EMPLOYMENT TRIBUNALS

Claimant: **Mr Michael Cleary**

Respondent: **Rail for London (Infrastructure) Limited**

Heard at: **East London Hearing Centre**

Before: **Employment Judge John Crosfill**
Members: **Ms Julie Clark**
Mr Peter Lush

On: **25, 26, 27 & 28 May 2021**

Representation

Claimant: **In person**

Respondent: **Iris Ferber of Counsel instructed by Eversheds Sutherland**

JUDGMENT

1. **The Claimant's claim for unfair dismissal relying on section 103A and brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.**

2. **The Claimant's claims that the Respondent unlawfully subjected him to detriments on the ground that he had made protected disclosures contrary to Section 47B (and brought under Section 48) of the Employment Rights Act 1996 are dismissed.**

3. **The Claimant's claim for unfair dismissal relying on section 100 and brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.**

4. **The Claimant's claims that the Respondent unlawfully subjected him to detriments on the ground that he had acted on health and safety grounds falling within Section 44 (and brought under Section**

48) of the Employment Rights Act 1996 are dismissed.

REASONS

Introduction

1. The Claimant is a skilled electrician with experience of working with high voltage equipment. In late 2018 he applied for, and was appointed to, a role with the Respondent as a Principle Maintenance Technician working on the Crossrail Rail Network. It was intended that he, and others, would be responsible for the maintenance of the electrical systems once the Crossrail project was handed over. The Claimant accepted terms and conditions which required him to work a shift pattern including anti-social hours. In return for this he was to be paid an antisocial hours supplement equivalent to 30% of his basic salary.

2. There have been significant delays in the construction of the Crossrail project. As a consequence, the staff engaged to do maintenance work could not immediately undertake their full range of duties. Initially the Claimant, and others, were not required to work any antisocial hours but nevertheless continued to receive the 30% salary supplement.

3. It is the Claimant's case that whilst awaiting the handover of the project from the contractor he was required to carry out activities in connection with preventing or reducing risks to health and safety at work. He says that on 7 occasions between 12 June and 8 August 2019 he raised issues connected to health and safety which amounted to protected disclosures for the purposes of Section 43B of the Employment Rights Act 1996.

4. The Claimant says that he was subjected to 9 detriments on the grounds that he had made protected disclosures and/or because of a health and safety reason falling within Section 44 of the Employment Rights Act 1996.

5. The Respondent's case is that the Claimant resisted its reasonable and lawful instructions requiring him to commence working his contracted hours of work and/or at its Plumstead Depot. It says that the Claimant's refusal, and the manner of his refusal, ultimately led to his dismissal. It says that after the Claimant failed to attend several disciplinary hearings a decision to dismiss him was taken in his absence. A letter was sent to the Claimant on 6 November 2019 informing him that his employment had been summarily terminated on 25 October 2019.

6. The Claimant says that the reason (or principal reason) for his dismissal was that he had made protected disclosures or alternatively that the reason fell within Section 44 of the Employment Rights Act 1996. After a period of early conciliation, the Claimant presented his ET1 to the Employment Tribunal on 11 February 2020.

The procedural history and the hearing

7. The Claimant indicated in section 8.1 of his ET1 that he was bringing a claim of unfair dismissal. In an attachment to the ET1 form the Claimant indicated that his claims included claims that he had been subjected to a detriment for raising health and safety concerns.

8. The Tribunal sent the Claimant a letter on 21 February 2020 requiring him to explain the basis upon which he was entitled to claim unfair dismissal in the light of the fact that it was apparent from his ET1 that he did not have 2 year's continuous service for the purposes of Section 108 of the Employment Rights Act 1996. The Claimant responded on 28 February 2020 explaining that he was contending that he had been 'automatically' unfairly dismissed for making protected disclosures and for raising health and safety concerns.

9. A telephone preliminary hearing was listed before REJ Taylor on 28 June 2020. At that hearing the Claimant contended that his claim form should be treated as including claims that the Respondent had acted contrary to Section 80 of the Employment Rights Act in refusing a flexible working request. REJ Taylor directed that there was a further preliminary hearing to decide the scope of the Claimant's claims and whether the Claimant needed or should be given permission to amend his ET1 to include all the claims he wished to advance. She set out in her case management summary a provisional list of issues for the claims brought under Section 47B of the Employment Rights Act 1996.

10. A further preliminary hearing took place on 8 September 2020 before EJ Burgher. He considered that it was reasonably clear that the Claimant had brought claims under Section 44 of the Employment Rights Act 1996. EJ Burgher identified that the Claimant was relying on sub sections 44(1)(a), 44(1)(c) and 44(1)(d) as affording him protection. EJ Burgher stated in his case management order that the detriments relied upon by the Claimant in his Section 44 claims were identified as the same as for the claim relying on Section 47B. EJ Burgher decided that the Claimant's ET1 did not include any claim brought under Section 80 of the Employment Rights Act 1996. The Claimant made an application to amend his claim to include such claims, but that application was refused.

11. EJ Burgher ordered the parties to prepare a composite list of issues encapsulating the decisions of REJ Taylor and his own decisions. A list of issues was drawn up by the Respondent and sent to the Claimant on 5 October 2020.

12. A further Preliminary Hearing took place on 8 February 2021. It seems that the principle purpose of that hearing was to deal with disputes about the disclosure of documents. Both parties had made requests for disclosure each complaining that the disclosure given by the other party was inadequate. That hearing was conducted by EJ Goodridge. He made some orders in respect of disclosure. He noted that the

Respondent had not pleaded all the points taken in the list of issues (which he describes as agreed). He noted from the procedural history that the Respondent had not applied to, or was not invited to, amend its' ET3 as the Claimant's case was clarified. He ordered the Respondent to file an amended ET3 to deal with the case as it was then understood.

13. At the outset of the hearing the Employment Judge asked the parties if they agreed that that list of issues was complete and accurately set out the position of both parties. The Claimant suggested that the list was not complete. He suggested that there were 7 additional detriments that ought to have been included in the list of issues. These were:

    13.1. That the Respondent had not heard his grievance(s); and

    13.2. That the Respondent's HR policies (in particular the disciplinary policy) were not applied (or fully applied); and

    13.3. The decision to suspend the Claimant (in contrast to the manner of suspending him which was already identified as an issue); and

    13.4. 'taking' disciplinary action against the Claimant at or during a meeting on 17 June 2019; and

    13.5. 'being ignored' when he had raised safety concerns on 12 and 14 June 2019 (in particular that he had raised concerns with Mike Brown, Mark Wild and Howard Smith); and

    13.6. That he had been suspended for an unreasonable length of time; and

    13.7. That he had been deliberately denied the right to a disciplinary hearing and an appeal.

14. We invited the parties to make submissions on (1) whether it was accepted that the detriments referred to by the Claimant had been included as claims in the ET1; and if not (2) whether we should allow an amendment to permit such claims to proceed. We shall not set out the entirety of the parties' submissions but took them into account in reaching our decisions.

15. It was common ground before us that the agreed list of issues already included (at paragraph 4.1.3) an allegation that the Claimant had been subjected to a detriment of being suspended including the manner in which that was effected. It was not therefore necessary to examine further whether the Claimant should be permitted to advance this aspect of his claims.

16. In respect of the other 6 matters the Claimant suggested that each was referred to in his ET1. When we were taken to the relevant paragraphs, we concluded that none of these matters were set out as being an unlawful act with sufficient clarity that the ET1 should be taken as including such a claim. In particular:

16.1. The Claimant suggested that including the opening passages of his ET1 which included the lines *'I have suffered detriment and been unfairly dismissed as a result of raising health and safety concerns……at no point had my previous employer sought to follow the ACAS code, act reasonably or fairly during the process'* was sufficient to amount to a claim that there had been a failure to hear a grievance. We disagree. It was not at all clear from that sentence that the Claimant was referring to a grievance at all as opposed to the disciplinary process that resulted in his dismissal. The Claimant did not identify in his ET1 what grievance he says he was not heard. Importantly he did not say that any failure to hear a grievance was on the ground of having made any protected disclosure or for a reason falling within Section 44.

16.2. In respect of not having HR policies followed the Claimant explained that he was complaining of the disciplinary process. In particular, he said that there had been a failure to take steps to resolve any disciplinary issues informally. The Claimant identified the sentence referred to in the paragraph above and argued that this was sufficiently wide to encapsulate this claim. He was unable to point to any part of his ET1 where he expressly alleged that the reason for this treatment fell within Section 44 or 47B. We concluded that this claim was not set out in the Claimant's ET1.

16.3. In support of the suggestion that the ET1 included a claim that during a meeting on 17 June 2019 disciplinary action had been taken against him the Claimant pointed towards the entries on the narrative section of his ET1 where that date was referenced. He was unable to point to any sentence or passage where he has made an allegation that disciplinary action was taken or threatened at that meeting. It follows that this allegation has not been sufficiently clearly set out in the ET1.

16.4. When asked to say where there was any allegation that he had been ignored when raising health and safety concerns <u>for an unlawful reason</u> the Claimant pointed to entries under dates of 12 and 14 June 2019. The ET1 refers to 12 June 2019 and the Claimant says that he reminded two individuals that he had concerns. He suggested that it is implicit that he was ignored (for an unlawful reason). In respect of 14 June 2019 the ET1 does include an express reference to being ignored. That is followed by a sentence where the Claimant says that he elevated his concerns by e-mail to three senior managers. It is unclear whether the Claimant is saying that this e-mail was ignored (which is inconsistent with the remainder of his ET1 or whether he is saying that concerns he says he raised on 12 June 2019 had been ignored. In his oral submissions the Claimant suggested that it was the former. A reference to a concern (which is said to have been a protected disclosure) being ignored is not

the same as stating in terms that the reason why the concern was ignored was on unlawful grounds. That is an essential part of the claim that the Claimant is seeking to introduce. The Respondent could not be expected to guess that what appeared to be part of a narrative was a free-standing claim.

16.5. The Claimant suggested that the allegation that the length of his suspension was a detriment imposed for an unlawful reason was implicit in the opening paragraph of his ET1 which we have referenced above. Elsewhere in his ET1 the Claimant refers to having been suspended on 18 July 2019 and dismissed by a letter received on 13 November 2019. It is clear from the ET1 that there is an allegation that the suspension spanned that period but no clear statement that the length of the suspension was excessive. Again, it is not enough for the Claimant to say that as he had given the dates of his suspension it is implicit that he is complaining that the length of the suspension was excessive and on unlawful grounds. Such a claim needs to be spelt out with sufficient clarity that the Respondent (and the Tribunal) could have understood it on a fair reading of the ET1.

16.6. It was argued by the Claimant that the allegation that he had not been offered a disciplinary hearing or an appeal could be ascertained from the opening paragraph of the ET1 read with later passages where the Claimant says that the timing of the receipt of the dismissal letter gave him no time to appeal the decision to dismiss him which he says *'was all planned by the company'*

17. In respect of the allegation that the Claimant was not invited to a disciplinary meeting or offered an appeal Ms Ferber accepted that much the same allegations were encapsulated in the existing list of issues. In that list the final detriment identified which was a complaint that the Respondent had sent letters to the Claimant's former address in Cardiff as opposed to a London address. There appeared to be no dispute that the Respondent had sent all correspondence to that address after the Claimant was suspended. The issue was whether that was deliberate or not. We agreed that there was no real difference between the detriment put forward at this stage by the Claimant and the way his claim had previously been understood.

18. Having found that 5 contentious detriments were not set out in the ET1 or if mentioned at all were not identified on any reasonable reading of the ET1 as claims under section 44 or 47B it followed that if we were to consider the claims the Claimant needed permission to amend his ET1 to include these matters.

19. In respect of the 5 contentious allegations Ms Ferber argued that the Claimant had had an ample opportunity to set out his case and that it would be unfair to allow him to expand it at this late stage. She said that the Claimant had been required to clarify his case by REJ Taylor and

again before EJ Burgher. A list of issues had been drawn up following the first two Preliminary Hearings. She pointed out that in respect of allegations that the Respondent had failed to follow policies and had ignored health and safety concerns, if the Claimant was allowed to expand his case, the Respondent would need to call additional witnesses. That would require a postponement. She said that the Respondent had prepared for the case on the basis that the list of issues had been agreed.

20. The Claimant argued that the further detriments were already included in the ET1 but that if they were not sufficiently explicit then he should in any event be allowed to rely upon those further detriments.

21. In deciding whether to permit the Claimant to amend his ET1 we directed ourselves in accordance with the principles set out below.

22. The leading case giving guidance upon whether or not to permit an amendment is ***Selkent Bus Co v Moore*** **[1996] ICR 836** in which the EAT said at 843F-844C:

> *"(4). Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> *(5). What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.*
>
> > *(a). The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.*
> >
> > *(b). The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal,* section 67 of the Employment Protection (Consolidation) Act 1978.
> >
> > *(c). The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time — before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on*

> *discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."*

23. The reference in ***Selkent*** to the importance of time limits as a factor in the exercise of the discretionary exercise must not be elevated to a suggestion that an amendment will not be permitted simply because it is (apparently) presented outside any statutory time limit. An Employment Tribunal has a discretion to allow an amendment which introduces a new claim out of time: see ***Transport and General Workers Union v. Safeway Stores Limited*** **(2007) 6 June, UKEAT/0092/07/LA**

24. When considering any application to amend an employment tribunal will fall into error if it fails to have regard to the overriding objective set out at rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 – see ***Remploy Ltd v Abbott and ors*** **EAT 0405/14**

25. The need for properly particularised proposed amendments was stressed in ***British Gas Services v Basra*** **[2015] ICR D5** where HHJ Serota said:

> *"It is essential before allowing an amendment that it must be properly formulated, sufficiently particularised, so the Respondent can make submissions and know the case it is required to meet."*

On the same point see also ***Chief Constable of Essex Police v Kovacevic*** **EAT 0126/13**

26. We had regard to all the circumstances and concluded that the balance fell firmly in favour of not permitting the Claimant to amend his claims at this stage in the proceedings. The following matters struck us as being the most important:

26.1. As we have set out above this case had been the subject of no less than 3 preliminary hearings. REJ Taylor had required the Claimant to set out his case in writing. The scope of the Claimant's case was then considered at the hearing before EJ Burgher. That resulted in a list of issues which at that stage was acted upon by the Respondent as being agreed. At the third preliminary hearing there was an opportunity to object to the list of issues, but it did not appear to us that any, or any sufficient objection, had been taken at that stage.

26.2. The parties had exchanged documents and witness statements on the basis of the list of issues prepared after the second preliminary hearing. That exercise had not been completed without controversy. Allowing the Claimant to expand his claim would, at least to an extent, require that exercise to be revisited.

26.3. In respect of the allegations that (1) health and safety concerns

were ignored and (2) that HR policies were not followed and (3) that the length of the suspension was unreasonable we are persuaded that the Respondent might reasonably require additional witnesses to attend if these allegations were pursued. If we permitted an amendment, we could not fairly refuse the postponement that Ms Ferber had said she would make.

26.4. We were concerned that the proposed amendments had not been reduced to writing. Some were vague – for example 'HR policies were not followed'.

26.5. We weighed up whether the Respondent would be prejudiced if Ms Ferber was expected to deal with these further allegations when cross examining the Claimant. We noted that she is a skilled advocate and could reasonably be expected to deal with some matters as they arose. However, in order to do so she would need to be given time to take instructions and to (further) prepare to cross-examine the Claimant.

26.6. We considered the prejudice to the Claimant. Clearly if he was not allowed to pursue these additional claims, he would suffer the prejudice of them not being heard at all. However, we took the view that the claims he was seeking to introduce were further thin slices of the broad complaint that he was making. We are able to deal with that broad complaint within the existing claims. If the Claimant was unable to satisfy us of the complaints that he has brought it appeared to us very unlikely that he would succeed in the claims he sought to introduce. If he succeeded in the claims he had brought, then the amended claims added very little.

27. We announced our decision that the Claimant would not be permitted to rely on the 5 contentious detriments. We asked that a revised list of issues be provided to us on the second day of the hearing. That list did not differ significantly from the list already prepared. We shall not set out the list of issues in its entirety by shall refer to the paragraphs of that list by their number when setting out our decision.

