EMPLOYMENT TRIBUNALS

Claimant: **Mr T Skillen**

Respondent: **Cranswick Convenience Foods Ltd**

HELD at Leeds **ON: 1, 2, 3, 4, 5 and 8 November 2021**

BEFORE: **Employment Judge Rogerson**
Mr R Webb
Mr J Howarth

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr Gareth Graham of Counsel**

JUDGMENT having been sent to the parties on 22 November 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

List of issues and background

1. By a claim form presented on 7 April 2020 the claimant brought complaints of automatically unfair constructive dismissal and unlawful detriment for making a protected disclosure. Unusually there were four preliminary hearings before the final hearing to deal with preliminary issues and case management. It is not necessary in these reasons to going through the history in any detail save to say that the claimant has had the opportunities to clarify his complaint, to provide further information and to prepare for the final hearing.
2. It must also be noted that this is not the first whistleblowing complaint the claimant has brought in an Employment Tribunal. In 2019 he brought a similar complaint which failed following a final hearing in June 2019 (see page 52). At this hearing

the claimant professed knowledge in this area of law and familiarity with the Tribunal process. The claimant understood evidence would be given by way of witness statements and documents and that evidence would be tested in cross examination and was expected to be truthful.

3. At the final preliminary hearing on 15 February 2021, Employment Judge Parkin had helpfully and clearly identified each of the 3 sequential steps the claimant needed to prove for his remaining complaint of automatically unfair dismissal to succeed.

> *"First, can he prove that the written grievance letter sent by email of 10 November 2019 was a qualifying disclosure meeting the requirements of section 43B Employment Rights Act 1996 in that the he reasonably believed the information disclosed was made in the public interest and tends to show one or more of the relevant failings identified in subsection 43B (a)-(f) and qualifying as being made to his employer under 43G. The determination of the issue whether he made any such protected disclosure in good faith was relevant to remedy only i.e. compensation for unfair dismissal. Second can he prove a constructive dismissal by the respondent namely a repudiatory breach of contract by the respondent, in particular a breach of the implied term of trust and confidence which he resigned in response to on 8 January 2020 without affirming the contract and waiving the breach. And finally, third can he prove that the reason or principle reason for the constructive dismissal was that he had made a protected disclosure on 10 November 2019".*

4. For the constructive dismissal the claimant identified 5 acts of the respondent he relies upon as breaches of the implied term of trust and confidence. These were:

   4.1 The failure by Hazel Pearce and Peter Colvin to deal properly with the Claimant's grievance, including failing to provide a written outcome.

   4.2 Being held accountable by Tony Stead for how other employees on the claimant's line dressed in PPE.

   4.3 Being threatened with dismissal by Tony Stead on 22 December 2019.

   4.4 Being blocked from appointments by Nick Golding.

   4.5 Being ignored and cold shouldered by Nick Golding.

5. The implied term of mutual trust and confidence requires that the employer does not without reasonable and proper cause act in a manner calculated or likely to destroy or seriously damage trust and confidence (Malik-v-Bank of Credit and Commerce 1997 ICR HL). For each alleged act the Tribunal needed to decide whether the alleged act had occurred, whether the alleged perpetrator had reasonable and proper cause for that act, and if not, whether objectively viewed(i.e. from the perspective of a reasonable person in the claimant's(or respondent's position)) that conduct was calculated or likely to destroy or seriously damage trust and confidence. If the respondent had committed any repudiatory breaches of contract, did the claimant resign in response to the breach or did he delay and affirm the breach? The claimant was only employed for 5 months and has insufficient service to complain of ordinary unfair dismissal. To be entitled to treat himself as constructively dismissed, he must prove that the reason or the

principle reason for that dismissal was the automatically unfair reason of making a protected disclosure.

6. In these reasons we will deal firstly with the alleged protected disclosure then the alleged breaches of the implied term and then finally the reason for the dismissal.

Applicable law

7. Section 43A provides that a protected disclosure means a 'qualifying disclosure' as is defined by section 43B which is made by a worker in accordance with sections 43C to 43H Employment Rights Act 1996. It is not in dispute that the written grievance of 10 November 2019 which was sent to the employer falls within section 43C and was a disclosure made to his employer. It is disputed that the email was a qualifying disclosure as defined by section 43B.

8. Section 43B (1) provides that "a "qualifying disclosure" means any disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

   (a) that a criminal offence has been committed, is being committed or is likely to be committed.

   (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

   (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

   (d) that the health or safety of any individual has been, is being or is likely to be endangered,

   (e) that the environment has been, is being or is likely to be damaged, or

   (f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

9. The definition of a qualifying disclosure has both a subjective and objective element. The subjective element is that the worker must believe that the information disclosed tends to show one or more of the 6 relevant failures. The objective element is that the belief must be reasonable. The worker must also have a (subjective) belief that the disclosure is in the public interest which must (objectively) be reasonable. This requires the tribunal to gauge what the worker considered to be in the public interest, whether the worker believed that the disclosure served that interest and whether the belief was reasonably held.

10. In **Chesterton Global Ltd-v- Nurmohamed 2018 ICR 731 CA** the Court of Appeal confirmed that the public interest as well as the personal interest of the worker requirement, can be satisfied where the basis of the belief is wrong and/or there is no public interest in the disclosure being made, provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable. The Court identified some of factors the Tribunal could consider in deciding whether it might be reasonable to regard the disclosure as being in the public as well as in the private interest of the worker:

    (1) The numbers in the group whose interests the disclosure served.

    (2) The nature to which they are affected and the extent to which they are affected by the wrongdoing disclosed.

    (3) The nature of the wrongdoing concerned and,

(4) The Identity of the alleged wrongdoer.

11. The claimant contended that his written grievance of 10 November 2019, in and of itself provided sufficiently detailed content and specificity for it to be a qualifying disclosure as defined by section 43B. It disclosed information by conveying the facts the claimant reasonably believed had occurred of deliberate wrongdoing that workers were putting contaminated food back onto the production which was a food safety concern in the public interest which tended to show two relevant failures. First that a criminal offence had been committed falling within 43B(1)(a) and second, that a person has failed to comply with a legal obligation to which he is subject falling within 43B(1)(b).

12. The respondent defended the claim. In the detailed amended grounds of resistance (page 156 in the bundle) it was disputed that a qualifying disclosure had been made for 5 reasons. Firstly, the grievance did not amount to information tending to show anything but rather was making an allegation or a statement of position. Secondly, whilst the grievance contained references to various pieces of legislation it did not amount to a protected disclosure because those statements were general and devoid of information. Thirdly it was a recall of a conversation that had happened on 8 November 2018 and contained the claimant's version of an altercation between the claimant and the factory manager regarding a broken lock on the production line the claimant worked on. Fourthly the claimant's grievance was not made in the public interest. Fifthly, it did not tend to show any relevant failure under (a) to (f),and as far as remedy was concerned the respondent averred that the disclosure was not made in good faith, it was made due to capability discussions with the claimant, an altercation with the manager and the claimant's gripe about not being promoted.

