EMPLOYMENT TRIBUNALS

Claimant: Mr G Kane

Respondent: Network Rail Infrastructure Limited

Heard at: Bury St Edmunds Employment Tribunal (remote via CVP) **On:** 8 to 11 November 2021 and 25 November and 1 December 2021 (in Chambers)

Before: Employment Judge K Welch
Mr A Hayes
Mr I Murphy

Representation

Claimant: In person
Respondent: Mr M Sellwood, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant's claims for unfair dismissal, wrongful dismissal, discrimination arising from disability, harassment and detriment on the ground that the claimant had made protected disclosures are not well founded and fail.

2. The remedy hearing listed for 4 February 2022 is vacated.

RESERVED REASONS

1. The Claimant brought claims for unfair dismissal, wrongful dismissal, discrimination arising from disability, harassment and detriment on the ground of having made protected disclosures. The claimant confirmed at the start of the hearing that he was not claiming dismissal as a detriment for his whistleblowing complaint, and therefore it was agreed that this would be removed from the list of issues which are set out below. The claimant also confirmed that he was not claiming automatic unfair dismissal under section 103A Employment Rights Act 1996 ('ERA') for having made protected disclosures.
2. The claim form was presented on 17 August 2020, following a period of early conciliation from 18 June to 18 July 2020.
3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The Tribunal considered it was just and equitable to conduct the hearing in this way.
4. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended. The participants were told that it was an offence to record the proceedings.
5. The parties were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal. From a technical perspective, there were no major difficulties with the hearing being held remotely.
6. Concern was expressed by the panel at the start of the hearing that there was insufficient time to properly consider the case on liability and deal with remedy. The case had originally been listed for five days but due to lack of judicial availability, the parties had been informed prior to the hearing that it was to be held over four days. The parties therefore cooperated in ensuring that the hearing was able to progress such that all evidence and submissions were completed within the four-day listing. An agreed timetable was largely adhered to with the help of the parties. The panel informed the parties that there would be at least one day in Chambers

required since there had been no time to deliberate during the hearing itself. A remedy hearing was listed for 4 February 2022.

7. The parties had agreed a bundle of documents of over 700 pages and references to page numbers in this Judgment relate to documents within that bundle. The parties were told that the panel would read the documents referred to in the witness statements together with those they were taken to. The Claimant asked the panel to look at a few documents and watch a video before hearing the evidence, which we did.

8. The Tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials, which were unmarked. The Tribunal was satisfied that the witnesses were not being coached in their separate locations.

9. The claimant's other witness, Mr Dixon, his Trade Union representative was due to give evidence on day two of the hearing. He had attended as an observer on the first day of the hearing whilst working for the respondent. He contacted the Tribunal to inform the panel that he had been told he could not attend as a witness. Following discussions with the parties it was confirmed that Mr Dixon could attend during working hours to give evidence, but could not observe the proceedings during working hours unless he took holiday. It was therefore agreed that Mr Dixon would give his evidence on day three of the hearing.

10. The Tribunal heard evidence in an agreed order which best suited the parties and their witnesses. We heard from:

    10.1. the Claimant;

    10.2. Darren Robinson, the Claimant's former line manager;

    10.3. Wayne Dixon, Trade Union representative for the claimant;

    10.4. Kathryn Connor, minute taker for informal investigatory meeting and welfare officer;

    10.5. John Kelly, investigating officer;

    10.6. Faith Carribine, disciplinary officer; and

    10.7. Sarah Jane Crawford, appeal officer.

11. All of the witnesses had provided written statements which stood as their evidence in chief.
12. The Tribunal ensured that appropriate breaks were given, and asked the parties to request any additional breaks, if required.
13. The Tribunal was provided with an additional witness statement for Mr Mahy, although were informed on the first day of the hearing that he was not attending to give oral evidence due to illness. Therefore, the parties were informed that appropriate weight would be attached to the statement in light of it not being sworn evidence, and not having been tested under cross examination.
14. The Respondent conceded that the claimant was, at all material times, disabled due to having been diagnosed with autistism spectrum condition (ASC). The claimant confirmed that he was content for the parties to refer to his condition as ASC during the hearing.
15. The respondent contended that, whilst it accepted that the claimant was disabled at all material times, it did not know of his disability at the relevant time for his discrimination arising from disability complaint.

Issues

16. The following list of issues were agreed by the parties, having been amended following the case management hearing before EJ Camp on 17 March 2021. The only amendment to the list was the removal of dismissal as an alleged detriment for the claimant's claim under section 47B.

<u>Discrimination arising from disability</u>

17. Contrary to section 15 of the Equality Act 2010 (EqA), did the Respondent treat the claimant unfavourably because of something arising in consequence of the claimant's disability? The claimant has been diagnosed with autistic spectrum condition (ASC).
18. The claimant relies on the following things as "something arising in consequence" of his disability:

18.1. A tendency to interpret instructions literally.

19. The claimant alleges he was treated unfavourably in relation to the following acts or omissions:

19.1. On 25th March 2020, there was an email order by Darren Robinson that personnel were not to go into the signal box. The claimant was subsequently disciplined because of his literal application of the email of 25 March 2020.

20. Did the respondent know, or could reasonably be expected to have known, that the claimant was disabled at the relevant time under section 15(2) of the EqA?

21. The respondent denies that it treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondent says that any treatment was a proportionate means of achieving a legitimate aim of the business.

22. The respondent relies upon the following proportionate means of achieving a legitimate aim:

22.1. The adjustments made to the investigation, grievance and disciplinary process were a proportionate means of achieving a legitimate aim of dealing with disciplinary issues fairly and justly.

Disability related harassment

23. Contrary to section 26 of the EqA, did the respondent engage in conduct by:

23.1. The act of holding an investigation meeting with the claimant (on 7 May).

23.2. John Kelly's suspension of the claimant on 11 May 2020.

23.3. On 11 May 2020, Kathryn Connor failing to disclose in the suspension meeting that she knew or suspected that the claimant has a disability.

23.4. On 19 May 2020, Faith Carribine, the disciplinary manager, sending an email questioning the ability of the claimant to do his signaller job.

23.5. On 15 June 2020, Faith Carribine substituting what she would have done in particular situations and failing to consider that the claimant may have reacted slightly differently due to his disability.

23.6. On 20 July 2020, Sarah Jane Crawford, appeal hearing manager, resisting James Denny's attendance at the appeal meeting in person.

24. If so, was the conduct unwanted?

25. If so, did it relate to the claimant's disability?
26. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
27. Taking into account the claimant's perception and the circumstances of the case, was it reasonable for the conduct to have that effect?

