EMPLOYMENT TRIBUNALS

Claimant: Mr D J Stockdale

Respondent: Cleveland Bridge UK Limited (in Administration)

Heard at: Newcastle **On:** 12-21 July 2021
20-22 December 2021
(in Chambers)

Before: Employment Judge Aspden
Mrs C Hunter
Mr G Gallagher

REPRESENTATION:

Claimant: Mr P Smith, Counsel
Respondent: Mr S Brochwicz-Lewinski, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that none of the claimant's claims are well-founded. All claims are dismissed.

REASONS

Claims and Issues

1. By a claim form presented on 21 May 2020 the claimant brought a claim of automatically unfair dismissal arising out of the summary termination of his employment on 14 May 2020 (case number 2500984/2020). For some reason a

duplicate copy of that claim was received by the Tribunal on the same day (case number 2500985/2020).

2. In those proceedings the claimant contends that his dismissal is automatically unfair in that:

2.1. The reason or principal reason for his dismissal was that, being a representative of workers within section 100(1)(b) Employment Rights Act 1996 ('ERA'), he performed a function as such a representative; alternatively,

2.2. The reason or principal reason for his dismissal was that he had made a protected disclosure in an email to the Health and Safety Executive ('HSE') on 3 October 2019.

3. In his grounds of claim the claimant alleges that the particular function he had carried out as a health and safety representative was to email the HSE on 3 October 2019 to notify them of his concerns that (amongst other things) the respondent had given employees incorrect information about the presence of asbestos on the shop floor of its Darlington site in the past, that two colleagues may have unwittingly drilled into asbestos in the previous two years, and that both he and his GMB safety representative colleague (Mr Blewitt) had been threatened with disciplinary action if they raised such concerns with the respondent again.

4. The claimant's case is that in his email he disclosed information to the HSE, which, in his reasonable belief, was made in the public interest and tended to show:

4.1. that the respondent had breached the following obligations:

4.1.1. its legal obligations as a 'duty holder' under regulations 4(8)-(10) of the Control of Asbestos Regulations 2012, to have in place a written plan identifying the measures taken for managing the risk of asbestos, etc;

4.1.2. the legal duty contained in section 44(1)(b) Employment Rights Act 1996, not to subject employees to a detriment on the grounds that they were representatives of workers on matters of health and safety at work etc., and had performed the functions of such representatives;

4.2. that the respondent had, in the past, endangered the health and safety of individuals working on the shop floor by telling them there was no asbestos on site when in reality there was, and in making reference to an incident where asbestos had been unwittingly drilled into by two colleagues.

5. The claim form contained an application for interim relief under section 128 ERA. That application failed. The claimant was given permission to serve amended particulars of claim. This the claimant did by presenting a new claim form (claim number 2501522/2020). To the complaints referred to above the claimant added the following complaints:

5.1. A complaint that his dismissal was automatically unfair by virtue of section 152 of the Trade Union and Labour Relations (Consolidation) Act 19932 ('TULR(C)A 1992'). In this regard it is alleged that the principal reason for the claimant's dismissal was the fact that he took part in the activities of an independent trade union (namely the GMB) by emailing the HSE on 3 October 2019.

5.2. Alternatively, a complaint that his dismissal was unfair by virtue of section 98 ERA (i.e. a complaint of 'ordinary' unfair dismissal).

5.3. A complaint that he was wrongfully dismissed at common law.

5.4. A complaint that the respondent subjected the claimant to a detriment contrary to section 146 TULR(C)A 1992 in that, on 22 May 2020, Mr Droogan wrote out to all employees providing confidential details about the claimant's disciplinary proceedings. Mr Smith confirmed at this hearing that the claimant relies on s146(1)(b).

5.5. A complaint that the, by sending that letter on 22 May 2020, the respondent subjected the claimant to detriment contrary to section 47B ERA because he had made a protected disclosure in an email to the HSE on 3 October 2019.

6. By a further claim form (claim number 2501583/2020) the claimant repeated the complaint that the respondent subjected the claimant to a detriment contrary to section 146 TULR(C)A 1992.

7. At a preliminary hearing for case management on 12 October 2020 Employment Judge Johnson recorded the claims being made by the claimant were as above. Ahead of this hearing the parties had, helpfully, agreed a provisional List of Issues.

8. As the parties did not complete their closing submissions until 4.50pm on the final day of the hearing, there was not time for the Tribunal to begin its deliberations in the time originally allocated for this hearing. The Tribunal arranged to meet on 5 and 6 August 2021 to deliberate. Before the Tribunal was able to begin its deliberations, however, it came to the Tribunal's attention that the company went into administration on 22 July 2021, the day after the hearing ended. The Insolvency Act 1986 provides that the proceedings could not be continued against the company without the consent of the administrators or the permission of the court. Neither party had informed the Tribunal that the company had gone into administration. The Tribunal made enquiries to ascertain whether or not the consent of the administrators or permission of the court had been sought for the proceedings to continue. For reasons that have not been shared with the Tribunal, the claimant's representatives appear not to have requested permission of the administrators to continue with the claim until 15 October 2021. As an aside, we note that the claimant's representatives incorrectly informed the administrators in October 2021

that 'the claimant has been ordered by the Tribunal to request permission of the administrators to proceed with his claim'. The administrators consented to these proceedings continuing on 24 November 2021, a fact of which the Tribunal was made aware on the evening of Friday 26 November 2021. The Tribunal then arranged to meet for its deliberations at the first opportunity.

Legal Framework

Unfair dismissal

9. An employee has the right, under section 94 of the Employment Rights Act 1996, not to be unfairly dismissed (subject to certain qualifications and conditions set out in the Act).

Automatic unfair dismissal – section 103A

10. Section 103A of the Employment Rights Act 1996 provides: 'An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.'

Meaning of 'protected disclosure'

11. In order for something said or conveyed by an employee to be considered as a protected disclosure, three requirements need to be satisfied (ERA 1996 s 43A). Firstly, there needs to be a 'disclosure' within the meaning of the Act. Secondly, that disclosure must be a 'qualifying disclosure', and thirdly it must be made by the worker in a manner that accords with the scheme set out at ERA 1996 ss 43C–43H.

12. In this regard, the following provisions of the 1996 Act are relevant:

> 43A Meaning of 'protected disclosure.
>
> In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
>
> 43B Disclosures qualifying for protection.
>
> (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

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

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

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

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

13. The definition of a qualifying disclosure comprises a number of elements. As was set out in Williams v Michelle Brown Am UKEAT/0044/19 (29 October 2019, unreported):

> *'First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'*

14. As to what amounts to a 'disclosure of information', the Court of Appeal held in Kilraine v Wandsworth London Borough Council [2018] ICR 1850, that in order for a statement to be a qualifying disclosure for the purposes of section 43B(1), it must have a sufficient factual content and specificity capable of tending to show one of the matters listed in paragraphs (a)–(f) of that subsection; the concept of 'information' is capable of covering statements which might also be characterised as allegations, although not every statement involving an allegation would constitute 'information' and amount to a 'qualifying disclosure' within section 43B(1).

15. Provided the whistle-blower subjectively believes that the information disclosed tends to show relevant wrongdoing and that belief is objectively reasonable, the fact that the belief turns out to be wrong is not sufficient of itself to render the belief unreasonable and thus deprive the whistle-blower of the protection of the statute: Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] IRLR 346.

16. The words 'in the public interest' in s 43B(1) were considered by the Court of Appeal in Chesterton Global Ltd v Nurmohamed [2017] IRLR 837. The leading judgment of Underhill LJ made it clear that the question for the tribunal is whether the worker believed, at the time he or she was making it, that the disclosure was in the public interest and whether, if so, that belief was reasonable. The judgment also

held that, while the worker must have a genuine and reasonable belief that a disclosure is in the public interest, this does not have to be his or her predominant motivation in making it.

17. In order to qualify for protection, the disclosure must be to an appropriate person. The claimant's case is that each of the disclosures which led to him being subjected to detriment fell within one or other of the following categories: disclosure to a prescribed person under section 43F; or disclosure to a responsible person under section 43C(1)(b)(ii).

18. Section 43F provides as follows:

> 43F Disclosure to prescribed person
>
> (1) A qualifying disclosure is made in accordance with this section if the worker—(a) makes the disclosure . . . to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
>
> (b) reasonably believes—
>
> (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
>
> (ii) that the information disclosed, and any allegation contained in it, are substantially true.

