrived at, was that SW was checking if the part was scrap (which we find is supported by the witness evidence) whereas the claimant had gone on to try and rework it. The claimant did not cross examine him regarding the outcome of any further investigation.

373 Despite a lengthy and detailed claim form, in respect of the appeal the claimant raised no specific allegations about the appeal or Mr Abraham other than a reference to unspecified omissions in the minutes of the hearing.

374 The claimant had cross examined Mr Merriman robustly and at length but did not do so with Mr Abraham despite it being made clear to him on numerous occasions throughout the hearing that he must put his case and allegations to the witnesses. The importance the claimant attached to the appeal process can perhaps be reflected in the very brief reference to it in his witness statement and despite a lengthy and detailed claim form, the claimant raised no specific allegations about the appeal or Mr Abraham. The claimant did not allege or put it to Mr Abraham when cross examining him that he had upheld the appeal because of any of the alleged protected disclosures nonetheless Mr Abraham stated that none of the disclosures had any influence over his decision to uphold the appeal.

375 We do not find on a balance of probabilities that Mr Abraham was influenced by any of the alleged protected disclosures and indeed, this was not put to him by the claimant. The claimant does not identify in his evidence, his reasons for alleging that the way this hearing was conducted or the outcome, was on the grounds that he had made any of the alleged protected disclosures.

Detriment k) failure to pay the claimant during the period of suspension

376 The claimant complains that the respondent failed to pay him during this period of suspension from 8 February 2019 to 6 March 2019.

377 The respondent accepts that the claimant was not paid all the monies due to him but contends this was an oversight.

378 It The undisputed evidence of the respondent is that the way payroll works is that an employee needs to ‘clock in and out’ for their hours to be registered. The claimant did not dispute that if an employee does not clock in their pay is reduced accordingly

on the system.

379 The minutes of the disciplinary appeal meeting recall the claimant mentioning at the end of the meeting that he been told he will be paid as normal during suspension; "*so if I am missing anything who should I take this up with and can you get by wage slips."* The claimant did not therefore actually alert the respondent at this stage that he had not received his full payment. The minutes record Ms Durrant informing him that the wage slips would go out in the post and in relation to any wage queries he should email Ms Sanghera.

380 The claimant then sent an email not as instructed to Ms Sanghera, but to Ms Durrant on 26 March 2019 in which he raised issues with his pay.

381 The respondent's disclosed a resignation letter from Mr Durrant which confirms her last day of work as 20 March 2019, predating the email from the claimant. The claimant was not in a position to dispute the dates Mrs Durrant left the respondent's business and we accept their evidence that she had left before the claimant emailed her with his wage queries.

382 The claimant had been specifically told to contact Ms Sanghera with any wage queries, however the claimant did not follow those instructions and there is no evidence that he attempted to contact Ms Sanghera.

383 The payments were ultimately paid. The evidence of Ms Sanghera is that it was an oversight and payment was arranged when they became aware of it. The allegations of non-payment were set out in the claim form issues on the 14 June 2019 and the respondent confirmed in its response in August that the sums were payable and in the process of being paid and were paid.

384 We accept on a balance of probabilities respondent's evidence that this was an administrative oversight. The claimant did not chase it up and the respondent appear to have been a bit tardy once they were aware of the claim and outstanding payments in organising payment but we do not find that this alone is sufficient to make a finding that any delay in organising payment was on the grounds of any of the alleged protected disclosures.

EASA Disclosure

385 It is not in dispute that the claimant following the termination of his employment, prepared a lengthy document which he had sent to EASA on 21 March and his evidence is that he also wrote to the CAA on 22 March.

386 The document provides illustrations of the wing of an aircraft Airbus A320 and A321 and the ribs. It set out in some detail his concerns about the misalignment of the holes on the Fail-Safe Strap with the holes on the Ribs and repeated the issues the claimant had raised during his employment.

387 The claimant accepted in cross examination that content of this document included information from an engineering standing which was not available to the public however he argued that the information did not belong to the respondent but to Airbus. Neither counsel in her cross examination nor the respondent in their evidence, identified what within the technical information was confidential. That said, the claimant in cross examination defended this disclosure to a third party on the grounds that; *"I **shared confidential information** only after the respondent had gone on a route of illegal conduct and had had many opportunities to remedy the non-confirming parts" [our stress]*

388 The claimant therefore by own admission had disclosed to EASA confidential information, he also accepted that he had included more detail in his report to EASA because; "*they are not in the workplace"*.

389 The claimant does not allege that this disclosure to EASA was a protected disclosure.

390 It was put to the claimant that the respondent would have had a fair reason to dismiss for gross misconduct on the grounds that he had disclosed confidential information without permission to do so, had he not been dismissed in connection with the incident on 27 January 2019.

391 It is not alleged however that the respondent has taken any civil proceedings regarding any infringement by the claimant of the polices and agreements he signed regarding disclosure of confidential information and if we were to determine whether he could fairly have been dismissed, that would require consideration potentially as to whether the disclosure to EASA may potentially amount to a protected disclosure which was not explored.

392 It was also argued that the claimant had breached company policy with regards to the taking of photographs and the covert recordings, however, the respondent was aware of this prior to dismiss and did not take any action at the time, albeit not perhaps the extent of it, however it had not sought to investigate it further.

Closure of TTI Department

393 The TTI department was closed in December 2019, however the respondent's evidence was that while some employees were made redundant, others were redeployed and any consideration of this issue in terms of remedy, would require further evidence potentially around the prospects of redeployment.

The Legal Principles

394 Before reaching our conclusions in relation to the issues, we have had regard to the law which we are required to apply when considering the matters for consideration;

Disclosures qualifying for protection

395 Section 103A provides that 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.

396 Section 43A of Employment Rights Act 1996 (ERA) defines a 'protected disclosure' as a qualifying disclosure as defined by section 43B ERA which is made by a worker in accordance with any of sections 43C to 43H.

397 The relevant provisions of section 43B of ERA provides that:

"(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 –*."

Section 43B then lists of six categories of wrongdoing. The categories relevant relied upon by the Claimant are those set out within section 43B(1)(a)(b) and (d);

(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 and safety of any individual has been, is being or is likely to be endangered. person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject

(f) *that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed"*

398 Section 43A provides:

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

399 Section 43B(1) provides:

"*In this Part, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:*

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

400 Section 43C provides:

"(1*) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith-*

(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."

Disclosure of information: section 43B ERA

401 The disclosure must be of *information*. This requires the conveying of facts rather than the mere making of allegations: **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT;**

402 The word 'disclosure' does not require that the information was formerly unknown. Section 43L(3) provides that 'any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention'.