Unfair Dismissal

28. What was the reason (or principal reason) for the claimant's dismissal?
29. Was the reason (or principal reason) a potentially fair reason for dismissal identified in Section 98 Employment Rights Act 1996 (ERA 1996)?
30. If gross misconduct, did the respondent have a genuine belief in gross misconduct?
31. Was the belief founded on reasonable grounds?
32. Was a reasonable investigation carried out in all the circumstances of the dismissal?
33. Did the respondent act reasonably in treating that reason as a sufficient reason for dismissing the claimant, in all the circumstances of the case? In particular, was the dismissal within the range of reasonable responses available to the respondent?
34. Did the respondent use a fair procedure in dismissing the claimant? If not, what is the percentage chance that the dismissal would have occurred in any event, had a fair procedure been adopted?
35. If the dismissal was fair within the meaning of section 98 of the ERA 1996, was the respondent entitled to summarily dismiss the claimant in the circumstances?
36. If the dismissal was unfair, was there culpable or blameworthy conduct on the part of the claimant? If so, did the conduct cause or contribute to the dismissal and is it just and equitable to reduce any award on that basis?

Wrongful Dismissal

37. Was the claimant's dismissal a breach of his employment contract? The respondent's position is that the claimant was summarily dismissed, without notice, for the reason of gross misconduct.

Whistleblowing

38. Did the claimant make a protected disclosure in terms of section 43B(1)(a) to (f) of the ERA 1996 namely:

38.1. that a criminal offence has been committed, is being committed or is likely to be committed;

38.2. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

38.3. that a miscarriage of justice has occurred, is occurring or is likely to occur;

38.4. that the health or safety of any individual has been, is being or is likely to be endangered;

38.5. that the environment has been, is being or is likely to be damaged; or

38.6. 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.

39. The claimant relies on section 43B(1)(b), (d) and (f) of the ERA 1996 in terms of:

39.1. his disclosure of a health and safety breach to his line manager (at the time), Darren Robinson, on 4 April 2020 and to the on-call manager Mr Mahy on a telephone call on 4 April 2020.

40. Did the claimant believe that the disclosure related to one of the prescribed acts listed above?

41. Was it reasonable for the claimant to believe that was the case?

42. Did the claimant believe that the disclosure was in the public interest?

43. Was the protected disclosure, if any, made to one of the categories of people listed in sections 43C to 43H of the ERA 1996?

44. Was the claimant subjected to detrimental treatment because of his disclosure? If so, what was the detrimental treatment?

45. The claimant relies on the following:

45.1. Concealment of the email of 25 March 2020 from Darren Robinson.

45.2. The claimant submits there was only one complaint by a member of public made on 4 April 2020. The other complaint was made 6 days later, however this was presented by the local management team as at the same time.

45.3. Darren Robinson states in an email on 20 April 2020 "is it just me or do we think this may be related to recent incident?" in reference to the claimant self-isolating on 19 April 2020.

45.4. The decision to suspend the claimant was made at a meeting where the claimant's local management were involved.

Remedy

46. What financial loss, if any, has the claimant suffered?

47. Should any compensation awarded be reduced based on Polkey?

48. Should any compensation awarded be reduced based on the claimant's contributory fault?

49. To what extent, if any, has the claimant mitigated his losses?

50. What award, if any, should be made for injury to feelings?

51. If the claimant has suffered financial loss, by what amount should any basic and/or compensatory award be reduced?

52. In the event that the whistleblowing claim is upheld, should compensation be reduced under s.49(6A) ERA 1996?

53. What recommendations, if any, should the Tribunal make?

54. Is reinstatement or reengagement an appropriate remedy?

Findings of fact

55. The claimant was employed by the respondent from 5 May 2009 until his summary dismissal on 15 June 2020. The claimant's contract [P83 – 93] included the following:

"*In the event of you being guilty of misconduct your contract of employment may be terminated without notice*."

56. The contract also referred to the respondent's disciplinary procedure which was contained in the respondent's handbook [P90]. This was stated to be non-contractual and said in the principles at P115, "*Employees will be informed of the complaints against them*" and went on to confirm that instances of gross misconduct, could result in dismissal without notice. Examples of gross misconduct were cited in the disciplinary procedure [P121], which included bringing Network Rail into serious disrepute.

57. The disciplinary procedure also confirmed that, "*Equally, if at the investigation stage it appears that a case initially treated as misconduct should properly be dealt with under some other procedure, the disciplinary procedure will be discontinued and an appropriate alternative procedure initiated*."

58. We were referred to various of the respondent's policies which were contained within the bundle. The Working in the Community Policy [P110-113] included, "*All parties will represent our industry in a positive manner, any time a member of the public comes into contact with any aspect of our industry: it's an opportunity to form an impression. We all want this to be the right impression*." It went on to confirm: "*What we expect from you*

- Positively engage and interact with our communities, neighbours and passengers

- Be a good neighbour. Treat our communities, neighbours and their property with respect at all times and in particular, please be mindful of the following unacceptable behaviour:… Offensive language or behaviour of any sort."

59. The claimant worked as a signaller mainly working at the Ascott Under Wychwood signal box, a single manned box in a remote location. There was car parking available for Network Rail staff, who parked in allocated spaces.

60. During his career with the respondent, and prior to the incidents leading to his dismissal, the claimant had been subjected to no disciplinary proceedings and had a good employment record.
61. The claimant has been diagnosed with Autistic Spectrum Condition (ASC) which he referred to as a lifelong condition. His ASC was not formally diagnosed until 1 December 2020 [P190], some months after his dismissal.
62. The claimant referred to the Change of Signaller section within the General Signalling Regulations [P124] which provided the technical point at which a signaller took over responsibility for the signalling box. This included, "*If you are taking duty, you must: – make sure you receive all necessary information – sign the Train Register with the words 'on duty at…… hours'*". Whilst we accept that this signified the time at which the signaller was responsible for the signals from that signalling box, we accept that when an employee in uniform walks towards his place of work and addresses members of the public, he is clearly representing his employer, whether intentionally or not.
63. The respondent's code of business ethics [P125 – 134] provided at page 130, "*We try hard to be a good neighbour by working with communities to minimise the effect of our work.*
    That means aiming to cut noise, reduced disturbance caused by deliveries to our sites and take care of issues like graffiti, trespassing or fly tipping on our property.
    How well we do this directly affects our reputation. That's why we expect everyone in our business to be a courteous and helpful neighbour, as well as to comply with laws, regulations and company procedures."
64. The Covid-19 pandemic resulted in a national lockdown from around 23 March 2020.
65. On 25 March 2020, the claimant's line manager, Mr Robinson, sent an email to various employees working in signal boxes, including the claimant [P215]. This confirmed that routine visits had been suspended and that the, "…*only visitors to your location should be those responding to operational incidents or those directed by Control. Please ensure you follow the Government and NWR advice re hand washing and social distancing both at work and home*."