28. The final matter that we dealt with related to some additional documents that had been produced by the Respondent having had regard to the contents of the Claimant's witness statement. We were told that these documents were to be examined by counsel to see if any part was privileged. We directed that they be produced the following morning. In the event the documents were supplied without redactions. We informed the parties that we would deal with the issue of whether they should be included in the bundle of documents if any party referred to them. No objection was taken to us following this course.

29. Reading the witness statements and documents and dealing with the applications set out above took the entirety of the first day of the hearing. Thereafter we heard from the following witnesses:

29.1. The Claimant (who gave evidence throughout the second day and briefly on the third day); then

29.2. Hayley Child, the Infrastructure Maintenance Delivery Manager and the person who sought to introduce a roster requiring staff, including the Claimant, to work a shift pattern; then

29.3. Dean Kinane-Powell an Infrastructure Maintenance Delivery Supervisor who reported to Hayley Child and who attended meetings with the Claimant to discuss working to the new roster and who suspended the Claimant from work on 18 July 2019; then (on the final day of the hearing)

29.4. Nisha Quinn who gave evidence via CVP link displayed on a large screen in the hearing room. She was at the time the Lead Planning and Performance Manager, a senior managerial position. She took the decision to dismiss the Claimant; then

29.5. Kevin Wilson an Integrated Auditor who has particular responsibility for matters of health and safety. He was the person who corresponded with the Claimant in respect of concerns that he raised and who also attended a meeting on 25 June 2019 to discuss those concerns.

30. Having heard the evidence, we invited the parties to make submissions. Ms Ferber had provided brief written submissions and she supplemented those with oral submissions. The Claimant had also provided brief written submissions and he too made oral submissions. We shall not set out those submissions in full but shall refer to the principle arguments made in our discussion and conclusions below.

Our findings of fact

31. We set out below our findings of fact in respect of the events giving rise to this claim. We do not seek to set out all the evidence we have heard but have restricted our findings to those necessary to decide the issues in this case. In making these findings we have had regard to all the evidence before us. In our discussions and conclusions below, we make further findings of fact in particular drawing on our primary findings to examine the reasons for the treatment that the Claimant complains of.

32. The Respondent is a company controlled by Transport for London. On completion it will have control and responsibility for the infrastructure of the Elizabeth Line. As is well known the construction of the Elizabeth line has been delayed well beyond the original time for its completion and opening.

33. The Elizabeth Line is being constructed by a number of contractors including ATC. Once fully built the assets have been handed over by the contractors to the Respondent. On handover the Respondent is/will be responsible for the operation and maintenance of the assets.

34. In what in hindsight appears to be an optimistic decision, in anticipation of the completion of the project, the Respondent decided in 2018 to recruit a team of Maintenance Technicians. The Elizabeth Line is electrified and is based on brand new technologies and assets. As such it was necessary to put in place a new team with new ways of working.

35. The Claimant is an experienced electrical technician. He had over 10 years' experience working with high voltage equipment at the National Grid. In June 2018 the Claimant applied for a role with the Respondent as a Principle Maintenance Technician High Voltage. At the time of his application he was supplied a job advertisement which set out a broad description of the duties entailed in the role. The principle place of work was identified as Plumstead in South East London. An indicative salary range was given. It is clear from that document that the postholder was expected to contribute to the safe delivery of maintenance tasks. When invited to interview the Claimant was sent a guidance document that referred to various competencies including 'safety awareness'.

36. In his witness statement the Claimant refers to the full job description for his role. Again, it is clear from that document that the Claimant was expected to work in what was described as a safety critical manner. Amongst the skills he was expected to exercise were 'established risk management skills'.

37. The Claimant was offered the position of Principal Maintenance Technician. On 13 August 2018 he was sent a draft contract of employment. On 21 August 2018 the Claimant sent an e-mail to an employee in the Respondent's HR department asking for some clarification on the unsociable hours allowance that had clearly been discussed with him. He was aware that he would not be working unsociable hours at the outset and he asked whether that would affect his pay. On 28 August 2018 he received a response which informed him that he would be paid the allowance from day 1. Thereafter he proposed a start date of 10 December 2018.

38. On 16 November 2018 the Claimant was sent a formal offer letter. That letter set out a base salary of £43,700. Included in that letter was the following passage:

> *'Rfl(I) operates an unsocial hours allowance scheme. Based on the role you have been appointed to and the existing work schedule you will be eligible for an unsocial hours allowance of 30% Rfl(I) can change or remove the allowance in line with the level of unsocial hours you work in accordance with the runes of the scheme. This is a non-contractual scheme. The allowance paid is pensionable'*

39. The Claimant signed a copy of that offer letter on 28 November 2018. He also signed a contract of employment on the same day. The material clauses of that contract are as follows:

    39.1. In Clause 5 the Respondent reserved the right to require the Claimant to work at any location it may determine from time to

time within the area served by the TFL network; and

39.2. At clause 8 the hours of work were stated as being 455 over a 13- week period over a roster which would operate 24 hours a day and 7 days a week. The Respondent had the right to require the Claimant to work additional hours.

40. It was understood by the Claimant that, once it was handed over by the contractor, his ordinary place of work would be the new office building that was being constructed at Plumstead.

41. Delays by the contractor meant that there was no active maintenance work for the Claimant and his colleagues to do. Instead he was asked to assist with planning and reviewing safety and 'RAMS' documentation ('Risk Assessment Method Statements'). Dean Kinane-Powell told us in his witness statement, and we accept, that the Claimant had worked closely with one of the High Voltage Engineers, Andy Gray. The feedback that Dean Kinane-Powell had heard was that the Claimant was very talented, and he believed that the Respondent was fortunate to have recruited him.

42. The Claimant initially worked at offices in Baker Street but then moved to the Respondent's offices in Endeavor Square in Stratford, East London. He generally worked from Monday to Friday and only during ordinary office hours. At this time, the Claimant's personal circumstances were that his wife was living in Spain. They would generally see each other at weekends. As such, the temporary working arrangements suited the Claimant.

43. From around March 2019 Managers gradually became concerned that the maintenance team were not working the patterns that they were originally employed to undertake. On 1 March 2019 Paul Jones, who was the Claimant's line manager first sought to introduce a roster which he circulated by e-mail. The Claimant says, and we accept, that the proposed roster, which would have included working at night, was not then enforced.

44. Hayley Child took up her position in around April 2019. She took the view that it was necessary to move the maintenance team to working on a roster system. She had a number of reasons for this. The first was that she believed that the maintenance staff would benefit from shadowing the ATC staff who were building the systems. In cross examination she added to this and explained that once the contractor had completed the work the Respondent needed to have its maintenance team up and running. She recognised that it would be a major upheaval to move from working hours to a shift pattern and believed that the time had come to make that transition. A meeting was subsequently held at 'TUCA' (a training centre at Ilford) in order to discuss the roster arrangements. The Claimant says that his understanding was that whilst a roster would be introduced it would only include working nights where that was necessary. Hayley Child says that at that meeting her rational for

introducing the roster at that stage was explained. We find that it is more likely than not that it was. It is common ground that there was some push back by the team (and not just the Claimant). We find that as a part of discussions some assurances were given that the roster would put in place in a reasonable manner.

45. The Respondent had adopted a policy which applied to setting a roster. We were provided with a copy of that policy in a supplementary bundle of policies and procedures. It is entitled 'Rostering Principles for Head of Infrastructure Employees'. That document provides that rosters would be provided at least 6 weeks in advance. There is provision for the rosters being agreed with the recognised employee representatives and dispute resolution mechanism is set out in the policy. On an individual basis any employee who wished to change an allocated shift is required to give 48 hours' notice and to seek the pre-authorisation of his or her line manager. The policy has provision for an equitable distribution of unsociable hours work. The normal hours of work are limited to 35 with a maximum of 48 hours per week. It provides for 12-hour breaks between shifts if safety critical work is undertaken.

46. On 3 May 2019 Hayley Child circulated a roster to members of the maintenance team. The Claimant was copied into that e-mail. During the hearing the Claimant suggested to Hayley Child that she could not be confident that the e-mail was correctly addressed to him. The basis for that being that the Claimant had been allocated an e-mail address including his name and the number 2. He suggested that that signified that there was more than one person with the same name in the organisation. Hayley Child suggested that this was unlikely and that subsequent e-mails had been delivered without any difficulty. We find it more likely than not that the Claimant was sent this e-mail. We had evidence that there were a number of employees who were dissatisfied with the new arrangements. We find it very unlikely that the Claimant was not included in these discussions particularly as he later purported to send an e-mail on behalf of his colleagues. The Claimant did not at that stage object or ask for any variation in his rostered shifts. Hayley Child told us, and we accept, that she was careful to phase in the shift work. Had the Claimant worked to the roster he was sent; he would have worked 82% on days and 18% nights.

47. On 6 June 2019 the Claimant sent Dean Kinane-Powell an e-mail seeking permission to work from home on 10 June 2019 or alternatively take the day as leave. He gave his reasons as being that his wife would be staying with him. The Claimant got no response to this but decided that he should work from home in any event. He says in his witness statement that there were other occasions where he worked from home without being challenged. He does not say that there was any express agreement that he could do so.

48. The Claimant did not adhere to the roster arrangements. It seems that this was discovered, and Paul Jones asked HR to send a copy of the roster. This was sent to the Claimant by e-mail at 9:33 on 11 June 2019.

At 12.32 the Claimant responded in the following terms copying in Paul Jones, Dean Kinane Powell and Hayley Child:

'*I am afraid I will have to respectfully decline the roster as it had not been delivered to me in the agreed timescale set out in the rostering principles.*

It does not align with my current work commitments and conflicts with family arrangements.

I hope you find this reasonable'

49. A few minutes before at 12:29 on 11 June 2019 the Claimant sent a long e-mail to a number of managers including Hayley Child. That e-mail purported to be written on behalf of the HV Delivery Team. In the e-mail the Claimant takes issue with the introduction of the new rosters. The basis of the objection is that, in the Claimant's view, introduction of the new rosters would not enable the team to work collaboratively with the contractor ATC.

50. Hayley Child responded almost immediately to the Claimant she told him that the roster had been distributed in accordance with the rostering principles and pointed out that it had been e-mailed to the Claimant along with the other team members. She instructed the Claimant to adhere to the roster. The Claimant responded a few minutes later. He asked for a copy of the earlier e-mail sending him the roster. He stated that *'I also fail to see the operational requirements of implementing the roster'* he referred to his earlier e-mail in that respect. This e-mail exchange continued to use the reply all function and the disagreement was conducted in full view of a number of managers.

51. At 12:45 on 11 June 2019 Hayley Child sent a further e-mail to the Claimant. She said that she had received a number of e-mails from individuals refusing to adhere to the rosters. She expressed her disappointment at the delay in raising the issues. She stated that she had drawn up the rosters with regard for when ATC would permit access to the infrastructure. She told the team that any personal reasons for needing to change a shift would need to be raised with their supervisors. She referred to the fact that she had been challenged about the fact that the team were receiving a 30% pay supplement for working anti-social hours when they were in fact not working those hours. The Claimant responded at 14:46. In that e-mail he refers to the fact that 'last week' some of his colleagues had asked what they would be doing on a night shift. From that we have inferred that the Claimant was aware of the introduction of the roster (see our finding above). Had he not received the roster e-mail he would have known his colleagues had and would have asked why. The thrust of the Claimant's e-mail is that in his view the changes were unnecessary.

52. At 15:11 on 11 June 2019 Hayley Child wrote an e-mail directed at all the staff affected by the roster changes. She explained her rational for

introducing the roster at this stage. She stated that the roster had been drawn up after discussions with ATC. She accepted that the transition was never going to be easy and said, *'it had to start somewhere'*. She expressed her disappointment that the employees who were unhappy about the changes had waited until the roster had commenced. She pointed out that the proper channel for an individual to ask for changes in the roster was to raise the matter with a supervisor and where necessary fill in a flexible working request.

53. The Claimant responded to Hayley Child's e-mail again using the Reply All function. He expressed his disagreement with the rationale set out in Hayley Child's earlier e-mail. He repeated his suggestion that he had only received his roster on that day and complained that Haley Child had *'yet to prove otherwise'*.

54. On 12 June 2018 Hayley Child sent the Claimant a copy of the e-mail of 3 May 2018 which had enclosed the roster. The Claimant responded at 23:16 on the same day. He did apologise for the fact that he had *'not seen'* the e-mail of 3 May 2019 before but then complains about the delay in being provided with evidence of what Hayley Child had told him the previous day. We find that an entirely unreasonable approach. The Claimant had no reasonable basis for questioning Hayley Child's assertion the previous day that he had been copied into that e-mail. The Claimant repeated some of his objections to working the new roster and repeated his statement that he would be 'unable' to adhere to it. He complained that he had lost 2 days of productivity. The Claimant referred to an e-mail he had sent at 08:54 to Hayley Child and several managers including Kevin Wilson. He said that in his opinion the Respondent was *'operating outside the realms of the law'* by not having sufficient health and safety documentation in place. Hayley Child in her witness statement told us that when she read the Claimant's e-mail she considered it very condescending. We find that that was an entirely reasonable response.

55. It is the Claimant's case that his e-mail sent at 08:54 is the first of his protected disclosures. We examine whether the e-mail meets the requirements of Section 43B below and shall not set out the entirety of the content here. In summary the Claimant questions whether the Respondent has sufficient risk assessments in place and states that in his view if there are risk assessments in place they are not being properly communicated.

56. Kevin Wilson responded to the Claimant within 24 hours. He starts his response with an apology and an explanation of the delay saying that he had been in a meeting for the entirety of the previous day. He acknowledges that it is necessary to have risk assessments in place for any activities that are being undertaken. He pointed the Claimant to a part of the Respondent's Intranet where risk assessments could be accessed. He went on to say that:

'Anyone working on site at present are under the control of ATC, who should detail

the risk assessment and safe system of work for that activity and location for the pre-start briefing. If this is not happening please let your supervisor know.'

57. We find that Kevin Wilson's response was as prompt as could reasonably be expected. Given that the Claimant had raised only a general query it was also as full as could reasonably be expected. It ends by inviting the Claimant to get back to him if he has any residual concerns. There is no hint in the body of the letter that the Claimant's actions in raising the matters he did were resented or were considered in any way inappropriate.

58. The Claimant did respond to Kevin Wilson at 09:30 on 13 June 2019. He quotes the statement set out above and asks, *'What exactly do you mean by this statement?'*. He then goes on to set out his opinion that whether or not ATC have done a risk assessment it remained necessary for the Respondent to do one as well including a risk assessment for site visits. This e-mail is said to be the Claimant's second protected disclosure.

59. Having asked Kevin Wilson a number of questions and requiring him to explain his position the Claimant waited just over 24 hours before sending an e-mail to the Commissioner and CEO of the Crossrail project and the CEO of the Elizabeth Line. The Claimant sent an e-mail at 10:32 on 14 June 2019. He says that he was raising safety concerns and *'cannot be ignored'*. He says that he had raised his concerns on 12 June but had to wait until 13 June for a reply. We do not consider that the Claimant had any reasonable basis to suggest that he was being ignored. He had received a response from Kevin Wilson within 24 hours together with a perfectly reasonable explanation for a delay. The Claimant says that having just completed his probation period he did not know how to raise his concerns other than going to the top of the organisation. We are unimpressed by that explanation. The Claimant knew that Kevin Wilson was a Health and Safety Advisor – presumably that is why he contacted him in the first place. The Claimant says that this e-mail was his third protected disclosure.

60. The Respondent's case is that the reason that the Claimant raised these issues in this manner at this time was that he did not want to work the roster that he had been required to work. We agree. Our reasons for reaching that conclusion are that the Claimant has not given any other satisfactory explanation for the timing of raising these concerns. The practice of visiting sites controlled by ATC was not new and had not been significantly altered by the introduction of the roster. The Claimant's failure to wait a reasonable time for a response to his e-mails and his decision to escalate matters so quickly are most readily explained by the fact that the Claimant had very quickly become deeply resentful of the instructions he had been given.

