Case No. 1405246/2019

EMPLOYMENT TRIBUNALS

Claimants: Mr K Jarco

Respondent: Hovis Limited

RECORD OF A HEARING

Heard at: Southampton (In Person) **On:** 2 and 3 December 2021

Before: Employment Judge Self
Mr K Ghotbi-Ravandi
Mr H Launder

Appearances

For the Claimant: In Person (via a Polish Interpreter)

For Respondent: Mr Z Sammour - Counsel

JUDGMENT

1. The Claim pursuant to section 47B of the Employment Rights Act 1996 (ERA) is not well-founded and is dismissed.

2. The Claim of unlawful deduction of wages is dismissed upon withdrawal.

3. Upon the Tribunal deciding that the section 47B ERA claim is not well-founded for substantially the same reasons given in the Deposit Order previously made in this Claim, the deposit of £20 shall be paid to the Respondent as soon as reasonably practicable.

4. The Claimant shall pay the Respondent £4,980 is respect of costs within 21 days of the date of this Order. For the avoidance of doubt the full costs sum is £5,000 made up of the sums detailed in this paragraph and at paragraph 3.

WRITTEN REASONS
ISSUED AT THE REQUEST OF THE CLAIMANT

1. Oral Judgment with reasons was given at the end of the hearing and these written reasons are produced at the request of the Claimant.

2. By a claim form presented on 25 October 2019 the claimant brought claims of whistleblowing detriment; victimisation (the protected characteristic being race); direct race and sex discrimination; harassment (the protected characteristics being race and sex) and unlawful deduction from wages.

3. On 30 July 2020 the claimant applied to amend his claims to include allegations that his dismissal, which had occurred on 20 May 2020, was automatically unfair pursuant to section 103A ERA 1996, and unfair contrary to s.(98)4 ERA 1996.

4. Matters came before EJ Midgley in November 2020 and after a Judgment which was later reconsidered, a number of claims were struck out and deposit orders made on a number of other claims.

5. At the start of this final hearing there were two live matters before us which was a claim for 4 days unpaid holiday pay and a single whistleblowing detriment claim under section 47B Employment Rights act 1996, in that the Respondent subjected the Claimant to a detriment by the manner in which they dealt with and concluded a request from the Claimant to move from the Tray Wash area to the Trays and Banks area.

6. Following the oral evidence in this case the claimant has accepted that, in fact, there was no deduction from his wages and that he was paid the proper sums for holidays. That Claim has been dismissed on withdrawal. The only matter to be considered, in these reasons, is in respect of the protected disclosure detriment.

7. We have heard oral evidence from the Claimant in support of his case and Ms Ottley, Despatch Manager at the Respondent's Avonmouth site and Ms Nash and HR Advisor for the Respondent. There was a Respondent's bundle in excess of 350 pages plus a Claimant's bundle and further supplemental documents were produced during the course of the hearing.

8. We heard oral submissions and the Respondent's counsel produced a skeleton argument. We have taken all matters that we have been shown and heard into account. The Claimant was assisted throughout the hearing by a Polish interpreter.

9. The claimant was employed by the respondent from 9 January 2006 until his dismissal on 20 May 2020.

10. The Claimant had been in dispute with the Respondent for a variety of reasons from 2016. On 25 May 2016, the claimant submitted a grievance to the Respondent complaining that his line manager Mr Goziewski had made racist comments to other staff members and generally acted inappropriately. He contended that had been a protected act and complained of certain detriments that flowed from that. These claims have all been dismissed previously.

11. The claimant alleges that thereafter, between 2017 and 2019, Miss Barclay and Mr Croft (who was his line manager at the material time of the issue in this case) regularly called him a "Polish troublemaker."

12. The claimant stated that he suffered a further detriment on grounds of having made a protected disclosure because on 29 August 2017 Mrs Ottley sent an email to the managers in the region stating of the claimant (in relation to the return to work process): "he plays the system well. I want to take him out of the process when he returns so will require as much information as possible so please ensure a thorough return to work is completed along with Q&A of why he was unable to drive back (he was okay to drive there)."

13. Furthermore, the claimant complained that Mrs Ottley directly discriminated against him on 29 August by requesting additional evidence regarding his time off work in relation to the period where he was seeking to recover his daughter. The claimant alleges that discriminatory conduct continued, forming part of a discriminatory policy that was applied again between the 13th and 18th February 2019, when he was required to provide evidence of his mother's surgery, following a request for time off in consequence of it, and on 2 March 2019, when he required a day's emergency leave for a family emergency.