19. The Health and Safety Executive is prescribed for the purposes of s43F in relation to 'matters relating to those industries and work activities for which the Health and Safety Executive is the enforcing authority under the Health and Safety (Enforcing Authority) Regulations 1998 and which are about the health and safety of individuals at work, or the health and safety of the public arising out of or in connection with the activities of persons at work': Public Interest Disclosure (Prescribed Persons) Order 2014 (SI 2014/2418).

20. Section 43C(1)(b) provides as follows:

> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—
>
> (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
>
> (i) the conduct of a person other than his employer, or
>
> (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

Automatic unfair dismissal – TULR(C)A 1992 s 152

21. A dismissal is automatically unfair if the reason for it is one of the union grounds specified in TULR(C)A 1992 s 152.

22. TULR(C)A s152 says this.

> 152 Dismissal of employee on grounds related to union membership or activities
>
> (1) For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
>
> …
>
> (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, …
>
> …

23. In Morris v Metrolink Ratpdev Ltd [2018] EWCA Civ 1359, [2018] IRLR 853, the Court of Appeal held that there is a distinction between dismissing an employee for trade union activities and dismissal for things done or said by an employee in the course of trade union activities which can fairly be regarded as a distinct reason for the dismissal notwithstanding the context in which they occurred. In so deciding, the Court of Appeal approved the approach taken in the case of Lyon and Scherk v St James Press Ltd [1976] IRLR 215, EAT, where Philips J said:

> *'We do not say that every such act is protected. For example, wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for dismissal which would not be unfair'.*
>
> *…'The marks within which the decision must be made are clear: the special protection afforded by [s 152] to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate.'*

24. The Court of Appeal in Morris also cited with approval the decision in Bass Taverns Ltd v Burgess [1995] IRLR 596, CA. In that case a union representative who had been invited to offer the union's perspective as part of the employer's induction course for new employees was excessively and scathingly critical of the employer. The Court of Appeal held that he had nevertheless been engaged in union activities.

Pill LJ considered it relevant that the employment tribunal had found that the trade unionist's actions were neither dishonest nor in bad faith and that 'nothing he had said went beyond the rhetoric or hyperbole which might be expected of any evangelist.'

25. In Morris, the Court of Appeal warned that tribunals 'must be astute not to find that the Lyon/Bass line has been crossed wherever there has been an error of judgment or lapse from the highest standards, because that would undermine the important protection which Parliament has enacted for employees taking part in trade union activities.' The flavour of the distinction, said the Court of Appeal, is captured by the reference in Lyon to acts which are 'wholly unreasonable, extraneous or malicious'.

Automatic unfair dismissal – ERA s100

26. Section 100 of the Employment Rights Act 1996 (ERA) provides:

> 100 Health and safety cases
>
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
>
> (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
>
> (b) being a representative of workers on matters of health and safety at work or member of a safety committee—
>
> (i) in accordance with arrangements established under or by virtue of any enactment, or
>
> (ii) by reason of being acknowledged as such by the employer,
>
> the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee…

27. In Sinclair v Trackwork Ltd [2021] IRLR 557, EAT, Choudhury P held that:

27.1. the scope of the protection afforded by s100(1) of the 1996 Act is broad;

27.2. activities carried out pursuant to a designation under s.100(1)(a) will be protected and the manner in which such activities are undertaken will not readily provide grounds for removing that protection;

27.3. however, conduct that is, for example, wholly unreasonable, malicious or irrelevant to the task in hand could mean that the employee loses the protection.

28. In so holding, Choudhury P adopted the approach taken by the case law in relation to dismissal for trade union activities described above.

Ordinary unfair dismissal

Reason for dismissal

29. When a complaint of unfair dismissal is made, it is for the employer to show

29.1. the reason (or, if more than one, the principal reason) for the dismissal, and

29.2. that it is either a reason falling within section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held: ERA section 98(1).

30. The reference to the reason, in section 98(1)(a), is not a reference to the category within section 98(2) into which the reason might fall. It is a reference to the set of facts known to the employer, or beliefs held by the employer, which cause it to dismiss the employee: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. In Abernethy the Court of Appeal noted that: 'If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason'.

31. Having identified the reason (or, if more than one, the principal reason) for the dismissal, it is then necessary to determine whether that reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. In this case the respondent contends that the reason for the claimant's dismissal was a reason relating to the conduct of the claimant, which is a potentially fair reason for dismissal within section 98(2)(b).

32. Where an employer alleges that its reason for dismissing the claimant was related to his conduct the employer most show:

32.1. that, at the time of dismissal, it genuinely believed the claimant had committed the conduct in question; and

32.2. that this was the reason for dismissing the claimant.

33. The test is not whether the Tribunal believes the claimant committed the conduct in question but whether the employer believed he had done so.

Fairness

34. If the respondent shows that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) of the Employment Rights Act 1996.

35. Section 98(4) of ERA 1996 provides that: '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.'

36. In assessing reasonableness, the Tribunal must not substitute its view for that of the employer: the test is an objective one and the Tribunal must not fall into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563. The objective approach requires the Tribunal to decide whether the employer's actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). This 'range of reasonable responses' test applies just as much to the procedure by which the decision to dismiss is reached as it does to the decision itself (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).

37. The Employment Appeal Tribunal (EAT) set out guidelines as to how the reasonableness test should be applied to cases of alleged misconduct in the case of British Home Stores Ltd v Burchell [1980] ICR 303. The EAT stated there that what the Tribunal should decide is whether the employer had reasonable grounds for believing the claimant had committed the misconduct alleged and had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

38. In that case the EAT also made clear that, in deciding whether an employer had reasonable grounds for believing that the employee had committed the misconduct alleged, the test is not whether the material on which the employer based its belief was such that, objectively considered, it could lead to the employer being 'sure' of the employee's guilt. What is needed is a reasonable suspicion amounting to a belief and that the employer had in his or her mind reasonable grounds upon which to sustain that belief. If the employer's decision was reached his or her conclusion of guilt on the balance of probabilities that will be reasonable.

39. The concept of a reasonable investigation can encompass a number of aspects, including: making proper enquiries to determine the facts; informing the employee of the basis of the problem; giving the employee an opportunity to make

representations on allegations made against them and put their case in response; and allowing a right of appeal.

40. The Tribunal must take into account relevant provisions of the In ACAS Code of Practice on Disciplinary and Grievance Procedures when assessing the reasonableness of a dismissal on the grounds of conduct (section 207(3) of the Trade Union and Labour Relations (Consolidation) Act 1992). The Code of Practice sets out guidance as to how disciplinary matters should be handled in the workplace. At paragraph 4, it outlines the elements of a fair process as follows:

40.1. 'Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

40.2. Employers and employees should act consistently.

40.3. Employers should carry out any necessary investigations, to establish the facts of the case.

40.4. Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

40.5. Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

40.6. Employers should allow an employee to appeal against any formal decision made.'

41. The Code then goes on to expand on these elements in more detail. There follows a section headed 'Special cases', which includes the following paragraph:

> '30. Where disciplinary action is being considered against an employee who is a trade union representative the normal disciplinary procedure should be followed. Depending on the circumstances, however, it is advisable to discuss the matter at an early stage with an official employed by the union, after obtaining the employee's agreement.'

42. Even if procedural safeguards are not strictly observed, the dismissal may be fair. This will be the case where the specific procedural defect is not intrinsically unfair and the procedures overall are fair (Fuller v Lloyd's Bank [1991] IRLR 336, EAT). Furthermore, defects in the initial disciplinary hearing may be remedied on appeal if, in all the circumstances, the later stages of a procedure are sufficient to cure any earlier unfairness (Taylor v OCS Group Ltd [2006] IRLR 613). The Court of Appeal noted that the Tribunal must 'determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process

and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.'

43. In applying section 98(4) the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances ie one falling within the range of reasonable responses open to a reasonable employer. As noted above, it is not for the Tribunal to substitute its view for that of the employer.

Wrongful dismissal

44. A dismissal without notice where summary dismissal is not justifiable will be a wrongful dismissal and give rise to an action for breach of contract.

