EMPLOYMENT TRIBUNALS

Claimant: Mr Anthony McCarthy

Respondent: HW Martin Waste Ltd

Heard at: **Newcastle Tribunal**

On: **5th, 6th, 7th July 2021 and 19th October 2021 (further deliberations)**

Before: **Employment Judge Sweeney**
Brenda Kirby
Dennis Morgan

Representation: For the Claimant: In person
For the Respondent: Ms Del Luongo, solicitor

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. **The claim under section 48 Employment Rights Act 1996 ('ERA') that the Claimant was subjected to detriments for making a protected disclosure is well founded and succeeds.**

2. **The Respondent is ordered to pay the Claimant compensation in the amount of £25,342.50** (consisting of £5,342.50 compensation for financial losses and £20,000 compensation for injury to feelings).

REASONS

Procedural background

1. By a Claim Form presented on **28 June 2020**, the Claimant brought a complaint of detriment under sections 48 and 43B Employment Rights Act 1996 ('ERA').

2. There were two case management preliminary hearings prior to the Final Hearing. Those preliminary hearings were held on **09 September 2020** and **20 April 2021** before Employment Judge Langridge and Employment Judge Morris respectively.

3. Judge Langridge identified the complaints and the issues, which she recorded in her case management summary, paragraphs 1 to 3, **pages 33 to 36** of the hearing bundle. Judge Morris made an order in respect of disclosure in respect of drug-test results.

The Final Hearing

4. The Tribunal read some of the documents and statements early in the morning of the Hearing and convened at 10am on **05 July 2021** to discuss the issues and a timetable. The parties had prepared a bundle running to 155 pages and a supplementary bundle consisting of 26 pages. At the outset of the Hearing, the Tribunal wished to understand the scope of the Claimant's complaints. He confirmed that he was not pursuing any complaint arising out of the termination of his employment and that his complaint was limited to one of detriment short of dismissal. On discussing the schedule of loss on **pages 20a- 20c** of the bundle, the Claimant confirmed that, if successful he would be seeking compensation limited to an award for injury to feelings (£25,000) and for losses occasioned by having to take sick leave, in the sum set out on **page 20a** (£5,342.50).

5. The parties agreed that the issues which remained to be determined were those as set out by Judge Langridge on pages **33 to 36**, paragraphs 2-3.

6. The Tribunal adjourned at 11.40am to complete its reading. The Hearing resumed at 2.30pm.

Witness evidence

7. The Claimant gave evidence on his own behalf. He also called a second witness, a former colleague, Mr Kane Scobie.

8. The Respondent called three witnesses as follows:

    1.1.1. Sean Sweet, Contract Manager
    1.1.2. Alan Patrick Ganley, supervisor and former colleague of the Claimant
    1.1.3. Donna Jolley, senior HR Manager

9. Insofar as relevant to our findings below, we must comment on our assessment of the witnesses who gave evidence before us. We found the Claimant, Mr McCarthy and his witness Mr Scobie, to be honest and credible witnesses. Each of them was measured in their evidence and they were overall reliable and consistent in their evidence. Neither sought to embellish their story in any way. We considered Mr Sweet to be honest, credible and reliable. He gave helpful evidence about procedures for drug-testing and record-keeping within the Respondent business. We were not so impressed, however, by the evidence of Mr Ganley or Ms Jolley.

Mr Ganley was, overall, an unreliable witness who tended to approach most matters by saying that he did not recall events. Ms Jolley, we regret to say, was in our judgement an unreliable witness and who gave what we regarded as untruthful evidence.

10. We did not hear from managers we would have expected to have heard from considering the nature of the complaints and the issues, which had all been identified by Judge Langridge in her case management summary. In particular, the Respondent did not call any evidence from Mr Tony Burnett, General Manager and from another employee whom we shall identify as 'MB', both of whom were central figures in the narrative. Nor did they call evidence from those who heard the grievance and appeal, Mr White and Mr Akers. We say more about this in our findings and conclusions.

Findings of fact

11. The Respondent, HW Martin Waste Ltd ('Waste') is a waste management company. It manages a variety of waste and recyclable materials for households and businesses at various sites across the UK. The Respondent is one of a number of limited companies within 'The Martin Group of Companies' ('the Group'). On **page 24** of the bundle of documents is a whistle-blowing policy which lists 15 companies within the Group. One such company is HW Martin Holdings Ltd ('Holdings'). Holdings employs a number of staff, referred to as 'core staff', including accountants, HR managers, legal officers/solicitors and Health and Safety Officers. Ms Jolley, for example, is employed by Holdings – as indeed is the Respondent's legal representative in these proceedings, Ms Del Luongo. Ms Jolley is a Senior HR Manager based at Alfreton.

12. The other companies in the group employ staff for the day to day running of the respective businesses. One such group company is 'Premier Waste Recycling Limited' ('Premier'). Ms Jolley, as Senior HR Manager, had HR responsibilities for Waste and Premier.

13. The Claimant commenced employment with Waste on **07 June 2010** as a Line Picker. Over time, in June 2015, he was promoted to the position of Site Supervisor. He was based at the Monument Park site. As Site Supervisor, his responsibilities included the day to day supervision of operations within the Transfer Station at Monument Park. He reported to the Site Manager. The Claimant had been well-regarded by senior management, notably Phil Darwin, a former General Manager; Andrew Jackson, a former Regional Operations Manager and Commercial Manager and Mark Faulconbridge, a director of Waste.

14. In **October 2019** the Respondent employed a new Site Manager to be based at Monument Park whom we shall refer to as MB, and who became the Claimant's line manager.

15. MB reported to his own line manager, Tony Burnett who was General Manager (and who has also been described as 'Director Designate'). We see this from a letter to the Claimant from Robin Akers, **01 May 2020** on **page 92**.

16. The Claimant understood Mr Burnett to be the General Manager of the site at Monument Park. In her witness statement, paragraph 7, Ms Jolley said that Mr Burnett was employed by Premier and is General Manager of Premier and that he had no line management responsibilities for the Claimant. The Claimant, however, never asserted that Mr Burnett was his line manager. However, Mr Burnett was, on the Claimant's understanding, MB's line manager – in that MB reported to Mr Burnett, as this is confirmed by Mr Akers.

17. In his evidence, Mr Scobie said that MB had been appointed by and reported to Mr Burnett and that the two were friends. The Claimant said that MB and Mr Burnett were on good terms. This was not challenged by the Respondent and there was no evidence to challenge it. The most that the Respondent said was that Mr Burnett was employed by Premier and that the Claimant did not report to him. We accept the Claimant's evidence and that of Mr Scobie and find that MB reported to Mr Burnett who was regarded as his boss; that decisions with regards to the site went through Mr Burnett. He and Mr Bateman were in regular contact. Therefore, although Mr Burnett was employed by Premier, he managed the Monument Park site through his line management of MB and was a significant decision-maker. Indeed, he had more contact with the day-to-day business of Monument Park than Mr Foulconbridge, a director of Waste. We accept the Claimant's evidence that Mr Foulconbridge, who is based in Derbyshire, did not attend regularly (only a few times a year). We prefer his evidence to that of Ms Jolley who rarely visited the site (see paragraph 9 of her witness statement). We find that there was a real fluidity and interchangeability of roles and involvement of the managers of companies with the group (in particular, with respect to the management of Waste and Premier). This extended to Mr Burnett, to Andrea Wain (see below) and to Mr Jackson (employed by Premier but who had for a while managed Monument Park). This was confirmed by Mr Sweet when he came to give evidence.

18. MB's first day on site at Monument Park was Monday **28 October 2019**. Over the coming weeks the Claimant came to be very concerned about MB.

20 November 2019

19. On **20 November 2019**, Andrea Wain ('AW') attended the Monument Park site. AW is – or was at the time - National Sales Manager, employed by Premier. Although she was employed by Premier, she was there to undertake an investigation into allegations of bullying and intimidation within and on behalf of Waste, at Monument Park. She spoke to several employees collectively, including MB and the Claimant. She asked whether they had any concerns about one another's behaviours and if so to 'put it on the table'. Unsurprisingly, in a group setting, they declined to speak up. However, AW could see that the Claimant was very agitated [**page 38**].

20. The Claimant telephoned AW shortly after this, on the same day, to speak privately to her. He told her talked about his concerns regarding MB. He explained that he was very conscious about disclosing anything to her about MB, especially in writing, as he had genuine concerns for his personal safety and for that of his family. This was, he said, because MB had personally described his violent nature directly to the Claimant. The Claimant said to AW that MB had been taking drugs and that he had openly spoken about doing so; that he had attended work under the influence of drugs and that while under the influence, was driving plant (a 360 machine). He said to AW that he had observed MB'S demeanour and behaviour that it was erratic. He did not give any specific dates to AW on which he said he had observed this behaviour. He also told her that MB had described to him how he had, in the past, nailed a person's feet to the floor; that he had poured petrol on this person and threatened to set light to them and that he took pleasure in seeing the person wet himself. MB said similar things to Mr Scobie, who was employed as a Yardman and Plant Operative at Monument Park, and to others.

