# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Derek Gorton

**Respondent:** Adria Glass Ltd

**Date** 19 January 2022

**Employment Judge** EP Morgan QC

**Appearances**

**Claimant** Mr Ali (Counsel)
**Respondent** No appearance

# JUDGMENT

1. The claim of unlawful detriment contrary to section 47B of the Employment Rights Act 1996 is well founded and succeeds.
2. The claim of automatic unfair constructive dismissal contrary to section 103A of the Employment Rights Act 1996 is well founded and succeeds.
3. The Claim of wrongful dismissal is well founded and succeeds.
4. The Respondent is ordered to pay to the Claimant the following net sums by way of compensation:

| | £ |
|---|---|
| Basic award | 2441.60 |
| Loss of statutory rights | 750.00 |
| Notice pay | 2100.00 |
| Injury to Feelings | 7000.00 |
| Aggravated Damages | 5000.00 |
| Interest | 1000.00 |
| **Total** | **£18291.60** |

5. It is recorded that the Employment Protection (Recoupment of Benefit) Regulations 1996 do not apply to any part of this award.

# REASONS

**Introduction**

1. By his claim form lodged with the Tribunal on 9 June 2021, the Claimant advances claims whistleblower detriment, automatic unfair constructive dismissal together with an assertion of certain other monetary entitlements. The original claim form [page 7] made anecdotal reference to disability discrimination. However, the claim was subject of clarification in the form of Further & Better Particulars. These make clear, and Mr Ali confirms, no disability discrimination claim is before the tribunal.

2. The Respondent attempted to file a response to the claim. However, it did not do so within the time limit provided by the rules. This prompted correspondence from the Tribunal. On 16 August 2021 a preliminary hearing was conducted before Employment Judge Brain. The Claimant was represented at that hearing by Mr Ali (Counsel). The Respondent was represented by Mr Coffey, a director. It is clear from the orders made following the hearing and the notes which accompany them [p43] that Mr Coffey intimated an intention to make application to file a response out of time. Upon this basis, a further preliminary hearing was set for 7 October 2021. However, notwithstanding the opportunity to do so, the Respondent made no such application. As a consequence on 20 October 2021, and following a notice of hearing being issued to the parties, Judge Brain conducted a further hearing. The Respondent did not attend that hearing. The Tribunal is satisfied (as was Employment Judge Brain) that the Respondent was at that time on notice of both the convening of the preliminary hearing and the matters to be discussed. In advance of that hearing the Claimant had provided further and better particulars of his claim. Whilst relying upon the same causes of action, they rather helpfully clarified the sequence of events upon which the Claimant relied. As such, no form of amendment was required. Having made the usual case Management orders, Employment Judge Brain directed that the matter was to be listed as an uncontested claim. Pursuant to Rule 21(3) of the Employment Tribunal Rules 2013, the Respondent has continued to receive notice of the hearing and has been provided with the documents relied upon by the Claimant for this purpose.

3. In the light of this history, the Tribunal is satisfied that the Respondent has received full notice of the purpose of today's hearing and has been given access- in good time -to the witness material and hearing bundle upon which the Claimant relies. Despite this, there has been no attendance on the part of the Respondent. The Tribunal has concluded, therefore, that the absence of the Respondent is intentional and voluntary. Despite this, the Tribunal proceeded to test the evidence provided by the Claimant by suitable questioning as might have been pursued in the event the Respondent had been represented.

**The Claim**

4. In essence, the Claimant contends that he made to disclosures to his employer. These disclosures caused him to be subjected to retaliatory negative treatment in the form detailed within the Further & Better Particulars of Claim. It is said that matters culminated in a meeting between the Claimant and the Respondent's management on 10 March 2021. During the course of that meeting the Claimant-and his colleagues-were informed that the company had participated in claims for furlough relief at a time when the workforce had been continuing to participate in full-time work. It is the Claimant's position that this statement-affirming as it did-Claimants own belief and previously expressed concerns, only served to further undermine the trust and confidence which he was able to invest in the Respondent. It was, says the Claimant, the final straw in the sequence of events which had commenced with a disclosure from the Claimant concerning compliance with Covid Regulations and the need to shield.

**Evidence**

5. The tribunal has been provided with a bundle of documents extending to 123 pages. It also had the benefit of hearing evidence from the Claimant. The Claimant had previously filed a witness statement (comprising 36 paragraphs). Given the absence of the Respondent, the Tribunal undertook extensive questioning the Claimant with regard to the contents of that statement and the documents included within the bundle.

