EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENTS**
MR T JONES	**V**	**LEGAL SUPPORT SOLUTIONS LIMITED (1) ABACUS ACCOUNTING & FINANCIAL SERVICES LIMITED (2)**

HELD REMOTELY ON: 10 – 14 JANUARY 2022

BEFORE: EMPLOYMENT JUDGE S POVEY
MRS M WALTERS
MR P PENDLE

REPRESENTATION:
FOR THE CLAIMANT: IN PERSON
FOR THE RESPONDENTS: MR HOWSON (CONSULTANT)

JUDGMENT & REMEDY

The unanimous judgment of the Tribunal is as follows:

1. The Claimant was employed by the First Respondent, not the Second Respondent.

2. The Claimant made protected disclosures as defined by section 43B of the Employment Rights Act 1996 (‘the ERA 1996’).

3. The Claimant was subjected to detriment by the First Respondent done on the ground that he had made protected disclosures, contrary to section 47B of the ERA 1996.

4. The Claimant was constructively dismissed for the principal reason of making protected disclosures. As such, his dismissal was automatically unfair, as defined by section 103A of the ERA 1996.

5. The Claimant’s claim of unauthorised deductions contrary to section 13 of the ERA 1996 was made out in respect of his entitlement to fuel

expenses. He claim in respect of commission payments was not made out and is dismissed.

6. The First Respondent was in breach of its duty to provide particulars of employment per section 1 of the ERA 1996 (as in force at the relevant time).

7. The First Respondent acted unreasonably in how it conducted these proceedings, such that it is appropriate to make a Preparation Time Order ('PTO') in the Claimant's favour. The number of hours in respect of which the PTO is made is assessed at 20.5, at an hourly rate of £40.

8. All claims against the Second Respondent are not made out and are dismissed.

9. The First Respondent must pay the Claimant the sum of £14,607.00, calculated as follows:

		£
1.1.	Compensatory Award	9977.00
1.2.	Injury to Feelings Award	3000.00
1.3.	Unlawful Deductions	120.00
1.4.	Section 38 ERA 1996 Award	690.00
1.5.	PTO Award	820.00
	Total	14607.00

10. The Tribunal was satisfied that the Employment Protection (Recoupment of Jobseeker's Allowance & Income Support) Regulations 1996 do not apply.

REASONS

Background

1. At the culmination of the hearing of these claims, and following deliberations, the Tribunal provided its judgment and reasons on both liability and remedy orally to the parties on 14 January 2022.

2. On 26 January 2022, the Respondents made a request for a transcript of the Tribunal's reasons. This is that transcript.

Introduction

3. These are claims brought by Tristan Jones (hereafter referred to as 'the Claimant') against Legal Support Solutions Ltd (hereafter referred to as 'the First Respondent') and Abacus Accounting & Financial Services Holdings Ltd (hereafter referred to as 'the Second Respondent'). Which of these Respondents was the Claimant's employer was one of the issues in dispute. It was not in dispute that the Claimant was employed from 17 June 2019 until his resignation, which took effect on 5 July 2019. He brings claims of detriment and dismissal on the grounds of making

protected disclosures, unlawful deduction from wages and breach of his employer's duty to provide him with written particulars of his employment. We were also tasked with determining his claim for a Preparation Time Order ('PTO'), arising from the Case Management Order of Judge Brace made on 8 January 2021.

4. By way of background, the Claimant was employed with what was know as the Street Team, whose role was, broadly, to gather information from tenants of social landlords regarding disrepair in their properties, to assess the cost of any outstanding repair work, to establish whether the disrepair had been brought to the landlord's attention and, if those criteria were met, to arrange for the tenant to sign a Conditional Fee Agreement ('CFA'), before the claims were then forwarded to a panel of solicitors' firms to be progressed.

5. The Claimant alleges that he made protected disclosures regarding the First Respondent's business practices during the course of his employment, albeit that the same only lasted three weeks. He further claimed that on 5 July 2019, during a meeting with managers of the First Respondent, he was subjected to verbal and physical intimidation, subjected to a number of accusations and told that he "had to go" as he was leaving the meeting. The Claimant alleged that this treatment was detrimental and was because he had made protected disclosures. He also alleged that the treatment was a fundamental breach of his contract of employment such that his resignation later the same day constituted constructive dismissal. As the treatment was for the principal reason that he had made protected disclosures, he claimed that his dismissal was automatically unfair.

6. Following a period of ACAS Early Conciliation, the Claimant presented his claims to the Employment Tribunal on 28 October 2019. Both Respondents resist the claims in full.

The Hearing

7. The hearing was conducted remotely via the Tribunal's Cloud Video Platform. Over the course of the hearing, the Tribunal heard oral evidence from the Claimant and for the Respondents, we heard from Emma Cundle, a consultant who provided services for the First Respondent at the time of the Claimant's employment. Each witness provided written statements which they adopted as their evidence in chief.

8. The Tribunal was also provided with a paginated bundle of documents to which we were referred throughout the hearing ('the Bundle'). Finally, we received oral submissions from the Claimant and from Mr Howson for the Respondents.

9. In reaching our decision, the Tribunal had regard to all the evidence we saw and heard, as well as the helpful oral submissions. We do not repeat or set out the applicable law, save as detailed in the course of these reasons. However, we did not understand there to be any significant

dispute as to that statutory provisions and legal tests to be applied in claims of this nature.

10. At the outset, the parties agreed that the issues to determine were as set out by Judge Webb in his order of 17 December 2021 from [388] of the Bundle onwards.

