EMPLOYMENT TRIBUNALS

Claimant:	**Ms J Murphy**	
Respondent:	**Cardiff Galvanisers (1969) Limited**	
Heard at:	**Cardiff**	**On: 13th,14th,15th,16th, 17th December 2021 & 13th January 2022 (In Chambers).**
Before:	**Employment Judge R F Powell**	
Members:	**Ms Izzard** **Mr Collier**	

Representation:

Claimant:	**Mr Walton, solicitor**
Respondent:	**Mr Pollitt, of counsel**

JUDGMENT

The unanimous judgment of the Employment Tribunal is:

1. **The claims under sections 47B, 48 and 103A of the Employment Rights Act 1996 are not well founded and are dismissed.**

2. **The claimant was unfairly dismissed.**

REASONS

Introduction

1. Ms Julie Murphy was employed by Cardiff Galvanisers (1969) Limited between the 9th February 2015 and the 31st August 2020. At the material times her role was that of Human Resource Administrator. She resigned from her employment, with notice, on the 17th August 2020. She stated that the reason for her resignation was the

conduct of the respondent's most senior managers; Mr Robert Evans and Mr Gareth Evans.

2. By a claim form presented on the 12th November 2020 Ms Murphy asserted that her resignation amounted to constructive unfair dismissal contrary to section 95(1)(c) to 98(4) of the Employment Rights Act 1996. Although Ms Murphy referenced a course of conduct stretching back through her years of employment the particulars of her claim refer to alleged "bullying" conduct between March and August 2020; a cumulative breach of the implied contractual term of trust and confidence.

3. The Respondent's ET3 denied the alleged "bullying" conduct and averred that the conduct which it did admit was with reasonable and proper cause. Further, the respondent denied that any of the alleged bullying was the effective cause of the claimant's resignation; she had resigned in response to the respondent's indication that it intended to investigate allegations of misconduct by the claimant and the termination of her line manager's employment, with whom the claimant was on very good terms.

4. The claimant, having initially been represented by Mrs Fiona Wakeley, her former line manager, later instructed a solicitor who, in response to a request for further particulars of the claim, set out details of a claim under section 103A of the Employment Rights Act 1996 in correspondence dated the 29th March 2021.

5. That claim also referenced, but perhaps inadvertently did not particularise, a claim for detriment contrary to section 47B & 48 of the ERA 1996.

6. The respondent objected to the perceived expansion of the claim and that dispute came before Employment Judge Moore on the 14th June 2021. She considered the further and better particulars and allowed all but one to proceed. To assist this tribunal, she adopted the titles chosen by the claimant:

    a. PID Unlawful deductions
    b. PID Bereavement Leave
    c. PID Unfair dismissals
    d. PID Nightshift
    e. PID Covid sickness

7. She ordered a revision of the further and better particulars; in a structure that reflected the essential elements of the respective claims noted above, her order helpfully set out those issues [101- 105].

8. At the close of the claimant's evidence, Mr Walton, on instructions, withdrew two of the above five alleged protected public interest disclosures. Consequently, the

Tribunal considered and determined the claimant's "whistle-blowing" case on the remaining three:

a. PID Unlawful deductions
b. PID Unfair dismissals
c. PID Covid sickness

The Evidence

9. The Tribunal read the sixty pages of witness evidence presented as the evidence in chief of the following people:

10. The claimant who gave evidence and was cross examined.

11. Mrs Fiona Wakeley, the respondent's former office manager and line manager of the claimant between March 2018 and August 2020, who gave evidence in accordance with her prepared witness statement and was cross examined.

12. Mr Robert Evans Co-owner, with his brother, and Managing Director of the respondent who gave evidence in accordance with his witness statement and was cross examined.

13. Mr Gareth Evans Co-owner, brother of Robert Evans, commercial director and senior line manager of the claimant who gave evidence in accordance with his witness statement and was cross examined.

14. Mr David Rice, General Manager of the Respondent and its associated company GlavaBlast Ltd who gave evidence in accordance with his witness statement and was cross examined.

15. Ms Wendy Jones, the respondent's account administrator who gave evidence in accordance with her witness statement and was cross examined.

16. The Tribunal considered those documents within the agreed bundle to which we were taken in the course of the evidence and in submissions.

Some general comments on the witness evidence

17. The tribunal had varying degrees of concern about the reliability, candour or honesty of all the witnesses. The claimant and Ms Wakeley had been friends at work and Ms Wakeley's evidence was undoubtedly affected by her desire to support the claimant and her own sense of poor treatment during the latter part of her employment with the respondent.

18. The claimant's statement did not address all the relevant issues, used colloquial terms rather that accurate statements of fact which overstated matters. She sometimes failed to answer direct questions in her ardour to "get her side across", she also changed her account when making concessions after being pressed; a factor which caused concern as to her reliability but was indicative of a generally frank person.

19. It was noted that in paragraph four of Mr Rice's statement he stated; " At this time , it was not widely known that asymptomatic people did not spread the virus" and the exact wording, and sentence structure, were also found in Mr Gareth Evans' statement at paragraph 40 and Mr Robert Evan's statement at paragraph 44.

20. These three witnesses, when invited to concede that their statements had been drafted by a third party for their approval, denied this and stated they had dictated their statements to the respondent's legal representative and their statements reflected the words they had dictated.

21. We find the possibility of three witnesses dictating the same words, with the same error, to be beyond credence. We do not accept their evidence was truthful on this point and have noted other examples of identical wording in statements which each witness said reflected their own words and recollection.

22. Mr Rice's evidence was partisan, for example, in paragraph 13 of his statement he complains of Mrs Wakeley's conduct for persuading the respondent to replace the men's toilets, build a H&S room, create a relaxing area, and change the computer systems; when such matters were reasonable and agreed. When questioned about his assertion that the claimant was "always on the take", he conceded the examples he gave did not support that assertion and said; " it's just an opinion we had about them" (the claimant and Ms Wakeley).

23. Similarly, with regard to the "Covid incident" (addressed below) Mr Rice stated he thought the claimant had lied when she said she had received concerns from production workers about colleagues coming onto the respondent's premises to undertake a temperature test. When asked what basis he had for that accusation he stated he had none save his personal belief.

24. Ms Jones' evidence was also difficult to accept in several instances; some of which are addressed below. In particular, her account, at paragraph 10 of her statement refers to the "the claimant instantly kicked off about this and started to be abusive to David Jones….She clenched her fist and screamed on the spot like a toddler[1]" was

[1] This wording appears to originate from Mr G Evans in his grievance interview; page 285 of the bundle. It is was not referred to by Ms Jones during her grievance interview at that time.

somewhat undermined when, in cross examination, she conceded that Mrs Wakeley's version of events in paragraphs 35 and 36 of her statement, was "basically correct" and that she had to squeeze past the claimant on a stairway. Mrs Wakeley's account also stated that the claimant had reacted angrily to receiving the brunt of Mr David Jones' angry shouting at Mr Mark Rossman, Ms Wakeley and the claimant for congregating on in a stair well. Mrs Jones' evidence had excluded the precipitating conduct of one of the Respondent's more senior production managers.

25. We found the evidence of both Gareth and Robert Evans to be less reliable than that of the Claimant and Ms Wakeley.

Findings of Fact

26. The members of the panel were unanimous in the findings of fact. In making these findings we have applied the civil standard of proof; which, save for the burden to establish a potentially fair reason for dismissal, lay upon the claimant to establish the factual foundation for her claims.

27. The Respondent is one of two small companies which are owned by Mr Gareth and Robert Evans; the sons of one of the original owners of the company founded in 1969. Another of the founders, Mr Haydon John, is the chairman of the respondent but has had no active part in the matters with which this tribunal is concerned.

28. Together the businesses employ around 90 people and they operate from the same site on East Moors Road in Cardiff. The majority of the employees are engaged in a variety of processes such as hot dipping, shot blasting, paint and powder coating of metal work.

29. The respondent contracts with a third-party business; Thomas Carroll Ltd for employment law and Human resources advice and has an 85-page Employee Handbook [135-217].

30. There is a small administrative team which included, amongst others Ms Wendy Jones and an office manager, who at the commencement of claimant's employment, was Ms Clare Regan.

31. The claimant applied for the vacant post of receptionist. She was offered that post and her employment commenced on the 9th February 2018 [218].

32. The claimant's witness statement describes a continuously unpleasant work environment. Her evidence is contradicted by the respondent's witnesses. The claimant's pleaded case concerns the alleged acts or omissions of the respondent which she says led to her resignation and her three alleged protected public interest disclosures. These are all said to have occurred between March and August 2020.

Accordingly, whilst we heard the parties' evidence on events prior to March 2020, we considered it to be peripheral to the case before us and did not consider the evidence to be relevant to our deliberations or judgment.

33. Within a few weeks of taking on the role of receptionist the claimant was asked to accept the role of Human Resources Administrator, the claimant had no prior relevant experience or training but she accepted the post. In practice the job role was largely limited to reconciling records of employees' working hours for the purpose of calculating basic wages, overtime and any shift allowances which the respondent offered.

34. We find that, with respect to the calculation of wages, there was a degree of confusion, amongst the workforce and the claimant as to the method by which overtime and shift allowances were calculated.

35. We also find that there were a number of production employees who did not wish to work overtime; a desire that was often contrary to the expectations of both Mr Evans.

36. We were provided with a copy of a contract for a "labourer" dated July 2019 [396]. The contract stated the person was required to work forty hours a week with an additional unpaid 45-minute break. The contract also stated that the labourer would be expected to work a reasonable amount of overtime according to the needs of the business.