**Primary Findings of Fact**

6. Having considered that evidence and upon the balance of probabilities, the Tribunal has reached the following findings:

6.1 The Claimant commenced employment with the Respondent on 6 May 2013. He resigned from that position on 15 March 2021. Throughout the course of his employment he held the position of a "glass cutter";

6.2 The Respondent is a private limited company concerned in the manufacture and supply of glazing units;

6.3 The Respondent employs somewhere in the order of 20 employees; including the Claimant. In management terms, the manufacturing operation was managed on a day-to-day basis by Mr Paul Taylor. He held the position of Gen Manager. Each of the employees worked within the same production unit; albeit allocated to their own workbench;

6.4 Prior to the matters giving rise to these proceedings, the workplace was a positive environment in which long-term employees fostered and encouraged social interaction and friendships. These friendships had been evidenced in a number of ways; including the formation of a colleagues' WhatsApp group and the holding of annual sea fishing trips. Prior to the disclosures made by the Claimant, he considered his relationship with his colleagues to be supportive and good-humoured. He had not been the subject of any form of negative treatment, adverse comment, or, criticism;

6.5 The Claimant's daughter has for some years been in receipt of medical treatment. With the arrival of the Covid pandemic, the Claimant and his partner were required to exercise particular vigilance in order to address his daughters susceptibility to risk of infection. The company management, including Mr Taylor, were well aware of these medical difficulties and had previously demonstrated an attitude of flexibility to enable the Claimant to participate in accessing necessary medical care. Neither the medical condition, nor the responsibilities it generated for the Claaimant's family, had previously been the subject of negative comment or criticism;

6.6 The Respondent's working routines were production led and order driven. Each member of the team participated in the production of glazing units; with the result that shift times were fixed and, when available, overtime required the participation of each member of the team. In the course of a normal working day, the Claimant and his colleagues commenced work at 6am and conclude their shift around 430pm;

6.7 Participation in working practices-including working hours-were recorded by means of a traditional clocking in system. There was no need for prior authorisation of over-time. The business need for overtime was communicated by Mr Taylor to the team as a whole and was undertaken upon the same basis. The Claimant confirmed-and the Tribunal accepts-that the clocking in system enabled management to understand the precise hours worked by each employee by reference to the clocking in records.

There was a single hourly rate of pay. In payroll terms, therefore, the calculation of the pay to which each employee was entitled ought to have been considered a relatively uncomplicated matter;

6.8 Prior to the events giving rise to these proceedings, in the event of any discrepancy between a payslip and a worker's entitlement, members of the team had been encouraged to take up the matter with Mr Taylor. Where these issues arose, Mr Taylor was able to ensure that the relevant discrepancy was remedied;

6.9 Communication between management and members of the team was informal. There was no noticeboard or centralised email account which might be considered customary in any larger scale organisation. The Claimant confirmed -and the Tribunal accepts – that the communications with Mr Taylor where invariably undertaken orally and communicated to the team as a whole;

6.10 In the case of the Claimant, the use of oral communication did not present any difficulty; not least as a result of the fact that the Claimant's own workbench was less than 10 feet away from Mr Taylor's office. In any case, the scale of the workplace and the proximity of the team in carrying out their duties, invariably resulted in information being shared collectively;

6.11 Before October 2020, the Claimant's relationship with Mr Taylor was "positive". It was the Claimant's evidence-which the Tribunal accepts-that prior to a change in the ownership of the company, Mr Taylor had presented himself as a member of the team with certain supervisory responsibilities. However, since the involvement of Mr Coffey, Mr Taylor had distanced himself from the team as a whole and had become less collaborative in his day-to-day working with members of the team. There was not, however, any form of antagonism or hostility demonstrated by Mr Taylor to any of the members of the team as a result of this change;

6.12 On or about 28 April 2020 the Claimant was approached by Mr Taylor on behalf of the Respondent. The Claimant was at that time on furlough leave. The purpose of the approach was to request the Claimant to agree to return to work. However, the request was made in terms that the Claimant would be paid via the furlough arrangement together with additional sums "cash in hand". The Claimant immediately recognised any such arrangement as being inappropriate and, in his view, unethical. The Claimant was aware that a similar invitation had been made to his colleagues. The invitation was accepted by all of the members of the team save the Claimant and one other colleague;