14. The Claimant continued to report issues at work to his employer, but he says that he suffered from increasing stress and anxiety, eventually developing depression with the result that he describes himself as feeling paralysed and unable to determine what he should do.

15. In the period November 2018 until January 2019 the claimant says that Mrs Ottley, Mr Croft and Mr Morgan directly discriminated against Polish employees and men by removing coverings from the windows of the buildings and Portacabins where the Polish employees and male employees change their clothing, and by Mrs Ottley entering the portacabin unannounced. He complained that latter treatment amounted to harassment and the grounds of his sex.

16. In the period December 2018 until April 2019 the Claimant alleges that he was subjected to a series of detriments by his first line manager, Mr Croft at work, including unreasonable criticism, being overloaded with work and being excluded from the portacabin where employees were permitted to change and keep their belongings.

17. On 2 March 2019, he alleges that Mr Croft harassed him on the grounds of his race by calling him a “dickhead” when the claimant requested time off for a family emergency.

18. On 27 March 2019, the claimant raised a Data Subject Access Request in accordance with the GDPR.

19. All of the above matters are mentioned as background detail only as to the friction there was in the workplace between the Claimant and a range of individuals which have either been struck out, or the Claimant decided not to pursue, in light of EJ Midgley’s deposit orders. We have not been taken to any of the detail of these allegations and do not make any findings on them save to observe that the Claimant’s relationship with management, including Ms Ottley, had been strained for a substantial period of time on account of a wide range of reasons.

20. The Claimant began a period of sickness absence on 8 April 2019 from which he did not return prior to his dismissal. On the same day, the claimant submitted a request by letter to Mrs Ottley to change his role from working on the Tray Wash to the Trays and Banks area on account of persistent stress at work. He stated that he did not feel safe in the Tray Wash role, citing “several health and safety issues” and also his treatment by management. He said he was happy to meet with Ms Ottley.

21. On 30 April the Claimant was the subject of an OH report in respect of his absence. He told OH that he had stress, anxiety and depression and that the condition flowed from the pressure of his role and also the management style.

22. The recommendation was for there to be an individual stress risk assessment prior to the Claimant’s return, a possible return on reduced hours and that consideration should be given to move to Trays and Banks, if operationally feasible. There had been no enquiry into any physical impairments that might prevent this at this point.

23. Following on from the Claimant’s letter and appointment with OH the Respondent sought to set up a meeting at which all the points that the Claimant sought to raise could be properly aired. That meeting was to be with Ms Ottley and it is noteworthy that the Claimant did not object to meeting her at that time on account of any previous dealings. We take from his agreement to attend the meeting that he still considered he could have a professional conversation with Ms Ottley.

24. Ms Nash also attended and took notes. There came a point in the meeting when the Claimant asked her to stop taking notes and she obliged him. The Claimant has also provided a recording and transcript following his clandestine recording of the meeting. There has been no objection from the Respondent to the recording being used in evidence and we are satisfied that it is a true recording of the meeting. Whilst not verbatim we are satisfied that Ms Nash’s notes are also accurate so far as it is relevant.

25. In that meeting all matters that needed to be covered were covered. The Claimant raised issues about his line manager Mr Croft and also raised issues about the reasons why the equipment he had to use in order to do his job was causing him stress and anxiety and why he considered a move was required. The Claimant did raise some health and safety matters, including an issue about signage for a fire assembly point and we will deal with those in detail later on in these Reasons.

26. During the discussion, Mrs Ottley discussed the claimant's concerns with him, identified that a previous occupational health report had suggested that working on the Trays and Banks position would exacerbate Claimant's existing back injury and offered refresher training in relation to the manner in which baskets should be removed in the Tray wash position. The Claimant stated he just wanted to change position and felt overloaded. He also mentioned an incident when his line manager had upbraided him for standing in the wrong place following a fire drill when he had been right all along.

27. Having looked at the notes the Tribunal can see the Claimant being able to have his say and can also see that Ms Ottley is responding appropriately and positively. There is not the slightest sense that anything that the Claimant is saying is causing her any cause for concern or upset.

28. Ms Ottley sensibly, and commensurately with her management responsibilities, referred the Claimant to OH to see whether the Claimant would be fit to work in an area that we find she genuinely perceived as more strenuous (Trays and Banks). She was also prepared to consider whether a swap could be entertained with an individual known as Bart if the Claimant was fit, as there was no vacancy as such.