Incident on 4 April 2020

66. The claimant attended for work on 4 April 2020 and found that one of the three network rail car parking spaces was occupied by a car he did not recognise. This did not prevent him from parking in an allocated Network Rail space, particularly as his colleague had parked on the road.
67. It was clear that the claimant took a specific route from the parking spaces to the signalling box when attending work. On doing so, he saw a lady gardening on land adjacent to or belonging to Network Rail. It was not clear to us which was the case. The lady was talking to another lady and her daughter, who were walking their dog and had stopped to talk to her. The claimant shouted across the road to the individuals querying why they had parked in the Network Rail space. The claimant gave evidence that he did not shout, but spoke loudly enough to be heard. We accept that the claimant was shouting, as this was evidenced by complaints subsequently received and the unsigned statement from DC who was on duty in the Signalling Box at the time [P285]. DC later confirmed that the unsigned statement was the same as a subsequently provided signed statement.
68. The claimant queried why the lady was gardening there and why she was causing a gathering. The claimant accepted in evidence that he might have sounded officious, but said that he was concerned about his own safety in that the lady was not following health and safety guidelines, and that if he crossed the road at his usual place for crossing he would not be distancing himself sufficiently from others as was mandated by the Government.
69. There was clearly some form of an altercation between the claimant and the two ladies (referred to as 'Members of the Public'). The claimant was upset by the fact that someone had parked in the Network Rail car parking space, who he believed was not meant to do so and that, in his view, they were causing a gathering by doing what he considered was unnecessary work.
70. The claimant took photographs of the Members of the Public, one of whom's daughter had by this time run off, upset [P591-592].

71. The claimant gave evidence that he was unable to cross at the safest place due to where the Members of the Public were. We do not accept that to be the case. We consider it was entirely feasible for the claimant to have crossed safely without going near to the Members of the Public.
72. The claimant provided the panel with a video of his route to the signalling box from the car park [P284]. He asked the Tribunal to watch the video with sound since, in his view, it showed that cars approached quickly to what was a blind bend in the road. However, we did not consider that to be the case. We accept that one of the Members of the Public did mention a blind bend in her complaint, but we do not accept that the claimant could only safely cross at the point at which the Members of the Public were.
73. The claimant did not consider that he did anything wrong and that he was well within his rights to challenge the Members of the Public due to their conduct.
74. The claimant said to the Members of the Public, "*I can't believe you're making me cross here it's dangerous and I will report this to control. Please move out of the way*." [Taken from the claimant's witness statement at paragraph 17]. He then crossed the road and went into the signal box.
75. The claimant telephoned control to inform them of the incident and put it down to, "obstinate members of the public". The claimant then repeatedly asked the remaining Member of the Public (CP) to leave. He videoed CP whilst doing so and admits in a statement that he sounded "frustrated but in control". We considered that his repeated demands for CP to leave the area and stop what she was doing, his videoing of her and his assertion that he would provide this to the police if requested, was intimidating. The Member of the Public, CP, continued gardening and did not interact further with the claimant.
76. The claimant made a note of the incident in the book within the signalling box [P603] which referred to a social distancing issue having been reported.
77. CD was the signaller on duty in the signal box when the claimant arrived on 4 April 2020. The claimant's evidence was that CD may have been concerned about the Member of the Public, PC,

still being close to the signalling box when he was due to leave. It was at that point that the claimant made the video and repeatedly asked CP to leave.

78. A short time after, an off-duty signaller, CJ, who is the claimant's brother-in-law, attended and initially spoke to the Member of the Public, CP. It appears that he had been called by the other Member of the Public, VB. CJ then attempted to gain access to the signalling box, but was told by the claimant that he should not be there and the claimant closed and bolted door so that CJ could not gain access. The claimant gave evidence that he considered CJ was under the influence of alcohol, but we noted that CJ was not on duty at that time, nor was he turning up for duty and was not dressed in Network Rail uniform.

79. The claimant took another video of CJ speaking with the Member of the Public, CP. We were provided with still photographs from that video [P611], which appeared to us to show that there was some distance between CJ and the Member of the Public at the time that the video was taken, although the claimant suggested that they had moved from their initial positioning.

80. The claimant gave evidence that CD, his colleague who was in the signalling box with him gave a differing statement to Network Rail [P285] from the one he gave to the claimant via WhatsApp messaging [P377 – 379]. We do not find that to be the case. CD confirmed in his Whatsapp messages that the unsigned version was exactly the same as the one he had signed.

81. The claimant emailed his line manager, Mr Robinson on 4 April 2020 [P237-8] in which he complained about CJ's and the Member of Public's conduct. He complained that, "the Social Distancing measures were flouted by" the Member of the Public which could put his colleagues at harm. He went on to say, "*I also strongly request that the woman I believe to be the councillor stop and desist the gardening / volunteering and not to park on Network Rail Parking again*." We accept that this email was a protected disclosure for the purposes of the claimant's whistleblowing complaints by virtue of the claimant reasonably believing there was a breach of a legal obligation and/or that the health or safety of any individual was likely to be endangered.

82. The claimant was called by Mr Mahy on the day of the incident to discuss the issue, following the claimant's report to Control and having sent in photographs of the incident. A transcript of this call appears at P223-234. The claimant complains in the call about the Member of the Public parking in a Network Rail spot and stated, "*Do you know …, I wouldn't have challenged her had she not been parked in the Network Rail parking which led to [the] initial challenge*". He went on to complain about the gathering, that he considered she was causing by carrying out unnecessary work, namely gardening, on what he believed to be Network Rail property although was told in the call that it was not. We accept that the claimant made protected disclosures concerning a possible breach of legal obligation and/or health and safety issues during this call.
83. One of the Members of the Public, VB, made a complaint [P240] on the day the incident, 4 April 2020. She called the Network Rail National Helpline to, "*complain about a staff member who has just had a go at me in front of my autistic daughter when I was out on my daily walking and had stopped over 2m from our local parish councillor to ask her to put my name down on the village volunteer list to help people currently self-isolating. My daughter over 30 mins later is still crying her eyes out and thinks that I'm going to be arrested due to your employee taking a photo of me and saying he's reporting me for not exercising or being at home*.". The complaint incorrectly named the claimant as "Garrard Kane".
84. The other Member of the Public, PC, sent a letter dated 4 April 2020 to Network Rail [P231]. Whilst this letter is dated 4 April, it appeared that this was not received until 10 April 2020. PC also made a complaint to Network Rail on 10 April 2020 by calling the Network Rail National Helpline [P280-1]. This referred to the case number that VB had been provided some six days earlier.
85. PC also raised the incident in a Parish Council meeting as evidenced by the extract from the minutes of this meeting [P242 – 244], which said in the 'any of the business' section that [CP] had, "*received loud and prolonged harassment from one of the Signal Box men while she was working on the culvert garden opposite the Signal Box. A parishioner and her daughter were also*