21. We have no way of knowing whether anything MB said to the Claimant was true. We have not heard from MB. It would be improper for us to make any finding on that. It may be that the things he said to the Claimant were invented for some reason. However, that is not to the point. For the purposes of these proceedings, having heard the Claimant's and Mr Scobie's evidence on this (which we accepted), we were satisfied that MB had said these things to the Claimant; that the Claimant (and Mr Scobie) had witnessed MB's behaviour as being erratic and that the Claimant genuinely believed them to be true. We find that the Claimant told AW the things he had been told by MB; he told her what he had observed of MB's demeanour; he told her what plant MB drove at work and he told her that he believed because of all this that MB was under the influence of drugs at work.

22. AW told the Claimant that there was a whistle-blowing policy and that she would advocate on his behalf. She did not forward the policy to the Claimant, however, and he was unaware of it and had never seen it. AW said she too had concerns about MB. She asked the Claimant to email her, that matters would be kept confidential and she would ensure that his concerns were passed on to Donna Jolley and Mr Burnett; that it would go to the higher echelons of the company. The Claimant did email AW late that evening [**page 37**].

23. AW emailed Ms Jolley and Mr Burnett at 10am on **21 November 2019** providing feedback about her visit [**page 38**]. She cut and pasted the content of the Claimant's email into her email. As conceded in cross examination, Ms Jolley spoke to AW over the phone about the Claimant's complaint. In answer to a question from the Tribunal, Ms Jolley said that she '*would have'* spoken to Tony (Mr Burnett) to say that they had a group of staff with concerns and to say to him that someone should go and speak to them. We find on the balance of probabilities that Ms Jolley did speak to Mr Burnett and that she relayed to him what AW

conveyed to her following AW's conversation with the Claimant (as set out in paragraph 20 above).

24. Neither Ms Jolley nor Mr Burnett did anything with what, on any analysis, is a serious complaint regarding MB.

25. Ms Jolley told the Tribunal in oral evidence that she did not see the email as the Claimant raising any complaint or concern, simply that the email was a 'general airing of grievances'. She said that, when she received the email, she forwarded it to Mr Burnett for him to act on it. This was not in her witness statement. Ms Jolley later changed this to say that she had emailed Mr Burnett a couple of weeks later to ask **if** action had been taken on it. This was, in cross examination, after the Claimant had pointed out that Mr Burnett had already been copied in. When asked by the tribunal judge if she could produce this email, Ms Jolley said she would look for it overnight. However, she was unable to produce any such email the following day. We do not accept that she either asked Mr Burnett to action it or that she asked whether he had actioned it.

26. Ms Jolley also said in oral evidence that, when she received the email at **page 38**, she spoke to the Health & Safety Manager, Tony Jones, in Derbyshire and arranged for a drugs test to be carried. She told the Tribunal that she said to Mr Jones that there was an allegation of potential drug use at Monument Park, that she asked him to carry out a random drugs test and that he told her later that day that he had arranged for this to be done by someone independent, from an external site. She said she did not forward Mr Jones a copy of the email but simply read from it. None of this was in her witness statement either.

27. We regret to say that we did not believe Ms Jolley on any of this. We find she was not being truthful to the Tribunal. Her evidence was inconsistent and contradictory by saying that she saw nothing in it but then said she asked Mr Burnett to action it, which then changed to asking him whether he **had** actioned it. She was unable to tell us anything that came back from Mr Burnett by way of response and unable to produce any email.

28. We find that she did not arrange for anyone to investigate the issues at all. We do not accept she went to Mr Jones. Paragraph 16 of her witness statement was inherently inconsistent with what she told the Tribunal in oral evidence. In her witness statement, she says it was 'not necessary to take 'any action' and that it was decided to continue to rely on the random drug tests. We find that she and Mr Burnett deliberately 'sat' on AW's email.

29. AW advised the Claimant and others to take a note of things that happened at work which were of concern to them. The Claimant did that and his short contemporaneous notes can be seen on **pages 53-57.** They are all about MB's alleged behaviour from **20 November 2019** to **26 February 2020**. The notes relate to the things the Claimant has identified in the list of issues, as far as they concern

MB. The Respondent was unable to contradict what the Claimant has set out in those notes as they did not call MB. We heard the Claimant's evidence and that of Mr Scobie about a number of these issues. We find that they withstood the test of cross examination and they gave truthful evidence.

30. At the Monument Park site, near the entrance to the car park was a large container, with double doors, which are always locked. On **29 November 2019** MB tried to persuade the Claimant to break into this container. The container contained drug testing kits. MB told the Claimant that he (the Clamant) had authority to gain access to the locker for any reason. The Claimant said that MB had more authority than him, as MB was the site manager. MB told the Claimant that he wanted to carry out a drugs test on himself as he had been 'spiked' two weeks earlier with a 'muffin'.

31. We accept what the Claimant says about this incident and that he felt that MB was trying to coerce him.

32. From about **mid-January 2020** onwards, MB was, we find, speaking in derogatory terms about the Claimant. We accept what Mr Scobie says in paragraph 8 of his witness statement that MB had said that when the Claimant was gone, he wanted Mr Ganley to be the new supervisor. This unacceptable treatment of the Claimant had been ongoing from the latter part of November. We find that this reflected a dislike of the Claimant from an early stage. The Claimant suggested that this dislike was brought about by MB's knowledge in November 2019 of his disclosure to AW. However, we were unable to infer that MB knew of the disclosure in November 2019. It is more likely to be due to the Claimant demonstrating integrity as a supervisor. However, we find that MB's behaviour towards the Claimant escalated in February 2020, the reasons for which we shall come to. We accept what Mr Scobie says in paragraph 28 of his witness statement in his oral evidence that MB was saying the things as described by Mr Scobie and that this had started to ramp up from about **07 February 2020**.

33. Early in **January 2020**, MB pre-warned staff in advance that there was going to be a 'random' drug's test in a month's time. The following month, on **03 February 2020** staff at the Monument Park site were drug tested. The Claimant tested himself and showed MB his temperature gauge and demonstrating that he had tested negative. MB produced a urine sample but refused to show the Claimant his temperature gauge. MB quickly emptied out the contents of his sample, which MB recorded as negative. The Claimant said that MB's test must be recorded as 'inconclusive' because he had not seen the temperature gauge, to which MB replied: '*it was 33, just write the fucker down*'. MB wanted the Claimant to record a temperature which the Claimant had not witnessed, which was not in accordance with how it should properly be done. The Claimant refused and MB became agitated. However, nothing further was said as another member of staff entered the room and the Claimant never recorded MB's temperature.

34. The same day, another employee ('C'), who had admitted to taking drugs in the past few weeks, told the Claimant that MB had asked him to speak to the Claimant to suggest that the Claimant produce a sample for C so that C would pass the drug test. The Claimant refused. As it turned out, C tested negative. We accept what the Claimant says in paragraph 35 of his witness statement.

35. In early **February 2020**, Mr Scobie was instructed by MB that, when taking waste from a company called Esity, he was to write the weights down on scrap paper but not to put it through the weighbridge system and not to issue any weighbridge tickets to drivers. MB said he had been asked to do this by Mr Burnett; that it would be going on for a few weeks and that a vehicle would come and collect it. Mr Scobie initially did what he was instructed but was very worried about doing so, as he believed it was wrong and unlawful. He contacted the Respondent's compliance manager, Mr Brough. Mr Brough was extremely unhappy upon learning of this. Mr Scobie said that he did not wish MB to know about this. Mr Brough said that he would explain it by saying that he had checked the CCTV and that he saw no tickets being issued.

36. From late **January/early February 2020**, MB's attention towards the Claimant intensified. MB was telling others, including Mr Scobie, that the Claimant was incompetent.

37. On **07 February 2020**, the Claimant reported a near miss to MB, as he had caused some slight damage to a Toyota 'clamp truck'. MB told the Claimant that he would have to buy paint out of his own pocket and to paint over the damage in his own time.

38. On **08 February 2020**, at 07.30am, MB called a meeting in his office. The Claimant and Mr Scobie, among others, were present. MB said that 'Tony Burnett told me someone from Monument has been on the phone to Carl Brough about Esity. Tony Burnett has told me there's a snake in the camp and I have to get rid of the snake by any means possible.'. As MB said this, he looked directly at the Claimant. The Claimant understood MB to direct his comment at him and he felt that this was obvious to everyone else in the room. Mr Scobie believed that the comment was directed at the Claimant. He certainly felt it was obviously directed at the Claimant. We find that by this stage, the Claimant was being targeted by MB. Mr Burnett had, we find, told MB something about the Claimant which made MB direct this comment directly at him. We address this further in our conclusions.