37. Overtime was paid for those hours in excess of the forty hours per week. Thus, if the person were to work 10 hours a day on Monday to Thursday, but was then not required to work on Friday, the extra two hours worked on each of those four days would be paid at the standard rate; £8.21. The expectation of some employees was that hours worked beyond the daily norm, would be paid as overtime and some saw little value in working into the evening if they could not be confident they would receive the overtime rate.

38. Further the employees of the respondent and the employees of Galva Blast ltd worked alongside each other but had different pay regimes which led to a further cause of dissatisfaction.

39. A further complication came from the additional possible payments; such as a "Night Allowance Monthly Bonus" [395] This scheme offered a monthly payment of an additional £1 per hour for those working a night shift. It is not entirely clear when it came into force.[2] But we accept the evidence of Mrs Wakeley, set out in paragraph

[2] Page 395 refers to "a possibility of changes being made to your payments of work during a night shift" and is signed and dated by an employee on the 27th July 2018

15 of her witness statement, that staff signed the "49 hour" Night Shift agreements around November 2019,

40. The £1 per hour bonus was conditional on an average productivity of 1645 kg of processed product per shift throughout the month. It was also subject to a daily deduction for each day a person arrived late or left early (for whatever reason). It was also subject to a whole week deduction if a person was absent from work; the period of absence is not defined.

41. It also required the employee to work 49 hours per week throughout.

42. The complexity of the interlaced payments, and the necessity of having all the relevant information to hand, was, in our judgment, a consistent cause of confusion for the claimant in her wages role. It is further evident that in late 2018 to early 2019 Mr Gareth Evans became dissatisfied with the claimant's calculation of the production staff wages.

43. The Tribunal accept, based on the evidence of the claimant and the evidence of Mr Gareth Evans, that the claimant's calculations were on a number of occasions not to Mr Evans' satisfaction. We find it was the claimant's calculations on this policy which subsequently caused Mr Evans' dissatisfaction with the claimant. We also accept that the claimant had a sincere perception that Mr Evans might have been interpreting the conditions of the policy unfairly to reduce the wage cost. It is common ground between Mr Gareth Evans and the claimant that she asserted the Respondent was treating some of its staff unfairly with regard to pay.

44. Despite the above, the relationship between the claimant and Mr Gareth Evans was largely uncontentious until sometime after Ms Wakeley was appointed as Office Manager on the 19th March 2018.

45. Ms Wakeley's professional background included experience of Human Resources management, unlike the claimant, she had a working understanding of the working time regulations and aspects of the Employment Rights Act 1996 such as unfair dismissal and unlawful deductions from wages.

46. We accept the evidence of the claimant and Mrs Wakeley that the claimant began to learn something of the employment law side of her Human Resources Administrator role from Mrs Wakeley. In our judgment both Mrs Wakeley and the claimant were concerned about the way in which the Evans brothers managed their production employees and the claimant started, according to Mr Gareth Evans, to become; "…more outspoken, confrontational and argumentative, often causing conflict with other staff"

47. Mr Evans' evidence on that point does not identify the subjects upon which the claimant was argumentative. Mr Robert Evans' statement refers to Mrs Wakeley as "being vigilant in fighting for staff rights, notwithstanding the company's interests"

48. None of the witnesses describe the claimant, prior to 2019, or her former manager acting in the same manner. The Tribunal finds that the presence of office staff who challenged the respondent's management decisions about its production staff was a new, and less than welcome, development in 2019.

Complaints about the calculation of production workers wages

49. This allegation is the earliest of the three instances of "whistle blowing" upon which the claimant relies.

50. Her witness statement, at paragraphs 16 to 21 does not set out the precise character of what information she disclosed to the respondent but it refers and relies upon the content of her grievance, dated the 17th August 2020 [261-2]. That account describes the claimant offering explanations for her calculations of bonus payments with which Mr Gareth Evans disagreed. The claimant explained that she had relied upon the times of the workers' attendance which had been confirmed by the signature of the respondent's production manager Mr David Jones. She goes on to report that Mr Evans instructed her to check such information with him and not rely on Mr Jones and she was not the sort of person who would treat a person as "being thick". To which Mr Evans replied "well if you did, you wouldn't go far wrong".

51. In cross examination the claimant conceded that she was not clear whether any deduction from the wages had been unlawful, or at that time whether she had a sound understanding of the law relating to breach of contract or unlawful deductions from wages under the Employment Rights Act 1996. She did stand firm in her evidence that she had described Mr Evans' actions as unfair.

52. Mrs Wakeley had not heard the claimant say to Mr Evans that he was acting unlawfully or making unauthorised deductions. Mr Evans denied such allegations were made.

53. Neither the claimant's witness statement, nor her grievance letter, suggested she had referred to any specific information; any specific fact or summary of a scenario. If her grievance account was accurate, her complaint was against Mr Evans' criticism of David Jones' competence in accurately signing off the time sheets which contained the information necessary to calculate the production workers regular wage and possible bonus payments.

54. We can appreciate the claimant may have been concerned that Mr Gareth Evans, who was not present at the factory during the 20 or so night shifts relevant for each month's bonus calculation, could not be in a position to contradict Mr Jones' records of staff attendance. However, that is not a concern that she articulated.

55. Taken at its highest, the claimant's statements to Mr Gareth Evans were unspecified statements of an unfair bonus system and her unwillingness to distrust Mr Jones' records of staff attendance.

The Bereavement inquiry

56. This alleged incident occurred between the Claimant and Mr Gareth Evans. The claimant's account states that she informed Mr Evans that an employee had left work, after informing his supervisor, due to the death of his uncle. The claimant then states that Mr Evans asked how close the employee had been to his uncle and that she repeatedly questioned whether the character of their relationship was relevant.

57. In cross examination the claimant was taken to the respondent's handbook, a document that she provided to each new employee, which at paragraph 5.4 sets out the degree of familial relationships for which unpaid leave might be granted. Uncles were not within the respondent's list. The policy also explains why Mr Evans made the enquiry.

58. On the claimant's case, Mr Evans derided the claimant for her stance and was aggressive. She gave no evidence of the words said or the conduct which was "aggressive".

59. On balance, given Mr Evans was aware of the bereavement policy and thereby he was aware of the relevance of his question, it was likely that he would have been irritated by the claimant's misplaced unwillingness to describe how close the employee was to his uncle.

60. Whilst Mr Evans may have had cause to deride the claimant for her lack of understanding to the respondent's bereavement policy, there was no precise evidence from the claimant sufficient to discharge the burden upon her. Accordingly, we find that Mr Evans did not deride nor act aggressively towards the claimant during this discussion.

Unfair Dismissal

61. The next incident has been titled “unfair dismissal” that is a title of convenience; neither party asserts that a dismissal took place. The claimant’s grievance of the 17th of August 2020 gave the following account:

“Gareth Evans came into the accounts office on Wednesday 11th of March, where I was having a discussion with my line manager Mrs Fiona Wakeley and colleague Mrs Wendy Evans, and also present was Mrs Joanne Evans.

He asked me a direct question in front of everyone and said: “how many people do we have on the books? I want to sack three people and take three more on.” I asked who the three members of staff were so I could see how long they had worked here because, if they were over two years, it wouldn't be that easy to dismiss them. Gareth then shouted at me;” it doesn't matter who they are or how long they have been there, just do it”. Fiona pointed out to Gareth that he couldn't do that but Gareth responded that he would do what he wanted to.

An argument ensued between Gareth and Fiona as she was trying to reason with Gareth that he could not just sack three people and take three more on. Fiona then said ”You will not make Julie break the law for you” to which Gareth replied “she”, pointing at me, “will do whatever I tell her to do”. Fiona then said; “not if it meant breaking the law”. With that he then stormed out of the office shouting behind him: “and I suggest you all start looking for a new job”

62. During the respondent's grievance investigation Mr Gareth Evans said, of this incident:

“I would not have shouted but I would definitely have said to her ; “well unfortunately if that's the case there's plenty of people there who are under two years’ service “ but I probably would have said “if I want that done I will have it done”.

Moving on from there, where it actually got a little bit more heated was really when Fiona got involved and actually said that she would not allow the likes of Julie to actually do something like this because she used the word “it was illegal”. Well, that is not the case, it is not illegal to do anything and my point was as a director I am asking her to do something.

I am not asking them to put anything on the line which they shouldn't be doing, because I am the one who's signing it off and it my responsibility and at the end of day they wouldn't do it. Fiona consistently said that she wasn't happy with that and said “we will not do it”. My point to that is, if you are not going to do the job, then I need to get somebody who will do the job, and if that is the case then there is no point in somebody being here.”

63. To give the above context, in the course of cross examination of the respondent's witnesses, it became apparent that for reasons relating to the way in which the respondent might "lay off" production workers on a Friday. if they had managed to complete all the available work in four days with "overtime", some of the employees became unwilling to work longer than their contracted hours for a variety of reasons; one wished to be with his children before they went to bed. another did not have a lift home from work and had to incur an additional cost if he worked overtime, another was simply disgruntled because he had an expectation that overtime would be paid at the enhanced rate to compensate for the loss of their evenings; but this was not done if the respondent chose to offer them no work on Fridays.

64. Mr Gareth Evans evidence stated:

"In or around February March 2020, I was notified by our general manager, David Rice, that various warehouse employees were not following company policies or their line managers reasonable requests and there were 2 to 3 ringleaders. I didn't have the names of the employees concerned at that time, as I needed more information from Dave Rice

As such, I went to the claimant's office to notify her of this issue and ask her to manage the situation. As I was walking to the claimant's office, the claimant and Fiona Wakeley were standing in the account's office chatting..... I said to the claimant" how many guys do we have on our books (to hire) as I want to let three guys go." I accept this was a flippant way of asking, but my main concern was whether we had potential resource lined up to replace anyone we let go. The claimant responded; "why?" and I explained that there were" three guys in the plant that weren't doing what they should be, and I want to let them go and replace them" at this point I was calm but direct

The claimant asked who they were and that it mattered how long the employees had been employed. She also said that she didn't have anyone on her books but could look through the old CV's. I dispute that I said; "it made no difference who they were, and the claimant should do as directed as alleged. Instead, I said "I just wanted it done and it didn't matter how long they had been employed for". by this I meant that I wanted the ringleader employees to be made an example of as I considered their conduct to amount to gross misconduct. I fully appreciated that this would entail us conducting a disciplinary process if they had more than two years' service. I wasn't demanding that the claimant should dismiss them that day or without any process, and the company always follows due process if we ever let anyone go."