included in the abuse. All were extremely upset and the daughter frightened as the signal man threatened repeatedly to call the police. [CP] has written to Network Rail, who own the land, to ask if the signal box man could be taken off the rota for Ascott-u-Wychwood. This is the third time that [PC] has been harassed by this person and she will have to re-consider working at the station if it happens again."

86. An informal investigation meeting was held by telephone between the claimant's line manager, Mr Robinson, and the claimant on 9 April 2020. Ms Connor attended to take the minutes of this meeting [P250 – 258]. The claimant read a pre-prepared script as he said that the battery on his phone may not last for the duration of the meeting. The claimant emailed his statement to Mr Robinson and Ms Connor, which included an extract from the Police and Criminal Evidence Act. The claimant had formerly been a police officer. After reading out his statement, the claimant confirmed that he had given a frank account and would not be answering any questions. We found this to be unreasonable, since it is not possible to carry out an investigation without the co-operation of the employee concerned. Ms Connor noted in her statement that the claimant had been aggressive in this meeting, which Mr Robinson in cross-examination said made him feel harassed and intimidated.
87. We found that the questions asked by Mr Robinson were reasonable and that the claimant had been told that the meeting was not a formal meeting. The claimant himself asked 10 further questions, which appeared to us to show that he wished to lead the investigation.
88. Minutes of the informal meeting was sent to the claimant [P259], which were substantially amended by the claimant, who later admitted that he had recorded it. The transcript of this meeting appeared at P274 – 278.
89. The claimant subsequently sent his questions to Ms Connor and these were answered by Mr Robinson [P273 – 275]. The claimant was sent 4 further questions by Ms Connor on 14 April 2020 [P287], although the claimant did not provide answers to these questions. Therefore, the decision was taken to move the matter to a formal disciplinary process.

90. The claimant went off sick due to self-isolating on 19 April until 25 April 2020. On 20 April 2020, Mr Robinson sent an email to Ms Connor and HR [P292] saying, "is it just me or do we think that this may be related to the recent incident?"

91. The claimant was told by telephone on 27 April 2020 by Ms Connor and Mr Robinson that it was moving to a formal process. He was sent a letter confirming this on 28 April 2020 [P299]. It was decided that Ms Connor would remain the claimant's welfare manager throughout this process.

92. A manager, Mr Kelly, who had not been involved in the informal investigation was asked to carry out a formal investigation. Mr Kelly called the claimant on 30 April 2020 to let him know that he had been asked to investigate the allegations against the claimant. This call was recorded and a transcript of the call [P305-307] shows that the claimant was informed that a call would take place the following Thursday to discuss the complaints received from members of the public. A letter dated 30 April 2020 was sent to the claimant confirming this [P300 – 301]. This letter confirmed that the meeting was to investigate, "*Complaints received from members of the public regarding harassment committed by yourself whilst on duty at Ascott Under Wychwood Signal Box on the 4th April 2020*." The claimant had adduced in evidence the envelope in which the invitation letter had been posted to him. This was date stamped 4 May 2020 although, we noted that 30 April was a Friday and there was a bank holiday on Monday 3 May, so we do not consider that this was unnecessarily delayed. A copy of this letter was sent by email to the claimant on 4 May. We do not accept the claimant's assertion that Mr Kelly delayed sending this letter until after he'd found out about the claimant's suspected ASC.

93. On 1 May 2020, Mr Kelly sent an email to HR [P308]. He had, by this time, seen the complaints from the Members of the Public and was aware of the claimant's conduct during the informal investigation meeting. He had not, however, met with the claimant at this stage. Mr Kelly stated, "*I think we may be dealing with a case of ignorance rather than vindictiveness here. My inclination is that we may be best served all round if we offer a way to de-escalate the situation. For this I would suggest that I offer him the chance to apologise to the [Members of the Public]*

and to his fellow signallers, [Local Operations Manager] and Deputy [Local Operations Manager]. Then carry out the [Network Rail] e-learnings…"

94. On 4 May 2020, the claimant's Trade Union representative, Mr Dixon, called Mr Kelly to inform him that he thought the claimant had autism [P629]. Mr Kelly told Mr Dixon that the claimant should contact his GP and his line manager would support him to make a referral. He stated, "*I do not see how this impacts upon the case and do not think it was appropriate for his rep to contact me to state this*."

95. On 5 May 2020, the claimant emailed Mr Kelly to inform him that he was seeking testing for autism [P311]. We do not consider that the claimant was only invited to the investigation meeting once Mr Kelly had been informed of the claimant's suspected ASC. We are satisfied that the decision had been made to invite the claimant to an investigatory meeting prior to this being disclosed.

96. The claimant had a welfare call with Ms Connor, his welfare manager on 6 May 2020. It was inferred that Ms Connor emailed the claimant to ask if he wanted assistance and he then called her; he recorded the call. The Claimant informed Ms Connor that he had self-referred for an ASC assessment during the call [P312].

97. An investigation meeting was held on 7 May 2020 between the claimant, Mr Kelly, Mr Dixon - his trade union representative, and a note taker [P320]. The claimant was aggressive during this meeting and refused to accept responsibility for his actions. He was convinced that the allegations were not founded since they referred to him being 'on duty' and he was not technically on duty, as per the Signallers regulations referred to above. After a brief discussion, the claimant stated that he was not on duty and was not going to comment any further. He also showed no remorse for his actions. The minutes of the meeting appeared at P320 – 325. At no point did the claimant or his trade union representative suggest that his suspected ASC affected his behaviour on 4 April 2020. We understand that the claimant's trade union representative

indicated that he thought the claimant had autism in order to ensure that reasonable adjustments were made for the disciplinary hearing.