29. We are satisfied that she knew that the Claimant did work from time to time in Trays and Banks but was rightly concerned to confirm that medically he would be fit for a full-time role there. Whilst she did not necessarily accept the points made by the Claimant, we find that she was open to try and assist the claimant if she could.

30. On 10 June an OH report was returned which formed the view that the Trays and Bakes department was more taxing than the Tray Wash and so a move was not recommended. We can see no reason why that opinion was not reached in good faith. It was the view of the Occupational Health physician and not part of the management team and no reason has been given to us as to why that individual would provide anything other than their true opinion.

31. The Claimant retracted his consent for management to see the report and we find that the Claimant took that step because the opinion did not fit what he wanted to hear and the role that he wanted to move into. When Ms Ottley found that she was not able to view the report she had to make a decision on what she had as the Claimant had denied her up to date information and so she went back to previous OH reports and formed the view, reasonably in our view, that she could not sanction a return to full time Trays and Banks on health grounds. She was aware that from time to time the Claimant worked there but reasonably formed a view that a permanent move was not appropriate.

32. On 10 June Miss Ottley made eleven recommendations as to how the Tray wash system could be improved and we find that this was a direct response to the Claimant's observations on 20 May. She had taken his concerns on board and had taken time to investigate them herself to see how it worked in practice and then made recommendations as to what could be improved for the benefit of the Company and staff. Such an attitude is in direct contravention to what is being suggested by the Claimant i.e. that she was hostile about matters spoken of at the meeting and caused the Claimant a detriment because of it.

33. Ms Ottley also considered the Claimant's proposed change of role and rejected it on medical grounds. That was a decision that it is wholly understandable on the information which she had and we find that it was a decision that she made in good faith. By June 21 the decision had been made and a draft letter was drafted. The Claimant states that he received it on 29 June which suggests that there was some delay before it was finally sent out. It should probably have had the date changed but such an administrative error is relatively commonplace and we can draw no nefarious purpose from it.

34. The Claimant complains that he was denied the chance to appeal the decision. We disagree. The letter says that an appeal could be made within seven days of the "issuance" of the letter. Our reading of that states that the seven days would run from the date of actual issuance which would be the date the letter was received. The Claimant in any event did not seek to appeal out of time.

35. It is acknowledged that receipt of this letter would have been a surprise to the Claimant who had been told that he would receive the outcome on the issues raised at a meeting on 1 July only to receive a letter about it. We cannot see that issue was so egregious so as to lose all trust and to simply not attend the meetings after this point was unjustified and counter-productive.

36. If the Claimant had issues, he wished to raise then he could have done so at those meetings. Ms Ottley invited him to a further meeting by a letter of 4 July as she wanted to find a solution to the issues moving forward. Shortly after the Claimant raised a further grievance stating that he no longer wished to be contacted by anybody on site. He raised a number of issues that he had already raised in the second part of the meeting some of which Ms Ottley had addressed and wished to communicate to him.

The Law

37. Section 47B of the Employment Rights Act 1996 reads (so far as is relevant) as follows:

(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

(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.

38. The meaning of a protected disclosure (again so far as is relevant) is set out within the Employment Rights Act 1996 as follows:

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

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.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a) to his employer…

39. In considering detriment claims of the type the Claimant has brought in this case one has to consider whether or not the Claimant has made a protected disclosure and, if so, whether the Claimant was subjected to a detriment on the ground of making that protected disclosure.

40. There is a need to consider whether the employee reasonably believed that any disclosure tends to show a category of wrongdoing as set out in section 43B (1) (a) to (f) and also consider whether the Claimant had a reasonable belief that the disclosure was in the public interest. We also have to be satisfied that there was a disclosure of information. We do not provide chapter and verse in this Judgment of the case law as it is not proportionate to do so we confirm that we are mindful of the case law that there is in considering whether there was a protected disclosure as defined by the Act such as:

a) Chesterton Global v Mohammed (2017) IRLR 837

b) Dobbie v Felton (t/a Feltons solicitors) (2021) IRLR 679

c) Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38.

d) Kilraine v London Borough of Wandsworth (2018) ICR 1850.

41. In the event that we find that the Claimant did make a protected disclosure then we need to consider whether the Claimant was subjected to a detriment. A detriment is to be judged from the perspective of the worker and in **Jesudason v Alder Hey Childrens NHS Foundation Trust (2020) IRLR 374** it was found that the test was whether a reasonable employee might consider the relevant treatment to constitute a detriment and whether there was a genuine belief in the part of the Claimant.