45. An employer is entitled to dismiss an employee without notice for gross misconduct. In this context, 'gross misconduct' means conduct that constitutes a repudiatory breach of contract.

46. The question here is not whether the respondent believed the claimant to be guilty of gross misconduct. It is for the Tribunal itself to determine (a) whether the claimant actually committed the conduct alleged to constitute the breach; and (b) if so, whether that conduct did constitute a repudiatory breach of contract.

47. The concept of gross misconduct was considered in the case of Sandwell & West Birmingham Hospitals NHS Trust v Westwood, where the EAT held that to amount to gross misconduct the employee's conduct must either be a deliberate and wilful contradiction of contractual terms or be conduct amounting to a very considerable degree of negligence. In Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at para 61) Etherton LJ said the legal test for whether there has been a repudiatory breach of contract is: '…whether, looking at all the circumstances objectively, that is from the perspective of the reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.'

Detriment

Detriment for making a protected disclosure

48. The Employment Rights Act 1996 gives workers the right not to be subjected to detriment for making a protected disclosure. The right is set out at section 47B, which says this:

> 47B Protected disclosures.
>
> A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

Concept of detriment

49. The concept of detriment is very broad and must be judged from the view-point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and the Court of Appeal in Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73, [2020] ICR 1226 confirmed that it has the same meaning in whistle-blowing cases.

50. A detriment exists if a reasonable worker (in the position of the Claimant) would or might take the view that the treatment accorded to him or her had, in all the circumstances, been to his or her detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had thereby been disadvantaged in the circumstances in which he had thereafter to work.

Reason for detrimental treatment

51. Section 47B requires that the act, or deliberate failure to act, is 'on the ground that' the worker has made the protected disclosure. That requires the Tribunal to ask itself why the alleged discriminator acted as they did: what, consciously or unconsciously, was their reason? In Manchester NHS Trust v Fecitt [2011] EWCA 1190; [2012] ICR 372, the Court of Appeal held that the test for detriments is whether 'the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower.'

52. The burden of showing the reason is on the employer: section ERA 1996 s 48(2). If the Tribunal rejects the employer's explanation for the detrimental treatment under consideration, it may draw an adverse inference and find liability but is not legally bound to do so: see Serco Ltd v Dahou [2015] IRLR 30, EAT and [2017] IRLR 81, CA. In the Court of Appeal, Laws LJ said: 'As regards dismissal cases, this court has held (Kuzel, paragraph 59) that an employer's failure to show what the reason for the dismissal was does not entail the conclusion that the reason was as asserted by the employee. As a proposition of logic, this applies no less to detriment cases. Simler J did not hold that it would never follow from a respondent's failure to show his reasons that the employee's case was right.'

Detriment contrary to section 146 TULR(C)A 1992

53. Section 146 of TULR(C)A provides as follows

> 46 Detriment on grounds related to union membership or activities

> (1) A worker has the right not to [be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—
>
> …
>
> (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, …

Evidence

54. In support of his claim we heard evidence from the claimant himself and from the following of his former colleagues:

54.1. Mr M Blewitt, who, at the time of the events with which we are concerned, was a GMB representative and a health and safety representative at the respondent alongside the claimant;

54.2. Mr M Heasman, who was a Fabrication Supervisor employed by the respondent;

54.3. Mr M Nobel, who was employed by the respondent as Health and Safety Manager between February 2017 and June 2018;

54.4. Mr K McStravick, who for the last three or four years of his employment with the respondent was the claimant's immediate supervisor;

54.5. Mr R Waller, who was employed by the respondent as a welder.

55. For the respondent we heard evidence from:

55.1. Ms D Boon, the respondent's Director of Commercial Operations; and

55.2. Mr J Allison, who dealt with the claimant's appeal against his dismissal.

56. The respondent had originally intended to call the respondent's Managing Director, Mr C Droogan, to give evidence. However, for medical reasons he did not attend. Mr Smith said he had no objection to the Tribunal reading Mr Droogan's witness statement and according it whatever weight was considered appropriate, bearing in mind that the respondent had not had an opportunity to challenge his evidence.

57. Towards the end of the day, on 16 July 2021 (Friday), Mr Brochwicz-Lewinski applied for permission to call as a further witness Ms Dover of the respondent's HR department. After hearing the parties' submissions, we refused that application for

reasons which we gave at the hearing and which we do not repeat here as we have not been asked for written reasons for that decision.

58. We were also referred to a number of documents in a bundle that ran to over 1300 pages. We have taken into account the documents to which we were referred. References in this judgment to numbers in square brackets are to page numbers in the bundle of documents.

Findings of Fact

59. We make the following findings of fact.

60. The claimant's employment with the respondent began on 7 February 1994.

61. The respondent was a company involved in the design, engineering, fabrication and construction of steel bridges and complex structures. It employed around 250 people at the time of the events with which we are concerned.

62. In April 2015 Mr Droogan was appointed Managing Director of the respondent and carried out a review of the whole business. Shortly afterwards, in June 2015, Ms Boon joined the company, initially as a self-employed consultant. As Director of Commercial Operations, she served on the Executive Management Team and was responsible for all commercial aspects of the business, reporting directly to Mr Droogan.

63. In November 2016 the respondent instructed Eton Environmental Group Limited ('Eton') to carry out a full survey of the asbestos and management of asbestos at the respondent's Darlington works, which is where the claimant worked. Having carried out that survey, Eton produced a comprehensive report in which, amongst other things, they recorded the location of the asbestos they had identified (or suspected to exist), grading the asbestos-containing material according to the risk it posed in their opinion. In each case they graded the asbestos-containing material at the respondent's site as either low risk or very low risk. The report made general recommendations that the asbestos-containing materials be suitably labelled and re-inspected on a regular basis and the location and risk of asbestos be communicated to staff and contractors.

64. From the information contained in that report the respondent produced a document which it titled 'Asbestos Management Plan (Risk Assessment) for 2016/2017' [956-960].

65. In March 2018, following an election by the union membership, the claimant became one of four GMB workplace representatives. That position incorporated the role of GMB health and safety representative. The GMB union was recognised by the respondent.

66. On 2 May 2018 a Ms Debnam was appointed Head of Health and Safety, becoming Mr Nobel's line manager.

67. On 24 May 2018 the claimant attended a health and safety meeting. Subsequently a disciplinary investigation was instigated against the claimant, it being alleged that he had behaved disruptively at the meeting. The respondent carried out a thorough investigation. Following a disciplinary hearing, the company's Compliance Manager, gave the claimant a verbal warning. She said the verbal warning would be put on the claimant's record for 12 months but, as the claimant had said he would attend a communications course, it would be removed early once he had successfully completed the course. The verbal warning was removed from the claimant's record when he completed the communication course in March 2019.

68. The claimant's evidence to us was that he did not behave disruptively at the meeting on 24 May 2018. That is consistent with what he said during the disciplinary investigation in June 2018. However, Mr Nobel said during the course of the disciplinary investigation that the claimant had acted disruptively, had raised his voice and disrupted the meeting and another of the claimant's colleagues described the claimant's conduct as disruptive, confrontational, intimidating and unprofessional. It was not suggested to us that either of those individuals had any cause to misrepresent what had happened on that occasion. We find that, in light of the information available to her, the company's Compliance Manager had reasonable grounds for giving the claimant a verbal warning.

69. A couple of months later the claimant acknowledged, in an email [630], that he 'was maybe a little too forceful' at the meeting and that he now understood that 'it could possibly have been seen to be intimidating'. That email also reveals that the person who was chairing the meeting in May had told the claimant after the meeting that his behaviour was unacceptable and warned him about his future conduct. In all the circumstances we find it more likely than not that the claimant did behave disruptively at the meeting on 24 May 2018.

70. On 14 June 2018 Ms Debnam emailed Mr Malcolm asking him to conduct a gap analysis regarding an Asbestos Management Plan. For reasons that are not clear but with which we do not need to concern ourselves, Mr Nobel took exception to that instruction. Shortly afterwards, Mr Nobel resigned because he did not want to work with Ms Debnam. He left the company on 20 June 2018, after he and the company agreed that he should leave without working his notice.