Findings of Fact & Conclusions: Liability

11. We heard from the Claimant and Ms Cundle and make a number of observations as to their credibility and reliability as witnesses and the evidence generally.

12. We found both witnesses to be credible, in that we accepted that they both honestly believed that the evidence which they gave was accurate. However, there were relevant aspects of their testimonies which were in conflict with each other and it was incumbent on the Tribunal to resolve those conflicts. We explain in course of these reasons how and why we resolved them but it is important to note that that does not adversely impact upon the Claimant or Ms Cundle's credibility. Rather, we found one account more reliable than the other, when the evidence as a whole was considered.

13. However, we also record that much of the Claimant's factual account was not challenged, either in cross-examination or by the Respondents adducing any evidence from many of those to whom the Claimant alleged to have made his protected disclosures or any of those who attended what turned out to be a highly relevant meeting with the Claimant on 5 July 2019. Those aspects of his account which were not challenged we have accepted, given our views on the Claimant's overall credibility. There were obvious limitations to the evidence which Ms Cundle could give and, to her credit, we found that she understood and adhered to those limitations.

14. We were also struck, again at a general level, by the lack of documentary evidence adduced by the Respondents in respect of aspects of the claims which, at least on its face, would have been reasonably available to the Respondents if it existed. We are reminded that the issues to be determine have been canvassed and clearly recorded throughout the history of this litigation. The Respondents were fully aware of the claims being pursued against them. They have had the benefit of legal advice and assistance throughout these proceedings.

15. We explore this further where it arises in our determination.

16. We set out our findings and conclusions as follows:

    16.1. Who was Claimant's employer?

    16.2. Did the Claimant make protected disclosures and if so, what were they?

16.3. If the Claimant made protected disclosures, was he subjected to detriment as a result?

16.4. If the Claimant made protected disclosures, was he constructively dismissed as a result?

16.5. Were there any unauthorised deductions from the Claimant's wages?

16.6. Were the Respondents in breach of their duty to provide a written statement of particulars of employment?

16.7. Should a PTO be made and, if so, in what sum?

Who was the Claimant's employer?

17. The Claimant claimed that he was employed by the First Respondent. The Respondents claimed that he was employed by the Second Respondent and placed to work with First Respondent. This was also the opinion of Ms Cundle in her evidence.

18. We preferred the Claimant's claim in this regard, for the following reasons:

18.1. The Claimant's unchallenged evidence of how the job was advertised (in name of the First Respondent), of how he got job (he met with Dale Rhys, who was working for the First Respondent), that he received instructions from predominantly Dale Rhys and Jason Miguel (who also worked for the First Respondent), who initiated the disciplinary process against him (Mr Rhys, Mr Miguel & Denise Raymond-Jones, who in her email correspondence with the Claimant referred to herself as the First Respondent's Head of HR), who queried whether he had resigned (Ms Raymond-Jones) and who paid him on one of the two occasions he was paid (the First Respondent).

18.2. There was no written contract at the time of the Claimant's employment. The Respondents relied on a contract provided after the Claimant left and which was a generic draft. It added little if anything to resolving who the Claimant's employer was.

18.3. The Respondents relied on two payslips in the name of the Second Respondent - one of which pre-dated C's employment, the other which post-dated it and which did not accurately reflect who had paid at least one of the Claimant's two wage payments. We were unable to place little, if any, weight on the wage slips in determining the identity of the Claimant's employer.

19. At its highest, the Second Respondent managed the First Respondent's payroll. If that position was different, we would have expected far greater documentary evidence of the Second Respondent's role as the Claimant's

employer. In reality, that evidence was limited to two payslips and a pro forma employment contract which post-dated the Claimant's employment. The Respondents were on notice that there was a dispute regarding who the Claimant's employer was and we would have expected greater evidence of the Second Respondent's role, the Second Respondent's employment of the Claimant and the Second Respondent's agreement with the First Respondent to supply the Claimant to the First Respondent, if such evidence existed. As we were provided with none, we concluded that it did not exist.

20. For all those reasons, we find that the Claimant was employed by the First Respondent between 17 June 2019 until 5 July 2019. We also find that the Claimant was employed under a contract of employment, albeit a verbal one during the course of his employment. We find this for the avoidance of doubt as we were not addressed on it and it was not in the list of issues. We were told that the Respondents intended to provide the Claimant with written terms and conditions but were in the process of having them drafted and they were not completed until after his employment ended. We return to the employment contract and the written particulars later in these reasons but for now, we simply record that we were satisfied that the Claimant was at all material times an employee of the First Respondent (rather than a worker).

21. We also find for the purposes of assessing the other claims advanced that Dale Rhys, Jason Miguel and Denise Raymond-Jones were at all relevant times acting on behalf and with the full authority of the First Respondent– to be fair, it was never contended otherwise by Mr Howson but we wanted to be clear given that there was some suggestion that Mr Rhys and Mr Miguel may have been self-employed contractors.

Did the Claimant make protected disclosures

22. The Claimant relied upon 24 alleged protected disclosures, which were set out at [120] – [125] of the Bundle along with the Respondents responses to them. We have adopted the numbering from [120] – [125]. The Claimant also asked the Tribunal to consider the alleged protected disclosures in the context of his written and oral evidence. Mindful that the Claimant is acting without legal assistance and that much of his evidence was not disputed, we have where appropriate had regard to the Claimant's evidence to understand the context of some of the disclosures.