13. The list of issues, makes it clear that good faith in relation to the disclosure is only relevant to remedy not to liability. The consequences for an employee making a disclosure in bad faith are that rather than losing out on the possibility of claiming automatically unfair dismissal he or she will at worst, lose a quarter of the compensation payable if the claim succeeds, assuming that there is no reduction made on any other ground(section 123 (6A) ERA 1996.

14. There was a clear dispute between the parties as to whether the written grievance of 10 November 2019 was an 'allegation' or 'disclosure of information'. Both parties cited the case of **Kilraine v The London Borough of Wandsworth** [2018] ECWA CIV 1436 in which the Court of Appeal provided the following helpful guidance on this issue:

"*The concept of information as used in section 43B (1) is capable of covering statements which might also be characterised as allegations. Section 43B (1) should not be glossed to introduce a rigid dichotomy between information on the one hand and allegations on the other. In Cavendish Munro the EAT was not seeking to introduce such a rigid dichotomy. All it was seeking to say was that a statement which merely took the form "you are not complying with health and safety requirements" would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure.*

35. The question in each case in relation to section 43B(1) as it stood prior to the amendment in 2013 is whether a particular statement or disclosure is a "disclosure of information which in the reasonable belief of the worker making the disclosure

tends to show one or more [of the matters set out in paragraphs (a)to(f)]" . Grammatically, the word "information" has to be read with the qualifying phrase "which tends to show [etc]".

In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a ***sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)***

36. ***Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case****. It is a question which is likely to be closely aligned with the other requirements set out in section 43B(1) namely that the worker making the disclosure should have a reasonable belief that the information he discloses does tend to show one of the listed matters. As explained in Chesterton Global ltd-v-Nurmohamed this has both a subjective and objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that its capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.*

41.Whether a particular disclosure satisfies the test in section 43B (1) should be assessed in the light of the particular context in which it is made. If to adapt the example given in the Cavendish Munro case the worker brings his manager down to a particular ward in a hospital gestures to sharps left lying around and says "you are not complying with health and safety requirements" the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time it was made. If such a disclosure was to be relied upon for the purpose of a whistleblowing claim the meaning of the statement to be derived from its context ***should be explained in the claim form and in the evidence of the claimant so that it is clear on what basis the worker alleges that he has a claim under that regime****. The employer would then have a fair opportunity to dispute the context relied upon or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner" (highlighted text Tribunal's emphasis)*

15. In these reasons we used that guidance to find the necessary facts to evaluate the evidence to decide whether the written grievance of 10 November 2019 was in and of itself a qualifying disclosure. Was it sufficient in its factual content specificity and context for it to be capable of tending to show a relevant failure under section 43B(1)(a) that a criminal offence has been committed or 43B(1)(b) that a person has failed to comply with a legal obligation, so that it is likely that the claimant's subjective belief was reasonable. Did the claimant subjectively believe it was made in the public interest and was his subjective belief objectively reasonable?

16. The Tribunal noted that the claimant relied upon **Kilraine** on the first day of the hearing to support his case that he had made a protected disclosure. He also alerted the Tribunal to an Employment Appeal Tribunal case of Blackburn-v- Aldi to support his constructive dismissal complaint, which is referred to later in these reasons.

Assessment of Credibility

17. The Tribunal saw and heard over the course of four days from the claimant. The Tribunal also heard evidence for the respondent from (1) Hazel Pearce the HR manager; (2) Peter Colvin the General Manager; (3) Tom Thompson the HSE Manager; (4) Tony Stead the Shift Manager and (5) Carl Mead the Site Director. We also saw documents from an agreed bundle of documents of 727 pages.

18. During the hearing and in closing submissions, Mr Graham made serious allegations about the claimant's credibility and conduct suggesting he was a dishonest witness. He submitted that the claimant had deliberately misconstrued evidence, he had concocted evidence and given evidence fundamentally contradictory to his case. He invited the Tribunal to find the claimant's conduct was not only unreasonable but falls into the more serious category of bringing the Tribunal process into disrepute which is vexatious/scandalous conduct. In making that submission he recognises that some allowance must be made for litigants in person but submits that such are the inherent weaknesses and contradictions in the claimant's case that at every stage there is a dispute of fact the Tribunal is invited to find that the respondent's version is accurate and that the claimant's evidence is not only not credible but is dishonest. This was a serious allegation to make which was quite properly put to the claimant during cross-examination and in closing submissions so that he had the opportunity to answer it. The claimant denies the allegation and resists any finding of dishonesty. He maintains he has been honest throughout and denies he has deliberately misconstrued or concocted evidence. He accepts his recollection of some matters may be 'mistaken' but says the mistakes can be made because recollections of events can fade with the passage of time.

19. Tribunals are familiar with resolving disputes of facts between parties. Witnesses may truthfully recall the same event differently. To resolve those factual disputes assistance can often be found by considering the contemporaneous documentary evidence closer in time to the disputed event. In civil cases including employment disputes the general rule is that a court or tribunal must find that something asserted by a party is a fact, if and only if its truth is shown by evidence to be more probable than not. In this case all the sequential burdens of proof require the claimant to prove the necessary facts for his claim to succeed. There is a significant difference between truthful but mistaken credible evidence and dishonest evidence concocted to mislead. Unfortunately, in this case the Tribunal has reluctantly found that the claimant's evidence falls into the latter category. He was dishonest and has deliberately fabricated evidence to bolster his case and to try to discredit the respondent. In these reasons, the Tribunal will explain how it reached that view. In contrast, the Tribunal found the respondent's witnesses were open and straightforward in the evidence they gave providing truthful and credible evidence which was supported by the contemporaneous documents.

Findings of fact

20. The respondent is a food manufacturer that prepares food products supplied to retailers including major supermarkets for sale to the public. It employs 578 people over three different sites. In July 2019 the claimant had applied for and been interviewed for a more senior role of Production Area Manager at a different site but was unsuccessful. He was employed as a team leader at the site at Sutton Fields from 19 August 2019 until his resignation without notice on 8 January 2020.

21. The claimant was employed on the 'A' shift working on a shift pattern of 4 days on and 4 days off. He was one of two team leaders responsible for managing the line working opposite shifts 'A' and 'B'. Team leaders were responsible for the management of the line during the shift. They were responsible for completing the daily inspections of the line, checking the machinery on the line before the shift, managing the team of operatives, ensuring health and safety and food safety procedures were followed and that the team worked to the standards set by the respondent .

22. The claimant had an extensive induction process before starting the role and was provided with ongoing training during his employment. The claimant's training records (pages 377 to 613) give a flavour of the level of training provided. It was clear the respondent invested time and resource to train managers. As part of the role the claimant was required to report to the Shift Manager, Tony Stead.

23. The job requirement for team leader sets out the responsibilities including "ensuring full compliance with the company policy on health and safety". Page 193 states:

    "*you have a duty of care to fellow colleagues within your area of work in a safe manner and as such your duties may include:*

    - *Safety start up checks on equipment within your area;*
    - *Reporting any damaged or faulty equipment to the management team;*
    - *Reporting any unsafe activities;*
    - *Wearing the correct personal protected equipment and clothing for the work being carried out at all times."*

24. Food safety was also a key responsibility identified in the claimant's job description: *"To understand the importance of ensuring statutory (industry guidelines) legal, food safety and customer requirements are met and* ***ensuring staff under your supervision are aware of the roles, they play their part in meeting these requirements and adhere to established company procedures at all times****."* (highlighted text Tribunal's emphasis)

25. It was clearly important to the respondent that its managers understood their responsibilities for food safety and health and safety procedures for the staff under their supervision and that accountability was expressly included into the manager's job description.