39. On **14 February 2020**, MB told the Claimant, without offering any explanation, that he was changing his working hours from 7.30am-4pm to 08.30am-5pm. A few days later, **on 18 February 2020**, MB told Mr Scobie that the Claimant was not competent to be supervisor. On **20 February 2020**, MB accused the Claimant of damaging a trailer, operated by another employee, MT.

40. On **20 February 2020**, MB called the Claimant. He accused the Claimant of damaging a trailer (referred to as a 'Mickey Tuff trailer'). MB did so without trying to establish any facts. He told the Claimant that he must complete an accident form – as opposed to an incident form. The Claimant, however, denied that he had caused any damage. MB said that he would sort it out later. MB also told Mr Scobie that the Claimant had damaged the trailer. He subsequently asked Mr Scobie to check CCTV. Mr Scobie did so, and MB said in his presence: *'I've got the fucker now'*. However, Mr Scobie did not see the Claimant cause any damage to the trailer.

41. On **24 February 2020**, MB asked the Claimant why he hadn't ordered any waste out, the implication being that the Claimant knew he was to do this and had failed to do so. This was a reference to the fact that the general waste bay was full and that the waste should have been removed. However, the Claimant had not been asked to do this. In **January 2020**, MB had taken that role on for himself. On **25 February 2020**, Mr Ganley told the Claimant that MB had asked him to make a statement against the Claimant saying that it had been the Claimant's job to remove the waste.

42. The following day, **26 February 2020**, Mr Ganley told the Claimant that MB would not allow the Claimant to drive the 360-machine because of the damage he, the Claimant, had supposedly done to the Tuff trailer.

43. As a result of the above, the Claimant emailed Mr Burnett and Ms Jolley on **26 February 2020** [**page 40**]. In the email he said that over the past week there had been a total breakdown of communication and working relationship with MB. He asked for a meeting to air his grievance. He said that '*the situation is such that I feel I can no longer carry out my duties at monument park at the moment and am therefore asking as of Thursday 26/02/20 if I can carry out any duties at new drum until this matter can be resolved*.' Ms Jolley replied the same day [**page 41**]. She arranged for Stuart White, Senior Transport Manager, to visit Monument Park later that day to discuss his grievance. She said that his request to work from New Drum site could not be actioned as there were no duties there for him to carry out. Ms Jolley also explained this on the telephone. She said that if he could not work at Monument Park, the only other option was for him to go on sick leave. In the period between **20 November 2019** and **26 February 2020**, the Claimant had done what AW had advised him to do, which was to take notes of events at work. Those are the notes at **pages 53-57** of the bundle. He had endured a stressful working environment in that period. Although he continued to work, he was 'soldiering on' and trying his best to get on with his work. Things were, however, taking a toll on him gradually as his anxiety grew and his family life became affected.

44. The Claimant met with Mr White on **26 February 2020**. The Claimant told Mr White that he felt like a broken man. In paragraph 48 of his witness statement, the Claimant sets out what he said to Mr White and what Mr White said to him. We accept this evidence. Following this meeting, he decided that he could do nothing

but take time off on sick leave. He was feeling stressed and had anxiety. It is more than likely that he told Mr Ganley that he would be going on sick leave, who in turn mentioned this to MB. MB told Mr Ganley that he (Mr Ganley) would be doing the Claimant's job in his absence. Mr Ganley, upon subsequently speaking to the Clamant, said to him that he had been told he would be taking on his role. We find that the way Mr Ganley had communicated this, combined with the Claimant's experience of MB up to that point, led the Claimant to believe that Mr Ganley was that he was from then being replaced. However, we find that this was in fact about Mr Ganley taking on the role during the Claimant's absence. Around this time, MB also gave Mr Ganley the task of shredding some carpet, which the Respondent had hoped to recycle for onward sale. This was to involve physical labouring. As things turned out, it did not result in the Respondent taking the matter forward other than for a very short period.

45. The Claimant emailed Ms Jolley and Mr White on **26 February 2020** saying: "*I have spoken to Stuart and a meeting has been arranged for 10am Tuesday of next week. The options we discussed today, i.e. working at Monument and giving Mike a 'wide birth'* [sic] *is untenable. I have not been granted the option of working at new drum so the only other option you said was available was for me to take sick leave. Therefore, just to make you aware that as of 5pm this evening I am on sick leave until this can hopefully be resolved*." We find that the Claimant was stressed and anxious about the situation by this stage, which was engendered not just by MB's attitude towards him but also by the fact that the Respondent had not addressed the issues which he had raised with AW back in **November 2019.**

46. Still on **26 February 2020,** Ms Jolley wrote to the Claimant inviting him to attend a formal grievance hearing on Tuesday **03 March 2020** at Drum Depot. Stuart White was to chair the meeting. Mr White duly met the Claimant on that day. Ms Jolley attended by telephone and there was a note-taker present with Mr White, namely Sarah Smith. At the end of the meeting, Mr White asked if he could take a copy of the email the Claimant had sent to AW [**page 37**] and the Claimant agreed that he should. Mr White told the Clamant he would call him back to discuss matters further.

47. Mr White then interviewed others, including Mr Scobie on **05 March 2020**. At the beginning of that meeting, Mr Scobie told Mr White that he was intimidated by MB and was concerned about his safety and too scared to give a statement. We do not need to set out in detail here what was said between Mr Scobie and Mr White. However, so that it is clearly understood, having listened carefully to Mr Scobie's evidence, we accept entirely what he says in paragraph 23 and in the two paragraphs numbered 24 of his witness statement. Mr White made notes about what Mr Scobie had to say separately from those which appear on **pages 58-59** and he told Mr Scobie that he would forward them to Mis Jolley. Those notes have never been produced. Ms Jolley accepted in cross examination that Mr White had spoken to her about what Mr Scobie had said about his own concerns regarding MB. She told the Tribunal that she said to Mr White that this was serious and Mr

Scobie's concerns needed to be looked into. If that is true, it is odd that the very same day, Mr White closed the investigation (see next paragraph). When asked what Mr White said in response to Ms Jolley, she said she had a bad memory following a bang on the head.

48. On the same day (**05 March 2020**) Mr White emailed Ms Jolley [**page 69**] to say that there was no reason to uphold any of the allegations against MB'. In light of what Mr Scobie had told Mr White – and especially if Ms Jolley is to be believed about what she says she said to Mr White (see paragraph above) – this was, to put it mildly a surprising stance to take by Mr White. We say regretfully that we do not believe Ms Jolley. Her memory did not prevent her setting out matters of such precision as appear in paragraphs 22 and 27 of her witness statement. When asked about that, she said that she had notes from which she took that information. She was unable to produce those notes however, as she said she had shredded them – after commencement of these proceedings. We do not accept that she told Mr White that he should investigate what Mr Scobie said. We conclude that she did nothing in response to his concerns.

49. Later that week or early the in the week following Mr Scobie being interviewed, MB told Mr Scobie and others that '*Tony has asked the company to choose between him and me and obviously the company has chosen me so I've won*.' (see paragraph 26 of Mr Scobie's witness statement). From this, we infer that MB was privy to the outcome of the grievance against him prior to the Claimant being told.

50. Although Mr White had said he would contact the Claimant to discuss matters further, he did not. The next contact from Mr White was on **13 March 2020**, when Mr White sent his outcome letter **[page 70-72]**. In the outcome letter, Mr White set out his findings by reference to numbered points. Those numbers corresponded to the numbers in the Claimant's notes [numbers 1-30 on **pages 53-57**]. Mr White numbered the points '*save for those in which you raise concerns relating to another member of staff's conduct regarding drug use – these will be addressed outside of the grievance*'. That was a reference to MB and to C's complaint regarding drugs. Accordingly, Mr White did not address the complaints numbered: 6, 11, 12, 13, 14, 22, 23, 25. None of the Claimant's grievances was upheld. Further, we find that none of the complaints relating to MB were in fact addressed outside of the grievance.

51. On **15 March 2020** the Claimant emailed Ms Jolley to say that he wished to appeal Mr White's findings and requested the grievance proceed to formal stage 2. He set out the grounds of his appeal in a letter dated **18 March 2020** [**page 75-76**].

52. Ms Jolley initially arranged for Mr Burnett to hear the appeal. The Claimant objected to this by email dated **08 April 2020** [**page 80**]. Among other things, he said that Mr Burnett had been involved in his grievance from the beginning and that '*AW had assured me when I whistle blew in November 2019 that Tony Burnett*

and HR would be informed of my whistleblowing grievance regarding inappropriate behaviour on site as first points of call.'.

53. Ms Jolley agreed to find a different manager. In a letter dated **09 April 2020**, she said that she had arranged for Robin Akers, Director, to hear the appeal on **16 April 2020**. The Claimant had hospital appointments on **16th and 22nd April 2020** and he asked for the hearing to be rearranged A grievance appeal was subsequently rearranged for **22 April 2020** by Ms Jolley, even though the Claimant was going to be unavailable on **22 April**. He contacted Mr Akers directly, following which it was arranged for **23 April**.