23. In his submissions, Mr Howson conceded that Disclosures 6 (*On a number of occasions during the Claimant's employment, the Claimant said to Dale Rhys (Business Partner) - "the tenant has not complained to their tenant before. This cannot be put forward as a claim"*) and 7 (*On a number of occasions during the Claimant's employment, the Claimant said to Emma Cundle (Allied Assist) - "the claim does not reach the quantum of £1,000. It does not fit the criteria."*) met the criteria to be protected, as did the first part of Disclosure 24 (which again related to requiring the Claimant to write up claims where the tenant had not reported the disrepair and was made in the course of the meeting on 5 July 2019).

24. The Respondents' objections to the other protected disclosures were either that they were not disclosures of information because they were questions (Disclosures 1 - 3,8,9) or allegations (Disclosures 4,5,11 – 15, 17 – 21) or they did disclosed information but the Claimant had no reasonable belief that the information either tended to show criminal activity or a breach of legal obligations (Disclosures 10,11, 16, 22 & 23). What Mr Howson did not cross-examine the Claimant on was whether or not he actually said what he claimed to have said. As that aspect of his evidence was unchallenged, and given our observations about the Claimant's overall credibility, we found that the Claimant did say what he claimed in each of the alleged protected disclosures (or words to that effect). What we had to determine was whether they met the criteria for protection.

25. That criteria is found in section 43B of the Employment Rights Act 1996 ('the ERA 1996') and is, so far as relevant, as follows:

    25.1. There must be a disclosure of information.

    25.2. The Claimant must have had a reasonable belief that the disclosure tended to show, in these cases, criminal activity or breach of legal obligation.

    25.3. The Claimant had a reasonable belief that the disclosure was made in the public interest.

    25.4. The disclosure must be made to the Claimant's employer or to the person who the Claimant reasonably believed undertook the conduct complained of.

26. We made the following findings regarding the alleged protected disclosures (utilising again the numbering from [120] – [125] of the Bundle):

    1) *On 18 June 2019, the Claimant said to Paulo (Sales Manager Cardiff), Andrew Alderman, and two other field sales team members - "why do you not follow the guidelines for claims for disrepair."*

    We found that it did not contain information, as it was a question; the Claimant was only on his second day of employment and the disclosure was not expanded upon in his evidence. We found that it was not a disclosure.

    2) *On 19 June 2019, the Claimant said to Andrew Alderman, and two other field sales team members - "why are you approaching members of the public."*

For the same reasons as above, save that this occurred on the Claimant's third day of his employment day and was not expanded upon in his evidence. We found this was not a disclosure.

3) *On 19 June 2019, the Claimant said to Andrew Alderman, and two other field sales team members - "why are some of you following members of the public when it is clear they do not wish to speak with you."*

   As above, this was a question, not a disclosure of information. It was not, therefore, a disclosure.

4) *On 19 June 2019, the Claimant said to Andrew Alderman, and two other field sales team members - "What you are doing is not legal."*

   This was an allegation and did not contain information. It was not a disclosure.

5) *On 19 June 2019, the Claimant said to Dale Rhys (Business Partner) - "the Cardiff team are not doing things right. This needs to be dealt with"*

   This was an allegation and contained insufficient detail or information to be a disclosure.

6) *On a number of occasions during the Claimant's employment, the Claimant said to Dale Rhys (Business Partner) - "the tenant has not complained to their tenant before. This cannot be put forward as a claim"*

   The Respondents accepted that this was a protected disclosure.

7) *On a number of occasions during the Claimant's employment, the Claimant said to Emma Cundle (Allied Assist) - "the claim does not reach the quantum of £1,000. It does not fit the criteria."*

   The Respondents accepted that this was a protected disclosure.

8) *On the week commencing 24 June 2019, the Claimant said to Dale Rhys (Business Partner) - "the team knows that they are not to leaflet drop at people's houses. Why is it that you are instructing them to do so?"*

   Whilst this contained a question, it was preceded by a statement of information and can be reasonably read as "the team knows not to leaflet drop, you are instructing them to do so and why are you doing that?" We found that it was a protected disclosure as it contained information and it was not suggested the Claimant did not have the requisite reasonable belief.

9) *On 21 June 2019, the Claimant said to Dale Rhys (Business Partner) - "the client does not have an email address. Are you saying I can provide mine to them to move the claim forward? This is not right?"*

It was partly a question but also we find that the Claimant could not objectively have concluded that this showed a breach of any legal obligation. We were provided with no details of what legal obligation was being breached or more importantly what legal obligation the Claimant reasonably believed at the time was being breached. As such, this was not a protected disclosure.

10) *On 24 June 2019, the Claimant said to Emily Graham - "Why are you using a different name when doing CFA calls? That can't happen?"*

The Claimant has not provided evidence of what at the time he believed was the legal obligation being breached. As such, we were unable to find that he held the requisite reasonably held belief and the same was not a protected disclosure.

11) *On 1 July 2019, the Claimant said to Jason Miguel (Business Partner) - "It is not appropriate to simply put money direct into my account Jason. There is a process to follow with receipts for fuel. You have them, I want this done properly please"*

For similar reasons, we had no evidence of what the Claimant believed was the legal obligation being breached in respect of how the Respondents' proposed to pay the Claimant's expenses. This was not, therefore, a protected disclosure.

12) *On a number of times during the Claimant's employment, the Claimant said to Jason Miguel (Business Partner) - "I am not prepared to prompt potential clients of claims to say that they approached one of the sales teams. I am not getting involved in this as it would be lying and illegal."*

When read in context of paragraph 19 of the Claimant's witness statement, namely that that the Claimant claimed that he saw members of the sales team approach clients directly, rather than the other way round, we found that the disclosure was more than an allegation and contained information. We therefore found that it was protected disclosure.