98. Mr Kelly reviewed all the evidence following the meeting with the claimant and prepared a disciplinary investigation report [P326]. Mr Kelly also considered whether suspension was appropriate since, whilst the claimant had not been suspended prior to this point, he was concerned following the investigation meeting. He therefore completed a suspension checklist [P331] and took advice from the respondent's HR department. Mr Kelly prepared a letter of suspension, but telephoned the claimant to inform him that he was suspended. Usually this is carried out in person, but we accept that due to COVID-19 and the fact that the claimant was due on shift that day, it was appropriate for the claimant to be called by Mr Kelly to inform him of his suspension. A suspension letter was sent to the claimant [P335] dated 11 May 2020. It was clear that the envelope enclosing this letter had been date stamped 14 May 2020, but we are satisfied that the claimant had been informed of his suspension prior to receipt of this letter. Mr Kelly also emailed the claimant's welfare manager, Ms Connor and HR to confirm that the suspension letter had been sent.

99. On 11 May 2020, a meeting was held between Mr Kelly - the investigation officer, Ms Connor - the claimant's welfare officer, Mr Robinson - the claimant's line manager and RH - the Route Operations Manager for the West. The claimant considered that the decision to suspend him had been made by the group during that meeting. However, we accept the respondent's evidence that Mr Kelly had made the decision to suspend independently, having taken advice from HR, and informed the group of his decision during that meeting.

100. Ms Connor did not inform the parties attending the meeting on 11 May that the claimant had suspected ASC. Her evidence was that this was a confidential matter and that it was not appropriate to discuss in an open meeting. We agree with her assessment.

101. The claimant presented a grievance against Mr Kelly on 11 May 2020 [P342]. This complained about the method of the claimant's suspension which he considered to be in breach

of the respondent's procedures, and that the suspension did not provide him with details of the allegations against him.

102. It had been agreed at national level with the Trade Union that grievances in these circumstances would be placed on hold until an outcome for the disciplinary procedure had been given.

103. The claimant's Trade Union representative, Mr Dixon, sent an email on 18 May 2020 to the disciplining officer, Faith Carribine and HR requesting a face-to-face disciplinary hearing as the claimant, "has a disability". Ms Carribine sent an email in response on 19 May 2020 [P353], which requested evidence of the claimant's disability and confirmed that the claimant had never declared this during the investigation meeting. She was concerned whether the claimant was able to carry out his role if he could only deal with issues face to face, since he would be required to frequently use the telephone to carry out his safety critical role. Ms Carribine confirmed that she would be recommending that an assessment was undertaken to confirm that the claimant could carry out his role in light of his suspected condition.

104. A date for the disciplinary hearing was agreed with the claimant's Trade Union representative. An invitation letter was sent to the claimant on 19 May 2020. Unfortunately, the letter got the claimant's name wrong. This letter included the investigation report and confirmed that Ms Carribine had been appointed to deal with the disciplinary hearing and that she had not been involved in the matter prior to this.

105. The claimant raised concerns over the minutes of the investigation meeting and so he was asked to make tracked changes to the minutes.

106. The claimant was invited to the disciplinary hearing by letter of 26 May 2020 [P381-2]. This confirmed that the allegations of gross misconduct were:

"*1. Bringing the company into disrepute for harassing members of the public- Abusive towards three members of the public on the 4th April 2020, including a disabled child.*

2. Failing to live up to the standards required of [Network Rail] staff ie Collaboration when refusing to take part in a NR investigation. Not collaborative with his management team or the investigation manager therefore failing to carry out his contractual obligations."

107. The invitation letter confirmed the claimant's right to be accompanied, and that a possible outcome of the hearing could be his dismissal without notice or payment in lieu of notice.

108. The claimant was initially offered 27 and 29 May [P353] as possible dates for his disciplinary hearing. To accommodate the claimant's request for a face to face hearing, Mr Dixon suggested 8 June. This was then postponed until 15 June 2020 [P397].

109. During the disciplinary meeting, Ms Carribine went through the allegations and gave the claimant the opportunity to respond to them. We consider that Ms Carribine handled the disciplinary hearing appropriately. She gave an example of what she might have done in the circumstances, regarding the crossing of the road, but we find that this was appropriate.

110. Ms Carribine decided to summarily dismiss the claimant for gross misconduct due to bringing the respondent into disrepute relating to the incident on 4 April 2020 and also his failure to co-operate in the disciplinary process. He was informed of the outcome at the end of the meeting. Mr Dixon, the claimant's trade union representative felt that the dismissing officer, Ms Carribine, should have read from a pre-prepared script or the dismissal letter, which he considered was usual in disciplinary hearings, but we are not concerned that she told the claimant the outcome without reading from a script. That is not a requirement under the respondent's disciplinary procedure or the ACAS code.

111. An outcome letter was sent to the claimant on 18 June 2020 [P457 – 459]. This confirmed the reason for the claimant's dismissal was bringing the company into serious disrepute and failure to co-operate during the disciplinary process, namely, "…*Failing to live up to the standards required of NR staff ie Collaboration when refusing to take part in a[n]*

investigation. Not collaborating with his management team or the investigation manager therefore failing to carry out his contractual obligations."

112. It noted that the claimant had failed to demonstrate any remorse for his actions on 4 April 2020, and that he could not see that he had done anything wrong. The claimant was informed of his right to appeal the decision to dismiss him summarily.

113. The minutes of the disciplinary meeting [P402 – 426] were sent to the claimant on 10 June 2020 [P401]. These were not agreed by the claimant, and a version amended by the claimant appears at P427-451. The claimant was concerned that Ms Carribine had sent the minutes of the disciplinary hearing to her husband, although we accept her explanation that she was unable to print them out at home unless she did so.

114. The claimant appealed against his dismissal [P463-7] raising various issues including the respondent's failure to deal with his grievance before the disciplinary hearing, failure to investigate properly, not considering an earlier complaint from PC against another signaller, failing to understand and agree his disability, the provision of new evidence and the severity of the charge.

115. The claimant presented a further grievance against John Kelly on 28 June 2020 [P474]. The complaint was based upon the claimant's assertion that the suspension letter was a false document and that there had been breaches of the Data Protection Act. Again, this grievance was placed on hold in accordance with normal practice and what we were informed was the national agreement with the Trade Union.

116. The claimant was invited to an appeal hearing by letter dated 3 July 2020 to take place on 20 July 2020 [P478 – 9]. The appeal hearing took place before Sarah Jane Crawford [minutes at P500 – 520]. During the appeal hearing, the claimant had requested that a person who had ASC attend the hearing in person. The respondent did not agree to him attending in person, but confirmed that he could attend the hearing remotely. The claimant was fully able to call this person if required. He chose not to do so. We consider that it was reasonable for the respondent

to request that the witness be heard remotely in the circumstances, particularly due to the Covid-19 pandemic.