54. Therefore, on **23 April 2020**, the Claimant attended the appeal meeting by telephone. Notes of the hearing are at **pages 86-90**]. Mr Akers chaired the meeting. Ms Jolley and Ms Bowron of HR attended (Ms Bowron as a note-taker). The Clamant was represented by Mr Avery of the GMB.

55. There was a significant factual dispute about this meeting which we had to determine. It concerned the Claimant's email to AW [**page 37**]. The dispute is of significance because the Claimant alleges that the Respondent – and in particular – Mr Burnett and Ms Jolley – deliberately sat on his complaint, doing nothing about it. He went further, suggesting, that the evidence suggested that the email had been 'buried'. The dispute is this: Ms Jolley said that she had sent the email to Mr Aker in advance of the grievance appeal meeting. It was, she said, in the pack of documents she had prepared for and which Mr Aker had at the meeting. The Claimant says that it was not given to Mr Aker. At that time, he was unaware that Ms Jolley and Mr Burnett had been sent his email back [**page 38**].

56. Firstly, Ms Jolley says nothing about this email in her witness statement. Secondly, what she said in oral evidence is inherently inconsistent with the notes of the meeting. There are two sets of notes: (1) the Respondent's notes [**pages 86-89]** and (2) the notes taken by the Claimant [**pages 94-103**].

Respondent notes

57. The Respondent's notes record the following exchanges (DJ = Donna Jolley; AMcM = Claimant' RA = Robin Akers; MA = union representative):

[**page 87 – on the subject of the email to AW**]

DJ: *Donna asked Tony why he did not report this.*
AMcM: *Tony said he did not know where to go. On the 20th November he reported to Andrea Wain concerns about drugs abuse.*
RA: *Robin said we would look into this*
MA: *Michael asked Tony if this was sent by email. If so, it would still be in his inbox.*
AMcM: *Tony confirmed it was sent by email. Stuart White was also given a copy. H will email a copy to Robin Akers*

[**page 88 – on the subject of the email to AW**]

***AMcM**: Tony referred to his email to Andrea Wain. He though it was being covered up. He had received no response from Andrea Wain, just a text message on the 20th November 2019. No other response had been received. His hands were tied, hence the evidence he had taken down in notes.*

[page 89 - on the subject of the email to AW]

***AMcM**: Tony said he would forward the email to Robin Akers.*

Claimant's notes

58. The Claimant's notes record the following exchange:

[**page 98**]

***AMC** said "…On 20th November 2019 I reported drug use on site and my concerns to Andrea Wain regarding drug use when he whistle blew." AMC asked if they followed that.*

***RA** then said that was the document they needed to find and talk to people as they have no record of that.*

***AMC** said that it must've been lost in transit and said he was sure Andrea Wain would confirm the email.*

***DJ** again asked AMC what date did AMC send it.*

***AMC** informed DJ he sent the email on Wednesday 20th November 2019.*

***MA** asked AMC if he had sent the email and it would be in his sent box.*

59. If Ms Jolley had prepared the pack and had sent the email at **page 37** to Mr Akers for the purposes of this meeting (as she told the Tribunal she had) we would have expected her to have referred Mr Akers to it when he asked about the email. The question regarding whether it was still in his inbox and about forwarding it would have been wholly unnecessary. We would have expected Ms Jolley to say: '*it is there in your pack*'. After all, she was the senior HR person present at the meeting. When asked by the Claimant, in cross examination, whether she could have helped Mr Akers locate the email during the meeting, Ms Jolley answered that she could not because she was there to take notes. When it was observed that Ms Bowron was the note-taker, Ms Jolley said she took her own notes and that she was there to assist Mr Aker. When asked was it not her role to help him find it, Ms Jolley responded '*with respect, I have a busy role, but it was in the bundle*'. She said that she may possibly have made a note that they had to check for that email. When

asked by the Tribunal judge whether she had retained those notes she said she might have shredded them. On Wednesday morning, **07 July 2021**, Ms Del Luongo and Ms Jolley confirmed to the Tribunal that they could not locate any notes.

60. We reject Ms Jolley's evidence as being untruthful and evasive. Her evidence was not credible. We do not accept that she gave the email to Mr Aker or that it was in the pack of documents given to him. We infer that Ms Jolley did not refer Mr Aker to the email because, it now being **April 2020**, she understood that she had done nothing about its content since **November 2020**.

61. It was the Claimant who forwarded the email to Mr Akers after the appeal meeting. Given Ms Jolley's role in assisting Mr Akers, we infer from the above that, at that point, she discussed with Mr Aker what had happened back on **20 November 2019**, when the Claimant had reported his concerns to AW. That is the most likely explanation for Mr Akers being able to set out what he did about the events of **20 November 2019**, in the outcome letter on **page 91-93** (see below).

62. Mr Akers rejected the Claimant's grievance appeal in a letter dated **01 May 2020** [**pages 91-93**]. As with Mr Burnett and Mr Bateman, we did not hear from Mr Akers despite paragraphs 2.1.21, 2.1.22 and 2.2 of the issues having been identified on **pages 35-36** back on **09 September 2020**.Mr Akers did not address any of the issues which the Claimant raised about MB. We have seen no evidence of any investigation whatsoever into the Claimant's complaints against him. Mr Akers did indicate that in future, drug and alcohol tests would be undertaken by person external to Monument Park.

63. The issue of drug-testing had been raised at a preliminary hearing before Employment Judge Morris on **23 April 2021**. Judge Morris ordered the Respondent to disclose a copy of the results of the drug and alcohol test taken by MB on **02 February 2020**.The Respondent was unable to produce that, or any other drug test undertaken by MB. Therefore, the Respondent called Mr Sean Sweet, a Contract Manager employed by Waste, based at Monument Park. As we have indicated, we found Mr Sweet to be honest and helpful in his evidence. He confirmed that he had searched everywhere he could but that he was unable to find any paperwork relating to this or indeed to any other drug test relating to or undertaken by MB on himself or any of his reports whether on **02 February 2020** or at any other time. Mr Sweet retained records of all tests which he personally undertook. It was with his assistance that we were able to make the following findings:

    63.1. A manager is (or was at the time) expected to carry out random drug tests on his direct reports;

    63.2. Those to be tested are to be chosen at random by accessing an excel spreadsheet;

63.3. Once a month, the manager should press F2 on the keyboard which throws up a random name – that person is alcohol and drug tested;

63.4. The company policy was to hold drug test records in hard copy and electronically;

64. There was a retention policy in respect of drug-testing records and we would be extremely surprised if there were not. Ms Jolley could not help us with what it said other than to say that there was one. She said she did not know what it said because it sat within health and safety policies and not HR and that she did not know what it says about record keeping.

Relevant law

Public interest disclosures

65. The purpose of the statute is to encourage responsible whistle-blowing: **Babula v Waltham Forest College** [2007] IRLR 346. Whistle-blowers do not have to be right. They may be wrong in their belief. The legislation is concerned with reasonableness. Section **43B ERA** defines a 'qualifying disclosure'. If a disclosure is a qualifying disclosure, then it becomes 'protected' if (among other things) it is made to the employer (s43(c)(1)(a)).

66. For a disclosure to be considered a protected disclosure under the ERA three things need to be satisfied:

1.1. Firstly, there needs to be a disclosure within the meaning of the Act;

1.2. Secondly, that disclosure must be a 'qualifying disclosure';

1.3. Thirdly, it must be made in a manner which accords with the scheme of the Act set out in s43C to s43H.

67. The Act provides a broad definition of disclosure. The worker must disclose information: **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, EAT. In **Kilraine v Wandsworth Borough Council** UKEAT/0260/15/JOJ Langstaff J observed that tribunals should observe the principle in **Cavendish Munro** with caution to the extent that it must not be 'seduced' into thinking that it must decide whether something is either 'information' or an 'allegation'. Information may be provided in the course of making an allegation. However, the requirement is still for information to be disclosed. Some facts or information must be conveyed.

68. If there is a disclosure, it is necessary to consider whether that disclosure is a qualifying disclosure. This will depend on the **nature of the information disclosed**.

69. As can be seen from the exercise undertaken by Langstaff J (in paragraphs 31-35 of the **Kilraine** case) it is a question of carefully assessing what was said or written so as to determine whether information was provided (which meets the qualifying criteria in the Statute) whether or not an allegation was made as well, or whether what was said does not amount to information, for example because of the vagueness or lack of specificity or clarity.

70. Section 43B (1) requires that, for any disclosure to qualify for protection, the disclosure must, in the 'reasonable belief' of the worker:

    a. be made in the public interest, and

    b. tend to show that one of the six relevant failures has occurred, is occurring, or is likely to occur.

71. This 'reasonable belief' requirement was inserted into the definition in order to achieve a fair balance between the interests of a worker who suspects malpractice and those of the employer, who could be damaged by unfounded allegations or the irresponsible disclosure of confidential information.