61. The response of the Respondent to the Claimant's e-mail of 14 June 2019 was to get Hayley Child to send an instruction to all team members requiring them not to attend any ATC sites until further notice. That

instruction was sent within hours of the Claimant's e-mail and we find was a response to it. We find that the immediate response to the Claimant's e-mail was to take the matter seriously and to react to it by ceasing all activities.

62. On 13 June 2019 Dean Kinane-Powell had sent each team member a list of the duties that they were expected to perform in accordance with the roster. The Respondent was expecting to move into its new offices in Plumstead during that period and amongst the duties allocated to the Claimant was assisting with that move. There is nothing in that document or elsewhere that would suggest that the Claimant was expected to act as a 'removal man'. The Claimant responded to Dean Kinane-Powell on 13 June 2019. We find that the tone of his e-mail was blunt to the point of rudeness. He said:

> *'As informed on multiple occasions and yet to receive acknowledgement or an appropriate response. I will not be working to this roster. Do not expect me in this weekend.*
>
> *If you want to threaten me with HR or disciplinary action then you are more than welcome to try.*
>
> *You can not simply ignore employees e-mails and carry on regardless. I have got family commitments.*
>
> *I've been working all week as stated in the whereabouts register. Which was left unchallenged. My wife is visiting me from Barcelona this weekend so I will be spending time with her. Weekends and leave are the only times we get to spend together. I also do not have a valid ATC card so will not be able to attend site'*

63. It was correct that the Claimant did not have a current 'ATC' card. The Claimant had been issued with a card by ATC to facilitate access to sites but had had his card removed when he was unable to produce evidence of his competency. Despite the Claimant not having an ATC card, we find that not having that card would not have prevented the Claimant from attending work at Plumstead. He attended a meeting at that site on 17 June 2019 which demonstrates that it was possible for alternative arrangements to be made.

64. Hayley Child sought advice on how to deal with the Claimant's refusal to adhere to the roster. We consider that that was unsurprising particularly in the light of the tone of the Claimant's correspondence. The Claimant had openly refused an instruction and had done so in 'reply all' e-mails. An e-mail was drafted which Haley Child instructed should be sent by Dean Kinane-Powell. She asked that any response be sent to her. The e-mail that was drafted simply informed the Claimant that he should work to the roster that he had been given and that a failure to do so would be considered under the Attendance at Work policy.

65. On 14 June 2019 the Claimant sent an e-mail to the Respondent's Head

of Employee Relations. He attaches e-mails that relate to the roster but also says that he has raised a few safety concerns *'which have been ignored'*. In e-mails disclosed during the hearing it is clear that an Employee Relations Manager advised that prior to instigating any disciplinary action it would be preferable for the Claimant's managers to meet with him to discuss both his roster and the safety concerns and also 'his e-mail conduct'. Following that e-mail the Claimant was invited to a meeting with his line manager Paul Jones and Dean Kinane-Powell that was to take place on 17 June 2019.

66. On 17 June 2019 (which for Kevin Wilson was the next working day) Kevin Wilson sent an e-mail to the Claimant telling him, as he clearly still had concerns, he would be invited to a meeting to discuss them with Kevin Wilson and his Manager Adam Davis. That meeting was fixed for 25 June 2019. This was an apparently sensible and reasonable response to an employee raising health and safety concerns. There is nothing to suggest that the Respondent was ignoring the concerns or seeking to sweep them aside.

67. As far as Dean Kinane-Powell was concerned the purposes of the meeting on 17 June 2019 was principally to discuss the failure of the Claimant to attend work on 15 and 16 June 2019 and to move matters forward. The meeting took place in Plumstead in the temporary offices that were in place pending the handover of the new office building. It was not suggested that this was to be a formal disciplinary hearing. We find that the two managers were really trying to understand the Claimant's position before deciding what if anything they should do about it. At the outset of the meeting the Claimant asked whether he could record the meeting. Whilst the managers were surprised by the request, they agreed. The Claimant has subsequently typed up notes from that recording. It was not suggested that the notes were inaccurate. The Claimant says that during this meeting he made a further protected disclosure. We deal below with the question of whether what the Claimant said during that meeting amounted to a protected disclosure.

68. One issue discussed at length during that meeting was the Claimant's assertion that he had been unable to attend work over the weekend because he did not have at ATC pass. What emerged was that some months previously the Claimant has had his card taken off him by the contractor ATC because he was unable to produce a physical CSCS card ('Construction Skills Certification Scheme'). He stated that a replacement CSCS card had been sent to his Cardiff address. Paul Jones commented at one point that he would have expected the Claimant to have taken some steps to rectify the position.

69. The Claimant maintained his position that he did not consider it appropriate that he was asked to work a shift pattern unless there were specific tasks appropriate for him to do. He took objection to the fact that on the task sheet he had been sent on 13 June 2019 he was expected to undertake e-learning and assist in the office move. He suggested that he should not be asked to do the latter task without manual handling

training. Paul Jones rather dryly suggested that it rather depended on what he was being asked to move suggesting that moving pens and paper would not require any such training. We find that the Respondent had never envisaged asking the maintenance team to move furniture or any other heavy objects.

70. The Claimant restated his position on working to the roster in the following terms:

> *'….everything I am saying is more than reasonable, everything I've raised all week has been more than reasonable and you guys and Hayley has chosen not to answer the questions or concerns just blatantly ignore it, I had to get hold of the employee relations people because you're just ignoring my concerns my wife was over from Barcelona right, you honestly expect me to come in and do eLearning and do manual handling on a site that I can't get to, when my wife has come over and surely you've got some like you've got to understand I've a home life as well, this weekend wasn't important we're not even operational….'*

71. Paul Jones explored the Claimant's reasons for failing to work to the roster. He also explained that working to a roster was what was expected and was a fundamental part of the job. He explained that the arrangements were transitional. The meeting ended with the Claimant being told that he could keep working as he was for the rest of the week. He was told that *'something would be sorted'* on the next roster. The Claimant's evidence was that this tacitly endorsed him continuing to work as he was. He was told of the possibility of making a flexible working request.

72. In fact, Paul Jones was not satisfied with the Claimant's explanations or his stance. He asked HR to deal with the matter as a disciplinary issue and investigated whether the Claimant should loose pay because he had not worked on 2 of his rostered days. Dean Kinane Powell explained that he was not the Claimant's line manager but that at this point Paul Jones took some annual leave and so it fell to him to become more involved in the situation. At this stage no disciplinary action was taken against the Claimant.

73. After the meeting on 17 June 2018 the Claimant provided details of his London address to Paul Jones who in turn forwarded these to the HR department.

<u>The meeting of 25 June 2019 and subsequent correspondence</u>

74. The Claimant met with Adrian Davis and Kevin Wilson on 25 June 2019. He says that in this meeting he made his fifth protected disclosure. The purpose of the meeting was to discuss the Claimant's concerns and, in particular, his view that the Respondent was obliged to carry out its own risk assessments when its employees attended sites to shadow ATC. In his witness statement the Claimant suggests that in the meeting Adrian Davis was trying to intimidate him. He gives no description of any intimidating conduct. There is no mention of any intimidating conduct in

the Claimant's ET1. He made no mention of this in his various grievances. He did not make any criticism of the way that the meeting was conducted in the correspondence he sent shortly afterwards. We do not accept that there was any conduct which the Claimant could reasonably have felt was intimidating.

75. There are no minutes of the meeting. Adrian Davis undertook to make some enquiries and said that he would type up some notes of the meeting once those were complete. Before those notes were prepared the Claimant sent an e-mail to Adrian Davis and Kevin Wilson on 28 June 2019. His e-mail purported to recap what was discussed. Kevin Wilson criticized that e-mail as not really reflecting the discussions. Having compared that document to the notes eventually produced by Adrian Davis we find that there is some common ground. The Claimant's e-mail sets out matters which he raised. What it does not do is set out the discussion that ensued.

76. When Adrian Davis sent his notes to the Claimant, he explained that before doing so he had sought advice internally and from the rail regulator. On the key matter raised by the Claimant, Adrian Davis informed him that in the view of the Respondent the Claimant was incorrect. He explained that in his opinion it was sufficient for the Respondent to rely upon risk assessments undertaken by ATC when the Respondent's employees visited the sites. He said that the ATC risk assessments had been audited and that they had been found to be comprehensive. He also set out the arrangements that the Respondent had in place and was developing with the recognised trade unions in its Health and Safety Consultation arrangements. He set out the steps that had been put into place to assess the risks of moving on to shift work.

77. The Claimant responded to Adrian Davis on 17 July 2019. He repeated his view that the Respondent needed to do a risk assessment whether or not one had been done by ATC. He referred to legislation in support of his arguments and then sought to illustrate his point by reference to a health and safety incident that had been reported in a bulletin circulated by the Respondent. The Claimant says that this was his sixth protected disclosure.

<u>The Claimant's flexible working request</u>

78. On 25 June 2019 the Claimant made a flexible working request on a standard template form provided on the Respondent's Intranet. He set out his existing hours as being 8:00 to 15:30 Monday to Friday. Whilst that might have been the hours the Claimant was working; he was aware that this was not what he was asked or contracted to do. He proposed the following:

    78.1. Monday 09:30 to 17:00 working from home; and

    78.2. Tuesday to Friday 08:30 – 16:00 with Friday working from home.

79. The Claimant met with Dean Kinane-Powell on 27 June 2019 to discuss his flexible working request. The Claimant says that during the meeting Dean Kinane-Powell informally agreed to his request. He says that after the meeting he sent an e-mail setting out what had been agreed and that Dean Kinane-Powell did not disagree with what was included on that e-mail. The Claimant's e-mail records that it was agreed that he would work from Endeavour Square until the new Plumstead offices were open and that he would only work unsociable hours where *'they are appropriate to my role as Principal Maintenance Technician'* but even then this was to be flexible and after consultation. The Claimant suggested that he would retain his 30% pay supplement subject to approval in due course by HR. When Dean Kinane-Powell responded he rejected the Claimant's request.

80. We do not believe that the differences between the Claimant's e-mail and the decision made by Dean Kinane-Powell are a simple misunderstanding. Dean Kinane-Powell says that he reached no agreement during the meeting but indicated that he would consider what the Claimant had proposed. We have come to the conclusion that the Claimant's e-mail is a self-serving document intended to set out what he asked for during the meeting rather than record any actual agreement. That is much the same approach as he took after the meeting on 25 June 2019 where he recorded only the points that he wanted to take from the meeting rather than the entirety of what was discussed. It would have been extraordinary if Dean Kinane-Powell had indicated that he would release the Claimant from (almost all) his obligations to work a shift pattern even on a temporary basis without discussing this with Hayley Child.

81. On 28 June 2019 Dean Kinane Powell sent the Claimant an e-mail where he turned down his flexible working request and also refused the Claimant's request to work from home on 1 and 16 July 2019. Dean Kinane-Powell provided the Claimant with a copy of the roster. He pointed out that the Claimant was not rostered to work on 16 July 2019 and therefore did not need to work from home. He had also noted that an application for leave made by the Claimant did not match the roster and he asked the claimant to amend this. This was not to the Claimant's disadvantage as he had booked leave on a day when he was not rostered to work when he did not need to do so.

82. The Claimant was rostered to work for 5 nights from 1 July 2019. The Claimant did not attend work during that period and submitted a medical certificate that stated that he was unfit to work by reason of acute stress. He then commenced a period of annual leave.

83. On 4 July 2019 the Claimant appealed the refusal of his flexible working request. We return to that below.

<u>The Respondent's Plumstead Offices</u>

84. The Plumstead Office was constructed by ATC and was purpose built.

Hayley Child and Dean Kinane-Powell both described the offices as state of the art. They suggested that the offices were far and away the best buildings that they had ever worked in. Part of the offices were made available to the Respondent by early July 2019. The weather was hot and in order to keep temperatures down employees had been opening the windows. The windows had a tilt mode as well as being hinged from the side. On 11 July 2019 Hayley Child circulated an e-mail in the following terms:

The windows in the office of the new accommodation in Plumstead should be opened in the tilt mode – to do this turn the handle anti-clockwise into the upright position – the window will then open at the top.

Windows should not be opened fully.

ATC are keeping the doors open on the side which we currently don't have access too [sic] therefore allowing air flow in the office. We expect the work to allow the top windows to open to be operational by next week.

If you see the windows open fully please close them.

The only time the windows can be open fully is when we have erected temporary barriers around them, if you feel the windows need to be open please speak to your line manager, Syd or myself and we will arrange for this to happen.'

85. The Claimant's first day back at work after his leave was 17 July 2019. Rather than going to the Plumstead office the Claimant went to Endeavour Square. The Claimant says that when he returned to work, he prepared his response to Adrian Davis which we have referred to above. Dean Kinane-Powell told us, and we accept, that he telephoned the Claimant to see where he was firstly at 9:45, when he got no reply, and then at 11:02. The Claimant answered that call and Dean Kinane-Powell instructed him to come to the Respondent's offices in Plumstead. It is common ground that the Claimant refused to do so. In his witness statement the Claimant says that he would have mentioned that the location was *'unsuitable'*. When the Claimant was interviewed about this as a part of the disciplinary process, he said that he could not remember if he had mentioned the location being unsafe. He then claimed that he probably would have done. The suggestion that the Plumstead offices were so unsafe that the Claimant should not attend is something that would have been so surprising that we have no doubt that Dean Kinane-Powell would have remembered it had it been said. If he had it in mind the Claimant would have included that in his e-mail response to Dean Kinane-Powell. We find that on 17 July 2019 the Claimant did not say anything about the Plumstead office being unsafe.

86. Dean Kinane-Powell then sent an e-mail to the Claimant at 11:24 instructing him in writing to attend the Plumstead office by 1:00pm. He made it clear in that e-mail that a refusal to do so might result in disciplinary action. The Claimant suggests that it would not have been

possible to get from Stratford to Plumstead in the time allotted. We find that if the Claimant had set off promptly, he would, at worst, have been a few minutes late.

87. The Claimant responded to Dean Kinane-Powell by return stating simply that he was working from Endeavour Square and would continue to do so all week. Dean Kinane-Powell came to the conclusion that the Claimant was not prepared to follow instructions and asked the HR advisors to assist him in commencing a disciplinary process. In his witness statement the Claimant says that he regarded Dean Kinane-Powell's conduct as *'mindless bullying'*. He complains that he should have been warned if Dean Kinane-Powell was serious about disciplinary action as that would have given him a *'fair chance'* of getting to Plumstead. We consider that the Claimant was clearly warned that he would face disciplinary action if he did not follow the instructions he had been given. Dean Kinane-Powell's e-mail could not have been clearer.

88. When he gave evidence the Dean Kinane-Powell told the Tribunal that his response to the Claimant's e-mail was in plain terms that he was *'pretty pissed off*'. On 17 and 18 July 2019 in consultation with the Respondent's HR advisors Dean Kinane-Powell prepared a letter suspending the Claimant pending a disciplinary investigation. He was advised to deliver that letter by hand and to escort the Claimant from the premises. We find that the only reason that Dean Kinane-Powell decided to seek the assistance of HR and instigate disciplinary action was the fact that the Claimant had bluntly refused to obey an instruction.

89. We find that Dean Kinane-Powell was not influenced in any way by the fact that the Claimant had made protected disclosures when he instigated this disciplinary action. Dean Kinane-Powell's only direct involvement with the protected disclosures was when he met with the Claimant together with Paul Jones on 17 June 2017. We find that Dean Kinane-Powell was not troubled in the slightest by the Claimant raising issues about the temporary offices at Plumstead. We find that he did regard the Claimant's stance in relating to working to the new roster to be unreasonable but that was entirely distinct to the other matters raised by the Claimant.

90. Dean Kinane-Powell went to Endeavour Square on 18 July 2019 and found the Claimant. He invited him to go into a private meeting room. The Claimant refused to do so saying that he would not attend a meeting without a trade union representative present. Dean Kinane-Powell then sought advice from the Respondent's HR advisors. Dean Kinane-Powell then returned, anticipating that the Claimant might be difficult, he was accompanied by the Head of Security. The Claimant was again asked to go into a private meeting room and refused once again. The Claimant told then that his trade union representative was on route. This caused Dean Kinane-Powell to seek further advice from HR. He then returned to the Claimant and read the Claimant the letter that he had prepared. That informed the Claimant that he was to be suspended pending a disciplinary investigation into his refusal to come to Plumstead. The

Claimant was then escorted off the premises.