6.13 During the period March-June 2021 Claimant and his partner were required to maintain shielding arrangements in order to insulate their daughter from risk of harm. The Claimant was contacted on 4 June 2020 by Mr Taylor on behalf of the Respondent. Mr Taylor asserted during the course of that telephone conversation that appropriate measures had been put in place to enable the Claimant to return to work safely. In addition, the Claimant was informed by Mr Taylor that should the Claimant fail to return to work, Mr Taylor would have no option but to terminate his employment. As a result of the pressure, the Claimant returned to work on 6 June 2020;

6.14 On 11 October 2020, the Claimant was invited to attend the meeting to discuss the implications of an employee testing positive for Covid 19. Unsurprisingly, given his own domestic circumstances and the obligation of safeguarding his daughter, the Claimant had conducted his own enquiries. He related to Mr Taylor the advice which he had received from the NHS Helpline and Public Health England. He relayed that,

according to this advice, all those employees who had come into contact with a colleague who had tested positive, were required to self-isolate for a period of 14 days. The Claimant expressed his own perception that it was therefore necessary for isolation to continue until 20 October 2020. The Claimant communicated a further concern that if these rules were not complied with, individuals might be subjected to a financial penalty. Drawing upon this information, the Claimant informed Mr Taylor that he would not be attending the proposed meeting;

6.15 At the time of communicating this information to Mr Taylor, the Claimant was actuated by a seriously and carefully formulated concern. He had formed the opinion that the company was at risk of breaching its statutory obligations towards himself and his colleagues and indeed that individual employees might themselves be acting in breach of the COVID Regulations and restrictions. The tribunal has no hesitation in concluding this belief was held by the Claimant and that he had reasonable grounds upon which to form the views which he did. Further, the Claimant communicated his concern to Mr Taylor in recognition of his own view that such information ought to be made known in order to serve the public interest of public health protection;

6.16 At the time of making this disclosure, there was a very real prospect that the Respondent and/or its officers would be acting in breach of their legal obligations and/or encouraging members of its workforce to breach the legal obligations to which they were themselves subject;

6.17 Following the making of this statement, the Claimant was subjected to a campaign of negativity and hostility. This included: the threat of disciplinary action from Mr Coffey; the categorisation of the Claimant as "lazy" on account of his perception of the need to absent himself from the workplace; an instruction to staff that the Claimant should not be spoken to; a suggestion that the Claimant had by his conduct imperilled the security of his own job and that of his colleagues; the suggestion that the Claimant was attempting to shut the company down; and the presentation of material by means of social media and WhatsApp groups which sought to undermine the Claimant as lazy, uncooperative and productive and the person who wished to "skive" from work;

6.18 These behaviours were demonstrated to the Claimant on a regular, if not daily, basis following his return to work on 21 October 2020. What had previously been a supportive working environment became an unwelcome hostile and intimidating workplace for the Claimant. Whilst the Claimant was approached by certain of his colleagues seeking further information, he continued to be labelled in negative terms by many of his colleagues and subjected to disassociation and exclusion. In the view of the Tribunal, this conduct would not have been possible without the knowledge and participation of Mr Taylor. Indeed, insofar as the conduct took the form of WhatsApp messages, the Tribunal is satisfied that Mr Taylor was a member of the WhatsApp group and, notwithstanding the terms of the messages in question, failed to intervene to correct or challenge the behaviours or views which were being expressed with regard to the Claimant. In the view of the Tribunal, given the scale of the workforce, such participation from Mr Taylor, could only have served to endorse the conduct and provide a licence for it to continue;

6.19 In February 2021 the Claimant and his wife were investigating the restructuring of their mortgage on the family home. As might be expected, the financial advisor required sight of the Claimant’s pay documentation for the previous three months. Upon examining the information provided by the Claimant it became apparent that there was a discrepancy between the hours worked by the Claimant and the pay

recorded as received by him. The financial advisor made attempts to communicate with the Respondent to clarify the discrepancy and in order to ensure that only accurate information was provided to any proposed mortgagee. No response was received;

6.20 Following previous practice, the Claimant approached Mr Taylor directly to discuss the pay discrepancy. He raised the question as to why his payslips were incorrect. Mr Taylor did not immediately accept the Claimant's account but gave a response to the effect that he would discuss matters with Mr Coffey, the new owner and director of the company;