71. A few days after his employment ended, on 29 June 2018, Mr Nobel emailed the claimant [239]. He told the claimant he was emailing him to update him on certain matters he had not had chance to speak with the claimant about before he left. In his email he referred to a number of matters. They included the Asbestos Management Plan. Mr Nobel said in his email:

'Shortly before I left the company I was tasked by the senior HSE manager to carry out a gap analysis of the Asbestos Management Procedures at the Darlington facility. A detailed survey was carried out in 2016 by external specialists which identified 31 items of low-level asbestos containing material, e.g. tiles and gaskets, etc. You are entitled to view the survey. These are of minimal risk to health as long as they are left undisturbed and managed correctly. It transpired that no Asbestos Management Plan is in place and I emailed the senior HSE manager and informed her of this fact and that in her senior role she must ensure a plan was implemented as a matter of urgency. An Asbestos Management Plan is a regulatory requirement. She stated in an email response that she was already aware a plan was not in place. Due to the urgency with this issue I am sure she will have already commenced this procedure and as a safety representative you should ask to be kept up-to-date with how she is proceeding. The workforce must be informed of the asbestos location and management procedures etc.'

72. In July 2018 the claimant attended meetings at which asbestos was discussed. Prompted by what Mr Nobel had told him, the claimant asked about the Asbestos Management Plan and was told there was one in place. At around this time Eton was instructed again to undertake a reinspection of asbestos within the Darlington works. The respondent subsequently prepared the document at [961-965] headed 'Asbestos Management Plan AMP 2018/19'.

73. On 14 August 2018 the claimant attended an asbestos awareness course delivered by external trainer. By this time the claimant was aware that Eton had been brought in to undertake a reinspection of asbestos within the Darlington works and that they had labelled the areas where asbestos was thought to be. On 30 August and 27 September 2018 the claimant attended further health and safety meetings at which he was told that the respondent was legally compliant regarding asbestos.

74. Around about this time somebody reported the claimant for using his mobile phone on an external service road. This was discussed with the claimant. The claimant emailed Mr Abbott at the time [626] saying he felt he had been singled out. Mr Abbott replied [627]: 'I can only imagine the person who observed the unsafe act was acting with your safe wellbeing at heart and not in a vindictive manner. We all need reminding sometimes (as you have reminded me on occasions for my own safety) of what is safe and not.'

75. The respondent gave toolbox talks to employees on regular occasions. These talks were given after information had been passed down by the safety department. The issues discussed ranged from serious issues to things that were relatively minor. At a toolbox talk a matter would be discussed and the employees would be told how they should work with the issue or remedy the problem. Those who are delivering the talk are usually given a script to read from. At the end of a toolbox talk those present would usually be given a form to sign to evidence that they

had been present at the toolbox talk. Sometimes, however, employees refused to sign a toolbox talk, for example if they do not agree with something that is said.

76. At the end of April 2019 Mr Hardy, a supervisor, gave a toolbox talk to employees working on F bay. Mr Blewitt was present at this toolbox talk. The claimant was not. The talk was about asbestos. Mr Hardy had been given a script to read from, as was the norm. During the course of that talk Mr Hardy said he knew there was asbestos on the shop floor as he had seen stickers. An area of factual dispute in this case, which we return to later in our findings, is whether, before saying that, Mr Hardy had said, seemingly reading from the script, that there was no asbestos on the shop floor.

77. After the toolbox talk Mr Blewitt went to speak to the claimant and asked him to go with him and Mr Hardy to see where the asbestos sticker was. Mr Hardy took them to G bay and pointed out an asbestos sticker. The claimant and Mr Blewitt then went to see Mr Abbott and the three of them went to talk to Mr Parker. The claimant and Mr Blewitt said they wanted to talk to Mr Droogan, the Managing Director.

78. On 7 May 2019 Mr Parker sent an email to Ms Dover in HR [137-8]. It is apparent from the content of that email that Mr Parker had already spoken to Ms Dover about the conversation he had had with the claimant and Mr Blewitt at the end of April. In that email Mr Parker gave an account of that conversation, saying that the claimant and Mr Blewitt had said that the fact there was asbestos in the factory was 'contrary to what he had been told by [Mr Shimmin] and [Ms Debnam]' and that that the claimant and Mr Blewitt had 'claimed on several occasions that they had been lied to by the business'.

79. Mr Parker's email makes no reference to the claimant or Mr Blewitt, or anyone else, claiming that Mr Hardy had initially said there was no asbestos on the shop floor. Mr Parker said in his email that he had told the claimant and Mr Blewitt that he would investigate what they were telling him and that he had subsequently spoken with Ms Debnam and had left it with her to investigate further.

80. Mr Parker, Ms Debnam and Ms Dover discussed the complaints made by Mr Blewitt and the claimant. Their understanding, as reflected in Mr Parker's email of 7 May 2019, was that the claimant and Mr Blewitt were claiming that they had been deliberately misled ('lied to') by senior managers in the business who, until the recent toolbox talks, had led them to believe that there was no asbestos on the shop floor and that workers were unaware of where the asbestos was located. A decision was made to ask someone independent within the business to look into the complaints as they were understood by the business. Accordingly, Mr Oakes, Training Manager, was asked to investigate the issues Mr Blewitt and the claimant had raised with Mr Parker.

81. Mr Oakes conducted an investigation, in the course of which he interviewed a number of people including Ms Debnam (on 13 May 2019), Mr Parker (on 13 May

2019), Mr Jackson (on 13 May 2019); the external trainer who had delivered asbestos awareness training in August 2018 (on 13 May 2019); the claimant (on 14 May 2019); a Mr Trotter (on 14 May 2019); Mr Abbott (on 14 May 2019); Mr Shimmin (on 14 May 2019); Mr Blewitt (on 15 May 2019); and, at some point, Mr Hardy.

82. When Mr Oakes spoke with the claimant on 14 May 2019, the claimant referred to discussions and meetings he had had about asbestos in 2018 with Mr Shimmin and Ms Debnam. Mr Oakes' notes of the meeting record that the claimant told him that G or F bay recently had a toolbox talk on asbestos and the 'lads were told that there was no asbestos on the shop floor'. Mr Oakes' notes also record that he asked the claimant 'what is your complaint?' and the claimant replied that he feels that he was lied to and that the company did not have an asbestos plan. The claimant was given a copy of the notes made by Mr Oakes of his meeting with the claimant some weeks later. The claimant did not agree with everything that was written in that document and so added his own notes and corrections. We were referred to a copy of that document showing the claimant's notes and corrections [546]. The claimant did not annotate or correct the part of the note that says, 'D Stockdale advised that he feels that he was lied to...'.

83. Mr Oakes' notes of his meeting with Mr Blewitt the following day record that Mr Blewitt said that during a recent toolbox talk some staff were advised that there was no asbestos in the factory.

84. During the course of his investigation Mr Oakes obtained a copy of the script from the toolbox talk about asbestos given to the maintenance team. He also obtained a copy of the register showing who had been present. That register records the talk as having been given on 1 May 2019.

85. On 19 June 2019 Mr Jackson met with the claimant and Mr Blewitt and took them through the Asbestos Management Plan.

86. In July 2019 Mr Oakes finalised a report into the investigation he had carried out [139-157]. The report was lengthy and detailed. The report began with an executive summary in which he said:

> 'The GMB union representatives asserted that they have been deliberately misled by the management regarding the presence of asbestos within the Darlington works. Following a thorough investigation, I have concluded that there is no evidence whatsoever of any attempt to mislead any individual. The detailed information regarding the status of asbestos at the Darlington site has, and continues to be, available for review in the HSE department. This document contains both written and pictorial details of the specific locations of suspected asbestos containing materials (ACMs). This documentation was available and referred to during the awareness training (attended by one GMB representative) in August 2018. Witness testimony indicates that the GMB representative has consulted the document, however

they chose for whatever reason not to make detailed inspection of its contents. Additionally:-

- Management have consistently made the controlled copy of the Asbestos Plan available for review.
- There is no substantive evidence that any supervisor has stated during toolbox talks that there is no asbestos in the works.
- Management and supervision of the maintenance department attended the asbestos awareness training and have had access to the Asbestos Plan, again for whatever reason they have not reviewed the detail.
- Labels have been in place on all suspected ACMs since September 2018.
- CBUK does operate an open door policy regarding HSE issues. Numerous systems are available to all employees to directly raise issues.'