13) *On 4 July 2019, the Claimant said to Josh (Media Sales Manager) (Business Partner) - "Jason is aware and happy that you do drugs at work? And your now driving. That's both you and Dales openly admitting that you take drugs at work"*

This was an allegation and a question. It did not contain information and was not a disclosure.

14) *On 4 July 2019, the Claimant said to Jason Miguel (Business Partner) - "so that is why Dale has not been in work recently. You are being investigated by Cardiff Council. And now you are forwarding the guidance on generating claims. I have told you before the way you are running this company is fraudulent and illegal"*

    The first and second sentences are allegations and/or questions. The third was information but that alone could not have reasonably led the Claimant to conclude that the Respondents were breaching a legal obligation and therefore it fails as a protected disclosure for a lack of reasonable belief.

15) *On 4 July 2019, the Claimant said to Jason Miguel (Business Partner) "I am aware Jason that you are inflating claims at the office so that you can pass them on to your solicitors. It is common knowledge. You have done the same when I have called you."*

    The Tribunal was unable to see how this disclosure differed from Disclosure 7 (above), in that it related to exaggerating the value of claims, which the Respondents accepted was a protected disclosure. As such, we found that this disclosure was in a similar vein and was, similarly, protected.

16) *On 4 July 2019, the Claimant said to Jason Miguel (Business Partner) "So Harry Griffiths is the son of Louise Griffiths. Is she not listed as the Director because she has been blacklisted and should not be running a company?"*

    The Tribunal agreed with Mr Howson's submission that the Claimant could not make out the reasonable belief that Ms Griffiths was listed as a director. A cursory check of Companies House would have revealed she was not a director and as such this was not a protected disclosure.

17) *On 5 July 2019, the Claimant said to Alexandra Edwards (Field Sales Manager) "Alex. Things will go pear-shaped. The company is being run in a fraudulent and illegal way. The bosses know this.'*

    This was an allegation and contained no information. It was not therefore a disclosure.

18) *On 5 July 2019, the Claimant said to Dale Rhys, Jason Miguel, Denise Raymond-Jones "you are actively committing fraud. You are defrauding councils and housing associations. I have evidenced this to you before but you have done nothing about it and just continued in the same vain.*

    This was, in our judgment, an allegation only and did not contain any information. It was not a disclosure.

19) *On 5 July 2019, the Claimant said to Dale Rhys, Jason Miguel, Denise Raymond-Jones "You are over inflating claims."*

The Tribunal found that this was a protected disclosure in the same vein as Disclosures 7 and 15, namely it related to exaggerating and inflating the value of claims.

20) *On 5 July 2019, the Claimant said to Dale Rhys, Jason Miguel, Denise Raymond-Jones "At every opportunity you look to misrepresent the claims of people that are vulnerable and trust you."*

We found that as this specifically referred to breaching the trust of vulnerable clients, it needed to contain more information to move it it away from being an allegation. In the absence of that further information, it was not a disclosure.

21) *On 5 July 2019, the Claimant said to Dale Rhys, Jason Miguel, Denise Raymond-Jones "Look Jason. I know you are over inflating claims and adjusting costs at your end. Did you think that this was never going to be recognised and dealt with.'*

The Tribunal found that this was a protected disclosure in the same vein as Disclosures 7, 15 & 19, namely it related to exaggerating and inflating the value of claims.

22) *On 5 July 2019, the Claimant said to Dale Rhys, Jason Miguel, Denise Raymond-Jones "We all know you are aware that Emily uses a different name when making CFA calls. Emily doesn't want to be a part of this. Illegal again.'*

There was insufficient evidence from the Claimant as to why it was reasonable for him to hold the belief that not using your name when making CFA calls was illegal. Whilst it was a disclosure of information, it was not protected due to the absence of reasonable belief.

23) *On 5 July 2019, the Claimant said to Dale Rhys, Jason Miguel, Denise Raymond-Jones "Even the Solicitors you use aren't regulated. You have a total disrespect for anything legal."*

On basis of what the Claimant was told by Dale Rhys per his witness statement at paragraph 20, namely that the solicitors used were regulated by the Financial Conduct Authority ('FCA'), the Claimant was entitled to hold the reasonable belief that those solicitors were not regulated by FCA because, as a fact, they weren't. We did not read that disclosure as being that the solicitors were not regulated per se, rather when read in the context of what the Claimant had been told by Mr, Rhys, namely, that the solicitors were regulated by FCA. The Respondents accepted that this was a

disclosure of information and we found that the Claimant's belief was reasonably held. It follows that this was a protected disclosure.

24) *On 5 July 2019, the Claimant said to Dale Rhys, Jason Miguel, Denise Raymond-Jones "Dale. You have told me to write up claims knowing full well they hadn't made any previous complaints. You just adjust everything at the office and send it off to your solicitors."*

The Respondents accepted that *"[Y]ou have told me to write up claims knowing full well they hadn't made any previous complaints*" was a protected disclosure. We agreed with the Respondents that the second half of the alleged disclosure was an allegation which was too broad and unspecific to be a disclosure of information (especially the reference to adjusting "*everything"*).

27. We therefore found that, in addition to Disclosures 6, 7 and the first half of 24, Disclosures 8, 12, 15, 19, 21 & 23 were also protected disclosures for the purposes of the ERA 1996.

Was the Claimant subjected to detriment as a result of making protected disclosures?

28. We began by making findings regarding the events of 5 July 2019:

28.1. There was meeting in the morning which the Claimant attended where the First Respondent informed staff that they were disbanding the Street Team, of which the Claimant was part.