Cumulative communications

403 ***Goode v Marks and Spencer plc*** **:** EAT accepted that information previously

communicated by a worker to an employer could be regarded as 'embedded' in a subsequent communication.

404 ***Norbrook Laboratories (GB) Ltd v Shaw 2014 ICR 540, EAT*****,** the EAT expanded on this point, explaining that two or more communications taken together can amount to a qualifying disclosure even if, taken on their own, each communication would not.

405 ***Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA*****;** the information imparted by a disclosure should be viewed in the context in which it is made. In that case, Lord Justice Sales gave the example of a hospital worker who points to discarded sharps lying around a hospital ward and says to his or her manager 'you are not complying with health and safety requirements'. In such a case, although the oral statement alone would not contain sufficient factual content to constitute a qualifying disclosure, the context in which the statement was made would fill that gap.

406 ***Simpson v Cantor Fitzgerald Europe 2020 EWCA Civ 1601, CA***, the Court of Appeal described the decision in *Norbrook* as 'plainly correct' but observed that whether two communications are to be read together is generally a question of fact; there is nothing unusual in this respect about the law on protected disclosures. The employment tribunal therefore did not err in law by failing to aggregate 37 separate communications, none of which it found amounted to a protected disclosure whether read in isolation or by reference to previous communications.

407 K**ilraine v London Borough of Wandsworth 2018 ICR 1850 CA:** When determining whether a worker had made a protected disclosure within the meaning of the Employment Rights Act 1996 s.43B, the decision in *Cavendish Munro Professional Risks Management Ltd v Geduld [2010] I.C.R. 325, [2009] 8 WLUK 58* was not to be read as requiring an employment judge to decide whether the employee had "disclosed information" or "made an allegation". There was no rigid dichotomy between the two; a disclosure might provide information and make an allegation at the same time, provided it had sufficient factual content and specificity.

Likelihood of occurrence

408 Under section 43B(1) the worker must reasonably believe that his or her disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely to occur*.

409 ***Kraus v Penna plc and anor 2004 IRLR 260, EAT*****.** In the EAT's view, 'likely' should be construed as '*requiring more than a possibility, or a risk, that an* employer *(or other person) might fail to comply with a relevant legal obligation'*. Instead, 'the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is *probable or more probable than not* that the employer will fail to comply with the relevant legal obligation';

410 *"Held, dismissing the appeal, that on the true construction of s.43B(1)(b) the word "likely"* required *more than a possibility or a risk that an employer might fail to comply with a relevant legal obligation. The information disclosed should, in the reasonable belief of the worker at the time it was disclosed, tend to show that it was probable, or more probable than not, that the employer would fail to comply with the relevant legal obligation…"*

411 In **SCA Packaging Ltd v Boyle 2009 ICR 1056, HL** although a case dealing with

the word 'likely' in the context of the Disability Discrimination Act 1995, the House of Lords held that likely meant '*could well happen'* rather than 'more likely than not'.

Reasonable belief

412 Section 43B (1) provides that the reasonable belief of the worked must be ;
That the disclosure is made in the public interest and
Tends to show one or more of the 6 different types of wrongdoing.

413 This 'reasonable belief' requirement was included to achieve a fair balance between the interests of a worker who suspects malpractice and those of the employer, it is about responsible whistleblowing.

Belief in the wrongdoing

414 The worker's reasonable belief must be that the *information disclosed* ***tends*** *to show* that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure has occurred, is occurring, or is likely to occur.

415 As the EAT put it in ***Soh v Imperial College of Science, Technology and Medicine EAT 0350/14*****,** there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'.

416 ***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT*****,** which held that reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

Identifying legal obligation

417 In ***Fincham v HM Prison Service EAT 0925/01*** **:** Mr Justice Elias observed that there must be 'some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the [worker] is relying'.

418 ***Bolton School v Evans 2006 IRLR 500, EAT*** held that, although the employee 'did not in terms identify any specific legal obligation' and no doubt 'would not have been able to recite chapter and verse', nonetheless it would have been obvious that his concern was that private information, and sensitive information about pupils, could get into the wrong hands. The EAT was therefore satisfied that it was appreciated that this could give rise to a potential legal liability

Public Interest

419 The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making the disclosures; see Lord Justice Underhill's comments **Chesterton Global Ltd.v Nurmohamed [2018] ICR** at paragraphs 27 to 30;

"28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the Tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured.

…

All that matters is that the Tribunal finds that one of the six relevant failures has occurred, is occurring, or is likely to occur and should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the Tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it…"

420 ***Phoenix House Ltd v Stockman 2017 ICR 84, EAT*****,** : the subjective element is that the worker must believe that the information disclosed tends to show one of the relevant failures and the objective element is that that belief must be reasonable.

421 In establishing as a matter of fact what the worker's belief was at the relevant time, the tribunal may need to consider evidence of whether the worker's belief in the implications raised by the disclosure was genuine. In ***Taylor v University Hospitals Birmingham NHS Trust EAT 0039/14***

422 ***Wickenden v Kids Funtime Beds Ltd ET Case No.2400699/16*** KFB Ltd unsuccessfully argued that W could not have reasonably believed that a problem with brakes on a company van posed a health and safety risk because he kept using the van. The tribunal did not accept that this was inconsistent with reasonable belief, particularly as W had said that he needed the job as he had been unemployed for a while.

Manner of Disclosure

Disclosure to employer

423 Section 43C (1)(a) which provides that a qualifying disclosure that is made to the worker's employer will be a protected disclosure.

Dismissal

424 An employee will only succeed in a claim of unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. Lord Denning MR in ***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*****.** If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under section 103A will not be made out.

425 As Lord Justice Elias confirmed in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*****, t**he causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B .A claim under section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, so long as it materially influences the decision-maker. Section 103A requires the disclosure to be the *primary motivation* for a dismissal.

426 The question for the Tribunal is why did the alleged discriminator act as he did and what, consciously or unconsciously, was his reason for doing it.

Burden of Proof – less than 2 years service

427 The burden is normally on the employer to show the reason for dismissal and in most cases, the employer seeks to discharge this by showing that, where dismissal is admitted, the reason for it was one of the potentially fair reasons under section 98 ERA however, where the employee does not have two years' continuous service to claim ordinary unfair dismissal, he will acquire the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair.

Drawing inferences.

428 Given the need to establish a sufficient causal link between the making of the protected disclosure and the act of dismissal, a Tribunal may draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. In ***Kuzel v Roche Products Ltd*** Mummery LJ that a Tribunal assessing the reason for dismissal can draw '*reasonable inferences from primary facts established by the evidence or not contested in the evidence*'.