87. The report went on to set out the methodology, the scope of the investigation, the conclusions and recommendations in more detail. In his report Mr Oakes said that both Mr Stockdale and Mr Blewitt had alleged that management had lied and were 'liars.' He said, 'The use of this type of language is extremely concerning, as it implies a deliberate attempt to deceive'. He said there was 'no rational explanation for their beliefs' and concluded that there were 'other agendas in operation here, which may be driving this negative and adversarial style of approach'.

88. It is apparent from the report that Mr Oakes investigated the allegation made by Mr Blewitt in his meeting on 15 May that the toolbox talk on asbestos given by Mr Hardy 'stated that there was no asbestos in the works'. His conclusions on this were as follows:

> 'All toolbox talks consist of a briefing sheet (see example in appendix 2) with supervisor script and completion record sheet (see example in appendix 3). I have reviewed the briefing notes for the talk in question, it is my view that it does not state anywhere that there is no asbestos in the works. Additionally, I find it difficult to see how the contents might be misconstrued as to suggest otherwise. Having interviewed [Mr Hardy], he is certain that he used the script as published, without embellishment and that no questions were forthcoming. I have been unable to obtain a copy of the completion sheet for F bay (other bays were available), and I suspect that for whatever reason it may not have been completed. In this case, testimony of MB and PH are contradictory. It is however difficult to see how anything in the published script could be construed as stating there is no asbestos in the works.'

89. Amongst Mr Oakes' conclusions were that the asbestos file, containing an Asbestos Plan, had been available to view since August 2018 and the claimant had seen it. He also concluded, however, that the company should have provided the health and safety representatives with a copy of the report rather than just allowing them to see it and that the Asbestos Management Plan was not sufficient to comply with legislation, in his view. He recommended that the Asbestos Plan be revised, that its format should be updated and that copies of the plan should be made available to employee representatives and trade union safety representatives.

90. Included in the report as appendices were copies of the following documents:

90.1. A document described by Mr Oakes as a briefing sheet, which was entitled 'Toolbox Talk, Asbestos Awareness' and at the top of which was written, 'maint' (short for the maintenance team). That document recorded the following 'points to note':

90.1.1. 'There is some asbestos on site but it is managed and not hazardous.

90.1.2. Asbestos only becomes hazardous if it is worked on, drilled, broken up or a grinder taken to it, all of which release the fibres.

90.1.3. The plant has an Asbestos Management Plan for the asbestos we have on site.

90.2. A document headed 'Supervisor Script' for a toolbox talk on asbestos. That script said:

90.2.1. 'The CBUK Darlington site does have some asbestos on site but in its present locations and state it poses no hazard at all to anyone on site. We have a management plan and a risk assessment carried out by a specialist company which details where we have asbestos, which type and what we need to do with it. All our asbestos is encapsulated (covered over) or not in areas where it can be easily damaged or disturbed. Asbestos only becomes a problem when the fibres are released into the atmosphere by moving it, working on it or damaging it. Any contractors who come on site and may come close to areas where asbestos is present are given a copy of our management plan and strict advice on what work they can and cannot carry out close to the asbestos containing materials (ACMs). The asbestos on site is mainly in ceiling coatings and vinyl floors, both of which are covered by carpet and false ceilings. We also have some pipe gaskets which contain asbestos.'

The document continued with the 'Points to Note' referred to previously.

90.3. A document described as an 'Asbestos toolbox talk record sheet'. This document contained a table in which the names of individuals in a particular team who had received the toolbox talk on a particular occasion were listed and the individuals' signatures noted together with the date of the talk. The particular document included in the report was for the maintenance team. It recorded that a toolbox talk on asbestos awareness had been given by a manager, Mr Trotter, on 1 May 2019 to ten individuals, who we infer were part of the maintenance team.

91. On 30 July 2019 the claimant and Mr Blewitt attended a meeting with Mr Parker and Ms Dover to discuss the investigation report. Mr Parker arranged this meeting so that the claimant and Mr Blewitt could see the report. An hour was set aside ahead of the meeting for Mr Blewitt and the claimant to read the report then afterwards they spoke with Mr Parker and Ms Dover. They then had further meetings on 1 and 5 August 2019 at which the report was discussed further. Ahead of one of those meetings, the claimant had prepared a note of a number of concerns he had about the report and he relayed those concerns during the meeting.

92. The claimant and Mr Blewitt were upset by the criticisms of them in Mr Oakes' report and, in one of the meetings, they asked if they could show the report to Mr Wilson, the GMB delegate. In response, the claimant and Mr Blewitt were told that the report was confidential and must not be shown to Mr Wilson. There is a dispute on the evidence as to exactly what was said about discussing or sharing the contents of the report, and we make further findings below as to the conclusions that were reached about that matter during the course of the subsequent disciplinary procedure and our own conclusions.

93. On 6 August 2019 Mr Parker wrote a letter to the claimant which was hand delivered to him the following day. The letter purported to contain a summary of what had been discussed at the meetings of 30 July, 1 August and 5 August. It summarised Mr Oakes' report. We infer from the contents of the letter that the claimant had said during one of these meetings that, although he had read the asbestos management file, he did not understand it and would like additional training on the matter. Mr Parker agreed that further training would be provided. We also infer from the contents of that letter that, at one of those meetings, Mr Blewitt had disagreed that there was 'no evidence that [Mr Hardy] had said there is no asbestos in the works'.

94. That letter included the following statement: 'It was asked if the delegate, Mark Wilson, could see the report. You were advised that the report is not for external circulation due to its commercial sensitivity and therefore it was not to be shared outside of CBUK.'

95. The letter also said:

> 'As advised to you, we actively encourage any person to raise concerns, in particular those that involve the health and safety of our workforce and we want people to feel safe. We want you, or anyone in the business, to raise these in a respectful, professional manner and for them to be made in good faith. We expect your behaviour and approach, in particular as a union representative, to contribute to promoting good industrial relations – it is not only what you do, but how you do it. In this particular instance in April 2019 you as GMB representatives made serious allegations of management non disclosure and deliberate attempts to mislead. In addition your comments were made in public. In our opinion this is inappropriate, unprofessional and involved personalised accusations. This is potentially damaging to CBUK, causing unnecessary concern and alarm amongst our employees. In this regard both you and Michael have made false allegations regarding CBUK senior management, which is extremely unprofessional and reputationally disrespectful. It is particularly disappointing given that you attended the communications course, organised by the company, demonstrating to us that you have not understood (or disregarded the training). This training, as you know, was recommended to you to improve your language and provide you with tools and guidance in appropriate communications. Under ordinary circumstances the company would be entitled to treat this matter under the disciplinary process. However, the company does and will continue to collaborate with the union for the benefit of the workforce, and as such we will not be pursuing it in this instance. Nevertheless, we will be writing directly to the GMB to express our serious concerns in the way in which you raised these serious claims, that were found to be false, that fostered mistrust which was unfounded. I must also remind you that this is a commercially sensitive issue and therefore this report is confidential and must not be shared externally.'

96. The letter went on to say that the company would provide the claimant and Mr Blewitt with further internal training on communication, on a one-to-one basis, and would ask the GMB to provide them with training and professional guidance. Mr Parker concluded the letter as follows:

> 'In closing, we have concluded this investigation at your request, and we have shared the findings with you. I trust that this closes this matter, and you will discontinue making any further allegations about management non disclosure and deliberate attempts to mislead. Should any other health and safety concerns be raised in the future by the GMB or any employee we will endeavour to investigate those concerns in an appropriate and timely manner.'

97. On 8 August 2019 the claimant attended a health and safety meeting at which Mr Parker discussed the investigation report and set out its conclusions. Then on 12 August 2019 Mr Parker wrote to Mr Wilson, the regional GMB organiser, making a formal complaint about the claimant and Mr Blewitt [191]. The letter began:

> 'Regrettably, we are writing to raise a formal complaint with the GMB in respect of the union representatives, [Mr Stockdale] and [Mr Blewitt] …This complaint is regarding their recent unacceptable behaviour and language, in their capacity as union representatives. In this particular instance, GMB representatives made unwarranted allegations of management non disclosure and deliberate attempts to mislead. In addition, these comments were made in public. In our opinion this behaviour and inflammatory language is inappropriate, unprofessional and involved personalised accusations. This potentially damaging to CBUK commercially, causing concern and alarm amongst our employees and especially those unreasonably accused. Specifically, [Mr Stockdale] and [Mr Blewitt] branded some members of the senior management team 'liars' claiming they had been 'lied to' about the presence of asbestos in the factory.'