65. It is common ground between the claimant, Mrs Wakeley, and Mr Gareth Evans that Mrs Wakeley interjected and objected to Mr. Evans direction to the claimant; "I'm not having you tell Julie to break the law for you"

66. Mr Gareth Evans evidence is that in response to this comment;

"*I became infuriated. Firstly, I wasn't asking the claimant to break the law, I fully appreciated due process needed to be followed and wasn't suggesting otherwise. Secondly this had nothing to do with Fiona Wakeley but was a conversation between me and the claimant. Thirdly, I considered Mrs Wakeley's outburst to be entirely unprofessional and disrespectful towards me. If she had a concern about what I was asking, she should have addressed it with me privately rather than in front of my staff. I accept that I became angered by Fiona Wakeley's conduct and said to her" you should do as I ask you and if you don't want to do it maybe you should all look for another job"*

67. Mrs Wendy Jones, at paragraphs three and four of her witness statement gives an account which is consistent with Mr Gareth Jones witness statement, but not quite so consistent with at Mr Gareth Evans statement in the grievance investigation. Indeed, she has a word for word recollection of Mr. Evans last comment, as noted in the paragraph above.

68. Her account in her own interview for the grievance on the 7th of September [274] Was as follows:

"I was present. There was a heated discussion between Gareth, Julie Murphy and Fiona Wakeley in which I did hear that he wanted to dismiss a few people but really and truly it was between those three and I didn't get involved about any of it…... It was a heated discussion between Julie, Gareth and Fiona she went on" yeah he did want to dismiss people and he said he wanted them dismissed and asked Julie to have a look if there was anyone on the books …"

when asked what the shouting was about she replied*:" well like I said, it was heated but that was between Fiona and Gareth and Julie I wasn't involved at all in it.*"

69. Mrs Joanne Evans, who was present throughout this incident, said the following in her grievance interview;

"Like you said, it is going back a few months ago. I can't really sort of remember specifically a lot about that conversation. I was only sat there and I do try not to listen and get involved. "

70. In cross examination the claimant accepted that in her grievance letter, her witness statement, Mrs Wakeley's evidence and Mr. Evans no witness suggested the claimant herself had made a comment to the effect that Mr Gareth Evans instruction was unlawful.

71. On the contrary, her part had been limited to asking Mr Gareth Evans questions and, as she herself accepted, it was difficult for her to; ” get ta word in edgewise” after Mrs Wakeley had told Mr Gareth Evans that she would not allow him to direct a member of her staff to act illegally.

72. The tribunal find as a matter of fact, that the claimant did not make any allegation concerning the legality of Mr Gareth Evans’ instruction and the information that she conveyed was limited to the absence of having any potential employees’ “details” on the book.

73. The tribunal accepts that the claimant intended, and tried, to express her disquiet at Mr Gareth Evans’ instructions but she appears to have been ignored whilst her more senior managers argued directly.

74. In essence, Mr Gareth Evans wanted the three ringleaders, who had some influence over their colleagues, to be dismissed as a warning to the others and in that way, to use Mr. Evans language; to bring them round to the company’s “way of thinking”.

75. Having considered all of the witness evidence and documentation we have reached the following general conclusions about the above incident:

76. We consider that the account given by Mr. Evans during the grievance is likely to be the more candid account. We find that after Mrs Wakeley had declined to allow the claimant to dismiss employees ”illegally” the respondent took no steps towards a dismissal through its disciplinary procedure.

77. We note that Mr Gareth Evans had decided the three members of staff should be dismissed before he was even aware of their names and we do not believe his assertion that his intention was to act in accordance with the procedure when he failed to do so after his apparent direction for summary dismissal had been opposed.

78. We further doubt that Mr. Evans could honestly have held a view that staff who declined to work overtime, which was not contractual, could be viewed as committing acts of gross misconduct. In our judgement Mr Gareth Evans intended the instant dismissal of, to use his terminology, the ringleaders, to teach other members of the workforce the consequence of inconveniencing the respondent.

79. We find that the principal reason for Mr Gareth Evans’ infuriation was not, as he asserts Mrs Wakeley’s demeanour, but the very fact that she opposed the instant dismissal of the men in question. We find that Mr Gareth Evans inquiry, as to whether there were any people available to take over the work of the three ringleaders was indicative that he had made a decision to dismiss and the only involvement that he sought from human resources was the recruitment of replacement staff.

80. We find that Mr Gareth Evans shouted a threat to Mrs Wakeley and the claimant to the effect that; if they would not do as they were instructed, they should look for new employment. We find that he did so because of Mrs Wakeley's resistance and the claimant's evident support of Mrs Wakeley.

The Nightshift,

81. The claimant does not assert that she made a protected public interest disclosure in respect of this issue. The factual assertion is that Ms Wakeley brought to the respondent's attention regulations 4 and 5 of the Working Time Regulations 1998 which, in the absence of an express opt out by an employee, limited the average number of working hours to 48 in any seven-day period. Such a limitation would impact on the respondent's intention to gain the written agreement of employees to work a 49-hour week.

82. Ms Wakeley's evidence, which we accept, was that she brought to the attention of the Directors the absence of any written "opt out" consents from employees. We noted an email from Thomas Carroll Ltd which states the respondent had been in possession of, or had online access to, a pro forma opt out form albeit the respondent's senior management appeared to have been unaware of the 48-hour restriction for the first 20 or so years following the regulations coming into force.

Covid 19

83. This issue occurred in the weeks before the first lockdown in late March 2020.

84. The Respondent's approach to managing the risk of spreading the covid infection is reflected in its initial documentation [394]. It chose not to provide face masks for employees nor did it require employees to use masks. Anti-bacterial wash was not provided and employees were advised they could, if they so wished, wash their hands at the start and end of their shift.

85. Further, the respondent stated it might consider the individual's personal temperature as an indicator of their health.

86. The Respondent was also aware of the guidance to people to stay at home if they had a high temperature or a new, continuous cough [350]; advice which had been issued in the week of the 9th March 2020.

87. After the "Covid 19" incident on the 18th March 2020, which we address below, the respondent issued a revised guidance document to its employees [353]. In our

judgment this revised document came into being as a consequence of the events we now address.

88. The claimant's evidence stated:

"On Wednesday 18th March 2020 I entered the office of Mr Dave Rice where Dave, Robert, Mr Gareth Evans and Mrs. Fiona Wakeley were having a conversation about dealing with employees ringing in with a temperature and the issues round COVID 19.

An employee had called in with a temperature, sore throat and cough and Gareth had asked that they returned to work and he would get them tested with our thermometer. I had received a complaint by another employee that they were unhappy that an employee with a temperature, sore throat and cough was being asked to come into work.

As I entered the office I explained to Gareth about the complaint and immediately he asked who had raised it. I asked "why?" . Robert then shouted at me right in my face "how dare I ask a director why" and that I was insubordinate and I should immediately tell Gareth who the employee was that had made the complaint. He shouted at me for a while saying that when a director asked me a direct question that I should answer. Whatever the question may be. I explained that the reason I had said "why" was in my experience with Gareth, once he knew the name of someone who had spoken to me in confidence. He would then be intent on sacking the person or giving them a disciplinary for questioning his authority.

I accept that I may have been a little guarded or curt with Gareth, but this is the way he has promoted and encouraged me to speak to him over five years. If Robert was unhappy with the way I spoke to Gareth, then he should have raised this with me in a formal way and not shouted at, and belittled me in front of three other people in a very nasty way. "

89. Mr Robert Evans, when interviewed for the grievance process, said in the course of his four-minute interview [276-7]:

"She's right. She did enter the room and she is correct that she would not initially give the name of the employee and she asked Gareth "Why ?" in a tone that is not what she should have used to a director and I said to her that is not the way to speak to a director.

I did not shout in her face simply because I was the other side of the room sitting on a table or leaning against the table. Between her and myself was Fiona Wakeley so I did not shout in her face.

Secondly, she may consider I raised my voice but that was simply in an authoritative manner. It wasn't a scream."

90. Mr. David Rice was interviewed for five minutes for the purposes of the grievance investigation [280-1]. As part of the interview, David Jones, had read part of the claimant's letter regarding the 18th of March 9…. An employee had called in with a temperature sore throat and cough and Gareth had asked that they returned to work and Gareth would have them tested with a thermometer.) Mr Rice replied: "that is the truth, yes.".

91. Mr. Jones then read out: "I had received a complaint by another employee that they were unhappy that the employee with a temperature, sore throat and cough was being asked to come to work) to which Mr Rice replied: "that is true, yes."

92. Mr. Jones then read out: "as I entered the office I explained to Gareth about the complaint and he immediately asked who had raised it" two which Mr Rice replied: "correct".

93. Mr. Jones then read out the following; "I asked Robert why. Robert then shouted right in my face, how dare you ask a director why and that I was insubordinate and should immediately tell Gareth who the employee was who made the complaint."

94. To which Mr Rice replied: "I would agree with what was said but I wouldn't say Robert shouted in her face. Robert was sat opposite my desk and he didn't move from there until the end of the conversation but at the end of the conversation he walked out of my office. But it wasn't a raised voice he wasn't shouting at her."