91. The Respondent has a Discipline at Work Policy. Unsurprisingly that policy refers to the possibility of an employee being suspended. There is no express reference in the suspension section to the employee having any right to be accompanied. However, the section that deals generally with fact finding hearings does refer to cases of 'investigatory suspension' where the outcome might be dismissal where the employee may be supported by a trade union. That part of the policy is unclear but in our view the context suggests that the trade union representative might be allowed to attend the fact-finding hearing rather than attend at the point that the employee is suspended.

92. The Claimant says that he was humiliated in front of his colleagues. Dean Kinane-Powell gave the Claimant every opportunity to have a meeting in private. We consider that the actions of Dean Kinane-Powell were entirely reasonable. He went to meet the Claimant to hand over a letter suspending him. We do not think it unreasonable for Dean Kinane-Powell to refuse to await the arrival of the Claimant's trade union representative before informing him of his suspension.

<u>The appeal against the refusal of the flexible working request</u>

93. On 18 July 2019 the Claimant was invited to a meeting to discuss his appeal against the rejection of his request for flexible working. The meeting was to take place on 7 August 2019 at the Respondent's new Plumstead office. In the run up to that meeting the Claimant questioned whether, as he remained suspended, he should attend that meeting. On 2 August 2019 Hayley Child confirmed that the meeting should go ahead. In response the Claimant sent an e-mail in which initially confirmed he would attend. However, a few minutes later he sent a further e-mail in which he said:

'As the buildings legal occupier please provide evidence that the location is fit for purpose. If you cannot provide this may I suggest we use an alternative location'

94. On receipt of the Claimant's e-mail Hayley Child contacted HR to seek advice. Her exasperation is clear from her e-mail where she describes the Claimant's behaviour as *'unacceptable'*. There was some discussion about using an alternative location if the Claimant's Trade Union raised the same objections this was never followed up and the appeal was never heard.

95. Hayley Child responded to the Claimant on 5 August 2019. She informed him that CRL Engineering had signed off the building as fit for habitation and that that was separately verified by the Respondent's Safety and Engineering Team. The Claimant did not respond, and he did not attend the meeting. No further appeal meeting was ever arranged.

<u>The fact-finding meeting</u>

96. The role of investigating the allegation that the claimant had refused to obey an instruction was delegated to Lesley Hull. She was the Infrastructure and Works Planning Manager. The Claimant attended the investigatory meeting together with Paul Jackson his trade union representative. The Claimant asked permission to record the meeting and was allowed to do so. Somewhat unusually the Claimant then attempted to introduce all the parties as if he was chairing the meeting. Lesley Hull intervened and suggested that that was her role. She reminded the Claimant that the role of his trade union representative was limited in a fact-finding meeting. The Respondent's disciplinary policy provided that in some circumstances an employee could be accompanied at a fact-finding meeting but that the trade union representative would not be permitted to answer questions or call adjournments. The Claimant's Trade Union representative made a robust response suggesting that that was unlawful. We need not adjudicate on that point.

97. Lesley Hull asked the Claimant whether he recalled the conversation that he had with Dean Kinane-Powell on 17 July 2019. The Claimant suggested that he could not remember. Surprisingly the Claimant then referred to the suggestion that Dean Kinane-Powell had told him on the telephone to come to Plumstead as an 'allegation'. In his witness statement he accepts that was the case. We find that the Claimant knew exactly what he had been instructed to do on the telephone and was being unnecessarily difficult and evasive. The Claimant was then asked about the e-mail exchange he had with Dean Kinane-Powell and he confirmed that the e-mail exchange had taken place. He was then asked why he had not done what he was asked. He suggested that it had been done on the grounds of health and safety. He referred to the fact that Hayley Child had circulated an e-mail about the windows and said that the windows were unsafe. He was unable to recall whether he had said that at the time he refused to attend.

98. The Claimant then summarised his position his position by reading the following statement:

> *'Due to a recent email sent out from Hayley explaining that the windows were unsafe (this lead me to believe that the company was not acting responsibly and moving into the building prematurely before it was fit for purpose) and due to the company recently refusing to complete risk assessments. I have legitimate concerns that the building would be unfit to occupy and work from similar to the temporary accommodation in the ATC compound. I took it on myself to manage my own health and safety and work from Endeavour Square.'*

99. The Claimant had previously suggested that the allegation had been made because he had raised health and safety concerns. He further complained about the manner of his suspension. Lesley Hull informed the Claimant that she would prepare a report within 14 days. The Claimant asked whether he would receive copies of all the evidence and Lesley Hull replied that she only had a statement from Dean Kinane-

Powell.

100. The Claimant then went on to suggest that Lesley Hull was not a partial investigator. The minutes of the meeting do not give any support for that. Lesley Hull has a simple task and it was to find out whether the Claimant accepted that he was given an instruction and if he did ask him why he had not followed that instruction. That is exactly what she did. She did not challenge the Claimant's account or comment adversely upon it. In the Claimant's full transcript of the meeting it appears that the Claimant and his trade union representative persisted in challenging Lesley Hull's impartiality without giving any reasons other than speculating that there was some personal relationship between her and Dean Kinane-Powell. It appears that after some time dealing with this Lesley Hull decided that the meeting should be drawn to a close.

101. On 7 August 2019 the Claimant sent an e-mail to Lance Dirwal in the Respondent's HR Department. In this e-mail the Claimant questioned the process that had been undertaken in the fact-finding meeting and questioned the impartiality of Lesley Hull. The Claimant comments that the investigation appeared to focus on obtaining Dean Kinane-Powell's account rather than his own. Having seen the transcript prepared by the Claimant that allegation was misconceived. The Claimant was asked for his account of what happened and was able to give such explanation as he had. Lance Dirwal responded to the Claimant on the same day he questioned whether the Claimant had any basis to suggest that Lesley Hull was not impartial. He warned the Claimant that the recording that he had made of the meeting should be kept confidential. The Claimant responded by saying *'I suggest you proceed with caution'*. He reiterated that he had concerns about Lesley Hull's impartiality but gave no basis for those concerns. Lance Dirwal did not respond to that e-mail. On 20 August 2019 the Claimant chased for a response, but none was forthcoming. It is fair to say that the tone of the Claimant's correspondence was unhelpful. He was making accusations of bias without any reasonable basis.

102. On 23 August 2019 Lesley Hull completed her investigation report. She concluded that the Claimant had a case to answer and recommended that he be invited to a disciplinary meeting. It appears from her report that she placed some weight on the fact that the Claimant had not given the explanation he now put forward when he initially refused to attend the Plumstead office.

103. We find that there is nothing in the report or in the conclusions reached that would allow us to draw an inference that Lesley Hull was influenced in any material way by the fact that the Claimant had made protected disclosures. We are satisfied that she was not. The Claimant did not dispute the allegation that he had refused an instruction. He had put forward a reason for that but there was clearly a case to answer. The reason given by the Claimant was not in any way convincing or compelling.

104. On 22 August 2019 the Claimant wrote to the HSE. The Claimant used his personal hot mail address that was later used for all correspondence by Nisha Quinn. It clear that the Claimant was seeking to appeal a decision by the HSE not to take any action. The Claimant had been asked whether the HSE could name him in their investigation. The Claimant responded saying that they could stating that *'this will not have any negative impact'*.

105. Between 22 August 2019 and January 2020 there was no further contact from the Claimant. He did not seek to chase his grievances at this stage or at all.

The disciplinary hearings

106. Nisha Quinn is a senior and experienced manager with no line management responsibilities for the Claimant. She was asked to conduct a disciplinary hearing by Lance Dirwal. Nisha Quinn agreed to take on the responsibility of conducting the hearing. When she did so she was sent the investigation report prepared by Lesley Hull. That report makes no mention of the fact that the Claimant has made protected disclosures other than a brief suggestion by the Claimant in the fact finding meeting that the company has failed to complete risk assessments and a reference to his reasons for refusing to attend the Plumstead office.

107. The Claimant spent some time cross examining Nisha Quinn seeking to establish if she knew or had close working relationships with Lance Dirwal, Lesley Hull, Hayley Child, Jon Jarrett or Howard Smith. The purpose of these questions was to seek to establish that Nisha Quinn was willing to do the bidding of others. We found Nish Quinn to be a straightforward and truthful witness. She accepted that she had worked with Lance Dirwal in the past. She knew of Howard Smith. She had no relationships with any of the others. If the Claimant was seeking to establish that she was in a close-knit group with a common goal, then he failed to do so. He established nothing more than the fact that Nisha Quinn had ordinary professional relationships with some of her colleagues.

108. On 16 September 2019 Nisha Quinn wrote to the Claimant inviting him to a disciplinary hearing to take place on 23 September 2019. The letter is from a standard template. The charge against the Claimant is that he failed to follow a verbal and written instruction on 17 July 2019. He is warned that dismissal is an option. He is advised about the right to be accompanied. The letter was addressed to the Claimant's address in Cardiff as opposed to the London address that had previously been sent to Lance Dirwal. On the same day Nisha Quinn sent a copy of the letter and all supporting documents to the Claimant to the e-mail address that he had habitually used for correspondence.

109. The Claimant did not attend the hearing on 23 September 2019 and did not make any contact at all. Nisha Quinn decided not to proceed in the

Claimant's absence and sent a further invitation to a disciplinary hearing this time to take place on 4 October 2019. She sent a similar invitation letter which was once again addressed to the Claimant's Cardiff address. At the same time, she sent a copy by e-mail. The Claimant did not make any contact and did not attend that meeting.

110. On 4 October 2019 Nisha Quin sent a third invitation to a disciplinary hearing this time to take place on 25 October 2019. She modified the letter to suggest that the Claimant could send a representative in his place or make written representations. She warned that the matter would proceed whether the Claimant attended or not. On 7 October 2019 Nisha Quinn sent a copy of that letter to the Claimant by e-mail.

111. The Claimant did not attend the meeting on 25 October 2019. Nisha Quinn told us, and we accept, that when the Claimant did not attend, she attempted to call him on his mobile telephone but got no response. The Claimant challenged that evidence but on balance we find it more likely than not that Nisha Quinn had done as she said.

112. The Claimant alleges that sending the letters to his Cardiff address was a deliberate act and was done on the ground that he had made protected disclosures and/or had done acts protected by Section 44 of the Employment Rights Act 1996. We need to make a finding about that. The Claimant told us that the address in Cardiff was occupied by a relative. All three of the letters sent by Nisha Quinn was sent recorded delivery. If there had been a desire to ensure that the letters did not come to the Claimant's attention, then using recorded delivery would be inconsistent with that. Furthermore, the letters were sent to the Claimant on his usual e-mail address that he had used regularly in the months before those letters were sent. Nisha Quinn was asked to explain why she did not contact the Claimant's previous trade union representative. She said that this had not occurred to her. She was also asked to explain why the Claimant's updated address in London had not been used given that it had been sent to Lance Dirwal. Again, she was unable to explain this other than by assuming that it had been overlooked.

113. We find that whilst it was undoubtably an error not to use the Claimant's London address and whilst it could have been useful to contact the Claimant's previous trade union representative there is nothing in those two errors that leads us to conclude that there was a deliberate effort to conceal the disciplinary meeting from the Claimant. The same correspondence was sent by e-mail on three occasions and we have accepted that Nisha Quinn attempted to call the Claimant. After the Claimant failed to attend for the second disciplinary hearing it would been perfectly reasonable to have proceeded in his absence, but a further opportunity was given together with alternative means of participating. We find that Nisha Quinn did not attempt to conceal the fact of the disciplinary hearing. We further find that she was not motivated in any way by the fact that the Claimant had made protected disclosures or that he had done acts protected by Section 44 of the Employment Rights Act. She made considerable efforts to engage the

Claimant in the process.

114. We go somewhat further. We find that it is highly improbable that the correspondence sent by Nisha Quinn did not come to the Claimant's attention. 3 registered letters were sent to an address occupied by the Claimant's cousin. 3 e-mails were correctly addressed to his e-mail address. The Claimant knew he had been suspended and that a disciplinary investigation report was to be produced. He then ceased all correspondence. We find it highly improbable that the Claimant would not correspond if he though there had been delays by the Respondent. In the past the Claimant had criticised delays measured in days. We find it more likely than not that the Claimant did receive some or all of this correspondence and that he has chosen to ignore it. That is consistent with his e-mail to the HSE where he suggests that using his name will make no difference.

115. On 25 October 2019 Nisha Quinn decided to proceed with the disciplinary hearing and decided that the Claimant should be dismissed. We consider that given the short service of the Claimant and the information before Nisha Quinn there is nothing surprising about that decision. We find that on the information before Nisha Quinn the Claimant's response to Dean Kinane -Powell could quite properly be thought to be gross insubordination. The Claimant's e-mail on 17 July 2019 to Dean Kinane-Powell is blunt beyond the point of rudeness. It demonstrates that the Claimant is entirely unwilling to follow instructions.

116. We need to ask whether the ostensible reasons given by Nisha Quinn for her decision are the entirety of her reasons. We find that they are. We found her a reflective witness prepared to make concessions where necessary. For example, when she was asked why she had not contacted the Claimant's trade union representative she acknowledged that that had been a possibility that she had overlooked. We reject the Claimant's argument that Nisha Quinn was close to others concerned in the previous events and was prepared to act as a management stooge. We accept that she approached the disciplinary hearing with no preconceived ideas. We accept that Nisha Quinn had no direct knowledge of the issues raised by the Claimant in his protected disclosures 1.1.1 to 1.1.6. She was aware of the Claimant's position on the safety of the Plumstead office. She took the time to obtain the e-mail from Hayley Child sent on 11 July 2019. She reached the same conclusions as we did that the contents of that e-mail gave no reasonable basis for failing to attend the Plumstead offices. She was entitled to take that view.

117. The Claimant says that he received the letter dismissing him on 13 November 2019. He says that he had decided to have his post redirected at that stage. He gives no explanation why he could not have asked his cousin to forward any correspondence. As it makes no difference to the outcome, we shall not make any finding as to exactly when the Claimant learnt of his dismissal. He did not appeal nor did he

say at the time that any correspondence had gone astray. That is an extraordinary omission if this letter was the first he knew of a disciplinary process.

118. On 6 January 2020 the Claimant sent an e-mail from his usual address to that of Nisha Quinn. He did not say that he had not had any notice of the disciplinary hearing at that stage. He simply asked for copies of all correspondence sent to the Cardiff address. He asked for that to be sent by e-mail on the same address as had been used previously. Nisha Quinn responded and there is no dispute that that e-mail was received.

Health and Safety Committee/Representatives

119. There was an issue before us as to whether the Respondent had a safety committee and/or any health and safety representatives. This was a matter that was discussed when the Claimant met Kevin Wilson and Adam Davis on 25 June 2019. In his e-mail summarising the discussions it is clear that the Claimant asked how employees could raise their concerns. Adam Davis explained that the Respondent was not fully operational and that the arrangements for a safety committee were under review. Adam Davis records a discussion about employee representatives, and it is implicit from that record that the Claimant was told that there were some existing trade union safety representatives.

120. When he gave evidence, Kevin Wilson explained that there was a safety committee that had bi-weekly meetings at which safety issues could be raised. The meetings had started at Baker Street but had migrated to Plumstead initially in the temporary offices. He said that the meetings were informal and that minutes were not kept. We find that this explanation is consistent with Adam Davis' e-mail where he suggests that there is some transition to a more formal arrangement. Dean Kinane-Powell was able to identify the trade union representative that had been appointed to act as a health and safety representative. We find that there was a safety committee albeit one that conducted business in an informal manner. We also accept that there was at least one health and safety representative.

The law to be applied

Protected disclosure claims

121. The protection for workers who draw attention to failings by their employers or others, often referred to as 'whistle-blowers', was introduced by the Public Interest Disclosure Act 1994 which introduced a new Part IVA to the Employment Rights Act 1996.