98. The letter went on to refer to the report conducted by Mr Oakes and said:

> 'In summary, it is evident that the union representatives made unfounded claims regarding CBUK senior management, which is extremely unprofessional, reputationally disrespectful and damaging to good industrial relations…We are further frustrated and deeply concerned that since sharing the substantive evidence in the report, the union representatives still hold the view that they have been 'lied to' and continue to make this statement. In ordinary circumstances the company would be entitled to treat this matter under our internal disciplinary process. However, the company has endeavoured to collaborate with the union for the benefit of the workforce, and as such we have exercised our discretion in the interests of good industrial relations not to pursue it in this instance. Nevertheless, we have felt it appropriate to highlight our concerns to the GMB, about what, and how, their union representatives raised the serious claims, especially as they were found to be false, and which have potentially fostered mistrust. This is now the second instance where we have needed to address the GMB directly regarding their representatives' behaviour and language.'

99. The letter ended with Mr Parker saying:

> 'We have advised both representatives that we now intend to close this matter. We have also made clear that they should desist from making any further and unfounded allegations about management non disclosure and deliberate attempts to mislead and create unnecessary conflict.'

100. On 16 September 2019 the claimant attended an asbestos awareness course organised by the respondent. The following day the claimant sent an email to Mr Wilson about the training. He referred to the workforce being 'at us' about asbestos and said, 'they are on about disciplining us if we mention it'. He said he hoped Mr Wilson would be able to give them some advice when he returned from holiday, adding 'hopefully we have a good case to sort them out'.

101. A couple of days later, on 19 September 2019, the claimant, Mr Blewitt and some others were given a tour of the site to show them where the suspected asbestos-containing materials were. That day the claimant emailed Mr Wilson saying he had just found out that two GMB members had drilled holes in some boards that did not contain asbestos stickers and that nobody had told the workers that the boards contained asbestos.

102. On 25 September 2019 the claimant and Mr Blewitt attended a health and safety meeting at which they voiced concern about the two employees they believed had drilled into asbestos-containing material. There was no senior manager at that meeting so an extraordinary health and safety meeting was arranged to take place on 3 October 2019. When, at that meeting, the claimant raised the asbestos issue Mr Shimmin said, 'the matter is closed' and would not permit the claimant to discuss the issue further. Mr Shimmin had prepared a script for the meeting [1247]. We infer from that document that Mr Shimmin said during the meeting:

> 'The subject of asbestos has continually been raised by the union H & S representative over the last 12 months culminating in the business carrying out a thorough investigation at the request of the union, which is concluded and closed. The company has in place all the relevant processes and procedures and are fully compliant regarding asbestos. It is unreasonable to carry out further investigations regarding asbestos for events that occurred 3, 5, 10, 20 or 50 years ago. The company is fully compliant, and the matter is closed.'

103. A further minute of the meeting at [1248] records that Mr Shimmin said at the meeting:

> 'The matter of asbestos has been answered fully and finally by the senior management. Asbestos is not to be raised in the health and safety meeting going forward. Any future concerns or observations regarding asbestos are to be raised with senior management who will deal with them personally.'

104. Because Mr Shimmin refused to allow the claimant to raise issues relating to asbestos in that meeting, the claimant said at the end of the meeting 'HSE it is then', or words to that effect.

105. On 3 October 2019 the claimant contacted the HSE in writing, saying:

> 'I am a GMB safety rep, the last Health and Safety Manager left in June 2018 and sent me an email thanking me for my help and updated me on my safety concerns. He also mentioned that an asbestos survey was done in December 2016 which identified 31 low risk asbestos materials. On June 18th he informed the Operations Manager and the new Health and Safety Manager that they did not have an Asbestos Management Plan, and the H & S Manager confirmed this by email. I questioned them on several occasions

about this and they said they had one. We had meetings with the Operations Manager. He said we don't need to see it as it doesn't affect us and assured us there was none on the shop floor. We took his word for this until May 2019 when the supervisors gave a toolbox talk on asbestos and said there was none on the shop floor. When someone pointed out there was all the toolbox talks went missing. I went to see the Works Manager and asked for a meeting with the MD. A couple of days later he said he has asked for an investigation for us. When we got the investigation back some important witnesses were not interviewed and we did not get to see our statements before they were handed in as there were several mistakes on them. They said we had ulterior motives and said they could discipline us and were not to mention it. We done [sic] an asbestos course this month and the Maintenance Manager whose name was on the work instruction regarding asbestos said it's the first he's heard about it and he was told by a previous Health and Safety Manager that there was no asbestos on site. A couple of days later we had a tour of where the asbestos is, and it was pointed out that two lads had drilled into asbestos within the last two years with nobody telling them it was asbestos. It was also pointed out that office refurbishment had been done where there was asbestos. I believe there is a plan in place now but there wasn't then as I have yet to see it. I write this with a heavy heart as I have worked there 25 years and been threatened with discipline for mentioned asbestos and I have nowhere else to turn.'

106. On 7 October 2019 somebody from the HSE emailed Ms Debnam about the concern raised by the claimant. She included a copy of the claimant's written complaint and asked for the company's response together with documentation. Ms Debnam sent a response to the HSE on 15 October 2019. In her response Ms Debnam said:

'As discussed with you the complainant is a member of GMB union who during my short time here has been extremely confrontational in his approach to health and safety. [He] made a complaint regarding asbestos which was fully investigated by CBUK/HR internally with the support of a consultant. [His] accusations were proved to be unfounded.'

107. The HSE replied two days later, confirming that her response was satisfactory and that the HSE did not intend to take any further action.

108. On 12 November 2019 the claimant sent an email to Mr Parker, copying in a number of people in the company. In that email he said:

'…We have been informed on the last two meetings there are certain safety issues we can't discuss, and certain issues we can't put in the minute. If we are not allowed to talk about certain health and safety issues we will have no option but to contact HSE…'

109. In mid to later November 2019 Ms Dover told the claimant she wanted to speak with him, on an informal basis. She wanted to speak to the claimant about the complaint he had made to the HSE. The claimant refused to meet with Ms Dover without Mr Blewitt being present. Ms Dover made further attempts to meet with the claimant and, in early December, explained in an email that the reason she wanted to talk to him was to speak about the complaint made to the HSE. The claimant replied that he was happy to meet with her but he wanted Mr Blewitt to be present because 'if you want to talk about the complaint to the HSE it is union related'. Ms Dover tried again to arrange the meeting, but the claimant had a period of absence from work. The Christmas break meant the meeting was further delayed.

110. On 16 January 2020 Ms Dover emailed the claimant saying:

> 'I'm following up on my emails at the end of last year as we didn't get an opportunity to talk as you were off work the rest of December due to illness. I'm tied up for most of the day but free at 3.30pm if you could please pop up to my office? As before, Mick can come with you, though the meeting is informal.'

111. The meeting went ahead on that date. Mr Abbott was also present, at Ms Dover's request. In the disciplinary proceedings and at this hearing the claimant claimed that he did not know that the meeting was about the complaint he had made to the HSE until it had started. We reject the claimant's evidence on this point. The claimant knew that Ms Dover wanted to speak to him about his HSE complaint, and he knew she had been trying to arrange this meeting since November 2019. The claimant's evidence that he did not know this meeting was to discuss that issue is simply not credible, given that the email in which Ms Dover asked the claimant to come up to her office specifically referred to emails she had sent the previous year and those emails, which referred to the HSE complaint, were included in the email chain.

112. Ms Dover told the claimant that this was a 'factfinding investigatory meeting' and was informal. She told the claimant that the company had been notified that a complaint had been made to the HSE regarding asbestos. She asked the claimant who the complaint had come from and whether it was from the union. The claimant replied that he is a union representative and told Ms Dover to 'ask the HSE'.