72. Each of the six categories involves some form of malpractice or wrongdoing and are referred as the 'relevant failures'

73. The worker is not required to establish that the information is true. He must establish that at the time he made the disclosure, he/she held a **reasonable** belief that the **information disclosed tended to show**. It is not a question of whether a hypothetical reasonable worker held a reasonable belief, but whether **the particular worker's belief was reasonable**.

74. The worker must also reasonably believe that he is making the disclosure in the public interest. That aspect is to be determined in accordance with the guidance of the Court of Appeal in **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed** [2018] I.C.R 731. In this case, the Court of Appeal identified four factors which may serve as a useful tool to tribunals in assessing this: the number in the group whose interest the disclosure served, the nature of the alleged wrongdoing, the nature of the interests affected and the extent they are affected, and the identity of the alleged wrongdoer.

75. The ERA provides two forms of protection to 'whistle-blowers': (1) protection from detriment under s47B and (2) protection from dismissal under s103A.

Detriment cases

76. By **s47B ERA** a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. The law protects the worker only against

the act of disclosure. If the worker was not subjected to a detriment because he made the disclosure, there is no contravention of section **47B**.

77. The concept of 'detriment' is very broad and must be judged from the viewpoint of the worker, albeit the test is not wholly subjective. A detriment is established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. An unjustified sense of grievance cannot amount to 'detriment': **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R.R. 337 HL, @ para 35; **Jesudason v Alder Hay Children's NHS Foundation Trust** [2020] IRLR 374, CA @ paras 27 and 27.

Causation and burden of proof

78. Causation **under s47B** has two elements:

    c. Was the worker *subjected* to the *detriment* by the employer?

    d. Was the worker subjected to that detriment *because* he or she had made a protected disclosure?

79. Section **48(2)** provides that:

> *'On a complaint under subsection...(1A) [a complaint of detriment in contravention of section 47B] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.'*

80. The Claimant must establish on the balance of probabilities that he made a protected disclosure and that he was subjected to a detriment by the Respondent. If he also establishes that there is an arguable ('prima facie') case of favourable treatment/detriment that requires to be explained, then the burden shifts to the respondent to show on the balance of probabilities that the ground on which the act or deliberate failure to act was done was not on the grounds that the claimant had made the disclosure. This requires it to show that the disclosure did not materially influence (in the sense of being more than a trivial influence) its treatment of the claimant: **Fecitt v NHS Manchester** [2012] I.C.R. 372.

81. Section 48(2) does not operate in the same way as section 136 Equality Act 2010. The Tribunal is not obliged or required to find against a respondent if it does not satisfy the burden under section 48(2). The approach which the Tribunal must take is as explained by the Court of Appeal in **Serco Ltd v Dahou** [2017] IRLR 81 (case involving detriment on trade union grounds) and **Kuzel v Roche Products Ltd** [2008] IRLR 530 (a case involving dismissal on 'whistleblowing' grounds). Therefore, if a respondent fails to show an innocent ground or purpose for its treatment of the claimant, the Tribunal **may** draw an adverse inference and conclude that it the treatment was done on the ground that the claimant had made the protected disclosure. If a Tribunal rejects an employer's explanation in a case under section 48, this rejection may give credence to the reason or ground

advanced by the claimant and the tribunal may find that to be the reason but it is not obliged to do so. This will depend on findings of fact and what inferences may properly be drawn from those facts. It remains open to the Tribunal to conclude that the reason or ground for treatment was not that advanced by either party.

Submissions on behalf of the Respondent

82. Ms Del Luongo made two submissions in relation to the issue of 'protected disclosure':

    82.1. She submitted that the Claimant did not make a qualifying disclosure in that the email of **20 November 2020** [**page 37**] was simply an allegation and did not convey any information ('the qualifying issue');

    82.2. She submitted that, even if the Claimant made a qualifying disclosure within the meaning of section 43B that disclosure was not 'protected' because it was not made to his employer ('the protected issue');

83. As to the 'qualifying issue' Ms Del Luongo observed that the Claimant relied on section 43B(1)(a) and (d). She submitted that there was nothing to show that the Claimant had disclosed information which in his reasonable belief tended to show:

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

    (b) That the health or safety of any individual has been, is being or is likely to be endangered.

84. She referred to the well-known case of **Cavendish Munroe** (see above). The email was a mere allegation that MB had acted in an erratic manner as though under the influence of illicit substances. There was no real information which the Respondent could have investigated. There were no dates or times provided. Ms Del Luongo accepted that, if the Tribunal accepted the Claimant's evidence of what he said to AW on the telephone, we must consider what he said alongside the email. However, she invited us to reject the Claimant's evidence on that as it was not set out in his witness statement.

85. Ms Del Lungo submitted that the Claimant could not reasonably have believed he was raising this in the public interest as there was no evidence of drug taking. When asked by the Tribunal Judge what about the evidence of the Claimant and of Mr Scobie, Ms Del Luongo invited us not to accept their evidence but to prefer that of Mr Ganley, whom she submitted was a truthful witness. Mr Scobie was, she submitted, lying to the Tribunal. She submitted that the Claimant's list of allegations as set out on pages **53 to 57** had been provided to Mr Scobie and his evidence was tailored around that.

86. As regards the 'protected issue', Ms Del Luongo submitted that:

86.1. The Claimant's contract of employment was with Waste;
86.2. The Claimant made his disclosure (if it qualified) to AW;
86.3. AW was employed by Premier;
86.4. Therefore, the Claimant did not make a disclosure to his employer within section 43C Employment Rights Act 1996;

87. Ms Del Luongo then submitted if, contrary to her submissions, the Tribunal were to find that the Claimant made a protected disclosure, nevertheless he was not subjected to any detriment. She submitted that there was little substantial evidence that he was subjected to any real detriment as a result. She referred to **Shamoon** and to the well known statement that an unjustified sense of grievance is insufficient to constitute a 'detriment'.

88. Ms Del Luongo submitted that the Claimant believes that at the meeting on 08 February 2020, MB knew that he (the Claimant) had 'whistle-blown' back in November 2019 and he suggests that the treatment of him escalated after that point. Therefore, she submitted – even if there were detrimental treatment, which she does not accept – it was for a short period of time because he raised a grievance on **26 February 2020** and went on sick-leave from which he did not return.

89. As to the complaint that the Respondent failed to investigate the grievance, she submitted that it was investigated by Mr White. She further submitted that there was no deliberate delay in dealing with the grievance.

90. Ms Del Luongo accepted in principle that the Tribunal was entitled to draw adverse inferences from the absent of witnesses such as Mr Burnett, Mr White and Akers. However, she submitted that we should not do so.

91. Ms Del Luongo then addressed the Tribunal on the issue of remedy. She referred to the schedule of loss at **pages 20a-20b** and to the counter schedule at **page 20c**.

92. On the subject of loss of earnings, she submitted that if the Tribunal accepted that the Clamant made a protected disclosure and that he was subjected to the detriments complained of resulting in him taking sick leave, she did not disagree with the amount identified as a loss, namely **£5,342.25**. However, she submitted that it was unreasonable of the Claimant to wait until **26 February 2020** before bringing his grievance and then to seek to claim loss of earnings in respect of the period after that. There should, she submitted be a reduction by virtue of the Claimant's delay in bringing his complaints to the Respondent's attention.

93. As regards injury to feelings, Ms Del Luongo submitted that whilst the Claimant puts his claim at the top end of the middle band of Vento, she submitted it is more appropriately assessed in the mid-point of the lower band.

Submissions on behalf of the Claimant

94. The Claimant submitted that on **20 November 2019** he had a discussion with AW and sent her an email and that the information conveyed in both the conversation and the email amount to a qualifying disclosure. He believed that criminal offences (illicit drug taking) had been and were likely to be committed. He also believed that the safety of individuals was likely to be endangered given the use of heavy machinery, such as a 360 machine. He submitted that he believes these things are in the public interest and that his belief is reasonable.

95. The Claimant submitted that his disclosure was concealed and not addressed. No whistle-blowing policy had been communicated and was not readily available. There was a lack of training and the culture was not transparent. He submitted that MB found out he was a complainant and that there was a breach of confidentiality and he suffered detriments because of reporting wrongdoing.

96. As to whether he made a disclosure to his employer, he submitted that he did. The Claimant referred to the fact that Mr Burnett (employed by Premier) was the manager with responsibility for Monument Park. He had weekly meetings with MB, who reported directly to Mr Burnett. Mr Armstrong, who had also been employed by Premier also managed Monument Park. He also referred to Phil Darwin, being the former General Manager for both Waste and Premier. In practice, managers from Premier were responsible for management at Waste and there was no distinction between them.

97. The Claimant made some further observations in relation to the detriments he said he was subjected to which were because he had made his disclosure back on **20 November 2019**.

Discussion and conclusion

Protected Disclosure

98. We start with the question of 'qualifying disclosure'. We conclude that the Claimant made a qualifying disclosure to AW on **20 November 2019** when he spoke to her on the telephone and emailed her shortly afterwards.