95. Mr Rice also confirmed Mrs. Murphy's account of Robert Evans' further comment and it is implicit that whilst he agreed the words said, he did not agree with the claimant's assertion about Mr. Evans demeanor or the tenor of his voice.

96. Mr Rice's witness statement for the tribunal, at paragraph 3, described the employee was saying he had "cold like symptoms close ". He goes on later: "the employee told us he felt he had the onset of a cold, not the symptoms of COVID-19 which were being talked about at the time e.g., fever/ temperature, sore throat, or loss of taste or smell."

97. The tribunal notes that Mr Rice's evidence has materially altered and the material alteration, as to the employee's self-description of his symptoms, has altered so as to be consistent with the evidence of his employer.

98. In cross examination it was asked of the respondent whether there was a suspicion that employees may have been saying they had COVID symptoms in order to justify their nonattendance at work for other reasons. This was confirmed; the respondent's method to test for possible malingering was to require an employee to come into work and take a temperature test.

99. On the evidence before us, neither Robert nor Gareth Evans or Mr Rice spoke to the employee who had reported their sickness absence. It is clear from Mr Robert Evans' witness statement that the claimant appeared to have processed the sick leave for the employee in question (named "Connor").

100. We accept the claimant's evidence that she sincerely believed, based on the information provided to her, that the employee had reported symptoms which were highlighted by the government as a cause for concern. Symptoms that could warrant an employee staying at home to reduce the risk of spreading the COVID-19 infection. It is common ground that Mr Gareth Evans asked the claimant to identify the names of the employees who had expressed their concern at the respondent's requirement for those who reported "COVID symptoms" to come into the factory for a temperature test to be undertaken, and assessed by the respondent.

101. The complaint of the employees about the temperature testing, if upheld, would inhibit the respondent's covert malingerer testing process. We have already found that Mr Gareth Evans had, by his conduct earlier in the same month (the intention to dismiss the "ringleaders" who were resisting requests to do overtime), demonstrated his willingness to punish employees who would not comply with the respondents wishes. And Mr Gareth Evans interest, not in the merits of the employees concerns but in the identity of the complaints, was in our judgment reasonably perceived by the claimant to be a further reflection of his interest to bring the staff round to the "the respondent's way of thinking".

102. On Mr Robert Evans' witness statement it is apparent that he perceived the claimant as being outspoken, argumentative, confrontational, crude, unprofessional and disrespectful towards others (see paragraphs 12 and 15 as examples of his evidence concerning his perception of the claimant). It is in this context he witnessed the claimant, curtly refuse to disclose the identity of employees who were complaining about his company's method of pressing an employee to attend work when that employee had described suffering symptoms which were indicative of Covid 19.

103. This incident occurred around one week after the Claimant, had with Ms Wakeley, impeded Gareth Evan's intention to manage staff behaviour through summary dismissals.

104. We have taken into account the evidence of all five witnesses present on this occasion. As we have already noted, we have concerns about all. However, we very much doubt that the respondent's witnesses are being wholly truthful in their evidence. We prefer the evidence of the Claimant and Mrs. Wakeley to such an extent that their evidence has persuaded us that it is more likely than not that Robert Evans shouted at the claimant out of frustration at her disobedience; her effort to protect the staff who were complaining, rather than assisting the

respondent to continue to require staff to travel to work to be temperature tested; a practice which ended later on this same day [353].

105. We find that Mr Robert Evans did shout at the claimant.

The Claimant's absence, grievance and resignation.

106. On the 27th March 2020 the respondent's business closed and the employees were placed on furlough [384].

107. On Friday 24th April the claimant had attended her Doctor who provided her with a MED 3 certificate stating that she was unfit to attend work for 28 days [221] due to an acute stress reaction. The claimant provided that certificate to the respondent on Monday 27th April 2020.

108. Mr Robert Evans wrote to the claimant by email on the 28th April to advise her she would receive statutory sick pay rather than her furlough salary during her sickness absence.

109. The respondent applied the statutory sick pay scheme and consequently, the claimant's pay reduced to around £95.00 per week. He also stated that the company had tried to call her on Monday the 27th April to ask her to return to work.

110. In the bundle is a draft of the wording of the email which Mr Evans had written out verbatim following a consultation with the respondent's employment law solicitor [224-6].

111. On the 5th May Mr Robert Evans, who as managing director, had decided to manage the claimant's absence, telephoned the claimant and made a note of that call [227].

112. Mr Robert Evans asked the claimant why she was ill and he recorded the reasons [227]. The first reason the claimant gave was; "Gareth Shouting and storming around the place during the last week before Furlough". She went on to describe circumstances relating to Covid 19 and the risk of infection and an incident affecting one of her children's health. She stated that she was so worried that she had asked her ex – husband to have their children live with him.

113. Mr Robert Evans' again spoke to the solicitor, prepared a hand written draft and which he then set out in an email of the 6th May 2020 [228]. The email places emphasis on Covid 19 as the trigger for the claimant's absence.

114. Mr Robert Evans went on to invite the claimant to provide details of her complaints about his brother, and stated he would undertake to investigate them. He also said he was content to wait until the claimant felt well enough to discuss her complaints.

115. Finally, he suggested he should speak to the claimant towards the end of May 2020. As Mr Robert Evans' records in his witness statement, he was suspicious of the claimant's reasons for absence; in essence, as was put in cross examination, he suspected that Mrs. Wakeley and the claimant were not ill when they presented their respective MED 3 certificates but were using sickness as a cover for a protest; through their absence, at the respondent's management of its staff during the early months of the Covid 19 epidemic.

116. The claimant responded on 12th May 2020 [232] stating she was aware her pay would be reduced to "SSP" and that, when she felt well enough, she would submit a formal grievance against Mr Gareth Evans.

117. Following the claimant's email of the 12th of 2020 her health did not improve and she submitted two further sickness certificates. There was no contact between either Mr Robert Evans or the claimant until his email of the 3rd of July 2020 [233]. Again, the content of this email had been agreed between Mr Robert Evans and his solicitor before it was sent.

118. The claimant replied to Mr Robert Evans within two hours of his email being sent. She declined to consent to a medical report being provided by her general practitioner. She stated that her degree of anxiety led to feel that she did not need to discuss its cause with Mr Robert Evans but she was content, if so requested, to discuss her health with an occupational therapist.

119. She confirmed that her health was improving and she hoped to be able to return to work on the 20th of July 2020. In the final paragraph of her email, she suggested that a "slow return to work may have a very positive impact on my anxiety and stress" [236].

120. Mr. Evans replied on the 6th of July, suggesting that the claimant should meet with Mr mark Rosserman on her first day back at work to discuss how the respondent was managing the health risks of COVID-19 within its premises and practices. He also accepted that, should the respondent require any medical information regarding the claimant's health, he would suggest obtaining the view of an occupational health adviser. Lastly, he stated that he looked forward to the claimant's returned to work.

121. On 14th of July 2020 the claimant responded. She was agreeable to a phased return to work and she stated that she believed she might be subject to disability discrimination relating to the respondent's decision to pay her pro-rata during her phased return to work.

122. With regard to Mr Robert Evans' suggestion that the return-to-work meeting should take place between himself and the claimant, the claimant asked that such a meeting should be with her direct line manager (Mrs. Wakeley) ; in accordance with the respondent sickness process. Failing that, Mrs. Wakeley should be able to attend the meeting as the claimant's representative .

123. On the 16th of July, again after consultation with the respondent 's solicitor, Mr. Evans sent a lengthy email explaining his position with regards to pay, and looking forward to her return.

124. On the 17th of July the claimant wrote to Mr. Evans again stating that she had been contacted by Fiona Wakeley who had asked the claimant whether she would supply a witness statement in response to allegations of misconduct that had been made by the respondent. The claimant stated that the news that Mrs. Wakeley was subject to misconduct proceedings had heightened her stress and that consequently her planned return to work on Monday 20th of July was no longer possible. She provided a further medical certificate to confirm that her health had not recovered sufficiently for her to return to work [246].

125. On the 5th of August Mr Robert Evans sent an email to the claimant stating that, in the context of her extended absence, he needed to allocate another person to look after the claimant's role and that to assist with that process, he needed the claimant to return her company keys and passwords for all electronic HR files and systems He required those to be provided by the Monday of the following week, in the alternative he was prepared to come and collect them from her home.

126. Finally, he informed the claimant that Mrs. Wakeley had taken all of the claimant's personal items from the office and wondered whether that had been done with or without the claimant's consent and, if there were any other personal items that the claimant would like returned; he would arrange this if the claimant so wished.

127. The claimant responded to the aforesaid email on the 9th of August. She expressed surprise at the request for the keys as Wendy Jones had been using them for the previous three months and that Gareth Evans had requested all the passwords from the claimant in May and those had been given.

128. She questioned why, as the respondent had copies of all the keys it requested from the claimant, and that she was still an employee, her copies were required.

129. She indicated that Mrs. Wakeley had kindly brought some of her personal belongings from the office but she did not require any of her other personal belongings as they were safely locked in the drawers in the respondent's offices.

130. She went on to detail her perception of how Mr Gareth Evans responded to employee's long-term sickness, in particular mental health and reiterated, in summary, points regarding Mr. Evans' approach to the calculation of wages and Mr Robert Evans' conduct towards her in March. The email goes on to contain that element which is marked "without prejudice" tribunal has not taken that element into consideration.

131. It is evident that, by the 9th August 2020, Mr Robert Evans perceived that the claimant might be absent for a substantial period.