122. In ***Jesudason v Alder Hey Children's NHS Foundation Trust*** **[2020] ICR 1226** Elias LJ described the purposes of the protection as follows:

'Ever since the introduction of the Public Interest Disclosure Act 1998, the law has sought to provide protection for workers (colloquially known as

whistleblowers") who raise concerns or make allegations about alleged malpractices in the workplace. Too often the response of the employer has been to penalise the whistleblower by acts of victimisation rather than to investigate the concerns identified. The 1998 Act inserted a new Part IVA into the Employment Rights Act 1996 designed to prevent this. The long title to the Act describes its purpose as follows:

> *"An Act to protect individuals who make certain disclosures of information in the public interest: to allow such individuals to bring action in respect of victimisation; and for connected purposes."*

The law which gives effect to the simple principle enunciated in the long title is far from straightforward. The basic principle, set out in section 47B of the Employment Rights Act 1996, is that a worker has the right not to be subject to a detriment by any act of his employer on the grounds that he has made what is termed a "protected disclosure".'

123. Section 43A of the Employment Rights Act 1996 provides that a disclosure will be protected if it satisfies the definition of a 'qualifying disclosure' and is made in any of the circumstances set out in Sections 43C-H. The material parts of the statutory definition of what amounts to a qualifying disclosure are found in Section 43B of the Employment Rights Act 1996 which says:

43B Disclosures qualifying for protection.

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

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

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

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

124. The proper approach to assessing whether there is a qualifying

disclosure for the purposes of Section 43B is that summarised by HHJ Aurbach in ***Williams v Michelle Brown AM*** **UKEAT/0044/19/OO**. He said:

"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

125. To amount to a 'disclosure of information', it is necessary that the worker conveys some facts to her or his employer (or other person). In ***Kilraine v London Borough of Wandsworth*** **2018 ICR 1850, CA** the meaning of that phrase was explained by Sales LJ as follows (with emphasis added):

"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)……..

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

126. The effect of Section 43B Employment Rights Act 1996 is that to amount to a qualifying disclosure, at the point when the disclosure was made, the worker must hold a belief that (1) the information tends to show one of the failings in subsection 43B(1) (a) – (e) and (2) that the disclosure is in the public interest. If that test is satisfied the Tribunal need to

consider whether those beliefs were objectively reasonable. The proper approach was set out in ***Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)*** **2018 ICR 731, CA** where Underhill LJ said:

26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B (1).

27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

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. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal 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.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

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: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

127. When going on to consider what was required to establish that something was in the public interest Underhill LJ said at paragraph 37:

"….. *in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."*

128. The 4 relevant factors identified by Underhill LJ were (at paragraph 34):

"(a) the numbers in the group whose interests the disclosure served – see above;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

129. In ***Dobbie v Felton*** **UKEAT/0130/20/OO** HHJ Tayler reviewed the

decision in ***Chesterton*** he extracted the following propositions:

(1) the necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence

(2) 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 – Underhill LJ doubted whether it need be any part of the worker's motivation

(3) the 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

(4) a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith

(5) there is not much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression

(6) the statutory criterion of what is "in the public interest" does not lend itself to absolute rules

(7) the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest

(8) the broad statutory intention of introducing the public interest requirement was that "workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers"

(9) Mr Laddie's fourfold classification of relevant factors may be a useful tool to assist in the analysis

i. the numbers in the group whose interests the disclosure served

ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

iii. the nature of the wrongdoing disclosed

iv. the identity of the alleged wrongdoer

(10) where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest

in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest

130. The fact that a disclosure is about a subject that could be in the public interest does not automatically lead to the conclusion that the worker believed that she or he was making the disclosure in the public interest: ***Parsons v Airplus International Ltd*** **UKEAT/0111/17/JOJ**. It is a question of fact as to whether the worker held the necessary belief.

131. Where a worker says that the information they conveyed tended to show a breach or likely breach of a legal obligation they do not have to be right either about the facts relayed or the existence of the legal obligation. It is sufficient that the worker actually holds the belief and that objectively that belief is reasonable - see ***Babula v Waltham Forest College*** **[2007] EWCA Civ 174**. However, it is necessary that the belief is actually held. In ***Eiger Securities LLP v Korshunova*** **[2017] IRLR 115** Slade J said:

'…. in order to fall within ERA section 43 B(1)(b), as explained in Blackbay the ET should have identified the source of the legal obligation to which the Claimant believed Mr Ashton or the Respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.'

132. There is no requirement for a worker to spell out what legal obligation they say is engaged within any disclosure but a failure to do so is evidentially relevant to the question or whether they actually held the necessary belief that their information tends to show the commission of any offence and/or breach of any legal obligation see ***Twist DX Ltd and ors v Armes and anor*** **EAT 0030/20**

133. In ***Kraus v Penna plc*** **[2003] UKEAT 0360_03_2011** Cox J held that where Section 43B required a reasonable belief that some wrongdoing was 'likely' that word was to be understood as equating to probable. That case was subsequently overturned by the Court of Appeal in ***Babula v Waltham Forest College*** on other grounds the conclusion in respect of the meaning of the word likely was not disturbed.

134. Any assessment of the belief held by the worker is entitled to take into account any specialist knowledge the worker may have - ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** **[2012] IRLR 4**

135. As a general rule each communication by the worker must be assessed separately in deciding whether it amounts to a qualifying disclosure however, where some previous communication is referred to or otherwise embedded in a subsequent disclosure, then a tribunal should

look at the totality of the communication see ***Norbrook Laboratories (GB) Ltd v Shaw*** **2014 ICR 540, EAT** and ***Simpson v Cantor Fitzgerald Europe*** **EAT 0016/18** (where the worker had failed to make it clear which communications needed to be read together) and ***Barton v Royal Borough of Greenwich*** **EAT 0041/14** (where it was held that separate and distinct disclosures could not be aggregated). When reached the Court of Appeal it was held that the issue of whether disclosures could be aggregated is a matter of common sense and a pure question of fact - see ***Simpson v Cantor Fitzgerald Europe*** **[2021] ICR 695].**

136. Section 43C provides that a qualifying disclosure will be a protected disclosure if it is made to the employer.

137. Section 47B provides:

47B Protected disclosures.

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

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(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.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a)the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b)it is reasonable for the worker or agent to rely on the statement. But this does not prevent the employer from being liable by reason of subsection (1B).]

(2) This section does not apply where—

(a) the worker is an employee, and

(b)the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K

138. In ***Timis and anor v Osipov (Protect intervening)*** **2019 ICR 655, CA**, the Court of appeal held that S.47B(2) does not preclude an employee from bringing a detriment claim against a co-worker under S.47B(1A) for subjecting him or her to the detriment of dismissal. This means that a detriment claim in such circumstances can also be brought against the employer, who will be liable for the detriment under S.47B(1B) unless the 'reasonable steps' defence can be established.

139. The meaning of the phrase *'on the grounds that'* in sub-section 47(1) has been explained in ***Fecitt v NHS Manchester (Public Concern at Work intervening)*** **[2012] ICR 372** where Elias LJ said:

'the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.'

140. A detriment can be on the grounds that the employee has made a protected disclosure whether the motivation is conscious or subconscious. It is not a necessary ingredient of the test that there was any malice towards the worker - ***Croydon Health Services NHS Trust v Beatt*** **2017 ICR 1240, CA.**

141. Depending on the facts there can be a distinction between the fact of the disclosure itself and the manner in which the employee raises or pursues any complaints: ***Panayiotou v Chief Constable of Hampshire Police and anor*** **2014 ICR D23, EAT,** ***Mid Essex Hospital Services NHS Trust v Smith*** **EAT 0239/17,** ***Woodhouse v West North West Homes Leeds Ltd*** **[2013] I.R.L.R. 773 and** ***Martin v Devonshires Solicitors*** **2, EAT,2011 ICR 35.** The underlying principle in those cases was approved by the Court of appeal in ***Page v Lord Chancellor and another*** **[2021] IRLR 377** per Underhill LJ at paragraphs 53 -56.

142. An employer who subjects an employee to a detriment or dismissed her of him on the grounds that they have raised some complaint that the employer genuinely and honestly does not regard as being a protected disclosure runs the risk that if an employment tribunal later concludes that a disclosure was made it will be taken to have acted unlawfully – see ***Croydon Health Services NHS Trust v Beatt*** *where Underhill LJ* said:

'I wish to add this. It comes through very clearly from the papers that the Trust regarded the Appellant as a trouble-maker, who had unfairly and unreasonably taken against colleagues and managers who were doing their best to do their own jobs properly. I do not read the Tribunal as having found that that belief was anything other than sincere, even though it found that it was unreasonable. But it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest. Those questions will ultimately be judged by a tribunal, and if the employer proceeds to dismiss it takes the risk that the tribunal will take a different view about them. I appreciate that this state of affairs might be thought to place a heavy burden on employers; but Parliament has quite deliberately, and for understandable policy reasons, conferred a high level of protection on whistleblowers. If there is a moral from this very sad story, which has turned out so badly for the Trust as well as for the Appellant, it is that employers should proceed to the dismissal of a whistleblower only where they are as confident as they reasonably can be that the disclosures in question are not protected (or, in a case where Panayiotou is in play, that a distinction can clearly be made between the fact of the disclosures and the manner in which they are made).'

143. The meaning of the word 'detriment' in Section 47B is the same as in a claim of direct discrimination under the Equality Act 2010 and is treatment that a reasonable worker would consider to be to their disadvantage. In ***Jesudason v Alder Hey Children's NHS Foundation Trust*** the Court of Appeal stated:

"27.In order to bring a claim undersection 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistleblowing cases. In Derbyshire v St Helens Metropolitan Borough Council (Equal Opportunities Commission intervening) [2007] ICR 841, para 67, Lord Neuberger of Abbotsbury described the position thus:

> *"67. In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13, 31A that 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment'.*
>
> *68.That observation was cited with apparent approval by Lord Hoffmann in Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065, para 53. More recently it has been cited with approval in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of*

Craighead, after referring to the observation and describing the test as being one of 'materiality', also said that an 'unjustified sense of grievance cannot amount to "detriment"". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: 'If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice'."

28.Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."

144. Where, as in the present case, there are several alleged protected disclosures and a number of alleged detriments and/or a dismissal it is necessary to take a structured approach. Guidance was given in ***Blackbay Ventures Ltd T/A Chemistree v Gahir*** **UKEAT/0449/12/JOJ** where it was said a tribunal should take the following approach:

a. Each disclosure should be separately identified by reference to date and content.

b. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.

c. The basis upon which each disclosure is said to be protected and qualifying should be addressed.

d. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

e. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in S43 B1 of ERA 1996 under the 'old law' whether each disclosure was made in good faith; and under the 'new' law introduced by S17 Enterprise and Regulatory Reform Act 2013 (ERRA), whether it was made in the public interest.

f. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

g. The Employment Tribunal under the 'old law' should then determine whether or not the Claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest.

145. Section 48(1) of the Employment Rights Act 1996 provides for a right of enforcing any claim brought under Section 47B in the employment tribunal. Sub section 48(2) provides that:

'(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.'

146. The effect of Sub section 48(2) of the Employment Rights Act 1996 is that once the worker proves that there was a protected disclosure and a detriment the Respondent bears the burden of showing that was not on the grounds that the worker had made a protected disclosure. The fact that the employer leads no evidence, or that the explanation it does give is rejected, does not lead automatically to the claim being made out. It is for the tribunal looking at all the evidence to reach a conclusion as to the reason for the treatment - See ***Ibekwe v Sussex Partnership NHS Foundation Trust EAT*** **0072/14** and ***Kuzel v Roche Products Ltd*** **2008 ICR 799, CA**. Where there is no evidence or the employer's explanation is rejected it may be legitimate for the tribunal to draw an inference from the failure to establish the grounds for any treatment.

147. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

148. Where the worker is an employee and complains of a dismissal by their employer (in contrast to the actions of a fellow worker in deciding to dismiss them) then the employee may present a claim that they have

been unfairly dismissed under Section 111 of the Employment Rights Act 1996. If they can establish that they have been dismissed, then the dismissal will be automatically unfair if the requirements of Section 103A are met. Section 103A reads as follows:

103A Protected disclosure.

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

149. Where, as here, an employee has less than 2 year's continuous service they have the burden of proving that the reason for the dismissal falls within Section 103A and therefore falls into the exception found in Section 108(3)(ff) of the Employment Rights Act 1996 - see ***Smith v Hayle Town Council*** **[1978] ICR 996** for the general principle and ***Ross v Eddie Stobart Ltd*** **UKEAT/0068/13/RN** specifically in relation to a complaint relying on Section 103A.

Health and safety

150. An employee who raises or responds to matters relating to health and safety is protected against any retaliation by her or his employer short of dismissal in the circumstances set out in Section 44. At the time of the hearing the material parts of Section 44 read as follows:

44 Health and safety cases

(1) An employee 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—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) ……

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d)in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his

place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) This section does not apply where the detriment in question amounts to dismissal (within the meaning of Part X).

151. The scope of Sub-section 44(1)(a) (and Sub-section 100(1)(a) which is in identical terms was considered in ***Castano v London General Transport Services Ltd*** **[2020 IRLR 417**. Eady J held that:

> *'Subsection (1)(a) is directed towards the situation in which a particular employee has been designated, over and above their ordinary job duties, to carry out specific activities in connection with preventing or reducing risks (essentially, a health and safety officer's function). Appointing an employee to do a job in which they must exercise some responsibility to take care of their own health and safety and that of others (which, per Von Goetz, could extend beyond other workers) is not the same thing.'*

152. The phrase '*which the employee reasonably believed to be serious and imminent'* is found in sub-sections 44(1)(d) and (e) and in the same terms in section 100. In ***Kerr v Nathan's Wastesavers*** **Ltd EAT 91/95**. The EAT noted that the purpose of the legislation is to protect employees who raise matters of health and safety and held that not too onerous a duty of enquiry should be placed on the employee.

153. Section 44 prohibits detrimental treatment 'on the grounds of' the various protected acts and functions. That phrase has the same meaning as in Section 47B of the Employment Rights Act 1996. To establish unlawful conduct, it is enough that the fact that the employee has done any protected act or function is a material influence in subjecting her or him to a detriment.

154. A claim under Section 44 is enforced through Section 48 of the Employment Rights Act 1996. Accordingly, the approach to the burden of proof is the same in a claim relying on Section 44 as it is under Section

47B and we have set out the relevant legal principles above.

155. Sub-section 44(4) provides that the section does not apply where the detriment complained of is dismissal. Protection from dismissal in these circumstances is afforded by Section 100 of the Employment Rights Act 1996. The material parts of that section read as follows:

Section 100 Health and safety cases.

(1) 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—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b)…

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he

shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

156. The burden of establishing that the dismissal was for a reason falling within Section 100 falls on the Claimant – see above.

Discussions and conclusions

157. There is some overlap in the claims. In particular where we have to make further findings of fact about the reason for any treatment of the Claimant. Before dealing with that we shall address the issues of whether the Claimant has established that he made any protected disclosures and/or did anything that was a protected act for the purpose of Section 44 of the Employment Rights Act 1996.

Has the Claimant established any protected disclosures?

158. In her submissions Ms Ferber argued that the Respondent had a knockout blow to any of the claims reliant on establishing a protected disclosure. In short, she says that the Claimant was so consumed by his own agenda that we can confidently conclude that he did not actually believe that anything he said was in the public interest or even that they tended to show any wrongdoing. We have not accepted the entirety of that argument for the reasons we set out below. We shall therefore address each of the questions posed in ***Williams v Michelle Brown AM*** grouping the disclosures together where it is convenient to do so. We shall adopt the numbering used in the list of issues to refer to each disclosure (1.1.1 – 1.1.7)

Did the disclosures include 'information'?

159. On behalf of the Respondent Ms Ferber concedes that in disclosures 1.1.1 – 1.1.6 the communications and discussions all included 'information'. That concession was made subject to the Claimant making it clear what parts of the discussions that took place on 17 and 25 June he relied upon. We find that that concession was rightly made.