117. An appeal outcome letter was sent on 5 August 2020 [P478 – 479]. The appeal was not upheld and the claimant's dismissal remained in place.

Submissions

118. Following a break for over 2 hours, the parties addressed us orally on the case. In brief, the Respondent contended that its witnesses had been entirely consistent, whereas the claimant had failed to accept he was wrong when multiple sources of evidence showed that to be the case. There was no actual or constructive knowledge of the claimant's disability. The respondent had no knowledge of the effect of ASC on the claimant's normal day to day activities and that further enquiries would have yielded nothing. It relied upon **Gallop v Newport City Council [2013] EWCA 1583** as authority for this. [The Respondent provided copies of the cases relied upon to the Tribunal and the claimant].

119. The discrimination arising from disability and whistleblowing complaints did not stand up on the facts. As far as unfair dismissal was concerned, the plain reason for the claimant's dismissal was gross misconduct. The respondent contended that it acted reasonably in all of the circumstances, and that the decision was within the range of reasonable responses.

120. The claimant asked for more time to finalise his submissions, which was given. The claimant contended that people who worked with him would be aware how his ASC affected his day to day life, he was a stickler for rules, and took instructions literally. He was honest and had always behaved this way. He went through the list of issues to explain why he considered that his case should succeed. Briefly, he felt that the respondent had got the allegations against him wrong. They had initially considered e-learning as an outcome, and yet had jumped to dismissal. If his behaviour was so appalling, they would not have considered e-learning as an outcome. There were no signed statements available, despite them having been taken. The decision to suspend him was not carefully considered. There was no fair process followed and the decision

was made without a proper investigation having been carried out. The Covid-19 pandemic was not a trifling matter, leaving 5 million people dead worldwide, and this caused high anxiety to the claimant. He believed his disclosures were in the public interest.

121. **LAW**

Discrimination

Burden of Proof and discrimination claims

122. The Tribunal had regard to the burden of proof in discrimination claims. This lies with the Claimant. However, if there are facts from which a Tribunal could decide in the absence of another explanation that the employer contravened the provisions of the EqA, the Tribunal must hold that the contravention occurred by virtue of section 136 (2) EqA.

Discrimination arising from disability Section 15 EqA

123. The Claimant complained that he had been treated unfavourably because of something arising as a consequence of his disability. The protection is laid out in Section 15 which states:
"(1) a person (A) discriminates against a disabled person (B) if -

(a) A treats B unfavourably because of something arising in consequence of B's disability and,

(b) A cannot show the treatment is a proportionate means of achieving a legitimate aim.

(2) sub-section (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had a disability."

124. No comparator is required for this assessment. In order for this to apply, the employer must have treated the Claimant unfavourably. The EHRC employment code explains at paragraph 5.6 that it is sufficient to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. There must therefore be a link between the unfavourable treatment and the Claimant's disability.

125. The knowledge required for a discrimination arising from disability claim is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

126. The Employer may seek to rely upon an objective justification for the unfavourable treatment where it is a proportionate means of achieving a legitimate aim.

Harrassment

127. Section 26 Equality Act 2010 (EqA) provides:

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

128. It is therefore necessary to consider whether the conduct is unwanted and related to disability. The conduct itself can be of any type, provided its purpose or effect is to violate the victim's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. Hence the conduct, viewed in the abstract, might be completely innocuous in nature.

129. There are therefore three components for claims of harassment, all of which must be satisfied in order to succeed, although the third has two alternatives within it. The conduct must be found to be unwanted; it must be found to relate to the relevant characteristic; and it must

have either the proscribed purpose or the proscribed effect, or both. Secondly, the test of whether conduct is related to a protected characteristic is a different test from that of whether conduct is "because of" a protected characteristic, which is used in the definition of direction discrimination found in section 13(1) of the 2010 Act. It is a broader, and, therefore, more easily satisfied test.

130. In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT noted harassment does have its boundaries: "*We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*." Whilst this case relates to harassment on grounds of race, it is equally appropriate for harassment on grounds of disability.

131. A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

132. Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention, even if entirely innocent, does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is

peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

133. The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**. The EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the Tribunal of all the facts, the Claimant's subjective perception of the conduct in question must also be considered.

Unfair dismissal

134. Under section 98(1) Employment Rights Act 1996 ('ERA'), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is either a reason falling within subsection (2) or 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.'

135. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) ERA). When considering reasonableness, a tribunal cannot substitute its own view. Instead it is required to consider whether the decisions and actions of the employer were within the range of reasonable responses which a reasonable employer might have adopted. The test applies to the procedure followed by the employer and to the decision to dismiss. A dismissal is only to be held to be unfair if it was outside the range of reasonable responses open to a reasonable employer.

136. In the context of a conduct dismissal it is clearly established that that test requires a Tribunal to address the following three matters:

a. Whether the employer genuinely believed that the employee was guilty of the relevant misconduct; and, if so,

b. Whether that belief was based on reasonable grounds; and

c. Whether that genuine belief on those reasonable grounds had been formed after having carried out a reasonable investigation.

Detriment for making a protected disclosure

137. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is

137.1. a 'qualifying disclosure' (a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'types of wrongdoing' set out in section 43B has occurred, is occurring or is likely to occur);

137.2. which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H. 35.

138. The claimant says that he made disclosures about the types of wrongdoing set out in sub-sections 43B(1)(b), 43B(1)(d) and 43B(1)(f) ERA, that is that he made disclosures which tended to show:

138.1.1. that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he is subject (section 43B(1)(b)ERA);

138.1.2. that the health or safety of any individual has been, is being or is likely to be endangered (section 43B(1)(d)ERA) and/or

138.1.3. that information tending to show any of the other 'relevant failures' had been or was likely to be deliberately concealed (section 43B(1)(f)ERA).

138.2. The method of disclosure relied on by the claimant is section 43C. This section provides that a qualifying disclosure is a protected disclosure if it is made to the worker's employer.

138.3. Section 43B(1) requires both that the worker has the relevant belief, and that their belief is reasonable. This involves a) considering the subjective belief of the worker and also b) applying an objective standard to the personal circumstances of the worker making the disclosure.

138.4. Relevant factors to be taken into consideration when deciding whether disclosures are in the public interest are: (a) the numbers in the group whose interests the disclosure served; (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. The larger or more prominent the wrongdoer (in terms of the size of its relevant community, ie staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest.