28.2. The Claimant was offered redeployment from field to office sales. The Tribunal preferred Ms Cundle's recollection that the Claimant was offered a job in the section she managed and that in or around the morning of 5 July 2019, after the first meeting, he spent a couple of hours with her, learning about his new role. This was also, in part, consistent with the Claimant's own evidence that after the meeting, he spent time with Ms Cundle (at paragraph 44 of his witness statement)

28.3. During lunch on 5 July 2019, the Claimant made a number of remarks to colleagues that were critical of the First Respondent. The Claimant himself admits saying to one colleague that things were going pear shaped. Both that conversation and other allegations of what the Claimant had said (including that he allegedly called the First Respondent a "Mickey Mouse operation" and a "bunch of shysters") were reported by staff to the First Respondent's managers.

28.4. The Claimant was invited to a second meeting with Mr Rhys, Mr Miguel and Ms Raymond-Jones. He was asked about the comments he was alleged to have made to colleagues. Specifically, the Claimant recalled in his witness statement at paragraph 47 that Mr Rhys asked him "*so what do you mean by*

things going pear-shaped", consistent with what the Claimant had said to one colleague. In addition, Ms Cundle's evidence was that she had been told that a number of people had reported the Claimant making derogatory comments, which was confirmed to her by, amongst others, Ms Raymond-Jones.

28.5. We found that Ms Cundle's recollection of what she was told was consistent with aspects of the Claimant's own recollection as well as a subsequent email from Ms Raymond-Jones to the Claimant on 27 August 2019 (at [186] of the Bundle). We found, on balance, that those allegations were raised and put to the Claimant in that second meeting.

28.6. The Claimant re-stated a number of his protected disclosures in the course of the same meeting and in response to the allegations made against him.

28.7. The Claimant's description of what he claimed was detrimental treatment was in the list of issues at [392] of the Bundle and relates to what was said in the meeting which took place on 5 July 2019 between the Claimant, Mr Rhys, Mr Miguel and Ms Raymond-Jones, namely to threaten and intimidate him, accuse him of libel, slander, bringing the First Respondent into disrepute and defamation and say that the Claimant "has to go" when he left the meeting.

28.8. The Claimant's evidence in this regard was not challenged in cross-examination nor were any other attendees from the meeting called to give evidence. Ms Cundle was not in the meeting and did not suggest that what the Claimant claims was said to him in the meeting and relied upon as detriment was disputed by anyone she spoke to after the meeting (whether Mr Rhys, Mr Miguel or Ms Raymond-Jones). We had no basis not to accept the Claimant's account, given we had found him overall to be a credible witness.

28.9. In addition, we found that the Claimant was told as he left the meeting that he would be subjected to the disciplinary procedure. This was also confirmed in the emails of 27 August and 9 September 2019 (at [186] & [189] of the Bundle respectively).

28.10. The Claimant subsequently left the First Respondent's offices and never returned. The parties agreed that he effectively resigned with immediate effect.

29. As set out in list of issues, we therefore found the alleged treatment made out as claimed. The First Respondent, through Mr Rhys, Mr Miguel and Ms Raymond-Jones, whether individually or collectively, at the meeting on 5 July 2018 threatened and intimidated the Claimant, accused him of libel, slander, bringing the First Respondent into disrepute and defamation and said that the Claimant "has to go" when he left the meeting.

Was it detrimental treatment?

30. What matters is that, compared with other workers (hypothetical or real), the Claimant is shown to have suffered a disadvantage of some kind. Detriment should be assessed from the viewpoint of the employee or worker. A threat by an employer (or its worker or agent) to take action which would constitute a 'detriment' is itself a detriment for the purposes of section 47B of the ERA 1996, provided that the threatened worker was reasonable in regarding it as being to his disadvantage (per Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).

31. It must be a detriment to which the employee or worker has been subjected in the 'employment field' (Tiplady v City of Bradford Metropolitan District Council [2019] EWCA Civ 2180).

32. Applying those tests to our findings of what was said to have happened in the meeting on 5 July 2019, we had no hesitation in finding that the things complained of did subject the Claimant to detriment.

Was the detriment because of the protected disclosures?

33. As found, in course of the meeting on 5 July 2019, the Claimant made Disclosures 18 – 24 (at [123] – [125] of the Bundle and per paragraph 48 of his witness statement). Disclosures 19, 21, 23 & 24 (in part) were protected disclosures.

34. The test of causation is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistle-blower (per Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2011] EWCA Civ 1190).

35. The burden of proof in this regard is on the First Respondent. Section 48(2) of the ERA 1996 means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the Claimant — i.e. that there was a protected disclosure, that there was a detriment and the First Respondent subjected the Claimant to that detriment — the burden shifts to the First Respondent to prove that the Claimant was not subjected to the detriment on the ground or grounds that he had made the protected disclosures.

36. The First Respondent's only direct evidence of what occurred at the meeting on 5 July 2019 were the emails from Ms Raymond-Jones at [186] & [189] of the Bundle:

    36.1. The email of 27 August 2019 referred to the Claimant "*making derogatory and disparaging comments regarding other members of the management team*". It was reasonable to infer that these could encompass the protected disclosures made in the course of the meeting.

36.2. Both the emails of 27 August and 9 September 2019 confirmed that the First Respondent had decided during or at the end of that meeting to start the disciplinary process against the Claimant . That was consistent with the Claimant’s evidence that Mr Miguel had told him that he was being disciplined (at paragraph 50 of the Claimant’s witness statement).