429 The reasonableness of the decision to dismiss is entirely irrelevant when it comes to a claim based on S.103A. Because the dismissal will be automatically unfair if it is shown that the reason for it was that the employee made a protected disclosure, the focus of the tribunal's inquiry is on establishing, on the evidence, whether a protected disclosure was made and, if so, whether the making of it was the sole or principal reason for dismissal. Lord Justice *Mummery in* ***ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA:*** *'[T]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence*.'

430 Nor is a consideration of the fairness of a dismissal a proxy for establishing the reason for dismissal. In ***Broecker v Metroline Travel Ltd EAT 0124/16*** EAT:

"*66. Logically, the first question is what the reason or principal reason for the Claimant's dismissal was, and whether it was that he had made protected disclosures. In our judgment the EJ erred in law in this case by repeatedly using a test of blatant or gross unfairness as a proxy for asking himself the right question. This led him to fail to focus on the evidence which was relevant to that question, and, instead, to focus on evidence which was either irrelevant, or of limited relevance. In particular, the EJ apparently failed to notice that two aspects of the misconduct for which, on his findings, the Claimant was dismissed, were acts which, he had found, amounted to protected disclosures."*

Detriment: generally

431 Section 47B (1) 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 or her employer on the ground that the worker has made a protected disclosure. In addition, under S.47B(1A) a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by another worker of his or her employer in the course of that other worker's employment, or by an agent acting with the employer's authority, on the ground that the worker has made a protected disclosure.

432 In any detriment claim under that provision, it is for the employer to show the ground on which any act, or deliberate failure to act, was done: section 48 (2) ERA. Where a claim is brought against a fellow worker or agent of the employer under section 47B(1A), then that fellow worker or agent is treated as the employer for the purposes of the enforcement provisions in section 48 and 49., and accordingly bears the same burden of proof as the employer.

433 It does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent (whether employer, worker or agent) must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant; that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment, the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

434 If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default: ***Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14***.

Causation.

435 ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*****,** The EAT held that S.47B(1) requires an employer to show, if it is to avoid liability, that the detrimental treatment was 'in no sense whatsoever' on the ground of the protected disclosure: the standard that applied in discrimination law as set out by the Court of Appeal in ***Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and ors 2005 ICR 931, CA***

Detriments: section 47B ERA – dismissal

436 Section 47 B (1) does not apply where the worker is an employee and the detriment complained of amounts to dismissal, this is provided for by section 47 B (2). The claimant is properly brought under section 103A.

437 The claimant however has brought a complaint that the decision to dismiss and the rejection of his appeal against dismissal, were alleged to be further acts of detriment pursuant to section 47B (1) and 47B(1A).

438 Only an employer, and not an individual worker or agent, can be liable for an automatically unfair dismissal under section 103A ERA. However, a worker or agent may be personally liable for the dismissal of an employee or worker as a detriment under S.47B(1A): ***Timis and anor v Osipov (Protect intervening) 2019 ICR 655, CA* :** it is open to an employee to bring a claim under S.47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal (i.e. for being a party to the decision to dismiss), and a claim of vicarious liability for that act against the employer under s.47B(1B). S.47B (2) only excludes a detriment claim against the employer in respect of its own act of dismissal. As it was put by Lord Justice Underhill;

68. I start by saying that I agree with Simler P that a construction of section 47B (2) which prevented a claimant from bringing a claim against an individual co-worker based on the detriment of dismissal would produce an incoherent and unsatisfactory result and is accordingly unlikely to conform to Parliament's intention. Once the decision was taken to make co-workers personally liable for whistleblower detriment it is hard to see any reason in principle why they should, uniquely, not be so liable in a case where the detriment amounts to dismissal.

439 Such a claim still required the claimant to establish the worker's personal liability before the employer could be held liable.

440 The employer has a potential defence under section 47B ERA;

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned *in subsection (1A) (a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker –*

(a) From doing that thing, or
(b) From doing anything of that description.

Conclusions

Legal Obligation

441 It is not in dispute that the respondent had a legal/contractual obligation to provide conforming parts to its customer and issue an NoE where nonconforming parts had escaped production or request a Concession where they did not meet the customers' specification.

442 In terms of Part 21; the claimant was we accept, aware that there are regulatory requirements which the respondent was required at the relevant time at least, to comply with. What he was not sure about was which regulations or certification system applied to them. However, what is required under the whistleblowing protection is not a requirement that a worker identify any specific legal obligation or a requirement that they 'recite chapter and verse' what the alleged legal obligation is.

443 We find that a concern was about the obligation to inform customers about nonconforming products. A5100 we find on the evidence, reflects some elements of the EASA regulations and A5100 requires customers to agree to accept a part if it is non-confirming via a Concession. We find that there is a legal obligation and regulatory requirement under A5100 to inform the customer about non-confirming products and the claimant had a general understanding that it was part of a certification process even if he has not identified the correct certification system which applied to the respondent.

444 The claimant we find held a reasonable belief that there was a certification process and what it involved at least in terms of a Concession process. The claimant had asked Mr Dobbins during the initial grievance investigation meetings to confirm whether the respondent operated under the EASA certification however Mr Dobbins had not clarified the position, adding we find to the reasonableness of his belief that it was Part 21.

First and Second Putative Disclosure

445 We have reminded ourselves that a disclosure might provide information and make an allegation at the same time, provided it had sufficient factual content and *specificity*.

Information

446 We find for the reasons set out in our findings of fact, that the claimant did disclose information to Mr Merriman about the jigs on the 4 December 2017 and when doing so demonstrated something to him with a gauge.

Wrongdoing – reasonable belief

447 On a balance of probabilities, we find for the reasons set out in our detailed findings of fact, that what was said and demonstrated to Mr Merriman, was consistent with the information which the claimant had disclosed in his email to Mr Crunkhorn. We also take into account what the claimant would say many months later to Mr Dobbins at the meeting on the 18 January 2019 about what he had been disclosing, namely that he did not know whether the alleged misalignment was within tolerance or not and that he had been asking when he wrote to Mr Rattu in August 2018 about the same issue ie ***if*** it was acceptable or not.

448 The production of nonconforming products of itself is not a breach of a legal obligation, the breach occurs where the respondent then fails to supply it to the customer without obtaining a Concession or fails to produce an NoE where it has escaped production. It also does not mean necessarily that lives will be endangered even where this happens however, we accept the claimant and Mr Merriman's evidence that they both believe that the consequences could be significant.