Protected disclosure detriment

138.5. Section 47B of the Employment Rights Act says that: "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."

138.6. The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower. This is a different test to the test for automatic unfair dismissal because of a protected disclosure, where the focus is on the reason or the principal reason for dismissal.

138.7. In a complaint of detriment, section 48(2) provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Where the claimant can

show that there was a protected disclosure, and a detriment to which he was subjected by the respondent, the burden will shift to the respondent to show that the detriment was not done on the ground that the claimant had made a protected disclosure.

Conclusion

139. We will deal with the claims in the order within the agreed list of issues.

Discrimination arising from disability

140. We accept that the claimant may have interpreted instructions literally from the evidence provided by the claimant during the hearing. An email was sent on 25 March 2020 which instructed people that routine visits had been suspended and that the only visitors to the signal box should be those responding to operational incidents or those directed by control.

141. We had to consider whether the respondent knew or could reasonably be expected to know that the claimant was disabled by virtue of ASC at the time that he was disciplined. Whilst no formal diagnosis is required for knowledge of disability, we do not, however, find that the respondent knew of the claimant's disability at this time. The only indication given by the claimant was that his trade union representative suspected that he may have autism and that he was self-referring for tests to be undertaken. There was no other indication or evidence before the respondent of the effects of this condition on his normal day to day activities or indeed how substantial this effect may have been. An indication that autism was suspected by his union representative was not sufficient to satisfy this test, and we therefore consider that the respondent could not reasonably have been expected to know that the claimant was disabled at that time.

142. Even if we are wrong on that, and the respondent ought to have known of the claimant's disability due to being told that the claimant was going to undergo tests for suspected autism, this claim would still fail since we do not accept that the claimant was disciplined because of his literal application of Mr Robinson's email dated 25 March 2020, which is the basis of his claim for discrimination arising from disability.

143. The claimant was disciplined in relation to the Incident which occurred on 4 April 2020, however, this was for bringing the respondent into disrepute and his failure to co-operate in the disciplinary proceedings. He was not disciplined for refusing to admit CJ, the off-duty signalman, into the signal box. Nor was he disciplined for attempting to get individuals to comply with social distancing requirements. Rather, he was disciplined for the manner in which he dealt with the Members of the Public, which brought the respondent into serious disrepute, together with his failure to co-operate in the disciplinary proceedings.

144. It is therefore unnecessary for us to consider whether the respondent has shown justification for any unfavourable treatment, by showing a proportionate means of achieving a legitimate aim. In any event, we accept that dealing with disciplinary matters fairly and justly is a legitimate aim and that the way the respondent dealt with the disciplinary process was a proportionate means of achieving that aim. Therefore, the claim for discrimination arising from disability is dismissed.

Harassment

145. From the findings of fact outlined above, we accept that the respondent engaged in the majority of the conduct relied upon for his harassment claim as contained within paragraph 23 of this Judgement.

146. Dealing with each in turn, we accept that the claimant was subjected to an investigation meeting on 7 May 2020, and that this amounted to unwanted conduct. However, we do not accept that this was related in any way to the claimant's disability. Throughout the disciplinary process and the Tribunal hearing the claimant confirmed that he had done nothing wrong on 4 April 2020, and provided no evidence or assertion that his conduct on this day had been affected by his ASC. However, if we are wrong on that and the investigation meeting on 7 May 2020 was related to his disability, we do not accept that the meeting had the purpose or effect of violating the claimant's dignity or creating an intimidatory, hostile, degrading, humiliating or offensive environment for the claimant. Mr Kelly approached the investigation in an appropriate manner

and had initially indicated that there may be other ways to deal with the allegations against the claimant. We consider that this shows that he had no intention or motivation to harass the claimant during the investigation meeting. Unfortunately, the claimant's behaviour during the investigation meeting did not enable Mr Kelly to consider alternative action against the claimant. Turning to whether the meeting had the effect as outlined in section 26(1)(b)EqA, we do not consider that it did. Mr Kelly was trying to investigate the serious allegations against the claimant, and was not able to do so due to the claimant's failure to fully cooperate.

147. The claimant had been suspended on 11 May 2020. Again, we accept that this was unwanted conduct, but we do not find that this had the purpose or effect of violating the claimant's dignity or creating an environment as set out in section 26(1)(b)(ii)EqA. Suspension in these circumstances was appropriate and did not in any way constitute harassment.

148. Whilst we find that Ms Connor had not disclosed the claimant's disability or suspected disability in a meeting on 11 May 2020, we do not find this to be unwanted conduct. We consider that the claimant may well have complained had Ms Connor disclosed his suspected condition during the meeting on 11 May, as he raised concerns over other data breaches in his grievance to the respondent. In any event, even if the conduct was unwanted, we cannot see how this failure to disclose information could have had the purpose or effect of violating the claimant's dignity or creating an environment such as to allow a harassment complaint to succeed. We accepted Ms Connor's evidence for the reasons why she did not disclose the information during that meeting, namely the confidential nature of that information and that this disclosure may have resulted in further complaints from the claimant.

149. Ms Carribine had sent an email on 19 May 2020 questioning whether the claimant was able to carry out his role in light of his suspected disability. This was unwanted conduct and was clearly related to the claimant's disability. We do not find, however, that Ms Carribine had the purpose of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We consider it was appropriate and

reasonable for a manager to enquire whether an individual could carry out his extremely safety critical role which required telephone and non-face-to-face communications, when the individual was requesting face-to-face meetings only.

150. In considering whether it had the effect of creating such an environment, we did not find that to be the case. We therefore do not consider that making these enquiries and suggesting that the claimant undergo an assessment for his role having disclosed a suspected disability, had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Whilst we accept the claimant's perception that this may have done so, in considering the other circumstances of the case and the nature of the claimant's role, we do not consider it was reasonable for the conduct to have had that effect.

151. We do not find that Ms Carribine substituted what she would have done in particular situations and failed to consider that the claimant may have reacted slightly differently due to his disability. Nor do we find that the respondent resisted the attendance of the individual with ASC at the claimant's appeal hearing. We understand that the individual was asked to join the hearing remotely rather than in person, but we do not consider that in doing so, this resisted his attendance at the hearing. We acknowledge that, at the time, employers were being encouraged to hold hearings remotely due to the pandemic and had adjusted this usual practice for the benefit of the claimant. In any event, we fail to see how either of these had the proscribed purpose or effect as required by section 26(1)(b)EqA.