6.21 The absence of any meaningful response from those Respondent prompted both the Claimant and his financial advisor to seek further information from third party agencies. Their combined efforts led to the discovery that the Respondent had been claiming furlough pay for all staff since March 2020 and in fact had done so notwithstanding the workforce return to work in June 2020. On closer examination the Claimant identified a further concern: namely that the financial details recorded within his payslips demonstrated levels of pay which were in fact in excess of those to which he was entitled; thereby potentially exposing him to an additional tax liability which was in fact unwarranted;

6.22 Equipped with this information, the Claimant approached Mr Taylor again. He expressed his concern to him that the company had been participating in a form of tax fraud. The Tribunal has no hesitation in concluding that the Claimant held this belief at the material time and had reasonable grounds for doing so. The evidence indicates that the Respondent was committing a criminal offence by making claims for indemnity through the furlough scheme from HMRC; doing so at a time when in fact the workforce to which the claims related were in full attendance in the workplace. In addition, the Respondent was failing to meet its own statutory obligations with regard to the provision of accurate payslips and the maintenance of physical records for the benefit of its employees. This behaviour was, in the view of the Claimant, of such a character as to tend to show an intention on the part of the Company and its officers to continue such financial irregularities whilst at the same time concealing both the offence and the manner of its implementation from HMRC and its own workforce;

6.23 Having made this disclosure, the Claimant was again subject to further adverse treatment. This treatment took the form of negative comments from Mr Taylor. It was also suggested to him that he ought to be concerned for his safety given the reputation and standing of Mr Coffey. The Claimant interpreted this as a reference to Mr Coffey's potential for retaliatory behaviour; which might result in physical harm to him. The Claimant recognised and received those words of warning in a manner which caused him to be fearful for his own safety;

6.24 Following the making of this disclosure, the Claimant was required to attend a meeting on 10 March 2021. The workforce of 20 staff attended that same meeting. Mr Coffey and Mr Taylor were also in attendance. During the course of this meeting Mr Coffey confirmed to the workforce that claims for furlough payments had been made in respect of all employees throughout the period from June 2020; notwithstanding the fact that employees had been in the workplace undertaking their duties as normal throughout the intervening period. It is the Claimant's evidence, which the Tribunal accepts, that there was in fact no diminution in the volume of orders undertaken by the Respondent company during that time. In the meeting on 10 March 2021, Mr Coffey sought to justify the claims for furlough payments as being in the financial interests of the company. He went on to give an assurance that the

claim for furlough payments would stop that day; with no further claim being made thereafter;

6.25 That statements made during the course of that meeting are in marked contrast to the communications which had been directed upon an individual basis to the Claimant. Following the Claimant raising this concern, he was in effect required to demonstrate evidential proof. This carried with it the inevitable imputation that the Claimant was misguided and/or in error in expressing the views he did. In fact, the Tribunal finds, both Mr Taylor and Mr Coffey full knew and appreciated that the concerns raised by the Claimant with regard to the accuracy of his own pay records and the furlough arrangements where true. The requests made of the Claimant to provide evidence were intended to undermine him further and to deflect attention away from scrutiny of the manner in which these matters had been conducted on behalf of the Respondent. In the view of the Tribunal, the requests made of the Claimant, only served to exacerbate the stress and isolation which he was experiencing at that time;

6.26 Having attended the meeting on 10 March 2021, the Claimant concluded that his position with the company had become untenable. He considered that the Respondent had by its conduct destroyed all trust and confidence and demonstrated a preparedness to act in contravention of the legal obligations which it owed to him. The Claimant tendered his resignation by letter of 12 March [p103]. The letter of resignation included the following statement:

> "Because the company has committed and confessed to the criminal act by claiming furlough for the entire workforce without our knowledge while we were actively working and then trying to justify it, I feel this has fundamentally undermined all trust and confidence I have in the company and I have been subject to detriments because I object to what has been done... "

And

6.27 The Claimant resigned with immediate effect. He did not work his notice. No payment in respect of notice has been paid to him.

**The Law**

7. It has long been recognised that the contract of employment incorporates an implied term of trust and confidence. The implied term requires the employer to refrain from conduct calculated or likely to undermine the trust and confidence of the employee without reasonable and proper cause: **Malik v BCCI [1998] AC 20**. Where it does so, the employer will be in fundamental breach of its obligations to the employee. It is trite law that in such circumstances, it is a matter for the employee to determine to affirm the contract or accept the breach and consider himself released from his future obligations.