449 The claimant's belief in the likelihood of the occurrence of wrongdoing need only be reasonable and therefore what is not required is detailed evidence supporting the claimant's calculation of the likelihood of the wrongdoing i.e. what is the likelihood of a breach of a legal obligation arising or risk to health and safety of the users of the aircraft, where there are non-conformances in the production of these parts because of the jigs. However, these is no risk of these wrongdoings unless there are or have been non-conformances in the production of the parts in the first place. These wrongdoings are not going to or not even likely to occur unless in the first instance the products have been non-confirming, are non- conforming or at least are likely to be.

450 The claimant refers to misalignment in these disclosures however, only in the context that when the ribs are removed from the jigs it; "***may"*** result in a hole's misalignment and he refers to his '***doubt***'. He does not use language we find that *tends* to show that the misalignment had occurred, was occurring or was likely to occur and that such a misalignment in turn has resulted, is resulting or is likely to result in a breach of a legal obligation as pleaded or risk to health and safety.

451 We do not find that when making this First or indeed the Second Putative disclosure it was objectively reasonable for someone with the claimant's experience, to believe that what he was disclosing *tended* to show that it was *more than a possibility*, that such wrongdoing had already occurred, was occurring at that time or was likely to occur.

452 The claimant as set out in our details findings, did not we conclude, consider that he was able to determine the level of the risk or indeed know whether or not it was acceptable or not with the tools he had. He conceded as much during cross examination and in the meeting later with Mr Dobbins on 18 January 2018.

453 The claimant did not produce a part which was not confirming because of a misalignment of the jigs, despite spending most of his time working on the jigs over the period of many months producing 100s of parts.

454 We do not consider therefore that the claimant had a reasonable belief that what he was disclosing as part of the First and Second alleged disclosure amounted to more than a '*doubt*' about the quality of the parts and that it did not satisfy the requirement that he believed that malpractice had or was occurring or was likely to. The whistleblowing protection does not cover situations where workers have a doubt or a query, it is about a reasonable belief in malpractice occurring, or if it has not yet done so, about it being more than a possibility that it will.

Public Interest

455 The claimant asserts that he made these disclosures in the public interest, in the belief that lives may be put at risk where nonconforming products are fitted to an aircraft.

456 We have considered the evidence of Mr Abraham about the parts not being mission critical however, we have considered the claimant's experience, and he is not a Technical Director. The belief of Mr Merriman is that non-conformances in the Leading Edge Track Ribs could have significant consequences in terms of safety

457 We have considered whether it was reasonable for the claimant to believe that the doubts he had at this time about how the jigs were operating and the disclosure he made about those doubts, was made in the public interest. Did the claimant reasonably believe that there was a health and safety risk in circumstances where he continued to work on the jigs for another 6 months without complaint and he did not consider it necessary to follow up his email with the Quality Director? The claimant had not identified a nonconforming part, he was not aware of any Concessions, NoE or production stops by this stage.

458 What we need to consider is what the claimant considered to be in the public interest, whether he believed that his disclosure served that interest and whether it was a reasonably held belief. It is not for this tribunal to consider for itself whether a disclosure was in the public interest.

459 His behaviour was not consistent with someone experienced working in the aerospace industry, who believed that they were dealing with a situation where lives may be put at risk. We are also concerned regarding the issue of likelihood relating to the risk of non-conformance, however, on balance we accept that the claimant reasonably believed that his disclosures, served a public interest namely preventing risk to the heath and safety of those who may travel on the aircraft.

460 We do not find however that the claimant had made a protected disclosure as defined by section 43A ERA in that we do not find he had a reasonable belief that the disclosure tended to show the malpractice pleaded.

Detriment a) and h)

461 For the reasons set out in our detailed findings of fact we do not find that the claimant has proven on a balance or probabilities that he made a protected disclosure in December 2017. In any event we have gone on to consider whether the treatment complained of was a detriment on the grounds of the alleged disclosures;

462 We do not find on a balance of probabilities that the claimant has proven that he was subject to a detriment. He has not proven that he made a request for annual leave in July 2018 which was refused by Mr Merriman and therefore the burden of proof has not shifted to the respondent.

463 For the reasons set out in our findings of fact, we do not find that the claimant was spoken to about his performance in circumstances where it was not reasonable for Mr Merriman do so. Mr Merriman accepted he had on occasion spoken to him informally and the claimant did not identify what the complaints were he considered unreasonable. Further the claimant accepted that the respondent's policy provides for such informal discussions about minor performance or conduct issues. The claimant has not proven on a balance or probabilities that he was subject to this alleged detriment and thus the burden of proof has not shifted to the respondent.

464 We find however that the respondent has provided an adequate explanation for

discussing performance issues with the claimant informally, and we find on a balance of probabilities, that Mr Merriman's reasons for doing so had nothing whatsoever do with any alleged disclosures. We accept that the reason was to address legitimate concerns about minor performance and conduct issues in accordance with the respondent's disciplinary policy. We do not find that there is evidence to support an allegation that this treatment was influenced by any putative disclosure.

465 This claim is not well founded and is dismissed.

Third Putative Disclosure: July 2018

Information

466 In accordance with our detailed findings of fact, the claimant did not disclose any *information* to Mr Merriman in July 2018 when he made this Putative Disclosure. He was asking a question of Mr Merriman namely whether there had been any alteration to the jigs, he did not convey any facts to Mr Merriman.

467 We therefore do not find that the claimant made a protected disclosure as defined by section 43A ERA.

Detriment i) overtime

468 The claimant has not proven on a balance of probabilities that he made a protected disclosure in December 2017 or in July 2018 and thus this allegation of detrimental treatment because of the prior disclosures, is not well founded however we have nonetheless gone on to consider whether the treatment complained of was a detriment on the grounds of the alleged disclosures;

469 For the reasons set out in our detailed findings of fact, we accept that the claimant's overtime was reduced from June 2018 and that loss of overtime would amount to a detriment. We accept the respondent's explanation on a balance of probabilities for the reason for this treatment namely that this was because of a policy introduced in May 2018. While the claimant alleged that this happened in July 2018 we find that this occurred from June 2018, some 6 months after the first alleged disclosures.

470 We do not find that any alleged previous disclosure/s had any influence on the decision about overtime.

471 This claim is not well founded and is dismissed.

Fourth Putative Disclosure

Information

472 We find as set out in our detailed findings of fact, that the claimant was disclosing information in this email, namely information about the jigs and the risk of misalignment of the holes in the ribs.

Wrongdoing – Reasonable Belief

473 The claimant alleges that he had disclosed enough information to convince the respondent that there was no chance to attempt a 'cover up'. The claimant had referred to the 'recent rectification (grinding)' in this email and in doing so we

understand that he believed he was putting the respondent on notice that he knew about the rectification and thus letting them know they could not cover this up. However, as set out in our findings we do not find that the information disclosed was information *tending* to show the alleged wrongdoing.