99. Had this issue turned only on the email itself we may well not have concluded that the Claimant had made a qualifying disclosure. However, we considered the email alongside discussion with AW.

100. First, we asked whether the Claimant conveyed any facts to AW. We concluded that he conveyed the following facts:

100.1. That MB had told him (the Claimant) that he took drugs (he conveyed the fact that MB said this to him);

100.2. That MB was driving a 360 machine (he conveyed the fact that he had seen MB drive the machine);

100.3. That he had observed MB behaving erratically (he conveyed his own observations);

100.4. He believed that because of his talking openly about taking drugs and his erratic behaviour that he was driving machinery and attending work while under the influence of drugs (he conveyed his belief);

100.5. He conveyed that he was seriously concerned about his safety and that of others (both on the telephone and in the email on **page 37**);

100.6. That MB had said the things to him as set out in the third paragraph of the email at **page 37** (he conveyed what was said to him);

101. Having regard to the legal principles as explained in both **Cavendish Munro** and **Kilraine** we are satisfied that the Claimant conveyed information in the course of making an allegation.

102. In essence, the Claimant was describing to AW his own observations as to MB's behaviour and what MB himself had said. In doing so, he alleged that MB was taking drugs at work or was under the influence of drugs and that he drove a 360 machine while under the influence and that he bragged about this and about his violent past**.**

103. We are satisfied that the Claimant genuinely believed that the information he gave to AW tended to show:

103.1. That a criminal offence had been committed and was likely to be committed again;

103.2. That the health and safety of an individual (namely him and anyone in the vicinity of the workplace at a time when MB was under the influence of drugs and operating heavy machinery) was likely to be endangered and that the Claimant's safety was also likely to be endangered by violent threats towards him;

104. We then considered whether this was a reasonably held belief. We conclude that it was reasonably held because:

104.1. The Claimant was acting on his own observations;

104.2. The Claimant had been told directly by MB about his drug-taking;

104.3. MB had described graphic depictions of violence that he had inflicted and threatened to inflict violence on others (as per **page 37**)

105. We had the evidence, not just of the Claimant but of Mr Scobie who confirmed that MB openly talked about his past drug taking and violence. We emphasise here, that we can never be sure that MB did the things which he described as having done, However, the issue is not whether MB did any of these things but whether the Claimant genuinely and reasonably believed that 'the information' which he conveyed tended to show the matters in section 43B(1)(a) and (d). We were entirely satisfied that his belief was genuine and reasonably held.

106. We next considered whether in disclosing the information to AW the Claimant genuinely and reasonably believed that he was disclosing that information in the public interest. Ms Del Luongo's submission on 'public interest' was made on the basis that there was no evidence of drug taking. If there was no evidence of drug-taking, then the Claimant could not reasonably believe that he was acting in the public interest. This, we felt, was better expressed as being relevant to the reasonableness of the belief of the matters in section 43B(1) (a) and (d); and as we have concluded above, we found that the belief that the information tended to show those matters was reasonably held because of what MB himself had said to the Claimant – and to Mr Scobie. Nonetheless, we considered the submission also in relation to the 'public interest' element. We reject the submission. We would also add that we entirely reject Ms Del Luongo's submission that Mr Scobie was lying. We have made our findings on his credibility and reliability. In her cross examination of Mr Scobie, Ms Del Luongo put to him that he had based his statement around the Claimant's document at **pages 53-57** and in submissions suggested that he was lying. In our judgement, he was a truthful witness. He had not seen **pages 53-57** before.

107. We have considered the 'public interest' element in accordance with the guidance given to us by the Court of Appeal in the **Chesterton Global** case: the number in the group whose interest the disclosure served, the nature of the alleged wrongdoing, the nature of the interests affected and the extent they are affected, and the identity of the alleged wrongdoer. In our judgment, the disclosure served the interests of all employees at Monument Park and anyone who visited the site. As to the nature of the alleged wrong-doing it was of a 'public' nature, being a complaint about, among other things, criminal activity in the form of illegal drug-taking. As to the nature and extent of the interests affected, the complaint related to the interests of the Claimant and all employees and their interests in working in a safe and responsible working environment. If this isn't the stuff of responsible whistleblowing, we struggle to think of what is.

Was the qualifying disclosure protected?

108. Having concluded that the Claimant made a qualifying disclosure we then considered Ms Del Luongo's submission that it was not 'protected' within the legislation because it was not made to the Claimant's employer.

109. We reject this submission on the facts. We also considered it as an opportunist submission, unworthy of any reasonable employer intent on taking whistleblowing seriously. If the extremely narrow interpretation which Ms Del Luongo urged upon us were correct, it could have the potential that unscrupulous employers might seek to arrange their corporate structure with a view to evading liability under the whistle-blowing provisions. A corporate group could arrange for managers to be employed by company 'A' but for those managers to manage staff employed by company 'B'.

110. We emphasise that we reject Ms Del Luongo's submission not on the grounds that it is opportunist but on the facts. It is opportunist because of the factual situation. The essence of the submission was that the Claimant made his disclosure to AW and, because she was employed by Premier and not Waste, he cannot be regarded as having made the disclosure to his employer.

111. As can be seen from our findings of fact, we accepted the Claimant's evidence that Mr Burnett (Premier) and MB (Waste) were in regular and weekly contact. Thus, the person to whom MB reported, although employed by a different group company, had managerial responsibilities for Waste. Mr Foulconbridge, although a director of Waste, had relatively minimal contact or management responsibility for Waste.

112. We also have the evidence of Mr Sweet, who told us that for a period of 6 months, Andrew Jackson managed Monument Park, yet Mr Jackson was an employee of Premier. Ms Jolley was unable to help us with this as she said it was before her time. Mr Darwin, in his time, had managerial responsibility for both Waste and Premier. We also note that Mr White carried out the investigation and grievance meeting, yet he was an employee of Premier. Ms Jolley had HR responsibility for Waste and Premier. Finally, Andrea Wain herself was undertaking an investigation on behalf of Waste and making recommendations to management. There was also the Whistle-blowing policy which the Respondent said was to be used by employees of Waste. The front page is headed 'The Martin Group of Companies' [**page 24**]. It lists 15 companies, including Waste and Premier. It is referred to as a 'group whistleblowing policy'. On the second page [**page 25]** the Martin Group of Companies is referred to as '**the Company'**. On the third page of the policy [**page 26**] is a description of the procedure for raising concerns. Under the third paragraph the 'discloser' is urged to disclose to '**any Director'**, who is described as the 'designated officer'. We read the policy as meaning that any employee of any of the 15 companies should report to any director of any of those 15 companies. According to the policy the designated officer then makes recommendations to the Group Finance Director, who makes a decision. Thus, the policy envisages that directors employed by one company will receive disclosures and make decisions by employees of a different company.

113. With those things in mind, the Respondent would have us accept that there was no managerial interchangeability between the two companies (see paragraph 34 of Ms Jolley's witness statement). However, there is ample evidence of

interchangeability – Mr Jackson, Ms Wain, Mr White, Mr Burnett, Mr Darwin and Ms Jolley herself.

114. We conclude that, when the Claimant spoke to AW and then emailed her on **20 November 2019**, he made a disclosure to his employer within the meaning of section 43C ERA 1996. She was carrying out managerial functions on behalf of the Claimant's employer. She advised those to whom she spoke that her discussion would be placed on their personal files. She had express or ostensible authority over the Claimant.

115. The Claimant may not have made his disclosure to a 'Director', but he had never been provided with a copy of the whistle-blowing policy and was unaware that he had to do this. Ms Wain never suggested to the Claimant that he should send his disclosure to Mr Foulconbridge, or to any director of Waste. She said she would forward his concerns. She did just that. She sent it to Mr Burnett (a director ''designate') and to Ms Jolley and we have found that Ms Jolley spoke to AW and to Mr Burnett about what the Claimant had said and written. Either of Ms Jolley or Mr Burnett could have sent it to a director but they did not. They sat on it. To expect an employee to understand the distinctions between managers, directors and directors designate of different companies in circumstances where there is significant managerial input from directors of other companies within a group structure is wholly unreasonable. In all the circumstances, we considered Ms Del Luongo's submission to be unrealistic and opportunist.

Was the Claimant subjected to any detriment on the ground that he made that disclosure, in contravention of section 47B ERA 1006?

Detriments

116. The alleged detriments were identified in the list of issues paragraphs 2.1.1 to 2.1.22 on **pages 33-36** of the bundle.

Detriment 2.1.1.

117. The first alleged detriment is that the Respondent did not act appropriately on receipt of the Claimant's disclosure.