8. Further, **section 95(1) (c) of the Employment Rights Act 1996** provides that a dismissal arises where an employee terminates the contract under which he is employed by reason of the employer's conduct. Such termination must be in response to a fundamental breach of an express or implied term of the employment contract, or, alternatively founded upon a series of events culminating in a "last straw". It is a matter for the Tribunal to determine whether a breach has occurred: **Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ *1493*, [2005] IRLR 35).** However, the claim of constructive dismissal is framed, the employee must satisfy the Tribunal that the decision to resign is in response to the breach(es) relied upon. A claim of constructive dismissal will succeed where, on the evidence before it, the Tribunal is satisfied that these elements are made out.

9. **Section 47B(1) of the Employment Rights Act 1996** provides:

> *"A worker has the right not to be subject 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*."

10. It will be self-evident that the protection afforded by this section is only available where a qualifying protected disclosure has been made by the Claimant. Not all communications made to the employer can be so classified. By way of example, the mere raising of expressions of discontent and/or unhappiness will not suffice: **Cavendish Munro Professional Risks Management v Geduld [2010] IRLR 38:**

> "24**….**Further, the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information.
> 27. Even if we are wrong in our conclusion that the Employment Tribunal erred in holding that the letter of 4 February 2008 disclosed information within the meaning of the ERA, we consider whether the Employment Tribunal erred in considering whether the letter of 4 February 2008 amounted to or contained a ***disclosure*** within the meaning of the section. The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However section 43L(3) provides that "disclosure" for the purpose of section 43 has effect so that "bringing information to a person's attention" albeit that he is already aware of it is a disclosure of that information. There would no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication". (per Slade J)

11. In **Kilraine v London Borough of Wandsworth [2016] IRLR 422** it was observed:

> "30. I turn now to the cases in respect of the third and the fourth disclosures. These were rejected. So far as the third is concerned, this was upon the basis that it was an allegation and not a matter of information. I would caution some care in the application of the principle arising out of **Cavendish Munro**. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point."
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> 33. I also reject Mr Milsom's submission that *Cavendish Munro* is wrongly decided on this point, in relation to the solicitors' letter set out at [6]. In my view, in agreement with Langstaff J below, the statements made in that letter were devoid of any or any sufficiently specific factual content by reference to which they could be said to come within section 43B(1). I think that the EAT in *Cavendish Munro* was right so to hold.
> 34. However, with the benefit of hindsight, I think that it can be said that para. [24] in *Cavendish Munro* was expressed in a way which has given rise to confusion. The decision of the ET in the present case illustrates this, because the ET seems to have thought that *Cavendish Munro* supported the proposition that a statement was either "information" (and hence within section 43B(1)) or "an allegation" (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment had to correct this error. The judgment in *Cavendish Munro* also tends to lead to such confusion by speaking in [20]-[26] about "information" and "an allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1).

> 35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in *Cavendish Munro* did not meet that standard."

12. The statement must be made in the public interest. In any event, at the time of making the statement, the Claimant must be actuated by a reasonable *bona fide* belief that the information tends to show one of the eventualities provided for in **section 43B of the Employment Rights Act 1996**: **Korashi v Abertawe Bro Morganwg University Local Health Board [2012] IRLR 4**:

> "17. The introduction into the **Employment Rights Act 1996** of protection for whistleblowers by reason of the **Public Interest Disclosure Act 1998** ("PIDA") provided rights to workers amenable in the Employment Tribunals. Part IVA and V deal with the law and the procedure. For the purposes of this case, a "protected disclosure" by section 43A must be a "qualifying disclosure" for the purposes of s43B: it is a disclosure which in the reasonable belief of the worker making the disclosure tends to show one or more of matters such as a criminal offence or a failure to comply with a legal obligation. It is common ground that the disclosures relevant in this appeal are qualifying disclosures under s43B". (per HHJ McMullen)

13. Where, as here, more than one disclosure is relied upon, it is necessary for the Tribunal to engage with each putative disclosure discretely: **Barton v Royal Borough of Greenwich UKEAT/0041/14. (adopting Bolton School v Evans):**

> "80. A protected disclosure must be a disclosure of information; a linked point is that one cannot convert a disclosure that does not qualify, for example because it is not a disclosure of information, by associating it with another disclosure that does qualify." (HHJ Serota)

14. The burden of proof is clear: **Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06**.

> "24. As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following.
> (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.
> (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.
> 25. "Likely" is concisely summarised in the headnote to Kraus v Penna Plc [2004] IRLR 260 EAT Cox J and members:
>
> "In this respect "likely" requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant legal obligation. If the claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply":". (per HHJ McMullen)

15. The six categories are not synonymous: **Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540**. Further, it is acknowledged that the act of failure relied upon may relate to the act or omission of a third party: **Hibbins v Hesters Way Neighbourhood Project [2009] IRLR 198**.