474 We do not find that the information disclosed that the respondent has or is likely to deliberately conceal information about malpractice as defined by section 43B ERA.

475 The claimant deliberately we find, did not disclose that he believed that there had been a 'cover up'. While he alleges this now as part of his claim, his evidence is that he disclosed sufficient information for this to be read into his email. We do not find that the information in that email tends to show concealment and we do not find that it would have been objectively reasonable for him to believe that it. We find that he was 'testing' the respondent and deliberately not disclosing information which tended to show such alleged malpractice.

476 With regards to his claim that this email contained information tending to show that the respondent was in breach of its pleaded legal obligations; he does not refer to Part 21 or generally to the respondent's regulatory requirements. The email does not refer to the failure to issue an NoE or ask for a Concession and it does not state that nonconforming have been produced already (for which a Concession or NoE should have been obtained/sought).

477 The email again refers only to holes which "*may"* be misaligned and that if perpendicularity of the holes has been accepted by Spirit ***"if"*** misalignment occurs this "***may***" not be within tolerance.

478 We therefore do not find that it would have been reasonable for the claimant to believe that he was disclosing information which tended to show the alleged malpractice. Nowhere within the email does it state that non-confirming parts have or are are being produced. The language used is that they *may* be or *may* have been produced, however we do not find that this meets the required threshold of the likelihood of the wrongdoing occurring. It is too hypothetical.

479 We therefore do not find that the claimant has established that he made a protected disclosure which meets the requirements of section 43A ERA

Fifth, Sixth and Seventh Putative Disclosure

480 We refer to our detailed findings of fact above.

481 The exact same email which was the subject of the fourth disclosure was forwarded on to Mr Riley, Mr Jenkins and Mr Rattu. For the same reasons as set out above in relation to Putative Disclosure 3, we find that the claimant has not established on a balance of probabilities, that he made a protected disclosure which meets the requirements of section 43A ERA in these emails.

8th Putative Disclosure

The removal of the bolt

Information

482 We refer to our details findings of fact above.

483 We find that the claimant did make a disclosure of information, in that he was

disclosing information about what he had been instructed to do and the size of the holes which would be left after removal of the bolt.

Reasonable Belief – wrongdoing

484 The claimant had complained that he was instructed to remove a bolt and refused to do so. He alleges that he made a disclosure tending to show a breach of the respondent's legal obligation and a disclosure regarding concealment of wrongdoing.

485 The claimant was as set out in our findings, instructed to remove a bolt. We find on a balance of probabilities that this was a reasonable and lawful instruction. He was not being asked to replace a bolt at that stage. We do not find that he referred to this specific instruction as itself being illegal but he did mention that removing the bolt would leave the hole oversized.

486 The claimant asks whether there is an approval to remove the bolts and he is told that there is one, and he does not dispute this. The claimant does not state that removing the bolt would or is likely to result in a breach of the pleaded legal obligation. We not find that it would have been reasonable for the claimant to believe that he was disclosing information tending to show such malpractice.

487 We find that the next step after the removal of the bolt would be to assess the hole and consider whether the bolt could be replaced and if not, then the normal process around Concession would have to be followed or the part scrapped. The claimant does not disclose any information tending to show that this process had not been followed, would not be followed or was likely not to be followed or that such a breach would be concealed.

Public Interest

488 Given the claimant's experience as a fitter, we find that he would have known the process and would have known of the specification which applied or at least how he could access it. As a fitter he was required to follow the specifications for the specific tasks he was performing. We do not find that the claimant reasonably believed that the disclosure of information he made about the bolts and the holes they would leave, was serving a public interest. He must have known we find, that the next step after removing the bolts would be to assess the hole. We do not find that at this stage, the claimant reasonably believed that discussing the hole that would be left by the removal of the bolt is serving the public interestt. It is far too remote from any possible risk and given his experience, he must we find, have appreciated that.

The jigs – email

Information

489 We refer to our detailed findings of fact above.

490 Although the claimant asked Mr Merriman to read his email, by which we accept he was referring to the email to Mr Rattu, he does not comment further in this conversation with Mr Merriman. That itself is not a disclosure of information, he is not disclosing anything to Mr Merriman, he is merely asking him to read an email.

Reasonable Belief – wrongdoing

491 The claimant does not go on to allege that there has been any concealing of

information about the jigs or mention any further issues about the risk of misalignment of the jigs. We therefore find that the claimant cannot have held a reasonable belief that he was disclosing information tending to show the alleged malpractice.

492 We therefore do not find that the claimant made any protected disclosure about the issue with the jigs during this discussion (We find that there was no follow up conversation later that morning as alleged by the claimant).

493 We do not find that the claimant had made a protected disclosure as defined by section 43A ERA.

Detriments b) and c)

494 We refer to our detailed findings of facts above.

Banned from drilling

495 The claimant alleges that he was banned from drilling in August 2018 on the grounds that he had made protected disclosure/s.

496 We do not find that the claimant had made any protected disclosures prior to this alleged detriment taking place, nonetheless we have gone on to consider whether the treatment complained of was a detriment on the grounds of the alleged disclosures;

497 We have found on a balance of probabilities that the claimant was not banned from drilling but required to complete his training matrix and we find this was a reasonable and lawful instruction and did not give rise to any detriment. If anything, the additional training was advantageous and even if the claimant did not want to do it, we do not find that this was a detriment. Even if this were a detriment, we accept the respondents' explanation for this treatment which was not as a result of any disclosures but to ensure the claimant (as with all fitters) completed the required cross training which he accepted, he had not yet done.

Swearing

498 The claimant alleges that Mr Merriman called the claimant a "fucking *idiot"* and stated that Mr Rattu did not give a "*fuck about the bolts"* on the grounds that he had made a protected disclosure.

499 As set out in our findings of fact, we do not find on a balance of probabilities, that the claimant has proven this happened and therefore we find that no such alleged detriment took place.

500 These claims are not well founded and are dismissed.

Detriment d) Air-blower – 5 October 2018

501 The claimant alleges that he was subjected to a detriment on the grounds of making a protected disclosure when he was reprimanded by Mr Merriman for using the industrial airpower to blow swarf off himself. We refer to our detailed findings of fact.

502 We find the claimant had not made any protected disclosures up to this point. In any event, we find that the informal reprimand while that is a detriment, we do not find that this was on the grounds of any alleged disclosures. In any event, we accept the

respondent's evidence that the claimant knew this was against the respondent's health and safety policy, that he had been told this at a Tool Box talk and we accept the evidence of Mr Merriman and Mr Kilcullen that he had been told this personally by Mr Kilcullen on a prior occasion.