42. Finally, we have to be satisfied that the protected disclosure materially influenced the decision maker i.e. it was more than a trivial influence – **Fecitt v Manchester NHS Trust (2012) IRLR 64.**

43. **Conclusions -** It is correct to say that the Claimant, despite the many previous hearings in this case and despite questions at the outset of this hearing was at all times vague as to specifically what disclosures it was, he was relying on. He was able to pinpoint the conversation between himself and Ms Ottley on 20 May described at paragraphs 24-26 in these reasons as being the conversation in which he made a protected disclosure and the detriment he alleges he sustained because of making a protected disclosure was **"the manner in which the Respondent dealt with and concluded a request from the Claimant to move from the Tray Wash area to the Trays and Banks area".**

44. We have carefully considered the meeting notes from the transcript of the recording that the Claimant took of the meeting. We are aware that anything said or done at that meeting may have been influenced by the fact that the Claimant was aware that the meeting was being recorded and Ms Ottley was not. Indeed, the Claimant specifically asked if the matter could go off the record at a certain point and so the note taker stopped taking notes but he kept recording.

45. The Claimant mentions a number of health and safety matters relating to his own job. We are satisfied that the Claimant did so because of his own personal situation and in his attempt to secure a move as opposed to holding any reasonable belief that those points / disclosures were in the public interest. We do not consider that those matters amount to public interest disclosures they were personal observations made with a view to securing a change of position.

46. The only part of the meeting which we consider did amount to a public interest disclosure was the conversation about a misplaced fire assembly sign which the Claimant had gone to during a fire drill only to find that it was incorrect and potentially unsafe. There is a discussion about the impact upon others and we do consider that the statutory definition of public interest disclosure is met by that part of the conversation.

47. Moving to whether or not there was a detriment we consider that there was no detriment in the manner in which the Claimant's request to move was dealt with or concluded, as there was a reasonable discussion followed by Ms Ottley taking appropriate steps to ensure that the Claimant's requested move would not be contrary to his back injury which he had suffered from. She engaged OH to get an up to date position and then when the Claimant refused her access to that report, she sought to look at the information that was available to make her decision. She came to a rational and, indeed the only, decision available to her by refusing the move on health grounds. Those grounds would have been supported by the most recent OH report that the Claimant would not disclose as it did not suit the outcome he required.

48. Going back to the case of Jesudason we have to ask ourselves **"whether a reasonable employee might consider the relevant treatment to constitute a detriment and whether there was a genuine belief in the part of the Claimant"**. We do not consider that the Claimant did sustain a detriment because a reasonable employee would not consider that a move to an area where there was an increased risk of back injury which was supported by up to date medical advice was a detriment. It was a protective measure designed to safeguard the Claimant's health and safety. Further we are not persuaded that the Claimant genuinely held the belief that it was a detriment and the whole issue is simply one that has been manipulated into permitting the Claimant to continue his wide-ranging grievances against the Respondent.

49. Having said all of that we are quite satisfied however that none of Ms Ottley's alleged adverse action to the Claimant following the discussion had anything to do whatsoever with the fact that the Claimant had raised the public interest disclosure that we have found, or indeed any of the wider health and safety matters, or indeed anything else that was raised in that discussion on 20 May. We are unable to detect within that meeting any hostility or upset from Ms Ottley about the matters that were raised. Indeed, we are quite satisfied that she listened to all of the Claimant's points, respected them and sought to make enquiry where required in order to improve matters. She acted entirely professionally throughout the process. The Claimant had all the information that we had before him and her actions and reasonableness

are plain for all to see. The protected disclosure or what was said re other matters had absolutely nothing to do with the way Ms Ottley conducted and concluded the Claimant's request for a change of role.

50. The detriment claim is dismissed.

51. **Costs**

The Respondent made an application for costs in the sum of £20,000. Costs in the Employment Tribunal and, so far as is relevant in this claim, are governed by the following provisions from the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

39(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) The deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

76.—(1) A Tribunal may make a costs order…, and shall consider whether to do so, where it considers that—

(a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) Any claim or response had no reasonable prospect of success.

78.—(1) A costs order may-

(a) Order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;…..