26. Mr Stead's evidence about the claimant's daily responsibilities was unchallenged. General line maintenance was managed by delegating individual responsibility for the line to the team leader. Mr Stead confirmed that the claimant was required to complete a daily safety start up sheet which recorded any mechanical problems on the line. He was required to report any breakages/damage for repair by the maintenance department or product issues for investigation by the quality assurance department. The team leader was responsible for ensuring the staff on each shift complied with the company procedures and that appropriate action was taken during the shift if any issues on the line had occurred.

27. Mr Stead was aware that the claimant struggled with certain aspects of his role and had to organise several re-training sessions for the claimant which took place between 21 October 2019 to 23 December 2019 and 30 and 31 December 2019. On 2 January 2020, the feedback provided by the trainer was that the claimant

showed "*little interest in what was said in all this training"* (see page 264). The trainer confirmed that the claimant had failed a compulsory competency assessment on 2 January 2020 which was the last shift the claimant worked before he resigned (page 378). These capability concerns had been reported to HR and Miss Pearce confirmed further action would have been taken following that feedback and dismissal was possible if the claimant had not resigned.

28. The 'daily safety start up' sheet includes a detailed 'pre-shift health and safety inspection checklist' (see pages 234 to 235). If the team leader reports any failures or damage to any critical equipment on the line, the consequence was that the line could not run until authorisation was obtained by a more senior manager. Those critical safety checks were required before the shift started for the line to operate safely. Any other non-critical issues that were identified during the inspection were also required to be reported on the daily start up report for referral to the engineering department for action. For example, if a lock on the bins under the production line was broken (see page 241).

29. The Tribunal saw pictures of the 2 blue bins located under the production line (pages 337 to 314). If the metal detector/X ray detects a problem with the product it is rejected and falls from the line directly into one of two locked bins. The product may be rejected because of size/weight or because of potential metal contamination which is why there are two separate bins under the line depending on the reason for rejection. Rejected products are examined by the quality assurance department who would investigate the reason for rejection. In the main the reason was quality assurance not because any metal was found in the product. Both blue bins are locked to ensure that rejected products are only removed by the line managers. For that reason, team leaders were given the keys to the locks so that at the end of the shift they could empty the bins and follow the correct procedure for disposal.

30. The primary measure to ensure food safety was that the rejected items would directly fall into the locked bins located on a lower level under the line and separate to the line. The only way the rejected product could have mixed with product on the line was if it was physically lifted out of the bins and put back on the line. The lock on the bin was the secondary measure to prevent rejected batches mixing with product on the line. A broken lock was not part of the critical safety check which would prevent the line from running safely.

31. On Friday 8 November 2019, the Factory Manager, Nick Golding had spotted a broken lock on the bin under the claimant's line and confronted the claimant about it to find out why it had not been fixed. A discussion took place during which the claimant alleges that Mr Golding suggested the claimant had breached health and safety and was going to be disciplined over the matter. The claimant alleges he told Mr Golding that he had already reported the broken lock to his manager. The claimant describes an 'altercation' with Mr Golding. He felt his integrity was being questioned and he was being unfairly blamed and threatened with disciplinary action.

Claimant's written grievance of 10 November 2019 – the purported protected disclosure

32. Two days after that 'altercation' the claimant sent an email to Emma Peach (HR officer) dated 10 November 2019 sent at 17:06. The subject heading of the email is "Grievance/Whistleblowing Policy". The full contents are as follows with the

sections of legislation cut and paste into the email by the claimant (highlighted text for the Tribunal's emphasis):

"Dear Sirs,

I started work at the company as a team leader in high risk and I was full of optimism. However, I now feel my optimism is misplaced.

On or around 8:30am on Friday 8 November the Factory Manager came to line 6 where I was working and made allegations that I had breached Health and Safety law and that I was going to be Disciplined over the matter. **He alleged that the lock on the metal detector was open and it was a non-conformance.**

I explained to him that I had informed my area leader at 5:30am the lock was broken. The factory manager then questioned my integrity and said: "if I ask him will he confirm that". An altercation occurred and I said to him "do you think I'm being dishonest".

On the face of it I have complied with health and safety by informing my area leader and factory manager of the shortcomings on the line. Under section 14 it states:

(2) *every employee shall inform his employer or any other employee of the employer with specific responsibility for the health and safety of his fellow employees-*

(a) of any work situation which a person with the first mentioned employees training and instruction would reasonably consider represented a serious and imminent danger to health and safety and

(b)

of any matter which.

The Factory Manager's action are of a man inciting trouble and not a man who is going to dismiss for instance dismissal as he allowed the line to continue and for me to continue my work. I believe he has failed in his obligation under section 2. *It states*

(2) *without prejudice to the generality of an employer's duty under the preceding subsection the matters to which that duty extends include in particular-*

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable safe and without risks to health:

The factory manager may be in breach of PUWER Regulations 1998 section 5 it states.

Maintenance

(5) – *(1) every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair*

(2) every employee shall ensure that where any machinery has a maintenance log the log is kept up to date.

I spoke to the factory manager again and he totally ignored me. I attempted to speak to him again and he walked past me again without speaking. I refuse to be bullied or harassed at work. Sending employees to Coventry is a form of bullying.

When I left the company at 18:00 hours the mechanism on the lock was still broken and the lock on my tool- box for line 6 was also broken after writing it down on the sheets. I believe the factory manager may be in breach of section 37 Health and Safety of Work Act 1974. In other words, turning a blind eye. It states.

The Health and Safety Executive states:

"if a health and safety offence is committed within the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other similar officer of the organisation, then that person (as well as the organisation) can be prosecuted under section 37 of the Health and Safety at Work Act 1974".

I believe I am protected by section 100 of the employment rights act. It states

"in circumstances of danger which the employee reasonably believed to be serious and imminent he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

In normal circumstances I would expect an investigation see Burchell v British home stores. I have represented friends in Tribunals against barristers and on the face of it, I have a strong case."

Tony Skillen.

33. In cross-examination, the claimant confirmed that it was his belief that the email of 10 November 2019 'in and of itself' meets the requirements of section 43B of the Employment Rights Act 1996 and is a qualifying disclosure. Although the claimant denied that the purpose of sending this email was to defend himself from the oncoming disciplinary action he believed was being threatened, he accepted that he made a reference to the Burchell test because he wanted to alert the respondent that he could not be dismissed for misconduct. In that sense he accepted he was trying to ward off the threat of any potential disciplinary action. The claimant had knowledge of the law and practice in unfair dismissal for gross misconduct and in whistleblowing claims because he had made a complaint in the Tribunal before against a different employer and had represented friends in Tribunal hearings.