36.3. The emails make no other reference to what was said nor provide any other detail. There was no other relevant evidence from Ms Raymond-Jones nor was she called by the Respondents to give evidence.

37. In the circumstances, we have the position where, in the course of a meeting in which the Claimant makes protected disclosures, he was subjected to detriment and told that disciplinary proceedings would be taken against him. Given the Claimant’s evidence, the absence of any detailed response from the First Respondent as to the events in the meeting and applying the test of causation, the Tribunal found on balance that the protected disclosures made by the Claimant in the course of the meeting materially influenced the detrimental treatment which took place during that meeting.

38. For those reasons, we found that the Claimant was subjected to detriment as a result of making protected disclosures.

Was the Claimant subjected to constructively dismissed as a result of making protected disclosures?

39. For this claim, the Claimant had to show that there was a fundamental breach of his contract of employment and that the reason or, if more than one, the principal reason for that fundamental breach was the making protected disclosures. In other words, was there a fundamental breach of contract and was it because of the protected disclosures?

40. There was a contract of employment between the First Respondent and the Claimant. Although the identity of the Claimant’s employer was in dispute, it was not suggested by the Respondents that the Claimant was not an employee working under a contract, albeit one that was verbal rather than written. There was evidence of mutuality of obligations between the Claimant and the First Respondent (the First Respondent provided work and the Claimant was obliged to undertake it). There was an intention to create legal relations, evidence of remuneration for the work undertaken and a degree of control over the Claimant by the First Respondent.

41. Implied into every contract of employment, whether that contract is verbal or written, is a term of mutual trust and confidence between employer and employee. That is because the relationship of employer and employee is regarded as one based on a mutual trust and confidence between the parties.

42. It is a fundamental breach of contract for an employer, without reasonable and proper cause, to conduct itself in a manner '*calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties*" (Courtaulds Northern Textiles Ltd v Andrew 1979 IRLR 84, EAT). It is not necessary to show that the employer intended any repudiation of the contract. The Tribunal must "*look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*" (Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT).

43. The alleged breaches of contract relied upon are the same conduct in the meeting of 5 July 2019 that founded the claims of detriment, namely the treatment of the Claimant in that meeting (at [388] – [389] of the Bundle). As detailed earlier, we have found those things to have occurred and to have been materially caused by the Claimant's protected disclosures. We similarly found, applying the above tests, that the First Respondent's conduct, when judged objectively, was likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the First Respondent. In addition, the First Respondent had no proper cause for acting in that way, in so far as it related to the making of protected disclosures by the Claimant.

44. It follows that during the course of the meeting on 5 July 2019, the First Respondent fundamentally breached its employment contract with the Claimant, such that the Claimant was entitled to treat the contract as repudiated, that is, at an end. It was agreed between the parties that the Claimant's resignation took effect on the same day. Given the proximity in time and the Claimant's oral evidence that as a result of what had gone on, he had no alternative but to resign with immediate effect on 5 July 2019, we found that the Claimant resigned in response to the fundamental breach and in no way could be considered to have affirmed or waived any breach.

45. It follows that the Claimant's resignation constituted a constructive dismissal.

46. Was the principal reason for the First Respondent's conduct during the course of the meeting on 5 July 2019 because the Claimant had made protected disclosures? We were mindful that we have found that the First Respondent was also investigating comments made by the Claimant to other members of staff and we considered whether the conduct complained of was motivated by that, rather than the Claimant's protected disclosures. However, the Claimant's account of what he says happened during the meeting was largely unchallenged and there was a lack of first-hand rebuttal evidence from the Respondents. We accept that after being asked about the comments he had made to other staff members, the Claimant presented Mr Rhys and Mr Miguel with a number of disclosures, some of which were protected and all of which were highly critical of the First Respondent's business practices. The Claimant's written evidence

was that it was these disclosures which prompted the response from Mr Rhys and Mr Miguel.

47. For those reasons, we found that the conduct of Mr Rhys and Mr Miguel which constituted a fundamental breach of contract was for the principal reason that the Claimant had made protected disclosures.

48. It follows that the Claimant's constructive dismissal was, by reason of section 103A of the ERA 1996, automatically unfair.

49. For the sake of completeness, the Tribunal did consider the Claimant's written evidence where he referred to believing, prior to the meeting, that his position was untenable. In addition, he claimed to have lost all trust in the First Respondent after sitting with Ms Cundle in the morning of 5 July 2019 but before final meeting with the First Respondent.

50. The Claimant had been offered redeployment and his actions in spending time with Ms Cundle suggested that if he believed there was a repudiatory breach of contract prior to second meeting on 5 July 2019, he didn't act on it. Rather he acted in the opposite way, sitting with Ms Cundle to discuss his new role. If, thereafter, trust already been lost prior to that meeting, was the Claimant's contract of employment repudiated? We have to accept that the Claimant was probably using such phrases in layman's terms, using "loss of trust" in ordinary rather than legal sense; expressing that he was fed up with the First Respondent. We also note that the Claimant attended the second meeting on 5 July 2019 upon the request of the First Respondent.

51. To be fair, it was never suggested by the Respondents that the contract of employment had ended prior to the pivotal meting on 5 July 2019. Given the Claimant's actions in and up to the conclusion of that meeting, we found that the contract remained in force and he entered that second meting as an employee of the First Respondent. The contract continued until the repudiatory breach by the First Respondent, upon which the Claimant acted by resigning.

Were there any unauthorised deductions from the Claimant's wages?

52. The Claimant claims that he is owed commission on 17 sales he made. The Respondents deny he is owed any commission on the basis that he never accrued any entitlement to commission.