132. On the 11th August an employee named Wayne Reese sent Mr Evans a photograph of a Face Book post which the claimant had "liked" on her Facebook page [255] on the 22nd of July 2020. The post was jocular in nature and said: "*Did you know if you text your boss "go F --- go self, you don't have to go to work anymore?".*

133. On the same day Mr Robert Evans responded to the claimant's previous email. With regard to his request for the keys; the respondent did not have a key to the claimant's desk or to one of the filing cabinets. He then set out a number of bullet points, the third of which stated as follows:

"With regard to your reference to feeling anxiety and stress due to COVID-19 in late May, I would like to discuss this with you as I have received evidence that you have been out and about during the COVID pandemic, which seems to contradict your reasoning for your sick leave. Please find attached just some of the Facebook posts that have been brought to my attention. I am questioning why you feel unable to attend work due to COVID-19 related anxiety, yet you are attending public restaurants and pubs. Moving forward I would like to investigate this further to reassure me that you are not using your sick leave entitlement. You are therefore entitled invited to attend a meeting with me, via telephone, on Tuesday 18th August at 10:00 AM full. Please note, or failure to comply with this request may be treated as a conduct issue pursuant to our disciplinary procedures."

134. Further on, Mr Robert Evans goes on to state:

"I would like to reiterate my request to obtain access to your GP records and to obtain further details regarding your health. I suggest that we discuss this further during our meeting of the 18th of August."

Towards the end of his email, he goes on:

"I'm aware that you have posted comments on social media that you have no intention of returning to work and that is your choice if you wish to resign."

This was a reference to the post noted above.

135. Attached to the email were two photographs of further posts from the claimant's Facebook page. The first shows a picture of five people, seated in close proximity to each other. That post is dated the 27th of May 2020 and was uploaded by a person called Lucy Day. The text states "can't wait to get back to normality, bring on the gin and beer gardens !" At the time of that post, public houses and restaurants in Wales were uniformly restricted from opening to the public; a fact of which Mr Robert Evans was aware. It is also self-evident that the person who wrote the message was expressing a hope for the future. Not making a reference to the present.

136. Another post from Lucy Day, dated 26th of May referred to lucy Day dying the claimant's hair. This indicated that Ms. Day had been in company with the claimant. The last post indicated that Lucy Day had been in company with the claimant at the Ty Nant Inn in July; after the Welsh Government had relaxed the social distancing restrictions.

137. On the 17th of August 2020 the claimant submitted that the two formal grievances to which this judgment has already referred. The claimant also indicated that, in light of her formal grievances against both Robert and Gareth Evans, she considered it inappropriate to have further discussions about her ill health with Robert Evans, but was happy to have a telephone meeting with an impartial human resources person. On the same day Mr. Evans responded stating he considered it appropriate that he should still meet with the claimant on the 18th, by telephone, and that discussion would cover a number of subjects; her sickness absence, her return to work and the posting of material on a social media site.

138. After receiving Mr. Evans email, at 23.24 on the same day the claimant sent an email tendering her resignation with two weeks' notice. In this she stated:

"*I find your email, demanding, that I take a verbal meeting with you at 10:00 AM on Tuesday 18th August, a further example of your constant intimidation and bullying towards me.*

Despite filing a grievance against you today, I am shocked that you do not feel it inappropriate for me to speak to you tomorrow, and despite my offering to speak to another impartial person, which is my lawful right. This is a further proof that you are not considering the fact that I have a medical condition mainly caused through bullying and intimidation at work. My current sicknote runs until the 22nd September yet you are still trying to control and intimidate me throughout my absence period to which I am currently seeking advice.

Any evidence you think you have on me with regards to social media posting during my sickness is at very best a poor attempt at seeking to invalidate my illness. If you think that being on sick due to stress and anxiety means I am not allowed to have a meal out with a friend you're very much mistaken. Because the doctor actively encourages going out with people who support you at a time when you are left alone it is a further detriment to my health. With regards to the second post where you

believe I was out partying. As you will be aware during the months of March until July 2020 this particular public house and indeed every other public house in the entire of the UK was closed- the photo you attached was taken in January 2020 and my friend was merely reminiscing.

I have also informed my friend of the misuse of her private Facebook account by yourself and Cardiff galvanizers. She will be addressing this issue with yourself in due course.

I will not speak to you tomorrow due to my medical condition as explained. I feel the pressure you are putting me under, I cannot handle any longer and you are prolonging my recovery with your fake concern. I feel you leave me with no alternative at this time than to give you my notice. I therefore give my two weeks' notice from Tuesday 18th of August."

139. The meeting of the 18th August did not take place.

140. On the18th August Mr Robert Evans replied that he did not accept that it was inappropriate for him to speak to the respondent's employees during sickness absence. He did not agree that the claimant's grievances against himself and his brother negated the need for him to speak to the claimant during her absence. He stated that he also planned to use the meeting to reassure the claimant that her grievance would be investigated by an impartial manager.

141. The person whom Mr Robert Evans appointed to investigate the claimant's grievance was Mr. David Jones who was a long-term employee reporting to the Evans brothers and, based on the content of his witness statement before the tribunal, a person who was manifestly not impartial in his view of the claimant at the time of this appointment.

142. Mr. Jones conducted the four interviews to which we have referred, they were recorded, and it appears from a handwritten note that all four interviews were completed in 16 minutes and five seconds The outcome of that report found that the claimant's grievances were not well founded .

143. In assessing this evidence, insofar as it is relevant to our judgment of the events which preceded the claimant's resignation, we have had to consider, amongst other things the conscious motivation of Mr Robert Evans in the conduct of his management of the claimant sickness absence and the decision to put the claimant on notice of potential disciplinary issues of misconduct.

144. Part of that context is the belief, as expressed in Mr Robert Evans witness statement, (at paragraphs 77 to 78) that the claimant was not genuinely ill and that she, together with Fiona Wakeley, were disguising the true reason for their absence behind medical certificates which recorded a medical condition which Mr Robert Evans doubted to be true.

145. Paragraph 78 of Mr. Evans statement cross refers to the evidence of Wendy Jones at paragraph 7 of her statement; “Fiona Wakeley also told me that…. she was going to call in sick so that the company couldn't call her into work. Fiona Wakeley advised me that given both her and the claimant were going to call in sick, I would be contacted by the company to request that I go in to complete the payroll. Fiona Wakeley said, “it's up to you what you want to do but they can't force you back” or words that effect. I took this as Fiona Wakeley trying to persuade me not to go into work, I considered this behavior to be unprofessional and when Robert Evans subsequently called me to go back to work to assist with the payroll I agreed.”

146. Having heard the evidence of Mrs. Wakeley under cross examination, we considered the prospect that Mrs. Wakeley would, as a protest at the injustice she perceived, have forgone her monthly income from her £40,000 a year salary or lied to the respondent. We are unanimous in our judgment that Mrs. Wakeley did not make the statement which Mrs. Jones asserts.

147. We find that Mr Robert Evans, had an underlying belief that the claimant might be falsifying her reasons for her absence and was doing so, with Mrs. Wakeley, as a protest against the respondent’s method of managing its staff. We think it is more likely than not that Mr Robert Evans’ decision to personally manage the claimant’s sickness absence, and to continue to do so when the claimant’s line manager was at work, was materially influenced by the claimant's conduct in March 2020, as set out in our findings above, and his belief at the claimant’s absence was not due to genuine sickness.

148. We set out further find regarding Mr Robert Evans’s conduct and motivation in the course of our reasons below

<u>The Parties Submissions</u>

149. Mr Pollitt presented a structured and detailed written submission. In ninety-nine succinct paragraphs he analysed the evidence against each of the claims, and the applicable legal matrix in turn. He also provided electronic copies of several cases. He spoke to that argument in some detail, emphasising examples of important inadequacies of evidence in the claimant’s case and examples from the oral evidence to underpin his submission that the respondent’s case was the more reliable account of the material events.

150. Mr Walton submitted a written submission. He spoke freely and with passion. He did not address the law or the detail of the oral and written evidence; his was a broad assertion that the respondent’s witnesses were less reliable than the claimant.

<u>The claims of protected public interest disclosure</u>

The unlawful deductions disclosure

151. The written submission on behalf of the claimant titled "Summation" set out the matters of law. Under the title "evidence of reasonable belief it stated:

" "the subjective test of the claimant is established by reference to her own WS the WS of DR and WJ as consistent of the following: B tends to show that the legal rights of an individual has been, is being or is likely to be infringed by reference to a background of confusing and contradictory information the nature of which is designed to obfuscate the rules and render them unusable. The application by the claimant of rules favouring bonus payments was an interpretation largely reflecting the policies as were both orally communicated and written down, application of which preceded by reference to information provided by DJ who produced timesheets. The overturning of bonus payments by GE proceeded largely by reference to the same information the claimant regarded the application of the rules by GE to be unfair"

152. This submission, in our judgment, is not quite consistent with the claimant's evidence which referenced the different treatment between two groups of workers, who were employed by the two different companies; the Respondent and Galvablast limited and the way in which the respondent used its contractual right to "layoff" staff, for instance on Fridays.

153. In this respect we prefer the submission of the respondent, which by reference to the authority of Cavendish Monroe Professional Risks Management limited v Geduld [2010] I.C.R. 325 stated that the giving information is the conveying of facts.

154. The claimant's evidence, at its highest, was that she described the respondent's policy as "unfair". That was not, even in the wider context of her discussions with Mr Gareth Evans, information.

155. The tribunal accepts that the claimant's challenges to the respondent about the way it applied its policies and the discrepancy between the terms and conditions of one group of employees with another's separate terms and conditions were raised, and that amounted to information but the claimant, by her own concession, which the tribunal considered to be reasonable, in cross examination, accepted that such information did not "tend to show" a relevant breach of a legal duty.

156. In these circumstances, we have reached the unanimous conclusion that the claimant's disclosure was not one which met the statutory test for a public interest disclosure.