The claimant's pleaded case about the alleged disclosure

34. In the claim form the claimant presented on 7 April 2020 he relied upon the written grievance of 10 November 2019 and states:

"*in an email **I raised a grievance about locks broken on the line and mixed batches of food under the whistleblowing policy**. I had a grievance invitation on 2 December 2019 that I attended. No outcome letter was ever received, and no records of the meeting were recorded. **Mr Stead has put public health or risk by knowingly using machines not fit for purpose**. Basically, there is a dispute over the evidence. The respondents have provided a different set of facts. This can be resolved by hearing all the evidence*". (highlighted text Tribunal's emphasis)

35. The written grievance of 10 November 2019 makes no reference to '*mixed batches of food under the whistleblowing policy*" or to Tony Stead having put "*public health at risk by knowingly using machines not fit for purpose"*. The written grievance only

refers to the claimant being pulled up for the broken lock and his altercation with Mr Golding on 8 November 2019.

36. In the 'further and better particulars' of the claim which the claimant provided on 16 July 2020 he states:

"*On 8th November 2019 at 8.30 am I stated to Nick Golding the factory manager. You are under an obligation to fix the lock* ***the foreign workers are putting contaminated food back on the line****"* (highlighted text Tribunal's emphasis)

37. The written grievance of 10 November 2019 makes no reference to the claimant reporting to Mr Golding that the consequence of the broken lock that he had witnessed was that workers were emptying the bins and putting contaminated food back on the line.

38. In the 'further and better particulars' provided the claimant also states that he believed this information disclosed a relevant failure of health and safety and a breach of a legal obligation made in the public interest because:

"*This satisfies section 43B employment rights. Cranswick sells meat to its employees and is breaching section 2(1) employer to employee. Nick Goulding is failing in his duty of care 1998 section 5 maintenance by not keeping the locks in good repair and efficient working order. He has failed to carry out a new risk assessment. He also breaches section 37HSWA connivance on other words turning a blind eye.*

Nick Goulding's actions also breaches food safety law 1990 in short Cranswick business must ensure food does not compromise a person's health. The company have admitted the risk and the risk undoubtedly concerns the public as they buy the product.

Nick Goulding has failed in the Management of Health and Safety Regulations 1999.Section 4, principles of prevention to be applied. Nick Goulding has simply walked away as his obligation as an employer. To be frank he has done absolutely nothing".

39. In the 'further and better particulars' provided the claimant also provided further information about his allegation about mixed batches of food. He states:

"*On 18 October 2019 around 2 pm while on line 7 packing crispy bacon bits. I witnessed Drew the Director inform Tony Stead the Operations Manager to get rid of the crispy bacon that had a use by date 22 October 2019 and use crispy bacon with a use by date 30 October 2019. Tony Stead waited until Drew turned his back and* ***then to my astonishment he mixed the batch with use by date 22 October 2019 with the product use by date 30 October 2019.****I informed Karen Shift Manager "Tony Stead is mixing batches of crispy bacon up he is going to poison folk"*.

Claimant's witness evidence about the purported disclosure

40. In the claimant's witness statement, his evidence about why he believed his written grievance of 10 November 2019 was a protected disclosure is set out in paragraphs 20,31, and 37.

"*On 10 November titled Grievance/Whistleblowing,* ***I asserted*** *the appropriate legislation along with the* ***factory manager failing in his obligation and the fact he was continuing the line with the broken lock … the foreign workers were emptying the bins with broken locks and introducing the contaminated food***

with metal in back on to the line. Again I asserted the correct legislation that the factory manager Nick Golding was in breach*… it should be noted I have quoted legislation and his obligations,* ***taken in isolation it is giving the company information and therefore it has the hallmarks of a protected disclosure and carries weight and cannot be said to be wrong****".(paragraph 20)*

"*Nick Golding was* ***putting lives at risk through producing defective products****. It is a classic example of profit before public safety. I also add that he was consciously conniving turning a blind eye and is in breach of section 37 Health and Safety Act" (paragraph 37).*

"*it is i****n the public interest to have food that is safe for consumption****". (paragraph 31)*

41. The claimant relies upon new information that was not articulated in the written grievance which is set out in full above. The claimant made no reference in the written grievance of 10 November to witnessing or informing Mr Golding on 8 November 2019 that "***workers were emptying the bins with broken locks and introducing the contaminated food with metal in back on to the line".*** The claimant made no reference in his written grievance to Mr Golding "*putting lives at risk through producing defective products"* His written grievance does not articulate any of those facts or how the facts he did articulate in his grievance show there was a relevant failure of the legislation by the factory manager.

42. The most significant concession made by the claimant was that he had not told his employer that workers were taking food out of the bins that was contaminated with metal and were putting it back on the production line to be sold to the public. The claimant could not explain why he had not included those details which he now seeks to rely upon to support his case that he made a protected disclosure. Mr Graham very squarely and fairly put to the claimant that the reason why he had not mentioned it at the time was because he was lying. The claimant had fabricated this allegation to bolster his case and was deliberately attempting to mislead the Tribunal. Although the claimant denied lying, Mr Graham invited the Tribunal to make that finding.

43. To assess the credibility of the evidence given, the claimant was asked by the Tribunal what possible incentive the workers would have for removing potentially contaminated food out of the bins to put back on the line. The claimant said that he thought the workers were doing it to help him out because as soon as the line is finished the work is completed. That answer made no sense at all and would implicate the claimant in concealing the deliberate wrongdoing he says he witnessed. The claimant would be guilty of turning a blind eye. The claimant was also asked why this very serious allegation was not included in any of his contemporaneous communications he sent to his employer before he resigned. The claimant's answer was there was "too much to cover because there were so many failings to report". In closing submissions Mr Graham referred to that answer which he submits was unsatisfactory and does not explain this very serious omission.

44. Mr Graham submits that the omission of relevant detail in the claimant's witness statement is striking and invites the Tribunal to make the following findings about his credibility:

(1) The claimant would know that he would have to set out his account in his witness statement not least because he was told by Employment Judge Parkin and has been through the Tribunal process before. In his 10 November 2019 grievance he asserts that he has represented friends in Tribunal proceedings, inferring that he knows what he is doing.

(2) Such has been the claimant's contradictions that the claimant's conduct falls in the category of vexatious and scandalous behaviour that brings the Tribunal process into disrepute.

(3) The examples of the contradictions are in the 'further and better particulars' (page 57) where the claimant says he was aware workers were putting contaminated meat back on 8 November 2019, but he said nothing about this in his grievance of 10 November. His oral evidence was evasive. If he was being truthful, why wasn't it raised until months after the claim was brought which affects his credibility.

(4) Such are the inherent weaknesses and contradictions in the claimant's case that the Tribunal are invited to find the claimant was not simply mistaken but he had deliberately misconstrued or concocted his evidence.

45. The claimant was given time to consider carefully what he wanted to say in reply to that submission. He maintained the evidence he gave to the Tribunal was the truth and suggested that if there were any omissions or contradictions in his evidence, these were mistakes. He denied fabricating any evidence. He could not explain why these significant matters were omitted from the written grievance of 10 November 2019. Taking a step back and considering the matter objectively this was critical information the claimant now relies upon to support his complaint that the broken lock was more than a mechanical failure it had resulted in deliberate wrongdoing. He had witnessed workers committing an actual breach of food safety which he now contends he reported to senior management out of public concern. Why was the claimant trying to retrospectively add new information omitted from his written grievance written closer in time to the food safety breach he had allegedly witnessed and reported? If he was genuinely concerned about public safety, there was no reason not to disclose those details if he was truthfully recalling events as they had occurred. Furthermore, his explanation for the omission was unconvincing, unsatisfactory and unlikely if he was genuinely concerned that the public had been put at risk by food contaminated with metal.