503 We find that it was reasonable for Mr Merriman to reprimand the claimant and although this was not the detriment the claimant identified in the list of issues (the claimant included only the reprimand by Mr Merriman), we consider that the comment by Mr Allcock was not on a balance of probabilities on the grounds of any alleged prior disclosure but was more likely than not to have been the result of some frustration when the claimant questioned the instruction and whether there was documentary proof that he had been made aware of this policy. We do not find that the treatment was influenced by any alleged protected disclosure.

504 The claimant was not therefore subject to a detriment within the meaning of section 47B ERA

Detriment e) Mobile Telephone – 19 October 2018

505 The claimant alleges that he was subjected to a detriment on the grounds that he had made a protected disclosure/s when he was reprimanded by Mr Merriman for having his mobile phone on the shop floor.

506 We refer to our detailed findings of fact where we have made our finding that the claimant had not made any protected disclosures up to this point. In any event, we find that he was merely told in line with the respondent's policy to put his phone away as set out in our details findings of fact.

507 We do not accept that the claimant has established that this was a detriment and even if it could be described as such, we do not find that this was on the grounds of any alleged disclosures. In any event, we accept the respondent's evidence that the claimant was not singled out. We heard the audio recording of this conversation and found that Mr Merman adopted a perfectly pleasant but firm manner with the claimant. We do not find that the treatment was influenced by any putative disclosure.

508 The claimant was not therefore subject to a detriment within the meaning of section 47B ERA

Detriment i): Holiday– December 2018

509 The claimant alleges that he was subjected to a detriment on the grounds that he had made a protected disclosure/s when Mr Merriman did not authorise his annual leave for Sunday 9 December 2018. We refer to our detailed findings of fact.

510 We find that the claimant had not made any protected disclosure/s up to this point. In any event, we have gone on to consider whether the treatment complained of was a detriment on the grounds of the alleged disclosures; although we find that the claimant has proven that he was subject to a detriment, in that he lost 3 hours annual leave, we consider that the respondent's explanation for that 3-hour leave is a credible and satisfactory explanation and not we find on a balance of probabilities on the grounds of any alleged protected disclosure.

511 The claimant was not therefore subject to a detriment within the meaning of section 47B ERA

9th Putative Disclosure: 10 of January 2019

Information

512 The claimant had disclosed we find information in this email. He did not make bare allegations. We find there was sufficient specificity for this amount to a disclosure of information. The information disclosed is as set out in our findings of fact.

Reasonable Belief – Wrongdoing

513 In determining whether the remaining requirements of section 43B are met, we find that the language used around the allegation of concealment is quite definitive i.e. that the company "*was not*" acknowledging "*the fault".* We find that it is reasonable to believe that the information tends to show that there was a fault with the jigs and that there was an attempt to avoid dealing with the *potential* prior non-compliance and *prevent* the claimant establishing "*any*" prior compliance.

514 However, although the fault with the jigs and concealment we find is referred to in terms which on balance meet the likelihood threshold, the fault is not of itself a breach of a legal obligation. The breach depends on whether that fault has produced, is producing or is likely to produce non-confirming parts and then a step on from that, whether this has, is or is likely to lead on to a breach of a legal obligation ie have they, are they, are they likely to be supplied to the customer in breach of the respondent's legal obligation to request a Concession or issue a NoE if the part has 'escaped'.

515 The letter refers to "*potentially"* non-complaint parts that have been produced.

516 While the fault and act of concealment of the fault is expressed in potentially sufficiently definitive terms, the wrongdoing which has been allegedly concealed must of itself fall within the definition of section 43B.

517 The claimant refers to the claimant being concerned that the respondent was not taking action about the prior "*potentially*" non- complaint parts. Had the claimant stated that he believed that respondent was not taking action or had not taken action about the prior production of non-confirming parts, this may be sufficient to meet the test in section 43B that he was disclosing a breach (i.e. a failure to prevent non-confirming parts being supplied and the non-conformance not being disclosed) however, he does not use those terms. The claimant throughout does not say that non-confirming parts *have been* produced and nor do we find that his language tends to show that this is likely. His reference throughout to "*potential*" we find is not sufficient.

518 Potential we find means possible, and has the same likelihood of occurrence as "*may"* and *"might"* but as set out in **Kraus** (above), likely requires something more than a possibility.

519 Further, the claimant is concerned in this letter with what has happened in the past, he does not refer to what is currently happening but what has happened. The term 'likely' is used within section 43B to refer to a **future** breach in terms of *likelihood*. The past tense in section 43B requires information which tends to show that the person "**has** failed or **"is** failing" to comply with a legal obligation, and not that it is likely or more than possible that that they have done so in the past or are failing now to do so.

520 We therefore find on a balance of probabilities that the claimant did not make a protected disclosure in this letter of the 10 January 2019 considered alongside and taking into account the cumulative impact of his previous putative disclosures and in

particular the email of the 4 August 2018 (which we had found not to meet the requirements of section 43B).

521 We therefore do not find that the claimant had made a protected disclosure as defined by section 43A ERA.

10th putative disclosure: 18th of January 2019

Information

522 We find that the claimant disclosed information within this meeting. He has not simply made a bare allegation. He has disclosed information as set out in our detailed findings of fact.

Reasonable Belief – wrongdoing

523 In terms of whether he has disclosed in this meeting (taking into account the cumulative effect of the previous putative disclosures he had made as set out in our findings), information which in his reasonable belief tends to show that the respondent has failed or is failing to comply with its legal obligation, we do not find that it would be reasonable for the claimant to believe that he had done so.

524 We refer to our detailed findings of fact. The claimant refers to *not knowing* whether the misalignment is within tolerance or not, that he is *asking the question,* that he cannot know he accepts with the tools that are available. We also do not find that it would be reasonable for the claimant to believe that the information he was disclosing tended to show that it was *likely* that the respondent was failing to comply with its pleaded legal obligations. For the reasons set out above in respect of the previous putative disclosure 9, we do not consider that "*potential",* which is the language used in this meeting, meets the requirements of "*likely*" set out in section 43B ERA.

525 Even at this stage the claimant has still not actually identified any specific part that has been produced and is not confirming for which a Concession needs to be raised or which has 'escaped' and for which an NoE should have but was not raised. After all these months the claimant does not identify any specific part that has been produced which does not conform and identifies no specific incident of a potential breach which undermines further, the reasonableness of any alleged belief that parts are or have been produced which are not conforming.

526 In terms of concealment of information tending to show a failure to comply with a legal obligation, while the claimant we find is understood to have disclosed in this meeting information which tends to show that there has been an attempt to conceal information, we do not find that it is reasonable for the claimant to believe that what he has disclosed are attempts to conceal that a breach **has** happened, is happened or is likely to happen and we refer back to the same reasoning as applies with putative disclosure 9.