Unfair dismissal disclosure

157. The second disclosure related to the issue of unfair dismissal. The claimant's summation stated as follows:

"On 11th March 2020 the claimant had uttered words that were clearly understood by all concerned by her reference to; "it mattered how long they had been employed " was a reference to the two years continuous service rules it was clear the claimant subjectively believed that dismissing such employees in order to set an example to the rest of the workforce would infringe their legal right to a fair dismissal."

158. The respondent's submission Is that the claimant's words were restricted to asking "who the men were" and that even on the claimant's case, taking it at its highest, included the tribunals finding of fact that the claimant had also said: "it matters how long they have been employed for", that was not a disclosure of information.

159. Having heard the claimant's evidence, having made our findings of fact, we are satisfied that the claimant statement did not contain information which tended to show a likely breach of the respondent's legal duty with respect to the Employment Rights Act 1996 provisions relating to unfair dismissal. It is evident from the claimant's own evidence that she was inadvertently prevented by Mr Gareth Evans and Mrs. Fiona Wakeley from expressing her thoughts because they were already in a vocal dispute which prevented the claimant from expressing herself.

160. The tribunal therefore finds that the claimant did not make a disclosure of information which tended to show a breach of a legal duty was likely to occur.

The covid 19 disclosure

161. With respect to the 18th of March incident ,the respondent first took the point on the claimant's pleaded case, as set out on page 119 of the bundle, which referred only to a legal obligation under section 100 of the Employment Rights Act 1996 and, that the claimant's verbal statement, taking it at its highest, could simply not be one which tended to show a breach of that legal duty had occurred.

162. The respondent noted that the claimant's case, which stated: "some staff were unhappy to hear that an employee with a temperature, sore throat and a cough and Gareth had asked that they returned to work to get them tested with our thermometer the claimant subjectively believed that the request by GE was in breach of government COVID guidelines and legal obligations to protect the health and safety of other employees" was of a much more general nature.

163. The respondent's first submission, noted above, might have been persuasive before the tribunal if it had not been pointed out that on page 180 in the bundle the pleading, in bold text, stated "the claimant alleges a breach of the ERA 1996, section 43 … breach of a legal obligation… a danger to the health and safety of any individual." .

164. The tribunal has made a finding of fact that the claimant disclosed, by way of repetition, concerns an employee (ostensibly on behalf of others) which stated that the respondent's requirement for an employee, who had described having symptoms of sore throat, a cough and temperature, should be called in to the respondents' premises for testing was a risk to the health of other employees.

165. This discussion took place a little over a week before the Welsh Assembly required a lock down; it was a time of the greatest uncertainty about the risks of COVID and uncertainty at how widely, and how easily, the infection could spread.

166. In our judgment the claimant's statement contained information and it was readily apparent to the respondent, as it is to us, t that the information tended to show that there was a risk, caused by the respondent's temperature test procedure, of infection entering the work premises and thereafter creating an avoidable risk of the spread of infection within the workforce and possibly out of the factory with a workforce returning to their homes.

167. The tribunal then turned to the question of whether the claimant had a reasonable belief in the information she was conveying .

168. We first find that the claimant, as an HR administrator, was aware of the respondent's process and so she had a reasonable belief that the respondent was engaged in the process of requiring staff, who reported ill health, to come into the respondent's premises to be tested. In our judgment, the claimant had a reasonable belief, one which she shared with some of the employees, that to ask an employee who reported symptoms which, according to the government, were indicators of COVID-19 infection, to come into work placed other employees, and potentially their families, at a risk of infection.

169. We find that the claimant had a reasonable belief in her disclosure. We then considered the guidance in the case of Chesterton global limited (trading as Chestertons) v Nurmohamed & Another [2015] I.C.R. 920 ; whether the claimant had a reasonable belief in the public interest in her disclosure.

170. Her disclosure concerned the risk of spreading a highly infectious virus into the respondent's premises where 90 or so employees worked. Those employees lived in the local community with whom they would have contact after they had been at work at the respondent's premises.

171. In March 2020 the consequence of being contaminated by COVID 19 was reasonably perceived as very serious to human health.

172. For these reasons we find that the claimant's disclosure of information on the 18th of March 2020 was a protected public interest disclosure.

173. As we've found one relevant disclosure we turn to the Issues of detriment and dismissal.

174. Section 103A of the Employment Rights Act 1996 states that an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason or if more than one, the principal reason, for the dismissal is that the employee made a protected disclosure. It is for the respondent to prove the principal reason for dismissal.

175. The tribunal notes from its findings of fact that the respondent's reaction to the claimant's disclosure was not one of anger or criticism of the claimant.

176. it was a question from Gareth Evans; asking the claimant to name the persons complaining about the presence of a possibly COVID infected employee on the respondent's premises. The respondent's behaviour, of which the claimant complains, was consequent to the claimant's "curt" response: "why?".

177. It was common ground between all the parties that Mr Robert Evans criticised the claimant for her insubordination towards his brother. Thus, whilst the protected public interest disclosure was the precursor to Gareth Evans question and thereby was also the foundation to the claimant's reply, Mr Robert Evans anger stemmed from the claimant's refusal to provide information, rather than her provision of protected public interest information.

178. Secondly, whilst Mr Robert Evans' anger that day was clearly part of the claimant's grievance itself it was not conduct of which she complained until May and did not formally raise a grievance about until August 2020. By which time the claimant had more complaints about Mr Robert Evans' behaviour arising out of his conduct of the management of her sickness absence and his raising of disciplinary issues against the claimant, that he personally wished to investigate.

179. Looking at the claimant's resignation letter, her evidence and the evidence of the respondent before the tribunal. it is on our judgment, the case that the respondent, which may rely on any source of evidence to discharge the burden upon it, is able to identify sufficient evidence to persuade us that on the balance of probabilities the principal reasons for the claimant's resignation was the cumulative

conduct of Gareth and Robert Evans between late 2019 into August 2020. Before us that evidence has been focused on the five specific incidents referred to in our findings of fact and the conduct of Mr Robert Evans after the claimant commenced her sickness absence in late April 2020.

180. in light of the above the respondent has, inadvertently, persuaded the tribunal that the claimant's protected disclosure of 18th March 2020 was not the principal reason for her dismissal.

181. In light the above the claim under section 103A of the Employment Rights Act 1996 fails.

182. We now turn to the detriment claim. The claimant has established to our satisfaction that she made a protected public interest disclosure on the 18th March 2020.

183. The respondent submits submission that this claim is "out of time".

184. At page 120 of the bundle, in subparagraph G of the claimant's particulars of the detriment suffered on the 18th of March, she stated as follows:

"As a result, they had become more aggressive and irrational the last few months, a matter which other members of staff had brought to the attention of Robert Evans, I.e., that Gareth Evans was becoming increasingly irrational and verbally aggressive leading up to her dismissal"

185. The tribunal notes, that the particulars, and further particulars, of the claim pleaded on behalf of the claimant were all too regularly a hindrance to the understanding of the claimant's case but ,as the particulars of the parties' claims represent a little under 1/3 of the entire bundle, the time for further clarification had passed.

186. The tribunal have concluded the reference to "verbal aggression", in the context of the 18th of March incident, can only be a reference to the conduct of Robert Evans; shouting at the claimant, a fact which we have found proven. That act occurred on the 18th of March 2020 . We note there was no evidence of Mr Gareth Evans shouting at the claimant on, or after, this date.

187. Section 48 of the Employment Rights Act 1996 states as follows:

"(1A)A An employee may present a complaint to the employment tribunal that he has been subject to a detriment in contravention of section 47B.
(3) unemployment tribunal shall not consider a complaint under this section unless it is presented - (a) or the end of the period of three months beginning with the date

of the act or failure to act to which the complaint relates, or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) within such a further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

188. We have not found that there was any later incident of a relevant detriment or dismissal under section 103A). Thus, in this case, the last date for a timely presentation of a complaint was the 17th of June 2020. Even allowing for a hypothetical period of timely ACAS conciliation, that period would probably not have extended beyond the 17th August 2020; the date of the claimant's written grievances.

189. The claimant commenced early conciliation on the 11th of November 2020, the certificate was issued on the 12 November. Her claim to the tribunal was presented on the 25th of November 2020.

190. At the case management hearing conducted on the 14th of June 2021, at paragraph 38, the first issue identified by Employment Judge Moore was whether or not the detriment claims had been brought within at the relevant 3-month time period.

191. This issue was not addressed in the claimant's evidence in chief and she did not offer any explanation in the course of cross examination.

192. The issue was not addressed in the written submissions on behalf of the claimant nor in the oral submissions made after the claimant had the opportunity to read the respondent's submissions and hear the respondent's oral representations based on those written submissions.

193. In short, the claimant's case in evidence and argument did not offer any basis to explain why, in all the circumstances of this case, it was not reasonably practicable for the claimant to have presented her detriment claim within the prescribed. period.

194. The relevant case law pertinent to this issue is that most commonly addressed in the context of unlawful dismissal claims and section 111 of the Employment Rights Act.

195. We noted that the onus of proving the presentation in time was not reasonably practicable rests upon the claimant: Porter v Banbridge limited 1978 ICR 943. Secondly, following the case of Asda stores limited v Kauser EAT 0165/07 we noted that the test reasonableness is not simply a matter of looking at what was

possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.

196. Tribunal took into account that the claimant acted as an HR administrator in her employment with the respondent. The tribunal took into account the claimant for instance, on the incident of the 11th of March 2020, demonstrated some understanding of unfair dismissal; one of the rights protected under the Employment Rights Act 1996 and that she had support and assistance of Mrs. Wakeley who also had demonstrated a reasonable understanding of the Employment Rights Act.

197. The tribunal took into account that the claimant was absent with a stress related illness which meant that she was unable to attend work. We also took into account that part of that stress related illness was caused by her presence at work and we have no clear indication, nor submission, that her level of sickness prevented her from articulating her complaint in writing or using a computer to access the internet.