46. The second significant omission in the written grievance was the claimant's failure to articulate the facts he now relies upon about 18 October 2019 when he allegedly saw Mr Stead mixing batches of out of date meat for sale to customers. He made no reference to this allegation at any time from 18 October 2019 to his resignation on 8 January 2020 and could not explain this second omission. If those asserted facts were true, the claimant has turned a blind eye or concealed information about a serious act of wrongdoing by Mr Stead. Again, the Tribunal explored this omission with the claimant to try to better understand his evidence. He was asked why he thought that Mr Stead might mix out of date batches of meat for sale to customers. The claimant said he believed Mr Stead did it to get a bonus but had no evidence to support his view. Mr Stead was not paid any bonus and his pay was not related to any KPI's or production targets. He received a fixed salary every month. The claimant was making serious unsubstantiated personal accusations against senior managers which calls into question the genuineness and reasonableness of his beliefs at the time.

47. The Tribunal considered very carefully the respondent's submission that the claimant was deliberately lying to mislead or whether there could be any other explanation for the claimant's conduct, could it perhaps be a mistake as the claimant suggests. After very careful consideration the Tribunal agreed the claimant has not been honest with the Tribunal and cannot explain it as a mistake. He has deliberately lied to mislead the Tribunal and has concocted evidence to bolster his case. The claimant was deliberately giving false evidence to the Tribunal about Tony Stead mixing batches of out of date meat and workers taking contaminated meat out of the bins and putting it back on the line. The Tribunal found the claimant fabricated these unsubstantiated allegations to try to discredit Mr Stead and Mr Golding to mislead the Tribunal to bolster his case.

Grievance Process

48. On 11 November 2019, Ms Peach sent an email acknowledging receipt of the claimant's grievance about the factory manager and requested that he complete a grievance form.

49. On 21 November 2019, the claimant completed the "employee grievance form". He confirmed he wished to raise a grievance about Nick Golding and his demeanour towards him. He specifically referred to Mr Golding threatening him with disciplinary action on 8 November 2019 and he confirmed that there were no witnesses that could be contacted.

50. On 3 December 2019 Ms Peach invited the claimant to attend a grievance meeting with the general manager, Peter Colvin, on 6 December 2019. The claimant was informed of his right to have a companion and took a companion with him to the meeting. He was informed that the purpose of the meeting was to allow the claimant to explain his grievance and discuss how it could be resolved. The letter also confirmed that if the claimant wished to rely on written materials or documents he could bring them to the meeting or send copies in advance of the meeting. If the claimant had believed it had wrongly been categorised as a grievance about the factory manager and was in fact a whistleblowing complaint, he cannot explain why he did nothing to correct that misunderstanding before the grievance meeting.

<u>Allegation 4.1: The alleged failure by Hazel Pearce and Peter Colvin to deal properly with the Claimant's grievance, including failing to provide a written outcome</u>

51. The grievance meeting took place on 6 December 2019. The claimant did not produce any notes of the meeting or give any detailed evidence about that meeting in his witness statement. We saw Miss Pearce's handwritten notes of the grievance meeting (pages 246 to 254) which had been misplaced but were found in March 2021. The handwritten notes and the transcribed notes of that meeting (pages 255 to 258) were disclosed to the claimant. He accepted the notes were an accurate reflection of the meeting but omit a reference he made to section 103A of the Employment Rights Act 1996. The claimant alleges that because of that omission Miss Pearce had fabricated the notes. Having heard Miss Pearce's evidence and having seen the notes The Tribunal accepted the handwritten notes were taken at the time and were not fabricated by Miss Pearce.

52. From those notes it was clear that the very first concern raised by the claimant was that he did not like being questioned about the broken lock by Mr Goulding and he objected to Mr Goldings demeanour towards him. When the broken lock was raised by the claimant his focus was on how Mr Golding had spoken to him not about the fault itself or any problems this posed. Mr Colvin expected that if the

claimant had genuine concerns about health and safety or the general attitude of the company to health and safety he would have been very clear about articulating anything he had witnessed that was of concern to him and used the opportunity at this meeting to raise any matters he wanted to raise.

53. Mr Colvin's perspective at the meeting was that team leaders were expected to be accountable for the line in accordance with their job description. The claimant did not like being told that he was accountable for the line and he became defensive and rude when Mr Colvin tried to refer to the team leader job description to explain what he meant by 'accountability'. It was clear the claimant's real gripe at this meeting was that Mr Golding had tried to hold him accountable for not reporting the broken lock. The claimant was sensitive to any criticism which was the catalyst for the 'altercation'.

54. What was clear from the Tribunals reading of the notes of the grievance meeting was that the claimant made no reference to either of the food safety breaches he now relies upon which he says he had witnessed of Mr Stead putting out of date meat on the line or workers emptying the bins with broken locks and introducing the contaminated food with metal in back on to the line.

55. Mr Colvin adjourned the meeting to speak to Mr Golding. He told Mr Colvin his recollection of the conversation with the claimant about the broken lock was just a normal conversation not an altercation. He agreed he would apologise to the claimant if he had spoken to him in a way which had caused him any offence. The claimant confirmed to Mr Colvin that he would accept an apology from Mr Golding. As a result of that agreement, Mr Colvin and Miss Pearce assumed that the grievance had been resolved to the claimant's satisfaction. The claimant accepted that was their genuine perception at the time and confirmed that after that meeting Mr Golding had apologised and the claimant accepted that apology.

56. Everyone concerned with the grievance had thought a line had been drawn under it and the claimant was happy with the grievance outcome. Mr Colvin accepts that with the benefit of hindsight, the claimant should have been provided with a written outcome letter and minutes of the meeting. It was an oversight on his part because he believed the grievance had been resolved to the claimant's satisfaction. For that reason, the claimant was not offered an appeal against the grievance outcome. It was reasonable in those circumstances for Mr Colvin not to have followed it up in the way he would done if he thought the grievance was not resolved to the claimant's satisfaction. If the claimant did not share the same view, he could have told Mr Colvin or Miss Pearce that he was not satisfied with the apology and that he wanted to pursue the matter further which might then have prompted them to revisit the grievance outcome. The claimant cannot explain why he left them to continue to genuinely believe that a line had been drawn under it and he was happy with the outcome. It was reasonable and proper in those circumstances for Mr Colvin and Miss Pearce not to provide a written outcome or minutes of the grievance meeting or a grievance appeal. Objectively viewed that conduct was not calculated or likely to destroy or seriously damage the implied term of trust and confidence

57. At the beginning of the hearing the claimant referred the Tribunal to the Employment Appeal Tribunal case of Blackburn-v- Aldi Stores in which the EAT decided "*that a failure to adhere to a grievance procedure is capable of amounting to or contributing to a breach of the implied term. Whether in any particular case it does so is a matter for the Tribunal to assess. Breaches of grievance procedures*

come in all shapes and sizes. On the one hand can it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to or contribute to a breach of the implied term of trust and confidence. Where such an allegation is made, the Tribunals task is to assess what occurred under the Malik test". On the facts found in relation to the claimant's grievance there was no breach of the implied term of trust and confidence.