160. The Claimant's second sentence of his e-mail of 12 June 2019 (disclosure 1.1.1) is inquisitorial. He asked, '*do we have suitable and sufficient risk assessments in place'*. That sentence taken in isolation does not appear to have any factual content at all. The fact that a disclosure is phrased as a question does not mean that it cannot be a disclosure of information. A surgeon who says, 'has this hospital not got a single working operating table?' is plainly disclosing information. The Claimant's second sentence cannot be read in isolation from the rest of his e-mail. In his first sentence he says he is raising a 'safety concern'. In later passages he refers to risk assessments not being disseminated. We find that reading the whole e-mail in context the Claimant is conveying information that there are insufficient

risk assessments in place. We find that that has a sufficient factual content to pass the test in ***Kilraine***.

161. In disclosures 1.1.2, 1.1.3,1.1.5 &1.1.6 the Claimant referred to the fact that the Respondent was not doing risk assessments where its staff attended the sites under the control of ATC. In our view that assertion is a description of a state of affairs. It has factual content – namely that the Respondent was not undertaking its own risk assessments. That factual information would 'tend to show' that there was a breach of a legal obligation to compile witness statements (assuming for these purposes that there is any such obligation). As such, we find that in each case the reference to the fact that independent risk assessments were not being carried out has a sufficient factual content to meet the test set out in ***Kilraine*** above.

162. In disclosures 1.1.1, 1.1.3 (which copies in 1.1.1), 1.1.5 & 1.1.6 the Claimant said words to the effect that that such risk assessments as there are not being cascaded to the employees. Once again, we would accept that this has factual content – that employees are not told of the risk assessments. Assuming that there is a legal obligation to disseminate this information then the information given by the Claimant would tend to show a failure. Again we are satisfied that there is sufficient factual content to meet the test in ***Kilraine***.

163. In the meeting with Paul Jones and Dean Kinane-Powell the Claimant made reference to the working conditions in the temporary offices at Plumstead (this is disclosure 1.1.4). He said that he sometimes could not get a seat and that it was noisy and he could not concentrate when reviewing documents. Elsewhere he had pointed out that the documents he was reviewing concerned high voltage systems. We consider that there are two factual elements, a lack of seats and a noisy environment in which to review important documents. In our view that is sufficient to amount to information. In the list of issues the Claimant (we assume) has suggested that he talked about the arrangements for working near high voltage and the suitability of safety critical information. Having read the transcript prepared by the Claimant we do not see that he raised those latter two matters either expressly or by implication. The closest he gets is to say that he had not worked to the roster because he was prioritising 'HV documentation'. We do not consider that there is any information given about this (or more accurately none given that tends to show any failure).

164. In his e-mail of 28 June 2019 (disclosure 1.1.6) in which the Claimant purported to summarise the discussions of the meeting of 25 June 2019. The Claimant repeats what he said about reliance on the contractor's risk assessments. The Claimant once again implies that risk assessments have not been disseminated. For the reasons above we find that this would constitute information sufficient to pass the test in ***Kilraine***. In addition the Claimant raised a number of additional matters in particular he says that staff had been told that the 'Control of Substances Hazardous to Health' regulations applied only to man-made substances. In our view this is 'information'. He goes on to assert that this is incorrect and that bird droppings and other biological agents are covered by the regulations. He

suggests that that presents a risk. Again we accept that those passages constitute information sufficient to pass the test in ***Kilraine***. In the light of our conclusions elsewhere it is unnecessary to go further into that e-mail. It is sufficient to say that some parts of it include sufficient information.

165. The final disclosure relied upon by the Claimant is his e-mail to Hayley Child sent on 2 August 2019 (1.1.7 of the list of issues). He couples that with what he said in the fact-finding meeting on 8 August 2019. We shall consider whether what the Claimant said on each occasion satisfied the requirement for conveying information before asking whether what the claimant said on two separate occasions can be aggregated in the way suggested.

166. Ms Ferber invited us to find that asking '*is Plumstead Depot fit for purpose'* amounted only to a question and included no information. We agree. The two sentences in that e-mail do not include any factual assertions at all. We would accept that there is an inference to be drawn that the Claimant is suggesting he believes that there is reason to doubt that the building is fit for purpose. However he fails to set out any facts to support that belief. We do not consider that this e-mail in isolation contains information sufficient to pass the test in ***Kilraine.***

167. During the meeting on 8 August 2019 the Claimant does on a number of occasions say that the e-mail from Hayley Child of 11 July 2019 indicated that the windows at the Plumstead offices were unsafe. He says that this led him to believe that the Respondent was moving in prematurely. We consider that a reference to a window being unsafe does constitute information sufficient to pass the test in ***Kilraine***. It is therefore not necessary for us to consider if the Claimant's two communications can be aggregated.

168. Accordingly to some degree at least we accept that on each of the 7 occasions when qualifying disclosures are said to have been made what was communicated was sufficient to amount to information for the purposes of Section 43B.

The Claimant's subjective belief -public interest.

169. The next question is whether, at the time the disclosures were made the Claimant actually believed that they were in the public interest. At paragraphs 14 and 15 of her closing submissions Ms Ferber makes a compelling case for the tribunal to find that the Claimant was so absorbed in his own self-interest that he gave no thought at all to the public interest. She correctly identified that the question of whether a belief was held is a question of fact for the tribunal – see ***Parsons v Airplus International Ltd***. Whilst recognizing the force of Ms Ferber's submissions we find that we can only agree with her in respect of the final disclosure.

170. We remind ourselves that it was made clear in both ***Chesterton*** and ***Dobbie v Felton*** it was confirmed that the tribunal are not primarily concerned with the motivation for making a disclosure. A disclosure in bad faith is still capable of being a qualifying disclosure. Provided that there is

a belief that the disclosure is in the public interest it does not matter how large a part that played in deciding to speak out.

171. We would agree with Ms Ferber in respect of the following matters:

171.1. that the timing of the Claimant's disclosure strongly supports a finding that he made his disclosures as a tactical measure to advance his position in respect of the introduction of the roster.

171.2. The suggestion that the disclosures were tactical is illustrated by the threats that the Claimant directed to Dean Kinane-Powell on 13 June 2019, 'you are more than welcome to try', when he was told to work to the roster. These were rapidly followed by an escalation of the disclosures to the commissioners on 14 June 2019 before giving the managers responsible for health and safety any realistic opportunity to discuss his concerns.

171.3. The Claimant unreasonably suggested that his safety concerns were 'being ignored' when he sent an e-mail to the Head of Employee Relations. The Claimant entirely unreasonably expected everybody to agree with him and was not prepared to listen to alternative views. He was never 'ignored' and could not reasonably have believed that he had been.

172. In respect of the first 6 disclosures we do not accept that the Claimant was so consumed by his own agenda that he never gave any thought to the public interest. Against Ms Ferber's argument is the fact that the Claimant's role and that of his team involved working with high voltages. Such work is very dangerous unless undertaken very carefully and there is a real risk of the very gravest of injuries if mistakes are made. There is an obvious public interest in ensuring that the proper safety measures are in place.

173. Applying the guidance in ***Chesterton*** we consider that, even if the Claimant only had in mind the interests his team members, in the circumstances that would be a sufficiently large group that in the particular circumstances of this case it would amount to a public interest.

174. We have regard to our findings about whether the Claimant actually believed that there was any relevant wrongdoing. Below we hold that the Claimant did believe that the Respondent were in breach of their statutory responsibilities in respect of health and safety. We have found that the Claimant was entirely rigid in his beliefs that the Respondent was wrong and that he was right. Given that he held that belief it would be surprising if he had given no thought to the public interest. We find that the Claimant was passionate about health and safety matters. That finding is supported by the reports of the Claimant being very good at his job which, prior to any maintenance work starting, was focussed on putting in place systems and documentation to support safe working practices.

175. Whilst we agree with Ms Ferber that the Claimant was driven to make his disclosures as a means of thwarting the instructions to start working to the roster with one exception we do not agree that that was to the exclusion of all else. We find that when raising the matters 1.1.1 -1.1.6 the Claimant did believe that saying what he did was in the public interest.

176. The exception to this is in respect of the final disclosure. We find that this disclosure was raised purely and exclusively as a means of excusing his refusal to attend at the office in Plumstead on 17 July 2019. The only issue with the Plumstead office that the Claimant knew about was the windows. He would have known that the Respondents had teams of professionals who would be responsible supervision the completion of the building. He had no reasonable basis for believing that any issues would be undetected. The issue raised about the windows illustrates that rather than undermines it. The instruction from Hayley Child simply and effectively informed the staff members how any danger from the windows could be averted.

177. We do not believe that the Claimant actually believed that there was anything dangerous about the Plumstead depot. He did not raise it at the time he refused to go to the depot on17 July 2019. It was something that he only raised when disciplinary proceedings were commenced against him. Elsewhere we have found that the Claimant had notice of all the disciplinary meetings it follows that we have found him an unsatisfactory witness in that respect. We recognise that being inaccurate about one matter does not necessarily mean that a party is being inaccurate about some other matter. However, where, as here, the disclosure is so obviously misguided as to raise serious questions about whether there could be a belief that it was in the public interest a willingness to put forward an accurate account elsewhere is a matter which we feel we can take into account.

178. Accordingly we accept that whilst the Claimant was motivated at all times by his own self-interest where he was raising matters concerning risk assessments he did believe that these matters were in the public interest. In respect of the final disclosure we accept Ms Ferber's argument that whilst the safety of the new offices was capable of being a matter of public interest the Claimant did not actually believe that his disclosure was in the public interest.

<u>Public Interest – the objective test</u>

179. Ms Ferber did not go as far as to suggest that the Claimant could not have reasonably believed that raising the matters he did was in the public interest. Her submissions focused on the subjective element. We consider that there is a strong public interest in ensuring that work on the railways is conducted safely and in accordance with the law. The consequences of any error are potentially so great that there could reasonably be though to be a public interest in what might in other industries appear to be minor transgressions. We remind ourselves that

the test is not whether we ourselves consider the disclosures to be in the public interest but whether the Claimant could reasonably do so. We are confident that that is the case in respect of disclosures 1.1.1 – 1.1.6. Apart from disclosure 1.1.4 the disclosures included information about risk assessments and their dissemination. These are important tools in reducing risk. Reducing risk is a matter of real public importance. A sufficiently wide pool of employees was directly affected to engage the public interest. The information conveyed in disclosure 1.1.4 concerned the working conditions when safety critical documents were being produced.

180. We have found that the Claimant gave no thought to the public interest when he referred to the safety of the Plumstead depot. However, we find that if he had, he could reasonably have believed that making reference to the safety of the windows was in the public interest. A significant number of employees were affected by the issue. If it could satisfy the test of 'tending to show' which we deal with below we consider that the Claimant could have reasonably believed that drawing attention to this was in the public interest. The fact that he could have believed this does not undermine our finding that he did not give this a moment's thought.

'Tending to show' – subjective belief

181. The Claimant says that each of his disclosures tends to show a matter set out in both sub-sections 43B(1)(b) & (d). The list of issues clarifies the position as follows.

1.5 Did the Claimant believe that it tended to show:

1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation; Management of Health and Safety at Work Regulations 1999 and Health and Safety at Work Act 1974; or

1.5.2 the health and safety of any individual had been, was being or was likely to be endangered.

182. We find that the Claimant did, and still does believe, that the effect of the Management of Health and Safety at Work Regulations 1999 and Health and Safety at Work Act 1974 required the Respondent to carry out a risk assessment when it required its employees to attend sites in order to shadow or work alongside the employees and subcontractors of ATC whether that company had done a risk assessment or not. We further accept that the Claimant actually believed that information about risk assessments that had been done was not being disseminated and that this was a breach of the legislation he has identified.

183. Ms Ferber took the same point as above in relation to whether the Claimant gave a moment's thought to whether his disclosures tended to show any relevant wrongdoing. Here we have no difficulty rejecting this argument in respect of the first 6 disclosures. We find that the Claimant has convinced himself that he is right. If the legislation imposed the

requirements that the Claimant believed it did then his disclosures all contained information tending to show that those requirements were not met. The Claimant actually believed that to be the case regardless of his motivation in making the disclosures.

184. The issue of whether the Claimant actually believed that what he said tended to show anything falling within sub-section 43B(1)(d) is less straightforward. Not doing a risk assessment or failing to disseminate a risk assessment does not by itself harm anybody. That said we would accept that the Claimant actually believed that not doing and not disseminating risk assessments placed employees at a greater risk of injury. We consider that the word 'endangered' does not require any actual harm. A person would be endangered if there was any risk of injury even if it never occurred. We therefore accept that the Claimant could, and actually did, believe that the failure to do independent risk assessments and disseminate all risk assessments tended to show that a person would be endangered.

185. We are satisfied that the Claimant strongly believed that he was right in all matters. This gives us confidence to find that he subjectively believed that the information he disclosed in disclosures 1.1.1 to 1.1.6 tended to show the two relevant failures he has identified.

186. Turning to disclosure 1.1.7 we accept the submission of Ms Ferber that in this particular instance the Claimant did not give a moment's thought to whether the information he disclosed tended to show any wrongdoing. We rely on our reasoning above when looking at the public interest. The Claimant had no reasonable basis for believing that there was some general failure by the Respondent moving in to the Plumstead offices. He is an intelligent individual and we do not believe that he would have held a wholly irrational view. In respect of the windows we would accept that the Claimant had some information that, if used in a particular way, the windows could give rise to a risk. However, what he also knew was that that risk had been identified and a straightforward and sensible solution found. The fact that there might be a risk if precautions are not taken does not mean that there is a risk if they are. The risk, which was probably never great, had been averted. We do not accept that the Claimant actually believed that the fact that the windows of the new office could be opened in swing mode tended to suggest either of the matters he has identified.

<u>Tends to show – Reasonableness</u>

187. We are able to deal with disclosures 1.1.1 to 1.1.6 together as with the exception of 1.1.4 they all include to a greater or lesser degree information about the practice of relying upon risk assessments completed by ATC and also about the manner in which risk assessments more generally were disseminated. Disclosure 1.1.4 concerns information about the working conditions where safety critical documents were being drawn up.

188. We need to consider whether the Claimant could reasonably believe that there was a breach of the health and safety legislation identified and/or a risk that a person's health and safety could be endangered by the practice of relying upon risk assessments produced by ATC. This issue was at the heart of four of the Claimant's disclosures. Whether or not the Claimant is right is a matter of statutory interpretation. As is clear from ***Babula v Waltham Forest College*** the Claimant need not be right about the existence of the obligation nor whether any obligation has been breached.

189. We are of the opinion that the question of whether the employer of a visitor to a site where another contractor is working is required to carry out a separate risk assessment is likely to depend on what the employee is required to do. If they are merely observing the work of the contractors employees then, without deciding it, we doubt whether the Management of Health and Safety at Work Regulations 1999 and particularly regulations 11 and 12 require a separate risk assessment to be carried out. We think that the Claimant was probably wrong. However, that does not necessarily mean that he could not have reasonably believed that he was correct. We take into account the fact that the Claimant was told that he was wrong by Kevin Wilson. Where a worker is made aware of facts which undermine their subjective beliefs it seems to us this will impact the question of whether their belief thereafter is reasonable. We find that the Claimant was very blinkered in his view. However, by a small margin we are prepared to accept that his interpretation of the regulations was arguable. As such we accept that he could have reasonably believed that the information he gave about the practice of relying on ATC risk assessments was a breach of the relevant legislation.

190. We do accept that where the Claimant conveyed information that suggested that risk assessments were not being disseminated to team members and when he said that safety critical documents were being produced in an unsuitable environment he could have reasonably believed that this breached the legislation he had in his mind and later referred to.

191. In the light of these findings it is unnecessary for us to separately analyse whether the disclosures 1.1.1 – 1.1.6 also qualified relying on Sub-section 43B(1)(d).

192. We do not accept that the Claimant could reasonably have believed that the information he conveyed on 2 and 8 August 2019 tended to show any past present or future breach of the legislation he had in mind or that a person's health and safety had been was or was likely to be endangered. The Claimant could not have reasonably believed that occupying the Plumstead office in circumstances where an issue with the windows had been identified and sensible precautions adopted amounted to an actual or potential breach of the legislation he had in mind. The Health and Safety at Work Act 1974 and the legislation thereunder does not require an employer to entirely eliminate all risks.