53. The commission structure operated by the First Respondent was detailed in a text message exchange between the Claimant and Mr Rhys (at [220] of the Bundle):

> [The Claimant]: Agents get paid the following. £10 for every converted sale over 21. £20 for over 31. £30 for over 1. As a manager I am rewarded for every Audit and CFA that gets accepted on the same pay scale.
>
> [Mr Rhys]: Correct

54. The Claimant did not suggest that his 17 sales were over and above the threshold for receiving commission on every sale achieved over 21. At its highest, it appeared the Claimant was relying on fact that as a manager, he got commission on every audit and CFA accepted by his team.

55. Ms Cundle's evidence was that the Claimant did not have a team working for him at the time of his employment and did not convert more than 21 sales himself. As set out above, the Claimant's claim is limited to 17 sales, with no evidence that this was over and above the threshold of 21.

56. We preferred Ms Cundle's evidence that as the Claimant did not have a team and was, in effect, learning the ropes, he was not entitled to any commission. There was no real challenge to Ms Cundle's evidence that the Claimant did not have a team during the course of his employment.

57. For those reasons, the Tribunal found on balance that the commission claim was not made out.

58. In addition, the Claimant said he was owed three outstanding expenses claims for fuel which totalled £120 (at paragraph 32 of his witness statement). This was not challenged in cross-examination. As we found the Claimant to be credible and as this aspect of his evidence was unchallenged, we found this claim made out. He is owed £120 for fuel expenses and those sums have not been paid. They therefore constitute unlawful deductions from his wages per section 13 of the ERA 1996.

Were the Respondents in breach of their duty to provide a written statement of particulars of employment?

59. There is a duty on an employer to provide written statement of particulars of employment per section 1 of the ERA 1996. The provisions in force at the time required that statement to be provided not later than two months from the beginning of the employment. It was not in dispute that the Claimant was never provided with a written statement of his particulars of employment during his employment or since.

60. Mr Howson submitted that the First Respondent was not in breach of that duty because the Claimant's employment had not lasted two months.

61. However, in our judgment, the duty is not dependent upon an employee remaining in employment for a minimum of two months. That was clear from the provisions of sections 1(2) & 2(6) of the ERA Act 1996 (as in force prior to amendments which took effect in April 2020), which, in summary, required that the written statement of particulars must be given within two months of start of employment and must be provided even if the employment ends before end of that two-month period (being the explicit effect of section 2(6) of the ERA 1996, as was).

62. It follows that the duty was engaged and it was not complied with. As the Claimant has succeeded in his other claims, by virtue of section 38 of the

Employment Act 2002, the First Respondent failed in its duty to provide written particulars of employment. The Claimant is entitled to an award equivalent to two or, if just and equitable in all the circumstances, four weeks' wages.

Preparation Time Order

63. On 8 January 2021, Judge Brace conducted a preliminary hearing to determine an application by the First Respondent to set aside a default judgment entered against it for failing to respond to the Claimant's claim in time. The First Respondent's application was ultimately successful, the default judgment was set aside, the First Respondent was given permission to defend the claims and the Second Respondent was joined to the proceedings (at [47] of the Bundle).

64. Judge Brace also indicated that the Tribunal was minded to make a PTO in the Claimant's favour. We found, after hearing from the parties, that the scope of any PTO was limited to the preparation time that had arisen as a result of the First Respondent's application to set aside the default judgment. That not only reflected the clear intent within Judge Brace's order but it was also consistent with the fact that the only plausibly unreasonable action on the part of the First Respondent in the conduct of the proceedings up to that point had been its failure to file a defence in time and its need to apply to set aside the default judgment.

65. After taking instructions, Mr Howson confirmed that the making of a PTO in those terms was not resisted by the First Respondent. However, the amounts claimed was.

66. The First Respondent was prepared to concede to 16 hours of preparation time. The Claimant revised his claim, in light of our determination of the scope of the PTO, to 34.5 hours, as follows (and utilising his numbering from the original PTO claim):

> 13. Preparation Time in response to respondent Application to set aside Judgement - 30th September 2020 - total hours 3
>
> 14. Claimant Correspondence Dated 13th October 2020 - Preparation time - Claimant Opposition to Set Aside Default Judgement - total hours 9
>
> 15. Preparation Time - Review/ Research Respondent Bundle of Documents sent 26th November 2020 - total hours 9
>
> 16. Preparation time - Review / Research of Respondent Statement of Evidence Emma Cundle - 7th January 2020 - total hours 7
>
> 17. Attendance at Preliminary Hearing 8th January 2021 - from 10:00hrs until 16:30 hrs - total hours 6.5

67. The assessment of the number of hours for the purposes of an order must be based upon:

67.1. Information provided by the receiving party in respect of his or her preparation time (Rule 79(1)(a) of the ET's Rules of Procedure), and

67.2. The Tribunal's own assessment of what is a reasonable and proportionate amount of time for the party to have spent on preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required (Rule 79(1)(b) of the ET's Rules of Procedure).

68. As can be seen, the assessment is not simply based upon actual time spent, although this is one of the criteria, but also upon the Tribunal's own assessment of what is proportionate and reasonable.