113. Ms Dover asked the claimant if the complaint was from him or from him and Mr Blewitt or from the union, and if the union were aware of the complaint. The claimant replied again by telling again Ms Dover to 'ask the HSE'. The claimant said she should read the complaint, and what it said at the bottom of the complaint, and asked her if it says it is from the union. Ms Dover said she had read the complaint and seen that it started with 'I am a GMB safety rep'. She asked the claimant again who the complaint was made by. The claimant said the complaint had nothing to do with Mr Blewitt. Ms Dover asked the claimant why he had contacted the HSE and the claimant replied, 'why do you think I made the complaint?'. The claimant said he

was frustrated that he was not allowed to talk about asbestos or other health and safety matters and that he had been threatened with disciplinary for talking about health and safety issues. The claimant also referred to Mr Oakes' investigation report and in particular its reference to he and Mr Blewitt having hidden agendas.

114. On Ms Dover asking the claimant again why he contacted the HSE, the claimant said that he believed the company was now compliant but that it did not have a plan (for asbestos management) in 2016, and the complaint was about not seeing a plan from 2016. Ms Dover went on to ask the claimant what outcome he was seeking in writing to the HSE and the claimant replied that they were told that they were not allowed to talk about asbestos anymore. The claimant referred again to the investigation report and that he believed it contained errors or lies, and that he found the investigation report 'disgusting in how it came out'. He said that he had not asked for the investigation. Ms Dover referred to the fact that the investigation report had been finalised in July 2019 and asked the claimant what had led him to make the complaint in October 2019. The claimant replied by referring to the extraordinary H & S meeting where, he said, they were told they were not allowed to talk about asbestos. Ms Dover asked the claimant if the complaint stemmed from being frustrated about not being able to talk about asbestos. The claimant said there were a lot of things that led to it. Ms Dover ended the meeting by saying that she had covered all the questions she had, that the meeting had to been to find out a bit more information about the reason for the complaint to the HSE, and that if she had any further questions she would get in touch with the claimant.

115. In the weeks after that meeting the claimant sent a number of emails to managers raising a variety of issues relating to health and safety.

116. On 26 February 2020 the claimant was sent a letter asking him to attend a disciplinary hearing that was, initially, due to take place on 5 March 2020. The meeting was subsequently rescheduled to take place on 1 April 2020 so that Mr Wilson could attend, as requested by the claimant.

117. The letter said the purpose of the disciplinary hearing was to discuss an allegation that:

> 'When you contacted the HSE on 3 October 2019, you made two assertions which you knew could not possibly have been true. The two assertions in question are:
>
> (a) that you were lied to by company managers as to the presence of asbestos in the factory; and
>
> (b) that you were 'threatened with discipline for mentioning asbestos'.'

118. The letter went on to say:

> 'For the avoidance of doubt, no allegation is made in relation to any other comment or assertion you made to the HSE on 3 October 2019.'

119. Enclosed with that letter were a number of documents, including Mr Oakes' report, Mr Parker's letter of 6 August 2019, Health and Safety Committee meeting minutes from August 2019, the claimant's complaint to the HSE, the notes from the meeting the claimant had had with Ms Dover in January 2020 and the company's disciplinary policy and Code of Conduct policy. The claimant was told in the letter that the allegation was one of gross misconduct and that a possible outcome of the hearing was his immediate dismissal. The claimant was told that Ms Boon would lead the hearing, that Ms Dover would take notes and that Mr Elliott, the company's employment law adviser, would also be present to 'facilitate the hearing…oversee the proceedings, to ensure due process and to provide any guidance required by either party'. Ms Dover went on in the letter to say that neither she nor Mr Elliott would have any involvement in deciding the outcome of the hearing, which would be a matter for Ms Boon alone.

120. Before the disciplinary hearing the claimant and Ms Dover exchanged emails in which the claimant asked for a number of additional documents. Ms Dover sent those documents. They included, amongst other things, interview notes from Mr Oakes' investigation. The claimant also sent to Ms Dover a number of emails and other documents which he wanted to have considered. They included the following, amongst others:

120.1. An email from Mr Abbott to the claimant dated 31 March 2020 in which Mr Abbott said:

> 'Regarding the meeting that took place in July 2018 attended by [Ms Debnam], [Mr Saunders], [Mr Shimmin], myself and yourself. I have recollection of it being stated that there was no asbestos on the shop floor to anyone's knowledge at the time, I do think that this was an honest statement that was made and there was no intention to deceive anyone sat around the table at the time.'

120.2. An email from Mr Saunders to the claimant of 31 March 2020 in which Mr Saunders said:

> 'I attended a meeting regarding asbestos where it was stated that there was either very little or none present on the shop floor and there was to be no concern. It was also stated that there was some, but this was located mainly in the offices.'

121. On 31 March 2020 Mr Crooks sent an email to the claimant in which he said: 'As a supervisor to [the claimant] I have been requested by him to confirm that I was told to postpone issuing the risk assessment for asbestos in the factory, this

instruction was made by my line manager Mr… Abbott.' The claimant forwarded that email to Ms Dover on 16 April.

122. The disciplinary hearing took place on 1 April 2020. The meeting lasted three hours. It was recorded and the recording was subsequently transcribed. Mr Wilson accompanied the claimant at the meeting.

123. At that meeting Mr Elliott asked the claimant a number of questions. Mr Wilson made the point, early on, that it was unusual that he, rather than Ms Boon, was asking questions. However, Mr Wilson confirmed that he did not perceive any problems with dealing with matters in that way.

124. In the disciplinary meeting the claimant said that he had never once said that anyone had tried to mislead anyone or called anybody a liar. During the course of the meeting Mr Elliott referred to the 'company's beef' with the claimant, being that, when making his complaint to the HSE, he said that he had been 'lied to'. In response to the claimant asking where he had said that in his complaint to the HSE Mr Elliott said:

> 'I understand and I accept entirely that you did not use the word 'lied', I understand that. There's no question of trying to be daft about that…I think what the company's position is, is by you referring to being told one thing and then being told something else, and mentioning to the HSE that the toolbox talks mysteriously disappeared overnight, you are creating the impression of foul play on the part of the company. I think that's the beef that the company has. I agree entirely that you do not use the words 'the company has lied to me'.'

125. Regarding what Mr Hardy had said in the toolbox talk, the claimant said that Mr Blewitt had told him what Mr Hardy had said. The claimant added: 'All the other men who were there at toolbox talk said he said it. The supervisor in charge. This is what they're telling me he said…'

126. The claimant then went on to say 'All the toolbox talks went missing, yes? On this day, [Mr Crooks], I sent an email off, he was my supervisor and was told not to read this out.' Shortly afterwards the claimant said that all of the reports from the toolbox talks to bays D, E, F and G had 'gone missing somewhere', adding, 'he said 'I've got others' but the only one he showed us is the one the day after. Why was my supervisor told not to read it out?'. By 'he said' the claimant was clearly referring to what Mr Oakes had said in his report. Mr Elliott then asked the claimant if details of the toolbox talks given before the one on 1 May 2019 had 'disappeared'. The claimant replied: 'He's saying that he can't find F bay's, other bays were available. Other bays, where's the other bays? That's just one. He might have other bays.' Again, the claimant was clearly referring to what Mr Oakes had said in his report. The claimant also said, 'we want to know where all the toolbox talks went when the lads signed it', and: '[Mr Oakes] said in his report that he could not find F bay, but

other bays, he said. That's maintenance, where's the other bays? He might be able to produce them, that's in his report.'

127. In answer to questions at the disciplinary meeting, the claimant said that if somebody wanted to refresh their memory on a toolbox talk they would ask their supervisor for a copy. The claimant said he had asked his supervisor, Mr Crooks, if he could have a copy, and Mr Crooks told him he had been told to hand the talk back in to Mr Abbott. The claimant referred a number of times to Mr Crooks having been told not to do the toolbox talk. Neither the claimant nor Mr Wilson said in this meeting that the claimant had asked anybody else, other than Mr Crooks, for copies of the toolbox talks given to the other bays.

128. Mr Elliott asked the claimant if there was anyone he thought Ms Boon should speak to about the toolbox talk 'misunderstanding or confusion'. The claimant suggested she speak with Mr Jackson or the supervisors, and Mr Elliott said that Ms Boon was going to have to 'do some digging about this.' Mr Wilson then asked the claimant 'do we know anybody who was the subject of the toolbox talk who was told there was no asbestos in the factory?' The claimant replied, 'about ten lads there. They weren't interviewed. We asked the question why they weren't interviewed'.