The Claimant with his specialist knowledge either knew or ought to have known that – see ***Korashi v Abertawe Bro Morgannwg University Local Health Board***. What is required by the legislation is reasonable steps to reduce risk. Hayley Child's e-mail of 11 July 2019 was an example of that in practice. She gave a clear instruction which, if followed, eradicated the risk of anybody falling from a window. The fact that there was a minor issue with cooling the building prompting some employees to fully open the windows (until instructed not to do so) did not give any basis for a reasonable belief that the Respondent had occupied the building early and in breach of any legislative requirements.

193. We do not accept that the Claimant could have reasonably believed that the Respondent's decision to occupy the Plumstead office endangered the health and safety of any person. On the information available to the Claimant a single issue had been identified with the offices that had been promptly and sensibly addressed. There was no further foundation for any belief that the employees' health and safety was endangered.

194. It follows from what we have set out above that we accept that disclosures 1.1.1 – 1.1.6 were qualifying disclosures. As it was common ground that in each case the disclosures were made to the Respondent it follows that they were protected disclosures for the purposes of Section 43A of the Employment Rights Act 1996.

Qualifying Acts under Section 44

195. The Claimant relies on a number of acts that he says qualify for protection under Section 44 of the Employment Rights Act 1996. These are:

    195.1. He says that he had been designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work (Section 44(1)(a) and List of issues 2.1.1).

    195.2. He says that he brought to his employer's attention by reasonable means circumstances connected with his work that he reasonably believed were harmful or potentially harmful (section 44(1)(c) – List of issues 2.1.4. The occasions where he says he did this are:

        195.2.1. On 25 June 2019 at a meeting with Adam Davis and Kevin Wilson – which was also protected disclosure 1.1.5 (List of issues 2.2.1)

        195.2.2. 27 June 2019 when the Claimant met Dean Kinane-Powell (list of issues 2.2.2)

        195.2.3. 28 June 2019 when the Claimant sent an e-mail to Adam Davis and Kevin Wilson – which was also

protected disclosure 1.1.6 (List of issues 2.2.3)

195.2.4. 17 July 2019 where the Claimant sent a further e-mail to Adam Davis (list of issues 2.2.4)

195.2.5. 2 August 2019 where the Claimant sent an e-mail to Hayley Child asking whether the Plumstead office was fit for purpose (List of Issues 2.2.5)

195.2.6. On 8 August 2019 during the fact-finding meeting where the Claimant raised the issue of the Plumstead office – the two matters both said to be protected disclosure 1.1.7 (list of issues 2.2.6)

195.3. He says that his refusal to attend the Plumstead office on 17 July 2019 satisfies the conditions in sub sections 44(1)(d) and (e) in that he says there were circumstances of danger which he reasonably believed were serious and imminent.

196. We shall deal with each of these in turn.

Sub-Section 44(1)(a)

197. Ms Ferber relied on ***Castano v London General Transport Services Ltd*** in support of her contention that the Claimant had not been designated to carry out activities in connection with reducing risks to health and safety. She developed that submission and said that it was not enough that from time to time the Claimant's role in maintenance required him to take steps to avert danger. What was necessary she said was that the Claimant was specifically designated to carry out a health and safety role.

198. The Claimant argued that during his recruitment the essential competencies required included awareness of health and safety practice and procedure. He pointed to the fact that he had prepared method statements and similar documents all of which were directed to a safe system of working.

199. We accept Ms Ferber's arguments but only in part. We find that appointing the Claimant to the role of Principle Maintenance Technician was not of itself designating him to carry out activities in connection with preventing or reducing risks to health and safety at work. However, it seems to us that when the Claimant was asked to prepare risk assessments or method statements which had as their primary purpose designing a safe system of work he was designated to carry out the sort of activities that could have been carried out by a Health and Safety Officer. The Claimant had included in the bundle a draft document entitled Proving Equipment is Electrically Dead. It seems to us that this is a clear example of the Claimant being designated activities aimed at reducing risks to health and safety.

200. We therefore conclude that where the Claimant was asked to do risk assessments and method statements, he does fall within the scope of Section 44(1)(a). However, we agree with Ms Ferber that the Claimant was not generally designated to carry out health and safety activities and the wording of Section 44(1)(a) and Section 100(1)(a) makes it clear that it is the carrying out of the designated activities that is protected. Where the Claimant went beyond the activities he had been asked to carry out he cannot rely on this section.

Sub-section 44(1)(c)

201. An employee can only rely on Sub-section 44(1)(c) where she/he works at a place where there is no health and safety representative or safety committee OR where there is, but it is not reasonably practical to raise concerns to the representative of committee.

202. We have set out in our findings of fact above our conclusions about the existence of a safety committee and health and safety representatives. We are satisfied that the Respondent did have a health and safety committee and that there were employee representatives at the material time. We need to deal with the question of whether they were available at the 'place' where the Claimant worked. We have accepted the evidence of Kevin Wilson that there was a safety committee that had bi-weekly meetings. Those meetings commenced at Baker Street, they were then conducted at Plumstead at first in the temporary offices and then in the new office. Furthermore, we have accepted Dean Kinane-Powell's evidence that Linda Strickland, a Trade Union Representative, had been appointed as a safety representative.

203. At the time that the Claimant raised matters relating to health and safety he was working from Endeavour Square having unilaterally decided to do so. Kevin Wilson accepted that the Safety Committee had its meetings elsewhere and nobody told us where Linda Strickland worked. It was always intended that the Claimant would be based at Plumstead. We do not consider that the fact that the Claimant was temporarily working elsewhere means that his place of work was other than the place where he would usually be expected to be based. In our view that is Plumstead. We consider that to fall within the requirements of Section 44(1)(c) the Claimant needs to show either that he raised his concerns to the safety committee OR that it was not reasonably practical for him to do so.

204. Both Kevin Wilson and Adam Davis sat on the safety committee. It seems to us that when the Claimant raised matters with those two individuals, he should be taken to have raised them with the safety committee. To hold otherwise is entirely artificial.

205. Neither Dean Kinane-Powell, Hayley Child or Lesley Hull were members of the Safety Committee. It is therefore necessary to ask whether it was reasonably practical for the Claimant to do so. When the Claimant met with Adam Davis and Kevin Wilson there was a discussion about the

means of reporting health and safety concerns. The Claimant was told that there were trade union health and safety representatives. As such he was aware from that point of the appropriate means of reporting any concerns. The Claimant relies on what he told Dean Kinane Powell on 27 June 2019 and what he told Hayley Child on 2 August 2019 and what he told Lesley Hull on 8 August 2019. At those times, he knew that there were health and safety representatives. We find that it was reasonably practicable to have raised any concerns with such a representative. If the Claimant did not know who they were he could quite easily have asked.

206. In respect of the meeting between Dean Kinane-Powell and the Claimant on 27 June 2019 we are unclear that the Claimant raised anything to do with health and safety. This was the meeting to discuss the Claimant's flexible working request. The basis of that request did not concern any health and safety issue. In his witness statement the Claimant does not point to the fact that he raised any health of safety issues. In his purported summary of the discussion in his e-mail of the same day he does briefly mention noise levels and overcrowding at the temporary Plumstead offices. We would accept that these two matters might be considered to be connected to health and safety.

207. In respect of the matters raised with Adam Davis and Kevin Wilson we repeat our conclusions in respect of the issue of whether the same events were protected disclosures. We are satisfied that the Claimant did raise circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

208. In conclusion we find that the conversations and communications with Adam Davis and Kevin Wilson did amount to protected acts but that the communications with Dean Kinane-Powell, Hayley Child and Lesley Hull did not as they were not raised with a safety representative when it was reasonably practical to do so.

Sub-sections 44(1)(d) and (e)

209. It is convenient for us to look at Sub-sections 44(1)(d) and (e) together. To amount to a protected act under those two sub-sections the worker/employee must show there were '*circumstances of danger which the employee reasonably believed to be serious and imminent'*. The Claimant relies on the circumstances at the Plumstead office.

210. The only known potentially danger that the Claimant had identified was that set out in Hayley Child's e-mail of 11 July 2019. Beyond that the Claimant has asked us to accept that there must have been other circumstances of danger because the Respondent declined to prove that the building was safe. We decline to draw any such inference. There is no material that would support such an inference. We find this to be a most unattractive argument. The Claimant had worked at Endeavour Square and attended the Tribunal building without any proof that either building was safe. We find that the Claimant's demands that the

Respondent prove that the Plumstead office was fit for purpose was simply a tactical move once he realised that his refusal to attend those offices needed to be explained.

211. We do not consider that the fact that the windows at Plumstead might be swung open objectively created circumstances of serious and imminent danger on 17 July 2019 and thereafter when the Claimant refused to attend that office. It is implicit from Hayley Child's e-mail that the fact that employees had been opening the windows in the swing mode was capable of causing a risk. We would accept that falling from a window is serious. However, what we cannot accept is that when the problem had been notified and entirely sensible steps taken to avert that danger the circumstances of serious and imminent danger persisted.

212. The test is not objective but is subjective subject to the objective standard of reasonableness. We have concluded above that the Claimant did not refuse to attend the Plumstead office on 17 July 2019 because of any perceived danger. We have found that this is a matter he seized on later to excuse his behaviour. We have found that he knew full well that there were no health and safety objections to him attending the Plumstead offices. As such we find that the Claimant never actually believed that there were circumstances of serious and imminent danger. If we are wrong about that we find that in the light of the full content of Hayley Child's email the Claimant could not have reasonably believed that there were any such circumstances.

213. For the purposes of Sub-section 44(1)(d) we would further say that insofar as the windows did present any danger at all then the Claimant could have been reasonably expected to avert that danger by following Hayley Child's simple instructions to open the windows in tilt mode or close any window open in swing mode. That could not have been easier.

214. For the purposes of Sub-Section 44(1)(e) we do not consider that the Claimant needed to refuse to attend the Plumstead offices to remove any danger posed by the windows. We do not find that the steps the Claimant took were 'appropriate'. The Claimant could and should have attended and followed the straightforward instructions he had been given in respect of the windows.

215. In conclusion we find that the Claimant's actions were protected to the limited extent set out above.

<u>The significance of the issue on time limits</u>

216. The Claimant first contacted ACAS for the purposes of Early Conciliation On 23 December 2019 he obtained an early conciliation certificate on 23 January 2020. He presented his ET1 to the Tribunal on 11 February 2020. Unless the Claimant can either show that an act or omission did or is deemed to take place after 24 September 2019 the Tribunal will have no jurisdiction to entertain any complaint earlier than that date.

217. The Claimant says that he only received notice of his dismissal on 13 November 2019. We have found that the Claimant probably received an e-mail earlier than that date but, in any event, there is no dispute that any claim arising from the dismissal itself is in time.

218. The time limits for a claim brought under Section 48 of the Employment Rights Act 1996 are set out in sub sections 48(3)-(5) which read as follows:

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

219. The Claimant did not present any evidence that would have permitted the tribunal that it was not reasonably practicable to bring any claim within the ordinary time limits imposed by section 48 of the Employment Rights Act 1996.

220. The meaning of 'an act extending over a period' is the same as the equivalent phrase in the Equality Act 2010. In ***Commissioner of Police of the Metropolis v Hendricks*** **[2002] EWCA Civ 1686** it was held that:

'*the burden is on [the Claimant] to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period''.*

221. In ***Tait v Redcar & Cleveland BC*** **UKEAT/0096/08** it was held that a disciplinary suspension was an act extending over a period.

222. In ***Arthur v London Eastern Railway Ltd*** **| [2007] IRLR 58** the Court of Appeal held that in order for time to be extended on the basis that an act ostensibly out of time forms part of a series of similar acts the Claimant needs to establish that there is at least one unlawful similar act that was presented in time.

223. We are prepared to accept that a dismissal might be a similar act to an earlier detriment (despite the claims falling under different sections of the Employment Rights Act 1996).

224. In the present case, unless the Claimant is able to establish that either his dismissal by Nisha Quinn or the fact that after 24 September 2019 she posted letters to his Cardiff address was unlawful or that there was an act extending over a period that ended after 24 September 2019 he will be unable to bring any earlier act within the jurisdiction of the Tribunal. For that reason, our analysis starts with the most recent acts.

Unfair dismissal – Section 103A and Section 100

225. We have agreed with the Claimant that he made protected disclosures 1.1.1 to 1.1.6. The issue for the Tribunal in the unfair dismissal claim that is made relying on Section 103A of the Employment Rights Act 1996 is whether the reason, or if more than one the principle reason for the dismissal was that the Claimant made a protected disclosure. In respect of the unfair dismissal claim relying on Section 100 the issue we need to decide is whether the reason for the dismissal is for a reason falling within sub-section 100(1).

226. Whilst we have set out above that in this claim the burden of proof rests on the Claimant to show that the dismissal was for an automatically unfair reason. However, this is not a case where we have found it necessary to rely on the burden of proof. Nisha Quinn has given us an explanation for why she decided to dismiss the Claimant. She told us that the reason that she dismissed the Claimant was that she considered that the Claimant's actions in refusing to attend work at the new Plumstead offices on 17 July 2019 was an act of serious insubordination which she categorised as gross misconduct. She had considered the excuse put forward by the Claimant for refusing the instruction he was given (the issue of whether the building was unsafe) and had rejected it.

227. We have set out above our findings of fact in respect of Nisha Quinn's knowledge of the Claimant's protected disclosures. We have accepted that she had no detail about them other than her knowledge of disclosure 1.1.7 which we have held was not a protected disclosure.

228. In fairness to the Claimant Ms Ferber drew attention to the possibility that the reason for the dismissal could be the reasons of Dean Kinane-Powell or Lesley Hull or the HR department all of whom had played some part in putting material before Nisha Quinn. Ms Ferber drew attention to the decision of the ***Supreme Court in Royal Mail Group***

Ltd v Jhuti [2019] UKSC 55. In that case the Supreme Court held that in the limited circumstances where *'if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason'*.

229. In the light of the reference to ***Jhuti*** we should make it clear that we find that the reason that Dean Kinane-Powell referred the Claimant to the HR team was exclusively that he felt that the Claimant had unreasonably refused a lawful order and had done so in terms leaving him *'pissed off'*. We find that the decision of Lesley Hull was one which was inevitable. Her role was to decide whether there was a case to answer. On the material before her it was obvious that there was. There is no evidence that she, or the HR department, were influenced in any way by the protected disclosures. The fact that there was adverse comment about the way the Claimant conducted and expressed himself is unsurprising and is not a matter from which any inferences could be drawn. Insofar as that provoked antipathy to the Claimant we find that this is truly severable from any of the protected disclosures themselves.

230. Given that we find that none of the persons involved in the decision to dismiss the Claimant had any 'hidden reason' for taking the actions they did ***Jhuti*** is of no assistance to the Claimant.

231. We have said above in our findings of fact that we accept that the only reason that Nisha Quinn dismissed the Claimant was his refusal and the manner of his refusal to attend the offices in Plumstead. The Claimant did not suggest that the refusal itself was a protected disclosure. This means that the Claimant's claim relying on Section 103A of the Employment Rights Act 1996 fails.

232. The Claimant's case was that his refusal to go to the new Plumstead office was a protected act falling within Section 100(1)(d) or (e). We have rejected that. We have held that at the time of the refusal the Claimant had not given any thought to the safety of the new offices and that he only later relied upon the e-mail of 11 July 2019 as an excuse. Even if we are wrong about that we have held that the Claimant could not have reasonably thought that there were circumstances of serious and imminent danger. Even if he had those could have been averted or avoided. It follows from that that the reason for the dismissal was not a reason falling within Section 100(1)(d) or (e).

233. Our finding that the exclusive reason for the dismissal was the Claimant's refusal to attend the Plumstead office precludes the Claimant establishing that any of the acts that we have held fell within Section 100(1) were the reason or principle reason for the dismissal.

234. We should make it clear that even if we had accepted that the Claimant's later concerns about the Plumstead office (protected disclosure 1.1.7) did amount to a protected disclosure our conclusions in respect of the

unfair dismissal claim would be the same. The Claimant was dismissed for failing to obey the instruction given to him on 17 July 2019 and for no other reason.