527 We therefore do not find that the claimant had made a protected disclosure as defined by section 43A ERA.

11th Putative Disclosure: 29th of January 2019

Information

528 The claimant had disclosed information but nothing materially different from the information disclosed at the previous hearing.

Reasonable Belief – Wrongdoing

529 We refer to our detailed findings of fact. The claimant had not we find, disclosed any further information within this meeting, which we find when considering it cumulatively with the previous putative disclosures, had changed the nature of his disclosure. He has again disclosed information which we find it was reasonable to believe tended to show that there had been some 'cover up' however, we do not find that it was reasonable for him to belief that he was disclosing information that there **had** been a failure by the respondent to comply with its legal obligations as pleaded, it was failing or it was **likely to fail** for the same reasons already set out in relation to putative disclosures 9 and 10.

530 We do not find that the claimant had made a protected disclosure as defined by section 43A ERA.

12th Putative Disclosure:1st February 2019

Information

531 The claimant had not disclosed information at this meeting which materially changes the nature of his previous disclosures other than a photograph and we refer to our detailed findings of fact on this as set out above.

Reasonable Belief – Wrongdoing

532 The claimant himself states in this meeting that he is repeating what he has disclosed before.

533 The claimant had not we find, disclosed any further information within this meeting, which we find when considering it cumulatively with the previous putative disclosures, had changed the nature of his disclosure. The photograph shows a flange distortion but the claimant does not allege that this shows that non-confirming parts **had been** produced as a result of this and the position remains as he accepted in his evidence, that it is for the engineers to make an assessment and determine whether the misalignment is acceptable or not and that he does not have the tools to make that assessment.

534 The claimant has disclosed information however we do not find that it was reasonable for him to belief that he was disclosing information that there **had** been a failure by the respondent to comply with its legal obligations as pleaded, that **it was** failing or it was **likely** to fail for the same reasons already set out in relation to putative disclosures 9,10 and 11.

535 We do not find that the claimant had made a protected disclosure as defined by section 43A ERA

13th Putative Disclosure: 4th February 2019

Information

536 The claimant disclosed we find information in this email, namely further technical detail explaining why he believes the due to the defects on the jigs the parts ***may*** be damaged. We refer to our detailed findings of fact.

Reasonable Belief – Wrongdoing

537 The claimant had not we find, disclosed any further information within this document either, which when considering it cumulatively with the previous putative disclosures, changed the nature of his disclosure. He still refers to his belief that the defects on the jigs ***may*** result in nonconforming parts. We do not find that it was reasonable for him to belief that he was disclosing information that there **had** been a failure by the respondent to comply with its legal obligations as pleaded, that **it was** failing or it was **likely** to fail for the same reasons already set out in relation to putative disclosures 9,10, 11 and 12. His belief remains essentially expressed as a hypothetical, with no evidence of parts produced which are not conforming.

538 The claimant is also disclosing information, which he has disclosed before about alleged attempts to alter the jigs to prevent the problem with the jigs. This adds nothing to the nature of his disclosures so far on this issue. While it is reasonable for the claimant to believe that what he has disclosed is likely to tend to show concealment, we do not find it reasonable for him to believe that it tended to show that that what was being concealed was that the respondent **had** failed to comply with its pleaded legal obligations, **was** failing or **was likely** to because on his own case, the likelihood of parts being produced which were defective did not meet the likelihood threshold. The risk that non-conforming parts **may** be produced, is not the same as "likely" and in any event, even if they are, that still does not mean that it is likely that the respondent will fail to comply with its legal obligations to comply with the issuing of an NoE or Concession and again, he does not state that there had already been such a failure.

539 We do not find that the claimant had made a protected disclosure as defined by section 43A ERA.

14th Putative Disclosure: Grievance Hearing 21st of February 2019

Information

540 We find that the claimant did disclose information during this meeting in that he referred again to Mr Merriman banning him from drilling to cover up the rectification of the jigs and allowing him back from Sub-Assembly when the respondent thought the problem with the jigs was sorted. He also we find refers to checking the jigs after the email from Mr Rattu in August 2018, and finding there was still an issue.

541 We refer to our detailed findings of fact.

Reasonable Belief – Wrongdoing

542 The claimant still does not state that nonconforming parts **had** been produced, **were being** produced or were **likely** to have been produced and still does not identify any specific parts which have been produced within these alleged disclosures.

543 As set out above, the production of nonconforming products does not give rise to a breach of a legal obligation unless they are supplied to a customer outside of the approved process (Concession or NoE). For the same reasons set out above in the earlier putative disclosures, we do not find that the claimant held a reasonable belief that the information he disclosed in this meeting tended to show that the respondent **had** failed to comply with a legal obligation, was failing, or **was likely** to fail.

544 We also do not find that that he held a reasonable belief that the respondent was concealing such wrongdoing. What he disclosed again is a problem and the alleged concealing, of a ***possibility*** that the jigs may produce parts which do not confirm to Airbus standards. This does not meet the required test of likelihood of an occurrence of wrongdoing.

545 We do not find that the claimant had made a protected disclosure as defined by section 43A ERA.

Dismissal: Automatic unfair dismissal and detriment

546 We have set out above our detailed findings of fact above.

547 The claimant has the burden of proving on a balance of probabilities that the reason for dismissal was an automatically unfair reason namely on the grounds that he had made a protected disclosure. However, we find that the claimant did not make a protected disclosure prior to the decision to dismissal and therefore this claim must fail.

548 Even had we determined that the claimant had made a protected disclosure, we do not find that there is any evidence to support the claimant's allegation that Ms Sanghera had instructed Mr Kilcullen to dismiss the claimant. Mr Kilcullen was candid we find, in the knowledge he had about the claimant's disclosures and robust in his denial that they influenced his decision at all.

549 We take into account our findings that the claimant's disclosure in December 2018 and August 2018 and indeed in February 2019, had on a balance of probabilities been investigated by the respondent. We also take into account that during the meetings with DW in January 2019 and February 2019 the claimant was being actively persuaded to cooperate with the respondent and disclose the information he had about the alleged issue with the jigs so that they could investigate, any evasion and lack of cooperation we find was on the part of the claimant.

550 We also consider that Mr Merriman and indeed Mr Kilcullen could have issued some form of disciplinary sanction in respect of the air-blower incident and mobile telephone which followed the putative disclosure in August 2018 but did not do so.

551 We also take into account that action could also have been taken into the claimant's breach of the ITAR policy when he admitted to the taking of photographs in a restricted area. No such action was taken.