152. Therefore, the claimant's complaints of harassment are dismissed in their entirety.

<u>Unfair dismissal</u>

153. We find that the reason for the claimant's dismissal was conduct, which is a potentially fair reason under section 98(2) ERA. We accept the respondent's evidence that the reason for the dismissal was as stated by Ms Carribine, namely bringing the respondent into disrepute by harassing members of the public and failing to co-operate with the disciplinary process thereby

breaching his contractual obligations. We do not accept that the claimant's actions towards CJ, the off-duty signalman, formed any part of the decision to dismiss.

154. We therefore have to consider whether the dismissal was fair in accordance with section 98 (4) ERA.

155. In considering the leading case of BHS v Burchell, we find that Ms Carribine had an honestly held genuine belief in the claimant's guilt in bringing the respondent into serious disrepute in relation to the incident on 4 April 2020 and his failure to co-operate in the investigation process. There were two separate complaints, which had been received from members of the public, concerning the claimant's behaviour on 4 April 2020, for which he showed no remorse. There was corroborating evidence from the statements of DC and CJ about what had occurred on that day. The dismissing officer also had grounds to reasonably believe that the claimant had failed to co-operate in the investigation, for which there was sufficient evidence from the minutes of the investigation meetings (both informal and formal).

156. We therefore consider that Ms Carribine's belief in the claimant's guilt was based on reasonable grounds following an investigation, which we consider was reasonable and was within the range of reasonable investigations.

157. We did not accept the claimant's assertions that the procedure was flawed in respect of the disciplinary process. Whilst we note that the complaints from the Members of the Public had been received on different days, there was no evidence that the respondent sought to mislead the claimant and/or state that these had been received on the same day.

158. The fact that the statements from DC and CJ were unsigned did not affect the fairness of the investigation or disciplinary process, particularly as there was evidence within the bundle that DC's unsigned statement was identical to the signed one he had provided.

159. We also consider that the decision to dismiss the claimant was within the range of reasonable responses open to an employer in these circumstances.

160. We considered whether Mr Kelly's email prior to the investigation meeting identifying that the issue might be de-escalated and could be dealt with by training and an apology, meant that the decision to dismiss was not within the range of reasonable responses. However, as this suggestion was before Mr Kelly's investigation meeting with the claimant, and in light of the claimant's assertions that he had done nothing wrong right up to his dismissal, we did not feel that this restricted the respondent's ability to deal with the claimant's misconduct by dismissing him. We therefore did not consider that this affected the fairness of the decision and still accept that dismissal was within the range of reasonable responses.

161. We consider that the disciplinary procedure followed was reasonable and in accordance with the ACAS code of practice and that, in dismissing the claimant, the respondent acted reasonably in treating his conduct as sufficiently serious as to justify his dismissal.

162. We therefore find that the claimant was fairly dismissed and his claim for unfair dismissal therefore fails.

Wrongful dismissal

163. Unlike unfair dismissal, we have to consider whether the claimant had actually committed acts of gross misconduct justifying dismissal without notice. We find that the claimant had done so in relation to his actions on 4 April 2020 and his failure to co-operate in the disciplinary process following that date. We find that these constituted fundamental breaches of the claimant's contract of employment. Due to this, he was not entitled to receive notice or pay in lieu of notice in accordance with the terms of his contract. Therefore, his breach of contract claim for notice pay is also dismissed.

Detriment on the ground that he had made protected disclosures

164. We accept that in his conversation with Mr Mahy and in his email to Mr Robinson, both on 4 April 2020, the claimant made disclosures qualifying for protection under section 43B ERA. In raising concerns about individuals who the claimant believed had breached legal obligations in respect of social distancing and health and safety the claimant had, in our view, satisfied

sections 43B(1)(b) and (d) ERA. We do not, however, accept that the claimant had satisfied section 43B(1)(f) ERA, since there was no evidence put before us, or referred to, that indicated that there had been or was likely to be deliberate concealment of any of the other matters referred to in section 43B(1)ERA.

165. The claimant genuinely believed that his disclosures related to breaches of legal obligations/health and safety being endangered. It is more difficult for us to determine whether it was reasonable for the claimant to have formed that belief. From the evidence provided, it was not clear that there were actual breaches of legal obligations and/or health and safety risks. However, in considering the claimant's claim for whistleblowing, we consider that it was reasonable for the claimant to have believed this to be the case in these circumstances.

166. We accept that the claimant believed that his disclosures were in the public interest despite him stating on a few occasions that he was concerned about his own health and safety. We find that he was also concerned with the health and safety of other signallers as identified in his email sent to Mr Robinson on 4 April 2020 [P236].

167. The claimant had made his protected disclosures to an appropriate person in accordance with legislation, namely his employer.

168. Therefore, in finding that the claimant had made protected disclosures, we then had to consider whether the claimant had been subjected to the alleged detriments he relied upon and, if so, whether he was subjected to those detriments as a result of having made those protected disclosures.

169. We do not find that the claimant was subjected to any of the detriments relied upon for his whistleblowing complaint. Namely, we do not find that there been any concealment of the email from Mr Robinson dated 25 March 2020. We did not find any evidence to show this to be the case. Therefore, we do not accept that the claimant was subjected to any detriment concerning the concealment of any such email.

170. We do not accept the claimant's assertion that the respondent presented the complaints from the Members of the Public as being submitted on the same date, when in fact they were submitted some six days apart.

171. We do not accept that Mr Robinson's email concerning the claimant's absence being possibly related to the incident on 4 April 2020 was a detriment. We consider that it was reasonable for Mr Robinson to query whether an absence may have been related to the Incident which had resulted in a disciplinary investigation and fail to see how, in querying this, this amounted to a detriment.

172. We do not find that the decision to suspend the claimant was taken in a meeting at which local management were present on 11 May 2020. We find that Mr Kelly made that decision independent to that meeting, although acknowledge that it was discussed within the meeting, and there was reference in emails to it having been made in that meeting.

173. If we are wrong, and the claimant was subjected to any of the detriments outlined in paragraph 45 above, we do not accept that any such detriments were done on the ground that the claimant had made protected disclosures. We find no causal link to enable the claimant to succeed in his whistleblowing complaint. Therefore, his claim for detriment for having made protected disclosures fails and is also dismissed.

174. In light of our findings, and the dismissal of all of the claimant's complaints, the remedy hearing listed for 4 February 2022 has been vacated.

Employment Judge Welch
Date: 16 December 2021

JUDGMENT SENT TO THE PARTIES ON

24/12/2021

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FOR THE TRIBUNAL OFFICE

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