198. We note that, during her sickness absence she was able to put forward her view clearly in her email correspondence and she was able to express, in informal language, her complaints against Mr Gareth Evans and Robert Evans. She had also been able to express, in writing, a belief that she had been subject to disability discrimination.

199. Throughout the period of her absence, she was able to communicate via email and she was clearly aware of the right to commence tribunal proceedings.

200. Having received no direct evidence from the claimant, having found no sufficient evidential basis within the documents, and received no submission to argue this issue for the claimant, we consider that the claimant has not discharged the burden of proof that lies upon her. Further, the evidence we have before us, to some extent, demonstrates that the claimant had the ability to communicate electronically, and could therefore have communicated with ACAS and the employment tribunal during the relevant 3-month period.

201. In light of the above we find that it was reasonably practicable for the claimant to have presented her detriment claim within the three months commencing with Mr Robert Evans conduct on the 18th of March 2020.

202. For the above reasons it is the tribunal's judgment that the detriment claim is not within the employment tribunal's jurisdiction and is dismissed.

<u>Constructive dismissal.</u>

The Legal Matrix

203. Section 95(1)(c) of the Employment Rights Act 1996 states that an employee is dismissed by his employer if the employee terminates the contract under which he is employed, with or without notice, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

204. We note that lawful conduct is not something that is capable of amounting to a repudiation and therefore the employer's conduct cannot be repudiatory unless it involves a breach of contract; Sparfax Limited -v- Harrison [1980] IRLR 442 Court of Appeal.

205. In this case, the claimant alleges the Respondent breached the implied term of trust and confidence.

206. The implied obligation of mutual trust and confidence in employment contracts requires that the employer shall not "without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employee/employer". This is a definition which has been cited in cases such as Malik -v- BCCI, Woods -v- WM Car Maintenance Services, Imperial Group Pension Trust -v- Imperial Tobacco and Lewis -v- Motorworld Garages Limited; all of which are well known to the experienced practitioners who have assisted the parties.

207. The implied obligation is formulated to cover a great diversity of situations and a balance has to be struck between the employer's interests in managing the business that they run as they see fit, and the employee's interests in not being unfairly and improperly exploited. It is a mutual obligation though it seems that implied terms add little to the employee's implied obligations to serve his employer loyally.

208. In assessing whether there has been a breach it is clear that what is of significance is the impact of the employer's behaviour on the employee rather than that which the employer intended, BG PLC -v- O'Brien [2001].

209. The burden lies on the employee to prove the breach on the balance of probabilities, this means that the employee must prove the alleged act or omission, and the employee must prove that the employer's conduct was without reasonable and proper cause.

210. The test whether such proven conduct, in the absence of reasonable and proper cause, amounts to a breach is said to be severe; Gogay -v- Hertfordshire County Council [2000].

211. It is not enough for the employee to prove the employer has done something which is simply in breach of contract, or "out of order", or perhaps unreasonable. He must prove that the degree of breach was sufficiently serious, or calculated, to cause such damage that the contract can be fairly regarded as repudiated and that repudiation was accepted. The cases of Croft -v- Consignia PLC and The Post Office -v- Roberts both indicate that the quality of the breach must be substantial.

212. Those cases, along with *Lewis,* also indicate that a repudiatory breach may be formed of the cumulative effect of a number of incidents which of themselves, in isolation, may or may not be repudiatory.

213. We note the case of Omalanju -v- The London Borough of Waltham Forest which directs us that the "final straw" need not of itself be a repudiatory breach or unreasonable or blameworthy conduct but it must have a degree of fault. Thus, entirely innocuous behaviour cannot sensibly be viewed as adding any weight to the accumulation of potentially repudiatory behaviour and therefore cannot be the final straw.

214. Lastly, we note that in cases where a final straw is alleged, but not proven, what matters is the Tribunal's findings of fact. If the Tribunal has concluded that the repudiatory breach existed prior to the "final straw" then it may not matter whether that final straw is proven.

215. However, if the final straw is not proven, it will be important to analyse the Claimant's conduct in the period following the last incident which is found to have contributed to a cumulative breach; it is likely to be a material consideration in respect of any question of affirmation.

216. We then turn to the issue of affirmation, in particular we have been guided by the case of W E Cox Toner International Limited -v- Crook [1981] IRLR 443 and Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121; deciding to resign is for many, if not most, employees is a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to them in their community. Their mortgage, regular expenses, may depend upon it and economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years

than it would be in the latter's case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

217. Lastly, we note that the effective cause does not need to be the sole or dominant cause of the resignation; Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493.

218. If the Claimant were to establish that he resigned in response to a proven repudiatory breach of contract then we must go on to consider whether the reason for his constructive dismissal was a potentially fair one. That requires us to determine what were the set of facts or beliefs held by the employer at the time of the dismissal Maund -v- Penwith District Council [1984] ICR 143. In this case, the pleaded potentially fair reason is capability or some other substantial reason.

219. The tribunal has already made its principal findings of fact concerning the respondent's conduct.

220. We then addressed whether such conduct was without reasonable and proper cause.

221. The tribunal reminds itself that the burden rests upon the claimant to demonstrate that the employer had no reasonable and proper cause for the actions in question: Hilton v Shiner limited -builders merchants 2001 IRLR 727.

222. We find that the conduct of Mr Gareth Evans on the 11th of March 2020 when he shouted at the claimant and Mrs. Wakeley words to the effect that, if they were not going to do as he told them to, that they should look for new jobs was conduct without reasonable and proper cause.

223. Without repetition of our findings of fact set out above; Mr Gareth Evans was seeking to dismiss employees immediately and without procedure, he was aware of the respondent's disciplinary procedure and he was aware of the risk of claims of unfair dismissal if any of the employees, whose names he did not know, had two years continuous service with the respondent. He received correct advice from Mrs. Wakeley, albeit in a discussion which became heated.

224. In the context of a discussion initiated by the commercial director's intention to dismiss employees without notice, he shouted a threat to staff to look for alternative employment. It was a serious threat; given it emanated from such a senior employee and occurred in the context of his express, but thwarted, intent to dismiss three other employees.

225. The conduct of Mr Robert Evans on the 18th of March 2020 was, in part, with reasonable and proper cause. It was reasonable and proper for Robert Evans to caution the claimant not to be insubordinate to the commercial director. It was wholly unreasonable to shout at the claimant in the presence of three other managers. And the claimant has proven that this conduct was without reasonable and proper cause.

226. The third aspect of the claimant's case is the conduct of Mr Robert Evans from the point he took over the management of the claimant's sickness absence through to her resignation late on the evening of the 17th off August 2020.

227. We have concluded that before Mr Robert Evans took on the management of the claimant's absence he had formed a view, based on a misleading statement from Wendy Jones, that the claimant had expressed a reason for her absence which was not genuine. In our judgment Mr Robert Evans already held a very dim view of the claimant, or be it neither he nor Mr. Evans had taken any steps to address their perception with the claimant through the normal channels of performance management. Thirdly, we also consider the claimant whether directly, or through her association with Mrs. Wakeley, was seen as an impediment to the respondent's freedom to manage its staff in a manner which the Evans brothers preferred.

228. We are satisfied that the claimant has established that she and Mrs Wakeley were perceived as an impediment and a hinderance to the respondent's approach to its employees, which on the evidence before us was not fettered by some of the common considerations of reasonable employers.

229. The given reason for Mr Robert Evans decision to take on the claimant's management was the workload upon his brother and the lack of availability of Mrs Wakeley. Although Mrs Wakeley was absent for a period, she returned to work until her suspension in late July and was then on garden leave.

230. It would have been natural to have returned the management of the claimant's absence to her line manager. The tribunal carefully considered Mr Robert Evans evidence as to the reason why, during a very difficult period for the business, he decided to manage the claimant's absence. We consider, that on the balance of probabilities, he wanted to manage the claimant in order to isolate her from the support she derived from Mrs. Wakeley and to cause some pressure upon her by being directly managed by the most senior officer of the respondent.

231. We find on the balance of probabilities, that he held a personal ill will towards a claimant after their conversation 5th of May 2020, when she first stated that a reason for her absence was the conduct of his brother; "shouting and screaming around the place during the last week of work before furlough".

232. We also find that Mr Robert Evans was somewhat manipulative in his correspondence, for instance on the 16th of July he said that he was happy for Mrs. Wakeley to attend the claimant's return to work meeting on the following Monday however, if she was unavailable the meeting would go ahead without her. In our judgment, by the time that email was written, Mr Evans was aware that the respondent was accusing Mrs Wakeley of misconduct and that she was not likely to be in attendance, at work on the day he set for Miss Murphy's return to work interview.

233. We note that the claimant's intended return to work did not happen on the 17th of July and that she provided a sick note which recorded the reason for her absence as an acute reaction to stress one which would remain valid until the 22nd of September [page 250]. It did not refer to Covid 19.

234. On the 5th of August, in an email to which we have referred, he insinuated that Fiona Wakeley might have taken personal items of the claimant without the claimant's consent and on the 9th he received a lengthy email from the claimant which included:

"I do not think that you appreciate my concerns with regard to Gareth and even yourself you must have been aware that I have worked for you for over 5 1/2 years now and I've seen how you have treated people and who have been on long term sick with the company. I have heard Gareth say on number of occasions "he's taking the ****" "we need to get rid of him" and "stress is a load of ****". You must be aware that I now feel that I am in that category. I have been personally bullied by Gareth a number of times. He comes into my office and shouts at me if I so much as pay a person 50P too much! When I have followed the rules which are not fully written down Gareth then changes his mind on the rules and blames me for calculating wages wrong. I've also seen his bullying towards members of staff many, many times. I was also a victim of your anger in March, when you shouted at and belittled me in front of three other managers, which I feel was totally unnecessary. The anxiety and stress that I was suffering has now been overtaken by the implication of how I will be treated on my return. During my recent conversation with my doctor, she understood how I was now feeling in relation to work which is why I was then given an 8-week sicknote."