118. We would expect any manager, upon discovering what the Claimant disclosed on 20 November 2019, to be concerned and to take reasonably prompt action in response to the complaint. We agree with the Claimant that the Respondent did not act appropriately upon receipt of his complaint and that, as he submitted, managers 'sat on it'. Ms Jolley and Mr Burnett did not nothing about it. We infer that this failure was deliberate on their part. We refer to our findings that Ms Jolley knew about the complaint from the day it was sent; that she was untruthful about including it in Mr Akers' pack and that her evidence generally as to what she did in response to the complaint was unreliable. We also draw the inference in the case of Mr Burnett from our findings that he too had been made aware of the complaint in November 2019; that he had disclosed to MB that the Claimant had

complained; that he was on good terms with MB and from his absence as a witness in these proceedings.

119. Applying the legal principles referred to above in the case of **Shamoon** we are satisfied that the Claimant did, and any reasonable worker would, consider the Respondent deliberately doing nothing in respect of a complaint of such seriousness to constitute a detriment, not least because of the anxiety and stress that waiting for action to be taken would, and we find did, engender In the claimant.

120. The more difficult question is why – or, on what ground did Ms Jolley and Mr Burnett deliberately fail to act on the complaint? The Claimant has adduced enough evidence to require an explanation from the Respondent. The burden is the Respondent to show the ground on which any act, or deliberate failure to act, was done under section 48(2 ERA. As indicated, we have rejected the explanation given by Jolley (which was essentially that she had gone to Mr Jones and had asked Mr Burnett whether he had 'actioned' the complaint). Therefore, the Respondent has not established the ground on which it deliberately failed to act.

121. Although we have rejected the Respondent's evidence and concluded that it has not shown the ground on which it deliberately failed to act, this does not in itself, compel us to conclude that the ground on which the Respondent deliberately failed to act was that the Claimant had made a protected disclosure (by complaining about drug taking on site), Even though the Respondent has not proved the ground on which it failed to act, it is still open to us to conclude that it was down to something else, for example, incompetence. However, we infer that Ms Jolley and Mr Burnett were materially influenced by the disclosure. We draw this inference from our findings above and our rejection of Ms Jolley's evidence as untruthful and we would add by the absence of Mr Burnett in these proceedings. The first detriment identified in the issues was the failure to act on the complaint. Considering Ms Jolley's evidence that she had asked Mr Burnett if he had actioned that complaint, albeit we rejected her evidence, we would have expected to have heard from him. We would add that it was not just the failure to call Mr Burnett. The Respondent did not call Mr Jones (who we were told arranged for drug-testing) or Mr White (who investigated the Claimant's grievance) or Mr Akers.

122. We were conscious about drawing adverse inferences in respect of the motivations of Mr Burnett (and others) given he was not present at the proceedings. However, his absence and that of others has caused us concern. Ms Del Luongo proffered an explanation for his absence as being that he was an employee of a different company. We do not accept that as satisfactorily explaining his absence such as to render it inappropriate to draw an adverse inference in respect of it and we considered it appropriate to do so in the circumstances. We conclude that Mr Burnett and Ms Jolley were indeed motivated by the Claimant's disclosure and that they did not want to end up in a position where they had unearthed illicit drug-taking at the Monument Park site. Therefore, no action was taken.

Detriments 2.1.2; 2.1.3; 2.1.4; 2.1.5

123. We have found that the matters complained of and set out in those paragraphs on [**pages 33-34**] have been made out by the Claimant (see paragraphs 30-34 above). We do not conclude that MB did these things because the Claimant made his disclosure to AW on **20 November 2019**, because MB did not, on our findings, know about that until about **07 February**, shortly before the meeting **08 February 2020**. The treatment of the Claimant by MB subsequently became motivated by the disclosure from **08 February 2020**. We refer to this in our further conclusions below.

124. However, the treatment of the Claimant as set out in the paragraphs **2.1.2; 2.1.3; 2.1.4; 2.1.5** on **pages 33-34**, was in our judgement detrimental to the Claimant. Had the Respondent acted appropriately in response to his complaint, he probably would not have been subjected to this treatment. Certainly, the failure to do anything contributed to the environment in which the Claimant had to work. We regard this as part of the detriment to which he was subjected by the Respondent's deliberate failure to act on his disclosure.

Detriments 2.1.7, 2.1.8, 2.1.11 and 2.1.12

125. We found the Claimant had established the matters complained of in these paragraphs. Again, applying the legal principles set out above, these constituted a detriment to the Claimant. As with the matters in paragraphs **2.1.2; 2.1.3; 2.1.4,** this was part of the detriment to which he was subjected by the Respondent's deliberate failure to act on his disclosure. However, by now, MB was, in his own right, we infer, motivated by the knowledge that the Claimant had made a protected disclosure back in **November 2019**. We infer that the Claimant was subjected to these detriments because he made the protected disclosure on **20 November 2019** (see further, paragraph 134 below). Mr Burnett told MB on or shortly before **08 February 2020** that he had complained about the Esity waste removal issue and, we infer, that the Claimant had complained about him taking drugs in **November 2019**.

Detriments 2.1.13-2.1.14 and 2.1.15

126. We refer to our findings in paragraphs 40 and 41 above. We conclude that the accusation of damage (made by MB on **20 February**, not **19 February**) and the subsequent implied accusation that the Claimant was failing in his duties in relation to booking out waste, constitutes a detriment to him; any reasonable worker would so regard it in the context of our other findings that MB was targeting the Claimant. These are further manifestations of MB's hostility now materially influenced by his knowledge of the fact that he had complained about him back in November. That complaint was probably not MB's sole motivation, but it need not be in order to establish liability for contravention of section 47B ERA. MB was also, on the balance of probabilities motivated by his belief that the Claimant had complained about Esity as well as a personal dislike of the Claimant.

Detriments 2.1.16 and 2.18

127. The Respondent investigated parts of the Claimant's grievance. However, we have seen little in the way of evidence that they investigated the matters relating to MB and drug-taking on site at all. We conclude from our findings that they did not. We refer to our findings in paragraphs 46-50 above.

128. We don't see much evidence that the Respondent took the allegation of drug taking seriously at all. On **page 69** on **05 March 2020** Mr White said that MB had passed a drugs test, but we have not seen any evidence of this. Mr White did not ask MB to produce the records of drug taking. There was no request to see the results of drug tests. Mr White's response is superficial and does not seem to do justice to the grievance and the content of it a. The question is whether it was right to draw an inference that, in not investigating the substance of the disclosure (the drug-taking) Mr White was influenced or motivated by the disclosure back in November. Given that this issue was identified by Judge Langridge on **page 35** we infer from our findings and from the absence of Mr White as a witness in these proceedings that there was a deliberate failure to investigate those parts of the grievance that related to MB and complaints of drug-taking. We asked but were given no explanation for Mr White's non-attendance as a witness to address this issue. It was, we concluded appropriate to draw the inference that Mr White too was motivated not to investigate those parts of the grievance by the fact (the content) of the Claimant's disclosure and that, like the other managers, was concerned by what might be revealed by such an investigation. This failure was a detriment to the Claimant and any reasonable worker would regard it as such.

Detriment 2.2.20, 2.2.21

129. From our findings in paragraphs 55-60 above. We conclude that by withholding the email of **November 2019**, this constituted a detriment to the Claimant. This, as with the other detriments described above, is something which in our judgement is likely to and in fact did cause the Claimant distress and anxiety. It was yet another aspect of the Respondent's deliberate failure to act appropriately in a serious situation. We infer that Ms Jolley withheld the email because she understood she had not done anything in relation to the complaint. We found Ms Jolley's evidence on this to be untruthful and lacking in credibility. We infer that, in withholding it, she was influenced by both the disclosure and the fact that she had sat on it. It was not in her or the company's interests that drug use at work might be revealed.

130. From our findings in paragraphs 54-64 (and looked at in the context of our other findings) we conclude that the grievance was not upheld because the Claimant had made the disclosure back in **November 2019**. As we have set out above, these issues were all set out clearly in the case management summary back in September 2020, yet we did not hear from Mr Akers. The burden is on the Respondent to show the ground on which it acted or deliberately failed to act. It has not shown to our satisfaction what the ground was for not investigating and not

upholding the Claimant's grievance. We found that the Claimant personally sent the email to Mr Akers (after its importance had been emphasised at page 98). Although Mr Akers, in his letter at **page 92**, refers to MB testing negative, we have seen no evidence of this. On the contrary, Mr Sweet positively searched for records relating to MB and found none. It was never explained how Mr Akers was able to reach this conclusion or on what information he was basing his conclusion. The Respondent has not satisfied us of the ground on which the Claimant's grievance was not upheld. We remind ourselves that we are not thereby compelled to conclude that the ground for not upholding the grievance complaint was significantly influenced by the disclosure. However, we do infer from our findings and from the absence of yet another key witness that the ground on which the Respondent failed to uphold the grievance was the protected disclosure.