16. Where it is satisfied that qualifying protected disclosures have been made, it is incumbent upon the Tribunal to consider each of the alleged detriments in turn: **Blackbay Ventrures Ltd v Gahir [2014] IRLR 416**. Whilst there is no statutory definition of the term 'detriment', the Tribunal should engage with the concept in a similar manner to that encountered in discrimination cases: (e.g. Shamoon). However, it remains clear that the Tribunal must be satisfied that the act or omission in question said to constitute the detriment must have been "*on the ground that*" a protected disclosure has been made. In discharging the burden of proof upon it, R must show that the protected acts did not materially influence the decision(s): **Fecitt v Manchester [2011] EWCA Civ 1190**.

17. On the causation issue, guidance is provided in **Bolton School v Evans [2006] EWCA Civ 1653**.

> "18. But even assuming, contrary to what he has said in paragraph 17, that Mr Evans's whole course of conduct should be regarded as a continuing act of disclosure, the employer's reason for the warning, as found by the ET, was its belief that Mr Evans had at the same time committed an act of misconduct. That was, in the terms of section 103A, the reason (or, if more than one, the principal reason) for what turned into a constructive dismissal. While I agree that the tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself, in this case there is no reason to attribute ulterior motives to the employer. Although not seized of this point, the EAT made observations that are very pertinent to it in paragraph 64 of its determination:
>
> "In this case the employee had not been subject to any discipline proceedings when he had earlier forcibly expressed views about the security system that should be adopted, nor is there any reason to suppose that he would have disciplined if he had simply informed the school that someone else had hacked into the system. The employers acted because of their belief that it was irresponsible for him to have done so even if the purpose was to demonstrate the force of his concerns." (per Buxton LJ)"

**Discussion and Conclusions**

*Did the Claimant make qualifying protected disclosures?*

18. The Claimant relies upon his communication to management on 11 October 2020 relative to self-isolation. He did so orally to the General Manager: Mr Taylor. In doing so, he was imparting information which tended to show individual employees were at risk of being endangered and both the Respondent and its employees were, if acceding to Mr Taylor's instruction, likely to be acting in contravention of their respective legal obligations. The Claimant's belief was sincerely held and reasonable. It was made in the public interest since it was directed to the containment of a contagious condition; the spread of which was harmful to the general public.

19. The Claimant also relies upon a disclosure to his General Manager made in February 2021. This concerned the Respondent's claim for HMRC furlough payments at a time when staff had not been furloughed but were working full time. The information tended

to show both the commission and concealment of a number of criminal and fiscal offences. The Claimant held the sincerely formulated view that this was the case. He had reasonable grounds (and evidence) upon which to form the view that he did. The statements were made in the public interest in that the disclosure was aimed at the cessation of improper claims, and thus protection of public funds from misuse. The disclosure was made orally. It formed the subject of a number of conversations; with requests made of the Claimant to justify his understanding of the pay records which were being relied upon. If and insofar as it is necessary to do so, the Tribunal has no hesitation in aggregating those communications as constituting a protected disclosure for these purposes.

20. Accordingly, the Tribunal is satisfied that the disclosures made by the Claimant constituted qualifying protected disclosures within the meaning of **section 43B of the Employment Rights Act 1996.**

*Was the Claimant Subjected to detriments?*

21. The Claimant relies upon a number of detriments. Following the first disclosure, the Claimant was threatened with disciplinary action and subjected to extended negative comment by management and colleagues. He was singled out and ostracised; being categorised as lazy and excluded from workplace interaction at break times. This behaviour included being labelled (and called) 'pathetic'. This conduct continued between October 2020 and March 2021.

22. Following the disclosure in February 2021, the Claimant was subject to additional detriment by management. His integrity was questioned. He was being asked to provide evidence to support his authentic concerns at a time when, his managers well knew that his concerns were well founded.