Allegation 4.2: being held accountable by Tony Stead for how other employees on the claimant's line dressed in PPE

58. On 20 December 2019, the claimant alleges that Mr Stead raised a "*trivial issue about how foreign workers dressed*". This is one of the alleged breaches of the implied term the claimant relies upon where no detailed evidence has been provided to support the allegation made to identify the issue raised about the way operatives were dressed. Details only came to light during the claimant's cross examination. He said that he was 'pulled up' by Mr Stead because workers on his line were wearing PPE incorrectly by not closing the top button of their uniform. The claimant accepted the respondent is a food manufacturer and he understood that PPE had to be worn correctly and was an essential requirement for all employees working in the food production area.

59. Mr Thompson, Miss Pearce and Mr Stead explained why it was so important in the situation the claimant describes. The top button of the PPE needed to be closed to prevent jewellery or possibly chest hair or other foreign particles contaminating food. Although that was the common sense and obvious reason for the top button to be closed the claimant suggested that it was unreasonable to hold him accountable for the failure of workers on his shift unless the policy specifically said the top button had to be closed. He accepted the policy provides that "PPE must be worn correctly at all times in the food manufacturing area" and that could include this but refused to accept that as a team leader he could be held accountable for workers on his shift if they failed to wear PPE correctly. It was reasonable and proper in those circumstances for Mr Stead to hold the claimant accountable for how workers on the claimant's shift dressed in PPE. Objectively viewed that conduct was not calculated or likely to destroy or seriously damage the implied term of trust and confidence

Allegation 4.3: being threatened with dismissal by Tony Stead on 22 December 2019

60. On 20 December 2019, the claimant also alleges that Mr Stead threatened him with dismissal. This is another alleged breach of the implied term the claimant relies upon where no evidence has been adduced in the witness statement to support the allegation. Mr Stead recalls an occasion when a senior member management Adam Crouch visited the site. The claimant had told Mr Stead he was going to tell Mr Crouch it was "shit" working for the respondent. In that context he admits to using words along the lines of "*you don't want to be saying that you'll get yourself sacked*". The claimant suggested he told Mr Stead he was going to tell Mr Crouch about the broken locks on the line. He says that Mr Stead suggested he should not say anything to Mr Crouch because he could get himself sacked and the claimant response to that was that Mr Crouch could not sack him.

61. The Tribunal preferred and accepted Mr Stead's evidence about the conversation and the context in which the comment was made. The claimant did not perceive it at the time as a threat of dismissal made by Mr Stead and believed that he could not be dismissed. The claimant was clearly not afraid to speak his mind to senior management and he made that clear to Mr Stead at the time. This allegation was an example of the claimant misrepresenting the facts to fit the case he was now presenting, instead of giving a truthful and transparent account of the event from the outset. He should have withdrawn this unsubstantiated allegation which was pursued without adducing any supporting evidence and has only served to further damage his credibility.

62. The final two allegations of breach of the implied term of mutual trust and confidence relate to Mr Golding cold shouldering the claimant on 8 November 2019 and blocking him from appointments.

Allegation 4.4: being ignored and cold shouldered by Nick Golding

63. The Tribunal agreed with Mr Graham's submission point that the claimant has simply failed to adduce any evidence of alleged ignoring/cold shouldering other than that which is referred to in his written grievance of 10 November 2019 which was resolved by way of an apology. That conduct occurred on 8 November 2019, 2 days before the alleged disclosure. Mr Graham makes the very valid point that evidence of alleged cold-shouldering predating the alleged disclosure cannot be caused by it. In other words, Y cannot have happened because of X, if X came before Y. The claimant perhaps recognising the weakness in his argument changed tact. In his submissions he invited the Tribunal to draw adverse inferences from the respondent's failure to call Mr Golding to answer the allegations he has made. Mr Graham accepted that upon advice, the respondent made a judgment call that Mr Golding was not required to give evidence. We agreed it was a matter for the respondent as to which witnesses it called to defend the claim. It was not appropriate to draw any adverse inference against the respondent in relation to its defence of the claim, when the claimant has failed to prove the facts to establish liability. Instead of addressing the inadequacy of his own evidence the claimant has tried to make mileage out of a witness he knew would not be giving any evidence for the respondent and who he did not himself call to give evidence.

Allegedly 4.5: being blocked from appointments by Nick Golding.

64. Dealing then with the allegation that Mr Golding blocked the claimant's promotion in breach of the implied term of trust and confidence. The claimant in his witness statement identifies one role he applied for after his written grievance of 10 November 2019 which was the Further Process Manager role. The claimant referred to an email (page 216) he received in December 2019 in which Miss Pearce confirmed his application would be kept on file because the role had been put on hold for business reasons. The recruitment process took place after the claimant resigned and that was the reason why the claimant was not interviewed for the role. He was not blocked from appointment by Mr Golding. The claimant's case is put no higher than suggesting that because he had unsuccessfully interviewed for a far more senior role of Production Area Manager in July 2019, he should automatically be entitled to be interviewed for any other management role that subsequently became available.

65. The Tribunal agreed with Mr Graham that there is no merit in the argument that the claimant should have been appointed to different roles on the strength of a failed application for a production manager role and in circumstances where the respondent had concerns about his abilities to perform a lesser role. The claimant has failed to prove facts to substantiate the allegation made. The Tribunal also agreed with the submission made by Mr Graham that it was contradictory for the claimant to argue on the one hand that trust and confidence in the respondent had been broken and on the other hand to argue he wanted to continue his employment with the respondent in a different role. This was a fundamental contradiction in the claimant's case.

The Resignation

66. Turning then to the reason for the claimant's resignation. In the letter of resignation sent on 8 January the claimant had the opportunity to raise any matters that were in his mind at the time because he had decided to resign and had nothing to lose. The claimant's email of 8 January 2020 sent at 14:16 states as follows:

"*I shall not be returning to the company from today's date 8 January 2020 due to the ongoing harassment and bullying by Tony Meade coupled with stress for bringing health and safety concerns to him. I am going to consider an application to the Employment Tribunal about this matter. I still await my minutes of meeting from previous grievance and grievance outcome letter. I do expect a substantial response in the next seven days".*

67. Miss Pearce replied on 10 January 2020 and requested the claimant to clarify who he was referring to because Tony Meade was not an employee of the company. She asked the claimant if he was referring to his direct manager (Tony Stead). She also confirmed her intention to invite the claimant to a meeting to discuss his resignation.