Detriments 2.1.8, 2.1.9, 2.1.10, 2.1.17, 2.1.19, 2.1.22

131. In respect of these issues, we have concluded that they do not advance the complaints any further or in some cases the Claimant has not established that they were detriments. We comment only as follows:

132. Issue 2.1.8: we conclude that the discussion that MB had with Mr Ganley at this time was about him acting as supervisor when the Claimant was absent on sick leave (see paragraph 44 above). We are unable to draw the inference from our findings that this was specific direction by MB was motivated by the fact that the Claimant had made the disclosure. It was wholly about the Claimant's absence on sick leave.

133. 2.1.9: From our finding in paragraph 44 above we conclude that this was simply a task given to Mr Ganley and that when the Claimant was told he would have 'nowt to do with it' (as the Claimant said in paragraph 34 of his statement), this was merely the language used to express the fact that Mr Ganley would be doing the physical work. It was not, in our judgement, a case of taking this from the Claimant. Had he not gone on sick leave, we would expect him as site supervisor to have had some supervisory responsibility for it, albeit not doing the physical work. We do not conclude that the Claimant was subjected to any detriment in this respect.

134. Issue 2.1.10 we conclude that this did not have any connection to the Claimant's whistleblowing whatsoever. However, we infer from our findings in paragraph 38 above, that it is what this issue (the 'Esity issue') which prompted Mr Burnett to disclose to MB that the Claimant had complained about him to AW back in November 2019. Mr Burnett knew about the disclosures – he had received the email from AW, and he had spoken to Ms Jolley. He was in regular and direct contact with MB and in a position to have given MB information regarding the Claimant. Clearly, MB had been told something by Mr Burnett. We infer that he was told about the 'Esity' issue and the disclosure – the trigger for telling him about the disclosure was the Esity issue. While it is possible that Mr Burnett had told MB about the disclosure back in **November 2019** (as the Claimant submitted), we are

unable to go that far and draw the inference that MB was aware as long ago as November.

135. Issue 2.1.17; we did not accept that the Claimant had made this complaint out. There was insufficient evidence that Ms Jolley tried to delay matters in the knowledge of time limits;

136. Issue 2.1.19: although Ms Jolley deliberately chose Mr Burnett to hear the grievance appeal, she agreed to change to Mr Aker. In our judgement this does not advance the detriment to the Claimant any further.

137. Issue 2.1.22: this was simply a statement and not something which was necessary for us to consider.

Summary of conclusions

138. The Claimant made a protected disclosure on **20 November 2019**. His complaint of detriment on the ground that he had made that disclosure, under section 48 ERA 1996 is upheld. The detailed detriments discussed above can be broadly summarised as follows:

138.1. The deliberate failure by Ms Jolley and Mr Burnett to respond to and investigate the complaint on the ground that the Claimant had made a protected disclosure on **20 November 2019** was, in itself, a detriment to the Claimant but it also contributed to an environment in which MB's detrimental behaviour (such as set out in paragraphs 30-37 above) went unchecked;

138.2. The targeting of the Claimant by MB from **08 February 2020** was a detriment to the Claimant done on the ground that he had made a protected disclosure on **20 November 2019**;

138.3. The deliberate failures by Mr White and Mr Aker to investigate and uphold the complaint and the withholding of the email of **20 November 2019** by Ms Jolley, were detriments to the Claimant done on the ground that the Claimant had made the protected disclosure.

Remedy

139. We turn now to the issue of remedy, upon which the parties addressed us at the end of the hearing.

Financial loss

140. If we were to find in the Claimant's favour, it was agreed that the loss incurred to him by taking sick leave on 26 February 2020 was **£5,342.25**. We do not accept Ms Del Luongo's submission (in paragraph 92 above) that we should not award the full amount of this loss because the Claimant had delayed in bringing matters

to the attention of the Respondent by way of a formal grievance. That was, in our judgement, a little rich coming from the Respondent considering how it had failed to do anything in response to the Claimant's email of 20 November 2020.

141. Section 49 ERA 1996 provides that where the Tribunal upholds a complaint under section 48(1A), it shall make a declaration to that effect and may make an award of compensation in respect of the act or failure to act to which the complaint relates. If a tribunal makes an award of compensation, the amount shall be such as the tribunal considers just and equitable in all the circumstances having regard to

141.1. The infringement to which the complaint relates, and

141.2. Any loss which is attributable to the act, or failure to act, which infringed the complainant's right;

142. If the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

143. We have not found that the Claimant contributed in any way to the acts or failures to act to which his complaint related. He was not at any fault at all. He submitted his grievance on 26 February 2020 at the point where he could not bear the working environment at Monument Park any longer. He had drawn to management's attention his concerns back in November 2019 and was told that they would be acted upon, but nothing was done. Even when he presented his grievance he suggested, responsibly, that he could work from another site – which was very quickly refused. As a result of the stress and anxiety he was facing, with nowhere else to go, he had little in the way of options. His doctor signed him as unfit for work. The loss he suffered as a result is all directly related and is a consequence of the acts and failures to act set out above. It would not, in our judgement be just and equitable to reduce the amount of **£5,342.25** by any proportion and we decline to do so.

Injury to feelings

Findings of fact

144. The Claimant gave evidence of the effect of the detriments on him and his family life in paragraphs 73 – 77 of his witness statement. He was not challenged on what he said in those paragraphs and, in any event, we accepted that his evidence and that his account of the effects was given honestly, without embellishment.

145. The Claimant felt angry that the Respondent had done nothing in response to his complaint. He also felt weak and helpless. This gradually began to affect him

through feelings of stress and anxiety, which continued and escalated up to the date of his resignation on 31 July 2020 and beyond. He experienced sleepless nights and started to drink heavily. His feelings of not being listened to increased upon receiving the outcome of the grievance from Mr White and subsequently the appeal by Mr Akers.

146. Matters spilled over into his family life and adversely affected his marriage. This brought on feelings of shame. His social life was adversely affected and in the Claimant's words, he became a shell of himself. At a time when his anxiety was particularly bad, he became physically ill. At one point he passed blood and was referred to a consultant urologist for tests in April 2020. We were never told of the outcome of those tests, which included a CT scan. We have no way of knowing if this was related to the anxiety and stress he had experienced, and we make no finding that it was. However, the Claimant saw it as being related, adding to his anxiety. The Claimant said, and we accept, that he was still feeling the effects of the anxiety and stress in February 2021.

147. The Claimant produced very little in the way of medical evidence. The fit notes at **pages 115-118** all gave as the reason for his sickness absence as 'stress at work'. There is a letter from his GP dated 20 April 2021 (**page 25** of the supplementary bundle). It does not say a great deal and tells us no more than that which the Claimant has told us.

Legal principles on awards in respect of injury to feelings

148. Such awards are intended to compensate a claimant for the anger, distress and upset caused by unlawful treatment. They are compensatory and not punitive. Tribunals have a broad discretion as to what award to make, guided by well known cases such as **Vento v Chief Constable of West Yorkshire Police (No2)** [2003] IRLR 102 and **Prison Service v Johnson** [1997] IRLR 162.

149. Awards should not be too low, as this would diminish respect for the policy of the anti-discrimination (or public interest disclosure) legislation. On the other hand, awards must not be excessive. They ought to bear some broad general similarity to the range of awards in personal injury cases and recognised that there is a need for public respect for the level of awards made. The Tribunal should consider the value in every-day life of the sum they have in mind.

150. The Court of Appeal in '**Vento'** identified three broad bands of compensation for injury to feelings and gave guidance (which has been subject to revision since then).

Discussion and conclusion

151. We are satisfied that the effects of the detriments to which the Claimant was subjected were quite significant. We were acutely conscious that the Claimant had

provided little in the way of medical evidence. However, that does not detract from our findings as to the significance of the detriment. It is not unusual, especially for unrepresented litigants, to proceed with minimal evidence on issues such as this. We remind ourselves that our function is to compensate the Claimant and not to punish the Respondent.

152. However, the period over which the Claimant suffered anxiety and stress was significant. The 'corporate' failure to act following his complaint on 20 November 2019 contributed to the poor working environment that continued and which resulted in stress and anxiety to the Claimant. Matters then escalated, when in addition to his failure to act, MB's targeting of the Claimant from about 08 February 2020 was motivated by the disclosure. In our assessment, the appropriate compensatory award for the effects on him throughout this period and beyond falls within the middle band of Vento. As the claim was presented in June 2020 the relevant band is £9,000 - £27,000.

153. The Claimant's ability to cope with work and with family life was adversely affected in the way we have found. His relationship with his wife and family was damaged. Although he did not seek medical help, the effects were nonetheless real and adverse. Although he has brought no complaint of unfair dismissal, he was so affected by his treatment that he resigned his employment. There is no evidence of future vulnerability to stress and it seems that from February 2021, the Claimant had been getting back to his normal self.

154. In our judgement the appropriate award is at the higher end of the middle band. We award the Claimant the sum of **£20,000** compensation for injury to feelings. That is what we consider to be a fair, reasonable and just award reflecting, as best we can do, the effects of the unlawful treatment on the Claimant.

Employment Judge Sweeney

2 November 2021