235. The email sent by Mr. Evans to the claimant on the 11th of August stated;

"with regard to your reference to feeling anxiety and stress due to COVID-19 in late May, I would like to discuss this with you as I have received evidence that you have been out and about during the COVID pandemic, which seems to contradict your reasoning for your sick leave.. Please find attached just some of the Facebook posts that have been brought to my attention. I am questioning why you feel unable to

attend work due to COVID related anxiety, yet your attending public restaurants and pubs. Moving forward, I would like to investigate this further to reassure me that you are not abusing your sick leave entitlement."

236. Attached to that email was a photograph of a Facebook "post " by a person called Lucy. Day. It showed a picture of five people probably in a public house or restaurant, with the words "Can't wait to get back to normal bring on the gin and beer gardens".

237. Mr Robert Evans was aware that Welsh pubs and restaurants were all closed before the 22nd of May and on reading the text it is not a reference to an attendance, but to the desire to attend a bar or restaurant, in the future.

238. The second facebook message by Lucy Day referred to an afternoon dyeing Julie Murphy's hair; "a lovely colour, nice change to racy red". The text and picture could not reasonably warrant an inference the dying of the claimant's hair took place in the bar or restaurant, it is dated the 26th of May .

239. The third post is dated the 27th of July 2020, again from Lucy Day, and states that she was with Julie Murphy at the Ty Nant public house.

240. In so far as Mr Robert Evans suggested that these three posts were indicative that the claimant had been attending "public restaurants and pubs" we can see no reasonable proper cause based on the evidence before him for that statement save with respect to 27th July post.

241. Mr Robert Evans stated that he was questioning why the claimant would feel unable to attend to work due to COVID-19 related anxiety yet was able to attend pubs.

242. We find that Mr Robert Evans was fully aware, from both the claimant's most recent Med 3 certificate and her email dated the 9th of August that, as of the 17th July 2020, the cause of her anxiety and stress was the conduct of Mr Robert Evans himself, and his brother. On the 17th July 2020 Med 3 certificate alone, it was evident that diagnosis no longer related to COVID.

243. In the context of the above, the allegation of potential abuse of the respondent's sickness absence policy was, in our judgment without reasonable and proper cause.

244. It is this Tribunal's conclusion that it is more likely than not by the time the claimant had made her August complaint about the conduct of both Evans brothers and notified her absence until September, Mr. Evans was intent to put pressure

upon the claimant in the hope she would resign and chose to do so by making an allegation which, on the evidence before him, could not be seen as reasonable act.

245. Further, that the chief executive of an organisation chooses to conduct a disciplinary investigation into an administrator when there were other, more junior, but sufficiently experienced and relatively more independent persons, available was, in our judgment, a conscious effort to make the claimant fearful of the outcome which was to be decided by a person against whom she had made serious allegations.

246. He knew, although he didn't disclose it, that he'd had suspicions about the claimant's honesty as to the reason for her absence for several months.

247. He knew that it was practicable to ask another member of staff to conduct meeting.

248. He knew he could call upon the respondent's external provider, if he so wished ,to conduct such a meeting.

249. He knew there was no particular imperative for the meeting to be conducted at 10:00 o'clock on the 18th of August.

250. Further, although previously accepting that if any medical opinion was required the respondent was content to use an occupational therapist to discuss the matter with the claimant, Mr Robert Evans repeated a request to have access to the claimant's GP records ; a request that went beyond a request for a medical opinion.

251. The tribunal has reminded itself it must apply an objective standard and it has reminded itself that it is for the claimant, not the respondent, to persuade the tribunal that Mr. Evans' conduct was without reasonable proper cause.

252. In light of our conclusions above, the claimant has persuaded us, on the balance of probabilities, that the course of conduct by Mr Robert Evans was without reasonable or proper cause.

253. The next question is whether, cumulatively or otherwise the conduct of Mr Gareth and Mr Robert Evans was repudiatory in nature.

254. We accept the respondent's submissions on the law. It is not enough for the claimant to establish that the conduct was simply "unreasonable".

255. In our judgment, in the context of the circumstances of this case, the cumulative conduct of Mr Gareth and Mr Robert Evans, as the most senior members of the management of the company was at different points, and to different degrees, threatening and humiliating. The cumulative behaviour of Mr Robert Evans over the period of the claimant sickness absence and in particularly the allegation that she had potentially falsified the reason for her absence, along with the insistence that the chief executive managed her absence and investigated the disciplinary allegations he raised, was overbearing and ill-willed behaviour.

256. In our judgment, as the industrial jury, we have no doubt that this was conduct which was intended to seriously damage the implied term of trust and confidence and that in this case the trust and confidence between the claimant and the respondent was so damaged that the claimant could not face returning to work under the management of the Evans brothers.

257. We thereby find that the respondent's conduct, which was without reasonable and proper cause amounted to a repudiatory breach of the implied term of trust and confidence.

258. The next question we have to consider is whether or not the effective cause of the claimant's resignation was the breach of the implied trust and confidence or, as the respondent asserts; the disciplinary allegations and termination of Mrs Wakeley's employment. .

259. We first turn to the disciplinary allegation. We do not accept the submission that the claimant resigned because she was in fear of being, reasonably or fairly, found to be guilty of misconduct.

260. We find that she knew she had a complete answer to the content of the three Facebook posts. The first was an old photograph reminding the readers of past good times. The second, was the dying of her hair in her own garden with the person who was in her permitted "social bubble". The third was the visit to the public house which was compliant with the July 2020 Covid restrictions and occurred when her sickness absence related to work related stress, not Covid.

261. We do consider that the absence of Mrs Wakeley was part of the claimant's reason for resigning. Without Mrs Wakeley the claimant would have no friend or ally, nor a buffer, between herself and Mr Gareth and Mr Robert Evans; both of whom had shown their antipathy and anger towards the claimant. However, we do not consider that this factor was the effective of cause of the claimant's resignation.

262. The importance of Mrs Wakeley's presence was the support she provided to the claimant and the degree to which she could afford the claimant some protection from the unreasonable behaviour of Robert and Gareth Evans.

263. The tribunal is satisfied that the claimant has demonstrated that the effective cause of her resignation was the conduct of Gareth and Robert Evans.

264. The respondent's written submissions argued that if the aforementioned elements of constructive dismissal were proven then the claimant had, by her decision to remain in employment, affirmed the contract of employment. It referred to parts of the claimant's pleadings and identified the claimant had stated the last act was the invitation to meet with Mr Robert Evans.

265. It was argued that the initial invitation to meet with Mr Robert Evans had been some months prior to the claimant's resignation and thereby she had, by her conduct, affirmed the contract.

266. At page 120 of the bundle, under "Section 3 and a further better particulars the claimant's case" the claimant's case was put thus;

"..the last straw in this case was the insistence of a face-to-face meeting. The claimant felt she was under too much stress to speak to Rob Evans verbally and therefore felt the only option was to hand in her notice which she did the next day and resigned on the 1st of September 2020."

267. The reference to the "next day" in our judgment is to the events of the 17th August 2020. The claimant handed in her notice by email on the 17th August 2020 at 23.24 in response to Mr Robert Evans email at 19.41 on the same day. In Mr Robert Evans' email at 19.41 he had stated that, despite the claimant's objection; "As your CEO I think it's appropriate to meet by telephone at 10.00. tomorrow." That meeting was intended, inter alai to consider the claimant's potential misconduct.

268. As we have noted above, that insistence, in our view was part of a course of conduct by the respondent which was intended to press the claimant into a resignation.

269. The period the of the claimant's "delay" was about four hours.

270. In our judgement, this email is the last in a course of conduct which commenced with the email from Mr Robert Evans on the 11th of August. Even if it were viewed as a separate incident, we would have no doubt that this email was not innocuous for the reasons we have stated above.

271. In any event, we would have taken into account that, had the claimant taken some considerable time to accept the repudiation, we would not have viewed that as an affirmation when the circumstances of this case showed that the claimant was

a person who was suffering with stress, not in receipt of any contractual pay, and she was a single mother living on a very modest means without any immediate prospect of obtaining employment. In those circumstances, should the claimant have paused before making the decision to resign, in our judgment , that would not have been indicative of an affirmation of the contract of employment.

272. In light of above, the tribunal has reached a conclusion at the claimant's resignation amounted to a dismissal for the purposes of section 95 (1)(c)of the Employee Rights Act 1996.

A potentially fair reason for dismissal

273. The respondent pleaded that the dismissal was for a potentially fair reason: some other substantial reason.

274. The respondent's witness statements made a number of references to information it had discovered ,after the claimant's dismissal, which might have warranted disciplinary proceedings or dismissing her. These are not matters which it asserted were the principal reason for resignation on the 17th of August 2020.

275. The written submissions on behalf of the respondent did not address this issue. That is no criticism of Mr Pollit; he had not been provided with any evidence upon which such a submission could be argued.

276. As the burden lies upon the respondent to establish a potentially fair reason for dismissal, in the absence of any evidence, regardless of its source, to sustain the unspecified character of the "some other substantial reason" we find that the respondent has failed to establish a potentially fair reason for the dismissal.

277. We also record that we have made an express finding of fact as to the respondent's intentions, and motivation, leading up to the claimant's resignation.

By reason of the above the claim for constructive unfair dismissal is well founded and succeeds.

Employment Judge R F Powell

8th February 2022

Sent to the parties on 15 February 2022

For the Tribunal Office Mr N Roche