23. The Tribunal is satisfied that these behaviours were in direct response to the disclosures made by the Claimant. The timeframe between the making of these disclosures and the commencement of this mistreatment, together with the form of the conduct itself enable the Tribunal to conclude that these were detriments which arose from and were the result of the qualifying protected disclosures he had made. In short: on the ground that he had made the disclosures to his employer.

*Was the Claimant constructively dismissed?*

24. The Tribunal is satisfied that, as at 12 March 2021, the Respondent had acted in breach of the implied terms of trust and confidence. From the issuing of illegitimate instructions concerning return to work, to the mistreatment of the Claimant following the making of the disclosure in October 2020, the Respondent had demonstrated a cynical disregard for the Claimant as an employee and had failed to provide him with a place of work which was free from harm. The conduct of colleagues went unchallenged. Unbeknown to the Claimant, his employer was mis-recording and declaring his own earnings to HRMC and utilising those manufactured figures for the purposes of furlough claims. The Claimant attempted to engage management on this issue. Again, the response was one of cynicism; requesting the Claimant to provide evidence of matters of which both Mr Taylor and Mr Coffey were fully aware. These breaches included and culminated in the revelation on 10 March 2021 the effect that the company had wrongfully and improperly made claims to HMRC in respect of fiscal benefits and statutory forms of protection to which it was not entitled. In the lodging of those claims, the Respondent was acting in breach of its own statutory obligations and participating in a number of criminal and fiscal offences. The documentation before the tribunal also confirms that in the course of doing

so that the Respondent through its officers -Mr Taylor and/or Mr Coffey- artificially exaggerated the earnings of employees in order to, seemingly, secure sums to which the Respondent had no legitimate claim.

25. There is no basis to suggest that the Claimant had waived any of these breaches, or otherwise affirmed the contract of employment. The Tribunal is satisfied that the Claimant tendered his resignation in response to the Respondent's conduct and was, as at 12 March 2021, entitled to treat himself as dismissed for the purposes of **section 95(1)(c) of the Employment Rights Act 1996.**

*Was such dismissal automatically unfair?*

26. In the view of the Tribunal, the reason for the Claimant's constructive dismissal was the qualifying disclosures previously made by him. The detriments to which he was subjected inextricably linked with those disclosures. As such, the Tribunal is satisfied that the constructive dismissal was automatically unfair within the meaning of **section 103A of the Employment Rights Act 1996.**

27. Given this position, the Tribunal has reached the following conclusions:

27.1 The Claimant was constructively dismissed. Such dismissal was automatically unfair;
27.2 The Claimant was subjected to detriment on the grounds of having made protected disclosures; and
27.3 The Claimant was wrongfully dismissed.

**Remedy and Related Issues**

28. The Claimant has secured alternative employment. The Schedule of Loss has previously been served upon the Respondent. The Tribunal is satisfied that it is appropriate to award the Claimant the following sums:

Basic award £2441.60
Loss of statutory rights £750
Notice pay £2100

29. The Tribunal has considered the detriments to which the Claimant was subjected, the nature of the workplace and the duration of the treatment which was applied to him. It may properly be categorised as sustained and, over the period in question, normalised to the point of becoming routine; conducted with the knowledge and participation of senior managers. Having considered these factors, the Tribunal is of the view that the appropriate award in respect of injury to feelings is £7000.

30. With his customary skill, Mr Ali invited the Tribunal to make an award of aggravated damages. The Tribunal recognises that aggravated damages are to be awarded in limited circumstances and, even then, with caution. Further, it has kept in mind that any such award is intended to reflect the additional hurt, or, injury of the Respondent's conduct; not to impose, albeit indirectly, a form of penalty or sanction. The conduct of the Respondent through its officers was serious and sustained. The impact upon the Claimant cannot be overstated. He was deprived of a congenial workplace and colleagues with whom he had enjoyed positive relationships. He was by this conduct rendered an outsider. When raising the concerns regarding the accuracy of financial records, he was subjected to the additional offence of being required to demonstrate to managers what was – or ought to have been- obvious to them. This concern involved him in direct dealings with HMRC and the natural anxiety that he has been exposed to fiscal inquiry; with his earnings been falsely recorded by his employer. In all of these

circumstances, the Tribunal is satisfied that it is appropriate to award aggravated damages in the sum of £5000.

31. The Tribunal also awards an amount of interest assessed in the sum of £1000.

32. Accordingly, the claims succeed and the Claimant is awarded judgment in the sum of £18291.60 (net).

Employment Judge Morgan QC
Date: 3 February 2022