69. The Tribunal accepted that the Claimant spent the time he claimed but the test is what we think is reasonable. On that basis, we determined that the following time was reasonable and proportionate (again utilising the Claimant's numbering):

13. Three hours, as claimed
14. Five hours
15. Five hours
16. Three and half hours
17. Four hours, (as there would have been break during lunch and some of hearing as not related to the application to set aside judgment)

70. That gave a total of 20.5 hours at an agreed and prescribed hourly rate of £40, which equates to £820.

Findings of Fact & Conclusions: Remedy

71. The Claimant provided a Schedule of Loss dated 31 August 2021 (at [315] of the Bundle) and confirmed that the figures claimed were what he relied upon now.

72. After taking instructions, Mr Howson confirmed that the following amounts were not disputed by the Respondents:

72.1. The unfair dismissal compensatory award of £9,977
72.2. The fuel expenses claim of £120
72.3. The PTO award of £820.

73. Thereafter, the Tribunal heard oral submissions from the Claimant and Mr Howson on the following agreed outstanding matters:

73.1. Whether an award should be made for injury to feelings and, if so, how much.

73.2. Whether the award under section 38 of the Employment Act 2002 should be equivalent to two or four weeks wages.

73.3. Whether an uplift can be applied and if it can, whether it should and to what extent (per the ACAS Code of Guidance).

Injury to feelings award

74. This remedy claim arises from the finding of unlawful detriment by reason of making protected disclosures. By reason of section 49(1) of the ERA 1996, the Tribunal must make a declaration to that effect. In addition, the Tribunal may award compensation for injury to feelings.

75. The amount of any award is what the Tribunal feels is just and equitable in all the circumstances having regard to the infringement to which the complaint relates and to any loss attributable to the acts which infringed the Claimant's right not to be subjected to detriment. The general guidelines that apply to were set out by the Court of Appeal in Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871. These guidelines provide for three broad bands: a top band applicable to the most serious cases, such as where there has been a lengthy campaign of detriment; a middle band applicable to serious cases that do not merit an award in the higher band; and a lower band applicable to less serious cases, such as where the detriment is an isolated or one-off occurrence.

76. The ACAS Code applies to detriment claims under section 47B of the ERA 1996 but only if the Claimant is an employee (per section 207A(1) of the Trade Union & Labour Relations (Consolidation) Act 1992). The most likely scenario for an adjustment under s.207A is where the employer has unreasonably failed to follow the ACAS Code when subjecting the employee to disciplinary action.

77. Mr Howson submitted that there can be no award for injury to feelings where reliance is placed on the same detriment relied upon for the unfair dismissal claim (as was the case here).

78. The Tribunal considered that submission to be wrong in law. Where, as here, an employee has been dismissed (including constructively) because of a protected disclosure, there can be no award for injury to feelings, since compensation for unfair dismissal is only recoverable in respect of identifiable financial loss and injury to feelings in a form of non-economic loss (per Dunnachie v Kingston upon Hull City Council [2004] UKHL 36).

79. However, the Claimant is not precluded from also bringing a claim under section 47B of the ERA 1996 in respect of any detriments he was subjected to before and up to the dismissal. If the detriment cannot be compensated under the unfair dismissal provisions -- for the reason that it is not a loss sustained in consequence of the dismissal -- then there is nothing to take it out of section 47(B) of the ERA 1996 and the provisions in section 49 of the ERA 1996, which require compensation for that detriment, should apply (per Melia v Magna Kansei Ltd [2005] EWCA Civ 1547).

80. In our view, it was just and equitable to make an award, as it would be unjust to prevent the Claimant recovering compensation for injury to feelings simply because he had pursued a claim for unfair dismissal claim.

81. However, we agreed with the Respondents that the detriment we have found was properly characterised as a one-off act and should be considered in the lower 'Vento' band. Having regard to the length of the Claimant's employment, the history of that employment and our findings as to what constituted detriment (upon which any award must be based), we agreed with Mr Howson that an award of £3000 is just & equitable in the circumstances.

Award pursuant to Section 38 of the Employment Act 2002

82. The Tribunal had regard to the following relevant factors:

    82.1. The First Respondent's explanation for why written particulars of employment were not provided to the Claimant was not disputed, namely that they were in the process of being drafted by an outsourced HR provider.

    82.2. The Claimant's employment only lasted three weeks.

83. Given those circumstances, the Tribunal did not find that this was a case where it as just and equitable to depart from the lower award of award of a sum equivalent to two weeks wages.

84. The parties agreed that the Claimant's weekly wage as £345. We therefore made an award under section 38 of the Employment Act 2002 of £690.

The ACAS Code of Guidance

85. Given our findings regarding the emails from Ms Raymond-Jones, the First Respondent appeared to believe that disciplinary proceedings had begun, certainly by the end of the meeting on 5 July 2019. It follows that the ACAS Code was engaged but there was nothing to suggest that, in so far as it undertook an informal investigation meeting with a view to progressing any disciplinary proceedings, that the First Respondent failed to comply unreasonably with the provisions of the Code. In reality, the process never really got started because the Claimant resigned. The Code focusses on process and procedure, not the motivation for instigating disciplinary proceedings.

86. For those reasons, we were unable to conclude that it was appropriate to exercise our discretion and apply an uplift in this case.

<u>Postscript: The Second Respondent</u>

87. As detailed above, the Tribunal found that the Claimant was employed by the First Respondent and that the First Respondent subjected him to

detriment by reason of making protected disclosures. The First Respondent was also liable to the Claimant for automatic constructive unfair dismissal. It followed that we found no liability on the part of the Second Respondent for the claims pursued.

88. It also followed that the First Respondent is responsible for meeting all the financial sums awarded to the Claimant.

EMPLOYMENT JUDGE S POVEY

Dated: 21 February 2022

Order posted to the parties on
22 February 2022

For Secretary of the Tribunals
Mr N Roche