552 We have also taken into account the respondent's attitude toward the claimant and his disclosures, that his annual leave request in December 2018 was accommodated at very short notice.

553 We have also taken into account the claimant's allegations of hostile treatment from Mr Merriman which after listening to the audio recordings, we found to be unfounded. We also find the allegation of being banned from drilling work to be unfounded.

554 We also take into account that the claimant had made it very clear that he was intending to leave the claimant's employment and that had the respondent wanted an end to his employment, it was unlikely that they would need to go down the path of dismissing him.

555 We also consider that we generally found the claimant to have an unreliable view of the treatment he was receiving particularly from Mr Merriman.

556 We do not find that the evidence supports a finding that the reason for the decision to terminate his employment was on the grounds of any of the putative disclosures and therefore would not in any event have found that the claimant was able to prove on a balance of probabilities that the dismissal was on the grounds that he had made protected disclosures even had he established such protected disclosures had been made.

557 We now turn to the issue of whether the putative disclosure materially (in the sense of more than trivially) influenced the treatment of the claimant, by Mr Kilcullen or Ms Sanghera in respect of the detriment claim under section 47B(1A) and (1A). The claimant did not identify which of the putative disclosures he was alleging had influenced the decision to dismiss and indeed he did not even put it to Mr Kilcullen that he had been so influenced, his question to him was whether he had received an instruction from Ms Sanghera to dismiss. However, the claimant put forward no evidence to support an allegation that any of the putative disclosures had materially influenced either Ms Kilcullen or Ms Sanghera when conducting the disciplinary process and hearing, to dismiss the claimant. The claimant did not identify anyone else he alleges was responsible for the decision to dismiss and did not put that to the witnesses in cross examination.

558 While there were inconsistences in the witness statements, we find that Mr Kilcullen reached a decision during the disciplinary hearing which was supported by the evidence; that the claimant had known that he must not rework a part which was scrapped, that he had been told that it was scrap including by Mr Westerby who had told him not to rework it and had gone ahead and grinded it without engineering approval. The claimant's obfuscation was not helpful to him in that process. Further, there was clear evidence that the respondent treats such matters as gross misconduct and rather than offer up mitigation the claimant was intent we find on trying to unreasonably avoid or deflect responsibility for his actions.

559 The respondent does not argue the defence under section 47B (1D) ERA however we find no basis for drawing any inference from any direct findings of fact, that the decision to dismiss was influenced by any alleged protected disclosures.

560 The claim that the dismissal was automatically unfair under section 103A and/or a detriment under section 43B(1A) and (1B) is not well founded and is dismissed.

15 Putative Disclosure: Grievance Appeal hearing 19th of March 2019

561 We refer our detailed findings of fact.

562 The claimant failed to identify the alleged protected disclosure that he made during this hearing and it was not obvious to this tribunal.

563 The notes of the hearing which he alleges were not complete but failed to identify what was missing, record a discussion which is a summary of the previous issues he had raised. When discussing the previous issues, he does not in those notes make any disclosure of information which we find in the reasonable belief of the claimant, objectively viewed, tended to show that there had been any pleaded wrongdoing. To the extent they could give rise to potential disclosures, those have been addressed in respect of his previous alleged disclosures in that he repeats here essentially the same concerns without any firmer assessment of risk.

564 When referring to past disclosures, he does not use language to identify any alleged wronging more likely than the language he had used in previous occasions, as addressed in respect of the other putative disclosures, but in any event, the claimant has not identified what he alleges the disclosure to be that he is relying upon.

565 We therefore do not find that the claimant has proven that he made a protected disclosure as defined by section 43A ERA and the burden of establishing such a disclosure rests on the claimant.

Dismissal Appeal: Detriment

566 We find that the claimant did not make a protected disclosure prior to the dismissal appeal and therefore this claim must fail. However, we have nonetheless gone on to consider the position had the claimant proven that he had made a protected disclosure. We are satisfied that there was an adequate appeal process. We are satisfied with the explanation for the decision to uphold the decision to terminate the claimant's employment, for the reasons set out within our detailed findings of fact. The claimant conceded that he had reworked a scrap part when he knew that he should not have done without the appropriate documentation.

567 We find no basis for drawing any inference from any direct findings of fact that the decision to dismiss was influenced by any alleged protected disclosures and indeed the claimant does not identify in his evidence, his reasons for alleging that the way this hearing was conducted or the outcome, was on the grounds that he had made any of the alleged protected disclosures. The claimant never even put this allegation to Mr Abraham however, we accept the evidence of Mr Abraham that he was not influenced by any of the alleged protected disclosures.

568 The claim that the dismissal appeal was a detriment under section 43B(1A) and (1B) is not well founded and is dismissed.

Detriment k) failure to pay the claimant during the period of suspension.

569 The claimant has not proven that he made protected disclosures as set out in our details findings of fact and therefore this claim cannot succeed.

570 We have gone on to consider nonetheless, we have gone on to consider whether the treatment complained of was a detriment on the grounds of the alleged disclosures; not being paid the monies due to him when they became payable, is a detriment however, on a balance of probabilities and as set out in our findings, we consider the respondent's explanation to be adequate and we accept that this was an oversight following the departure of Ms Durrant. The claimant did not contact Ms Sanghera as instructed and we find that based in her resignation letter, Ms Durrant had already left before the claimant sent her his email.

571 We find that the respondent has put forward a credible and adequate explanation and we do not consider there are any inferences it would be appropriate to draw from any primary findings of fact.

572 The claimant was not therefore subject to a detriment within the meaning of section 47B ERA

Breach of Contract/ Wrongful Dismissal

573 As set out in our detailed findings, we find that on a balance of probabilities the claimant did commit the offence of reworking a part which had he had been told was scrap and in circumstances where he had been told by his superior, Mr Westerby not to touch it. We further find that on a balance of probabilities he had reworked the part (which he had been responsible for producing) with the intention of trying to make good the part and knowing that to do so without authorisation from the engineering department, was a serious disciplinary offence and breach of the Cardinal Rules of Quality. We find that the respondent's approach to treating it as an offence of gross misconduct was consistent with how the respondent had viewed the offence committed by another employee, albeit we find on a balance of

probabilities that there were mitigating circumstances in his situation. The claimant had also we find, been evasive during the disciplinary investigation, hearing and appeal process.

574 We find that the claimant's conduct amounted to a repudiation of the employment contract entitling the respondent to terminate the contract without notice.

575 The claim of wrongful dismissal is not well founded and is dismissed.

Summary

576 The claimant's claims are not well founded and are dismissed.

.

_____

Employment Judge

Date: 16 January 2021

JUDGMENT SENT TO THE PARTIES ON

19 January 2021

FOR THE TRIBUNAL OFFICE