84. In deciding whether to make a costs …. order, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

52. In this Claim, the sole allegation we have had to determine was the subject of a deposit order pursuant to Rule 39. We have considered the reasons for the Order as set out by EJ Midgley and have concluded that the Claim has been dismissed at this hear for substantially the same reasons as set out by him. The Claimant was

given an opportunity to make representations in relation to whether the default position of unreasonable conduct under Rule 39(5) could be displaced and the Claimant did not provide any information from which that could be done. The Claimant shall be treated, therefore as having acted unreasonably in pursuing that specific allegation to a final hearing.

53. Further pursuant to Rule 39 the Claimant will forfeit the £20 deposit that he paid to pursue this Claim and if a costs order is made then that £20 will be deemed to be part of any award of costs made to the Respondent pursuant to Rule 39(6).

54. Moving to the substantive application for costs, any decision to award costs is a two-stage exercise. First the tribunal must consider whether its discretion is engaged and second whether that discretion should be exercised. In this case the first stage i.e. that the Claimant has acted unreasonably, has been met as detailed above by virtue of the mechanism with Rule 39(5).

55. We move therefore to the discretionary element. When exercising our discretion, we take into account the following matters:

a) Costs in the employment tribunal are the exception as opposed to the rule.

b) Costs in the employment tribunal are compensatory and not punitive. We need to consider what loss has been occasioned by the Respondent and consider which of that has been "reasonably and necessarily incurred". The Respondent has told us that the total costs expended on this matter is £20,805 of which £7,000 is counsel's fees. We have not been given a detailed breakdown of the solicitor's costs which is surprising taking into account how long an application for costs had been in contemplation. When there was a warning re costs the estimate given to the Claimant was £15,000- £20,000.

c) We will take into account the Claimant's ability to pay as we consider it just to do so. The Claimant told us that he had a number of temporary jobs since leaving the Respondent and he has also received Universal Credit. He is a qualified Class 1 driver and has earned about £1,000 in the last three weeks. He owns half of his own home. It would seem to the Tribunal that moving forward the Claimant should be able to gain regular driving work especially as there are shortages at the moment.

d) It seems to the Tribunal that the Claimant was exceptionally well warned as to what the consequences may be if he pursued his claim. That was not only from the Respondent themselves but also from EJ Midgley, who cast an independent eye over the matter and provided the Claimant with a very strong indication as to what was likely, and indeed did, happen. We can understand why a Claimant and especially one acting in person might take the Respondent's condemnation of the claim with the proverbial pinch of salt – "they would say that wouldn't they". To be told by an Employment Judge however is of a different character and would make most litigants consider their position very carefully taking into account the risks faced.

e) Notwithstanding what is said at (d) above the warning given is only one of the factors that needs to be weighed up and we are aware that a costs order does not follow as of right.

f) We take into account that the Claimant is a litigant in person as this is a factor that is important as we should not judge the Claimant by the standards of a professional advisor. Having said that this point is greatly mitigated by the clarity of the message that EJ Midgley demonstrated which should have been clearly understood whatever the Claimant's status.

56. Having taken all of these matters into account we are of the clear view that this is a case where we should exercise our discretion to award costs. The Claimant was clearly warned of the risks and nevertheless decided that he would take the chance. It was reasonably clear on the paperwork that Ms Ottley had discharged her duties professionally and appropriately and there was really very little that could be said in support of the Claimant's claim. It was all there for the Claimant to act upon but he decided to press on unreasonably

57. It is to the Claimant's credit that he limited his claims after the previous Preliminary Hearing and the Tribunal do not criticise him for pursuing his holiday pay claim as there were unusual circumstances which the Respondent only explained late in the day.

58. Whilst the costs themselves as a total do not seem unreasonable taking into account the reasonably torturous progress of this Claim, we do not have any particularisation of precisely how the solicitor's costs have got to that figure. The primary criticism of the Claimant must be his decision to pursue the claim after his fortune had been read by EJ Midgley. Prior to that we take into account his litigant in person status as a factor.

59. Any precise figure is bound to be speculative to some account. We form the view that there should not have been a hearing in this case on the detriment claim. An award of £5,000 in costs is a figure that we consider reasonable considering the Claimant's means and what he may earn in the future. He also part owns a property. The figure awarded amounts to a substantial portion of counsel's fees for the final hearing and is appropriate compensation weighing as best we can all of the discretionary factors.

Employment Judge Self
Date: 11 January 2022

Reasons sent to parties: 18 January 2022

FOR THE TRIBUNAL OFFICE