68. The claimant's email replied 10 January 2020 confirmed that he was referring to the operations manager.

"*I can confirm that I have resigned due to the breach of trust and confidence in Tony Meade the operations manager. Trust and confidence is an implied term that is the heart of my contract and often not in written terms. No right- thinking person would want to be part of the actions of Mr Tony Meade. I'm sure Marks and Spencer will take a dim view of his actions or any judge."*

In the claimant's witness statement at paragraph 6 he states: *"Consequently, I resigned on 8 January 2020 due to their unreasonable behaviour. In particular, no right- thinking person would want to be part of the actions of Tony Stead operations manager mixing out of date batches of meat".*

69. The claimant accepts he has omitted to mention any of the alleged breaches of contract or the alleged protected disclosure email of 10 November. He also accepts that the email of 10 November was never sent to Mr Stead and he does not suggest Mr Stead became aware of it in any other way. Mr Stead's unchallenged evidence was that he had not seen that email. The claimant accepts that email of 10 November makes no reference to Mr Stead and was all about the factory manager Mr Golding.

70. Mr Graham's submission as to the reason for the claimant's resignation is supported by the evidence the claimant gave in cross-examination:

(1) The claimant did not resign in response to any of the matters now relied upon as breaches of the implied term of trust and confidence.

(2) On any reading of the email of 8 January 2020 or the clarification provided subsequently the reason the claimant gave at the time was not related to the email on 10 November 2019.

(3) Mr Stead's alleged treatment of the claimant could not be motivated by the email of 10 November of which he had no knowledge.

71. Mr Graham submits that the Tribunal should find that the real reason the claimant resigned is that he was attempting to threaten the respondent by foreshadowing that he would be bringing a claim and the matter would be raised with a client of the respondent. He was not resigning in response to any legitimate complaint. It was the damage intimated in the email that he would cause to the respondent by bringing this information in a Tribunal claim. Mr Graham suggests the real reason for the claimant resigning was that he knew he was not carrying out his job, he had failed a competency assessment on 2 January 2020 and was not suited to the role hence his repeated attempts to find alternative roles.

72. There is some support for that submission because just before his resignation the claimant was having to undergo repeated ongoing training and had failed a competency assessment. The claimant's failures in this regard are evidenced by the emails sent by the trainer updating Mr Stead about the claimant's lack of progress. Those emails confirmed that despite the claimant being repeatedly shown what he was required to do he did not show any interest or aptitude in the areas in which he was being re-trained (page 254).

73. The Tribunal considered the fact that the claimant is an intelligent man able to articulate the message he means to convey in his written communications. He is knowledgeable about employment law and practice. He uses his resignation to warn the respondent of the possible repercussions of bringing a claim by intimating the damage it would cause to the respondent's reputation ("*I am sure M&S will take a dim view or any judge*.") We agree with the respondent's submissions. The claimant resigned because he knew he was not carrying out his job competently, he had failed a competency assessment on 2 January 2020, he was not suited to the role and was at risk of dismissal. He saw his resignation as an opportunity to intimate a claim that would embarrass or potentially damage the respondent's reputation.

Conclusions

74. The first issue the claimant had to prove was that his written grievance letter sent by email of 10 November 2019 was in and of itself a qualifying disclosure meeting the requirements of section 43B Employment Rights Act 1996: that the he reasonably believed the information he disclosed in that email was made in the public interest and tends to show one or more of the relevant failings identified in subsection 43B (a)-(f). The Tribunal considered the 'specificity detail and context' of the information disclosed in the email of 10 November 2019 to decide whether the information articulated in that email satisfies the requirements of Section 43B to meet the definition of a qualifying disclosure.

75. Mr Graham submits the email is nothing more than a series of allegations. The information relied upon is the allegation that the factory manager is in breach of a legal obligation. He submits it is precisely the type of conduct that was warned

against in Cavendish Monroe and does not fall under the protection of the legislation (even when considering the stance adopted in **Kilraine**). He submits that on any level it is plain that the email is simply an attempt by the claimant to pass the blame elsewhere and to garner the protection of the legislation when he thought he was in danger of being dismissed.

76. To support that submission Mr Graham points to the following content:

    1. The claimant references Mr Golding as 'a man inciting trouble'.
    2. The claimant blames Mr Golding for allowing the line to continue.
    3. The claimant says that Mr Golding (not the organisation itself) is in breach of section 37 Health and Safety at Work Act by turning a blind eye to the lock (which is plainly not true given that it was Mr Golding who confronted the claimant about the broken lock in the first place).
    4. The claimant expressly refers to section 100 ERA and says he cannot be dismissed.
    5. The claimant then refers to the Burchell test demonstrating that his fear is that he might be dismissed for gross misconduct.

77. In contrast the claimant says he was disclosing information and was not making an allegation. He relies on **Kilraine** and the example given of "*wards not cleaned"*. His email refers to the broken lock on 8 November 2019 because he believed the factory manager had breached the regulations he identified in the email. The information tends to show 2 relevant failures that a criminal offence had been committed by the factory manager because health and safety is an act of law and it is a criminal offence to breach health and safety law, and it is also a breach of a legal obligation. It was made in the public interest because the respondent supplies food to supermarkets for public sale and consumption. The claimant also draws a distinction between a grievance which is a matter of individual concern and whistleblowing which is of wider public concern. He says that his email of 10 November 2019 was the latter not the former. He says he was acting in good faith to take care of himself and others and had sufficient grounds to bring his claim which was not a vexatious claim.

78. Although the claimant appears to recognise the distinction between a grievance and a whistleblowing complaint, he does not explain how any of the facts he articulated in his grievance email fall into the latter category and not the former. He does not explain how he reasonably believed the facts asserted in the written grievance tend to show his reasonable belief that the factory manager had committed a criminal offence or had breached a legal obligation (the relevant failures) or was made in the public interest.

79. The facts articulated in that written grievance are all about the claimant's 'altercation' with the factory manager on 8 November 2019. The information he conveys is that "*on or around 8:30am on Friday 8 November the Factory Manager came to line 6 where I was working and made allegations that I had breached Health and Safety law and that I was going to be disciplined over the matter. I explained to him that I had informed my area leader at 5:30am the lock was broken. The factory manager then questioned my integrity and said: "if I ask him will he confirm that". An altercation occurred and I said to him "do you think I'm being dishonest. I spoke to the factory manager again and he totally ignored me. I attempted to speak to him again and he walked past me again without speaking*.

I refuse to be bullied or harassed at work. Sending employees to Coventry is a form of bullying. When I left the company at 18:00 hours the mechanism on the lock was still broken and the lock on my tool- box for line 6 was also broken after writing it down on the sheets".

80. Only after the claimant articulates those facts about the way the factory manager had spoken to him does he make any references at all to breaches of health and safety legislation. Those references are made in the context of trying to deflect any blame for the broken lock back onto the factory manager. The first reference he makes is about the duty to report to the appropriate person any work situation which represents a serious and immediate danger to health and safety. He does not explain why he reasonably believed the facts he articulates in the preceding paragraph tend to show a serious and immediate danger to health and safety to show a criminal offence had been committed by the factory manager or that he had breached any other legal obligation. The claimant does not articulate any facts to suggest he is concerned about food safety for the public. He does not articulate the (fabricated) facts he now relies upon of having witnessed workers emptying the bins with broken locks and introducing contaminated food with metal in back on to the line or witnessing Tony Stead mixing out of date batches of meat which would have tended to show very serious breaches of food safety.