235. Accordingly, we find that the Claimant has not established that the reason or principle reason for his dismissal fell within Section 100 or within section 103A. His unfair dismissal claim therefore falls to be dismissed.

236. Conscious that the Claimant was unrepresented we note that following clarification in ***Osipov*** it was open to the Claimant to have formulated his complaint not about the dismissal but about Nisha Quinn's decision to dismiss him and brought the claim under section 47B and 48 of the Employment Rights Act 1996. For completeness we will deal with the claim on that basis. Such a claim can only succeed if the decision to dismiss was on the grounds that the Claimant had made protected disclosures. Even under the lower 'causation' test which requires only that the disclosures were a material influence we are entirely satisfied that it was not. Nisha Quinn dismissed the Claimant because of his actions on 17 July 2019 and for no other reason.

The detriment claims

237. The Claimant says that he suffered 9 detriments identified in the list of issues at paragraphs 4.1.1 to 4.1.9. We shall take these in reverse chronological order for the reasons given above. We have not found the dismissal to be unlawful and below we say why we have not found that any detriment was unlawful. In each case we have sought to identify the reason or reasons for any treatment that we have found to be established. We remind ourselves that we need to be alive to the fact that the protected disclosures/acts need not be the reason for the treatment it is enough that they materially influence the treatment. We have found that they did not.

238. It is necessary to deal with all the acts individually, but we have not lost sight of the fact that a series of apparently innocuous acts can establish a pattern that calls out for explanation. We have born that in mind when looking at the acts individually and considered all the evidence even when we have not referred to it.

Sending letters to the Claimant's Cardiff address (list of Issues 4.1.9)

239. There is no dispute that the 3 invitations to a disciplinary meeting were sent to the Claimant's former address in Cardiff when he had notified the Respondent of his address in London. Ordinarily we would accept that that would be a detriment because it would risk the Claimant being unable to attend an important meeting. However, we have found that the Claimant did receive the same correspondence by e-mail. As such he suffered no discernable disadvantage and nothing that a reasonable employee would consider a detriment.

240. In case we are wrong we go on to look at the reasons for the letters being misaddressed. We are entirely satisfied that the reason, and the only reason, that the letters were misaddressed was inadvertence. We have set out above our reasons for rejecting the suggestion that this was deliberate. Had it been deliberate the letters would not have been sent recorded delivery (which would inform the Respondent that they had not been received) and the correspondence would not have been copied to the Claimant's correct and functional e-mail address. Had the Respondent sought to dismiss the Claimant in his absence Nisha Quinn advised by Lance Dirwal would have had no need to postpone the hearing on two occasions to give the Claimant a chance to attend.

241. We are satisfied that the only reason that the letters were sent to the Claimant's Cardiff address was nothing whatsoever to do with the fact that the Claimant had made protected disclosures and/or that he had done protected acts falling within Section 44(1) of the Employment Rights Act 1996. The only reason was a simple failure to update the Claimant's contact details correctly.

<u>Suspending the Claimant on 18 July 2019 including the manner of his suspension (List of Issues 4.1.3)</u>

242. Dean Kinane-Powell was the person who, following advice from HR, suspended the Claimant. The Claimant says that this was carried out in an unreasonable and oppressive way. We have made findings of fact about that above. We have rejected the Claimant's factual case. We have held that Dean Kinane-Powell acted in a calm and reasonable way and that it was the Claimant's own actions in refusing to go to a meeting room and/or accept the suspension letter that caused the situation to become difficult and inflamed. Nevertheless, we would accept that whether he had any right to do so the Claimant could consider not awaiting the arrival of his trade union representative was a disadvantage (hence a detriment). We reach the same conclusion in respect of the suspension itself. We therefore need to turn to the reason for the treatment.

243. We find that Dean Kinane-Powell was entirely untroubled by the protected disclosures made in his presence (concerning the Plumstead temporary offices). We find that he had minimal involvement with the Claimant's other concerns and that insofar as they had come to his attention, he had no objection to team members raising safety concerns.

244. We find that Dean Kinane-Powell sought HR advice and suspended the Claimant because the Claimant had refused to obey his instructions on 17 July 2019 and what is more had none so in a manner in which left Dean Kinane-Powell feeling *'pissed off'*. Objectively the Claimant's words and actions on that day, coupled with his previous refusal to work to the roster would be considered very challenging behaviour by any manager. We consider Dean Kinane-Powell's reaction to be unsurprising and proportionate. Given the way the Claimant had behaved it was objectively reasonable for him to be suspended from

work as he was refusing to obey lawful instructions. We find that this was the actual reason that he was suspended.

245. We have not accepted the Claimant's case that the manner of his suspension was a detriment. We have found that the Claimant was the author of his own misfortune by refusing to meet privately and by refusing to read a letter that had been prepared.

246. We are satisfied that the only reason for suspending the Claimant was that he had bluntly refused a lawful and reasonable instructions. That reason was nothing whatsoever to do with the fact that the Claimant had made protected disclosures and/or that he had done protected acts falling within Section 44(1) of the Employment Rights Act 1996.

247. We would accept that the Claimant's suspension persisted until his dismissal. Ordinarily that might amount to an act extending over a period, a continuous detriment. However, we have concluded that the Claimant received invitations to disciplinary hearings which he did not act on. We doubt whether in those circumstances he could really regard his continued suspension as a detriment. Had he done so he would have contacted his employer. However, if we are wrong about that we shall consider the reasons for the treatment.

248. We find that once a decision to suspend the Claimant was taken there was no active consideration to reviewing that other than endeavoring to arrange a disciplinary hearing. We do not consider that surprising. There was an apparently strong case that the Claimant had acted in a way that made him impossible to manage. His continued presence in the workplace risked further disruption. Objectively suspension until a disciplinary hearing was held was a proportionate and reasonable response. The same circumstances that existed at the outset of the suspension persisted. There is nothing about the decision (or omission to review it) to maintain the suspension that would lead the Tribunal to infer that the reason for the continued suspension was that the Claimant had made protected disclosures and/or had done a protected act.

249. We are satisfied that the reason that the Claimant's suspension was not lifted was that Dean Kinane-Powell and the HR department considered that the Claimant's conduct and the risk of further disruption merited a period of suspension pending a disciplinary hearing. It was that reason that persisted throughout the period and no other. That reason was nothing whatsoever to do with the fact that the Claimant had made protected disclosures and/or that he had done protected acts falling within Section 44(1) of the Employment Rights Act 1996. Whilst the continuation of the suspension amounted to an act extending over a period, we find that it was not unlawful.

<u>The detriments concerning flexible working</u>

250. There are six detriments relating to the Claimant's flexible working request and it is convenient to deal with these together. They are:

250.1. The rejection of the flexible working request by Dean Kinane-Powell (List of issues 4.1.1); and

250.2. The failure to conclude the appeal against the rejection (List of issues 4.1.2); and

250.3. Suggesting to the Claimant that he would lose his 30% antisocial hours payment (List of issues 4.1.4)

250.4. Not offering the Claimant flexibility on shifts when other employees were from 14 June 2019 (List of issues 4.1.5); and

250.5. Requiring the Claimant to rearrange annual leave in a way it was 'impossible' for him to comply with (List of issues 4.1.7)

250.6. Refusing the Claimant's requests to work from home (List of issues 4.1.8)

The rejection of the request including the request to work from home (List of issues 4.1.1 and 4.1.8)

251. The Claimant's flexible working request was made at a time when he knew that the Respondent wished to move to the 24/7 shift pattern that had always been envisaged and for which the Claimant had been receiving substantially enhanced pay. His proposal was in that context ambitious. He essentially asked only to work shifts when he agreed that it was essential and that he ordinarily work at the office and from home within ordinary office hours. Given that we have agreed that Hayley Child had good business reasons for moving to the roster system this request was very unlikely to be agreed.

252. We have rejected the Claimant's case that Dean Kinane-Powell initially agreed to the request and then changed his mind. We consider that the reasons set out in Dean Kinane-Powell's e-mail of 28 June 2019 refusing the request are ostensibly sensible business reasons. The reasons are not detailed but are essentially that the role is one designed to be worked to a 24/7 roster.

253. Dean Kinane-Powell refused one request from the Claimant that he be permitted to work from home on 1 and 16 July 2019. His reason for refusing the request for 1 July were that the claimant was rostered to work at night. He told us that he did not believe that the Claimant would adhere to the instruction to commence night work from home. In respect of 16 July he refused the request because the Claimant was not rostered to work on that day.

254. It is not necessary for us to decide whether Dean Kinane-Powell's reasons were good or bad. Employment Judge Burgher did not permit the Claimant to advance a separate claim based on his flexible working request. What we must ask is whether the reasons given by Dean Kinane-Powell were unaffected by any protected disclosures or

protected acts.

255. We are satisfied that there is nothing remarkable or surprising about the refusal of the Claimant's flexible working request. It was an ambitious request that drove a coach and horses through the 24/7 roster system that all other employees would be expected to adhere to. There is nothing about this decision that would lead us to infer it was taken for any improper reason. In reality the Claimant had made a request that sought to avoid the regular shift work he had agreed to in the first place. Dean Kinane-Powell was not prepared to let him do this.

256. Having had regard to the totality of the evidence we find that the only reasons that the Claimant's flexible working request was refused were the ones given by Dean Kinane-Powell. Good or bad those were business reasons and nothing whatsoever to do with the fact that the Claimant had made protected disclosures and/or that he had done protected acts falling within Section 44(1) of the Employment Rights Act 1996.

257. If we are wrong about this, we find that this complaint was presented out of time and the tribunal has no jurisdiction to entertain it.

<u>The failure to conclude the appeal</u> (List of issues 4.1.2)

258. The Claimant's appeal was going to be heard by Hayley Child on 8 August 2019. The Claimant refused to attend the offices at Plumstead, and no further hearing was arranged. The Claimant did not chase this up. Despite this we would accept that failing to reconvene an appeal hearing is capable of amounting to a detriment.

259. We shall deal with this briefly. At the outset there was no unwillingness to hear an appeal and a hearing was organised. We have found that the Claimant's refusal to attend the Plumstead office was utterly unreasonable. Hayley Child's subsequent internal e-mails show her frustration with the stance taken by the Claimant. We do not find her frustration surprising. At this stage the Claimant had been suspended from work. His future as an employee was uncertain. It does not appear that anybody gave any thought to reconvening the flexible working appeal in those circumstances.

260. We need to ask whether the fact that the Claimant had made protected disclosures and/or done protected acts played any part in the omission to hold a reconvened appeal meeting. We find that it did not. We find that the matter was simply overlooked in the context of the ongoing disciplinary matters.

261. If we are wrong about this, we find that this complaint was presented out of time and the tribunal has no jurisdiction to entertain it.

<u>Suggesting to the Claimant that he would lose his 30% antisocial hours payment</u> (List of issues 4.1.4)

262. We would accept that it was at times intimated to the Claimant that if he did not work to the shift pattern that required him to work anti-social hours he might not receive the 30% salary payment that he received for agreeing to do this. We would have thought that the Respondent's position was so obvious that nobody would have been surprised by it. It seems obvious to us that public funds should not be used to pay an enhancement to pay for working anti-social hours when those hours are not being worked.

263. As a matter of fact, the Claimant never had his pay reduced. We find that the only reason that the possibility of the enhancement being removed was the fact that the Claimant was unwilling to work the roster pattern that the enhancement was specifically designed to reward. That had nothing whatsoever to do with the fact that the Claimant had made protected disclosures and/or that he had done protected acts falling within Section 44(1) of the Employment Rights Act 1996.

264. If we are wrong about this, we find that this complaint was presented out of time and the tribunal has no jurisdiction to entertain it.

Not offering the Claimant flexibility on shifts when other employees were from 14 June 2019 (List of issues 4.1.5)

265. It was common ground before us that some other employees had either made flexible working requests or approached their line manager and asked for an ad-hoc change to the roster. That is the process envisaged by the Respondent's rostering policy. One example we were given was that changes were made to facilitate an employee who had court ordered contact with his children that clashed with some rostered shifts.

266. What the Claimant was seeking was not some minor changes to the roster system but a wholly different way of working whereby his ordinary ours of work would not be on the shift system but would be office hours save that he would work antisocial hours where 'appropriate' and after consultation.

267. We find that if there was any difference in approach to the Claimant then the reason for it was that the Claimant was seeking a working arrangement that radically differed from the 24/7 working pattern that the role had been designed around. What is more, the Claimant wished to maintain some, if not all, of the enhanced pay for working anti-social hours. We find that what the Claimant was asking for and what others had been granted were very different things. We repeat our findings and conclusions in respect of Dean Kinane-Powell's refusal to agree the flexible working request. For the same reasons this claim fails.

Requiring the Claimant to rearrange annual leave in a way it was 'impossible' for him to comply with (List of issues 4.1.7)

268. In his e-mail of 28 June 2019 Dean Kinane-Powell did ask the Claimant to rebook his annual leave. As we have found above that did not amount

to changing the dates that the Claimant had requested leave. Indeed, had the Claimant followed the instructions he was given he would have used up 1 less day of annual leave. Dean Kinane-Powell acknowledged that there were difficulties with the system used to implement this change. The question for us was whether the instruction was influenced by the fact that the Claimant had made protected disclosures or done any protected act.

269. It is a bold suggestion that Dean Kinane-Powell asked the Claimant to book the same leave but in a manner which meant that he would use up less leave by aligning his booking with his rostered shift in order to retaliate against the Claimant for making protected disclosures and or doing protected acts. We find that the reason that Dean Kinane-Powell asked the Claimant to book leave in this way was that he wanted to ensure that the Claimant was working to the roster pattern and not to a Monday to Friday pattern. That had nothing whatsoever to do with the fact that the Claimant had made protected disclosures and/or that he had done protected acts falling within Section 44(1) of the Employment Rights Act 1996.

270. If we are wrong about this, we find that this complaint was presented out of time and the tribunal has no jurisdiction to entertain it.

Requiring the Claimant to work night shifts on 28 June without assessing the risk to his health (List of Issues 4.1.6)

271. Dean Kinane-Powell did remind the Claimant in his e-mail of 28 June 2019 that he was rostered to work at nights from 1 July 2019. As we have set out above the Claimant did not actually undertake that work as he submitted a certificate of ill-heath.

272. The Claimant had never raised any specific health issue that impacted on his ability to work at nights. We reject the suggestion that there was no consideration of risk. The 'Rostering Principles for Head of Infrastructure Employees' are plainly designed to ensure that night work is fairly distributed. The Respondent recognized trade unions and we are satisfied that the issue of night work would have been dealt with as part of the ongoing consultation. We were not provided with any specific risk assessment but are not surprised by this.

273. The roster was not just applied to the Claimant at the time it was introduced. It was applied across the board. The rosters we were provided with do not have any hint that the Claimant was given more night work than anybody else.

274. We have found above that there were good business reasons for introducing the roster at the time it was brought in. The Claimant was in no sense singled out. The question for us is whether the fact that the Claimant had made protected disclosures and/or done any protected acts materially influenced either the decision to allocate the Claimant night shifts or the stance in respect of risk assessments. We find that it

did not have any influence at all. These were both matters that applied to everybody in the same way and had nothing to do with the Claimant's individual circumstances or actions.

275. For completeness this allegation was presented outside the time limits imposed by Section 48 of the Employment Rights Act 1996 and the Tribunal has no jurisdiction to entertain it.

276. For the reasons set out above whilst we have found that the Claimant did make some protected disclosures (although for self-serving reasons) and did do some acts protected by Section 44(1) and/or 100(1) of the Employment Rights Act nothing that the Respondent did was in any sense whatsoever on those grounds. The claims all fail.

277. The Employment Judge apologises to the parties for the delay in preparing these written reasons. The decisions recorded here are those decided by the Tribunal on the final day of the hearing in note form. Unfortunately, the Employment Judge had a significant backlog at the time and has subsequently dealt with some very long cases. It has taken some time to deal with the backlog and to deal with all the issues in this case. This will be of little comfort to the parties and again the Judge apologises.

Employment Judge Crosfill
Dated: 15 December 2021