81. The claimant knew the respondent had in place safety maintenance systems requiring team leaders to complete critical safety checks before the start of the shift to ensure the line could operate safely. He knew a broken lock on the bin under the line did not prevent the line operating safely (see findings of fact 28-30). He does not convey any facts in the written grievance that tend to show he reasonably believed the factory manager had committed a criminal offence/breached a legal obligation in relation to work equipment or maintenance logs. The claimant does not convey any facts that tend to show he reasonably believed the factory manager had breached section 37 Health and Safety of Work Act 1974 and had committed a criminal offence or breached a legal obligation. The claimant's suggestion that the factory manager was 'turning a blind eye' to the broken lock is plainly not true on the facts articulated in the grievance. The facts the claimant articulates are that it was Mr Golding who confronted the claimant about the broken lock in the first place not vice versa.

82. The Tribunal concluded that the claimant was conveying facts to express his dissatisfaction with the factory manager and his unhappiness at the way he had been spoken to and treated on 8 November 2019. The claimant did not like being told he was accountable for any shortcomings on the line or having his integrity questioned. He wanted to avoid the dismissal he thought the factory manager was contemplating and was concerned about his future employment with the respondent. The only person whose interest the disclosure served was the claimant. He was the only person to whom those comments were made. No one else witnessed the conversation and no one else was affected by the grievance outcome. The claimant was a disgruntled employee who wanted to get his account of the conversation out first. The written grievance was a shot across the bows to warn the respondent not to take any further action or try to dismiss him. The Tribunal gained some support for those findings from the way the claimant and the respondent subsequently labelled and treated the email as a personal grievance against the factory manager. The grievance outcome was a personal apology made by the factory manager to the claimant for the way he had been spoken to.

The claimant accepted that apology drawing a line under the grievance. If the claimant genuinely and reasonably believed his written grievance was a complaint made under the respondent's whistleblowing policy and that he was raising food safety concerns in the public interest he could have made those concerns clear in his written grievance instead of continuing to treat it as a personal grievance against the factory manager.

83. The written grievance of 10 November was not in and of itself a protected disclosure. The Tribunal concludes that the claimant did not have a reasonable belief that the written grievance tended to show a relevant failure of 43B(1)(a) or (b) in that the factory manager had committed a criminal offence or breached a legal obligation. The claimant did not believe the information articulated in that email was made in the public interest to have food safe for consumption. Objectively viewed his belief that the disclosure showed a relevant failure or was made in the public interest was not reasonable. The Claimant has failed to prove his written grievance of 10 November was a disclosure qualifying for protection under section 43B and his complaint of automatically unfair constructive dismissal for making a protected disclosure therefore fails and is dismissed.

84. The second stage of the sequential burden of proof required the claimant to prove the respondent committed repudiatory breaches of the implied term of trust and confidence and that he resigned in response to those breaches on 8 January 2020 without affirming the contract and waiving the breach. Although it was not necessary to decide the second stage, the Tribunal concludes that the claimant failed to prove any of the 5 alleged breaches of the implied term of trust and confidence that were relied upon to establish a constructive dismissal for the reasons identified by the Tribunals in its findings of fact in relation to each alleged breach. As to allegation 4.1: the alleged failure by Hazel Pearce and Peter Colvin to deal properly with the claimant's grievance see findings of fact at paragraphs 51-57. As to allegation 4.2: being held accountable by Tony Stead for how other employees on the claimant's line dressed in PPE see the findings of fact at paragraphs 58-59. As to allegation 4.3: Tony Stead threatening the claimant with dismissal on 22 December 2019, see the findings of fact at paragraphs 60-61. As to allegations 4.4 and 4.5: Mr Golding cold shouldering the claimant on 8 November 2019 and blocking the claimant from appointments see the findings of fact at paragraph 63 - 65. In conclusion the Tribunal finds there was no repudiatory conduct by the respondent that would entitle the claimant to treat himself as constructively dismissed.

85. The third stage required the claimant to prove that the reason or principle reason for the constructive dismissal was that he had made a protected disclosure on 10 November 2019.The claimant has not only failed to prove a constructive dismissal he has also failed to prove he made a protected discourse which is the automatically unfair reason he needed to prove was the reason or principal reason for the dismissal. The Tribunal has concluded there was no dismissal the claimant voluntarily resigned because he knew he was not carrying out his job competently, he had failed a competency assessment on 2 January 2020, he was not suited to the role and was at risk of dismissal. He used his resignation to attempt to threaten the respondent's reputation by foreshadowing that he would bring a whistleblowing claim that would embarrass or damage the respondent's reputation and its relationships with customers.

86. Mr Graham submits the claimant has fabricated evidence and has unreasonably conducted these proceedings causing the respondent to unnecessarily incur costs in defending a false claim. The claimant has been dishonest has deliberately misrepresented facts and brought a fundamentally contradictory case for mischief bringing the tribunal proceedings into disrepute. It is submitted that the claimant's conduct in bringing these proceedings is unreasonable and vexatious.

87. The claimant denies that his conduct of these proceedings was unreasonable or vexatious and quoted the Collins dictionary definition of vexatious "a legal action instituted without sufficient grounds so as to cause annoyance or embarrassment to the defendant". He denies his conduct falls within that definition and contends he had 'sufficient' grounds to bring his claim.

88. The Tribunal has concluded that the claimant has failed to prove any part of his claim and failed on each of successive burdens of proof. Not only has the claimant failed to provide credible evidence, he has misrepresented the facts and deliberately lied making very serious false unsubstantiated allegations against the respondent to pursue a false claim about Tony Stead (mixing batches of out of date meat) about other workers (taking contaminated meat out of the bins and putting it back on the line) and about the Factory Manager. The claimant has been dishonest to the Tribunal to bolster his case.

89. The definition of 'vexatious' given by Lord Bingham in Attorney General-v-Baker 2000 FLR 759 is that "*The hall mark of vexatious proceedings is that it has little or no basis in law (or at least no discernible basis) that whatever the intention of the proceedings may be its effect is to subject the defendant to inconvenience harassment and expense out of all proportion to any gain likely to accrue to the claimant and that it involves an abuse of process of the court, meaning by that a use of the court for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*".

90. That definition encapsulates the parties' respective understanding of the meaning of 'vexatious' conduct. Mr Graham identified the mischief of bringing tribunal proceedings into disrepute if a claim is brought based on fabrication and dishonesty. He refers to the inconvenience and unnecessary expense caused to the respondent defending a false claim. The claimant maintains he had sufficient grounds to bring the claim and that it was not brought for any improper purpose (to cause annoyance or embarrassment to the respondent).The Tribunal viewed those arguments in the context of the findings made that the claimant has been dishonest with the Tribunal and brought a claim founded on that dishonesty which is vexatious and unreasonable conduct. The claimant is on his own evidence an experienced litigant in person, knowledgeable about the process and law. He ought to have known the risk he ran in bringing such a groundless and false claim.

In his resignation email he signalled his aim was to use this claim to embarrass or damage the respondent's reputation and its relationships with customers. In pursuing that aim the claimant has had no regard to the consequences of his dishonesty on the individuals he has falsely accused of serious wrongdoing, to the respondent in having to defend a false claim or to the tribunal process which has been used for that improper purpose.

Employment Judge Rogerson
2 March 2022

3 March 2022