129. Mr Wilson said that the reason the claimant contacted the HSE was not to raise ongoing concerns about asbestos management but to raise concerns about the claimant being prevented from raising historical asbestos related management issues. Mr Wilson added:

> 'If we learn of historic exposure to asbestos, we're duty bound to raise it with the company in order for the company to deal with the investigation into how it happened and have an outcome on what the company needs to do as a consequence of being aware that somebody was exposed to asbestos. …'

130. Mr Elliott asked the claimant why he felt it necessary to draw the HSE's attention to the change in message from management and toolbox talks having disappeared if the trigger for contacting the HSE was that the claimant had learned about two workers drilling into some boards and the lack of a signs and a failure to implement recommendations for 2016. The claimant's response was, 'Well they have, haven't they? I was just telling the truth'. The claimant said he was just 'giving the HSE a bit of background on what's happened'.

131. On more than one occasion during the meeting, Mr Wilson suggested that the claimant believed that all the toolbox talks had gone missing because that was what he had been told by others. He did not say who had told the claimant that all the toolbox talks had gone missing. Nor did the claimant. Indeed, as recorded above, when the claimant was asked about the matter he simply referred to Mr Oakes' statement in his report about not having been able to locate the talk for F bay and Mr Crooks having been told not to do the toolbox talk.

132. Mr Elliott asked the claimant questions about his statement to the HSE that he had been threatened with discipline for mentioning asbestos. In that context, Mr Elliott referred the claimant to the letter from Mr Parker on 6 August 2019. The claimant drew Mr Elliott's attention to the paragraph that said, 'Under ordinary circumstances, the company will be entitled to treat this matter on the disciplinary process…and that it will not pursue it in this instance'. The claimant said he took that as a threat. He also alleged that he and Mr Blewitt had been told they would be disciplined when they asked to show Mr Oakes' report to Mr Wilson. The claimant said he could not remember whether it was Mr Parker or Ms Dover who had said they would be disciplined if they showed the report to Mr Wilson. The claimant also alleged that they were told in that meeting that they would be disciplined if they mentioned the meeting to people on the shop floor. Referring to the fact that those matters were not reflected in Mr Parker's letter, the claimant said he thought the 'minutes' (i.e. what was said in the letter) had been 'diluted down'.

133. The meeting ended with Ms Boon and Mr Elliott explaining that Ms Boon needed to make further enquiries and obtain more information. There was then a discussion about who else Ms Boon would speak to and interview. It was agreed that that would include Mr Blewitt, amongst others, the intention being that Ms Boon would speak to him either that day or the next day, if he was available.

134. The next day the claimant forwarded some more information and documents to Ms Dover, including:

134.1. An email from Mr Crooks saying that he had meant to refer to a toolbox talk rather than a risk assessment in his previous correspondence;

134.2. An email from a supervisor, Mr Heasman, saying: 'I am a supervisor at Cleveland Bridge and would like to confirm to you that we were given a toolbox talk to be given to all the men on the shop floor. I gave this out to them all in my bay and I can definitely confirm that it stated that there was no asbestos at all on the shop floor. This has been an ongoing argument for years. Then all of a sudden there were areas of asbestos. These were areas that were of no danger to us apparently.'

134.3. An email from Mr Blewitt dated 2 April saying:

> 'Myself and Dave were both given a copy of our report each of the investigation into the asbestos claims to read. I can't remember which of the three meetings but in one of them Richard Parker and Jane Dover came into the room and asked us various things. But Dave asked if we could show the report to Mark Wilson (the organiser). We were told by Jane Dover in no uncertain terms that we were not to show the report or discuss it to Mark Wilson (the organiser) or anybody else, including the shop floor, and we were not to speak about it. If we did either of those, it would result in a disciplinary and that it would be a serious breach.'

135. Over the course of the next few days Ms Boon interviewed, amongst others, the following people in the presence of the claimant: Mr Saunders; Mr O'Kane; Mr Heasman; Mr Abbott and Mr Waller. The interviews were recorded, and transcripts were produced and provided to the claimant. In addition, Ms Boon interviewed Mr Crooks; Ms Dover; Mr Parker; Mr Oakes and Mr Hardy.

136. Both Mr Crooks and Mr Abbott said in their interviews that Mr Crooks had not given the talk to his team (prep) because Mr Abbott had told him not to. Mr Abbott said he did so because the claimant and Mr Blewitt had taken offence to something in the talk given to F Bay, though he had not read the script himself. During the course of Mr Abbott's interview the claimant asked if he could have all the copies of the toolbox talks that people had signed. Ms Boon said that it would all be in the file and that they were all there apart from the one from F bay and the one from prep. The claimant said that Mr Oakes' statement only contained the maintenance one and that he had 'said he could not get hold of the bays.' The claimant added, 'I'm just going off [Mr Oakes'] statement'.

137. When Ms Boon interviewed Mr Jackson she asked him questions about, amongst other things, where toolbox talks were stored. Mr Jackson said that there was only one toolbox talk issued on asbestos in April 2019. He sent to Ms Boon copies of the toolbox talk and supervisor script and the signature sheets for the night shift, D bay, E bay, G bay, maintenance, quality and another team.

138. Although Ms Boon had planned to interview Mr Blewitt, he went on sick leave and Ms Boon decided that in the circumstances it would be inappropriate to interview him. On 7 April, however, the claimant forwarded to Ms Dover an email Mr Blewitt had sent to Mr Wilson that day. In his email Mr Blewitt said that he 'can state 100% that in at least one meeting with [Mr Shimmin] involving an asbestos discussion, that he stated that there was no asbestos on the shop floor. He also stated that they had an Asbestos Management Plan but that we [the GMB reps] didn't need to see it'. He added:

> 'I would also like to explain that during a toolbox talk around one year ago, that [Mr Hardy] gave a toolbox talk in which he read that there was 'no asbestos on the shop floor', after which he came over to myself and told me, the talk was incorrect as he knew there was some at the bottom of G bay (the south end), … he then took me to and showed me what he told about…I would also like to state that during a meeting involving myself and [the claimant] into the findings of the 'asbestos investigation' in which we both had reports into the findings, we were told by [Ms Dover] that we were not to speak about or share anything from the report, as to do so would result in disciplinary action. After [the claimant] asked if we could at least show it to [Mr Wilson] (GMB organiser), because we didn't agree with the findings, we were told that, that would result in the same action.'

139. The claimant was sent copies of the interview transcripts by email on 23 April 2020. In her email Ms Dover said: 'Please be advised that [Ms Boon] does not wish to interview Mr Blewitt. His statement will be taken as read.'

140. The disciplinary hearing continued at a meeting on 11 May 2020. The claimant attended with Mr Wilson. Ms Boon and Mr Elliott were present again as was Ms Dover, who recorded the meeting and subsequently created a transcript. Ahead of the meeting a question had arisen from Mr Wilson as to the purpose of the meeting. Ms Dover explained that the main purpose of the meeting was to give the claimant and Mr Wilson an opportunity to comment on the further investigations. Mr Elliott reiterated this at the beginning of the meeting. The meeting lasted just over an hour.

141. At this meeting the claimant made the point that when he had the informal meeting with Ms Dover in January 2020 she did not tell him she was taking minutes and he did not see her with a pen in her hand. Ms Boon asked the claimant if there was anything in her record of that meeting that he did not agree with. Mr Wilson then said that he thought the point was about it 'being the first stage of a disciplinary process without it being identified as such'.

142. The claimant and Mr Wilson were given an opportunity to comment on the information that had been sent to the claimant. During the meeting Mr Wilson, in summing up the claimant's position, said, 'we hope that this demonstrates that everything he did was in the context of his trade union duties and then we can just put this to bed…' The meeting ended with Ms Boon saying she needed to look at what the claimant had said and all the additional information and reach a conclusion, but that it might take some time.

143. Following that meeting Ms Boon decided to dismiss the claimant without notice. She emailed to the claimant a letter dated 14 May 2020 explaining that decision and giving reasons for it. The letter began by setting out the allegations as had been set out in the invitations to the disciplinary meetings. There followed a summary of the process followed and a section headed 'Conclusions' in which Ms Boon outlined what she said were her 'key findings, conclusions and reasons'.

144. In her letter, Ms Boon first addressed the allegation that the claimant had made an assertion in his contact with the HSE on 3 October 2019 which he knew could not possibly have been true: that he was 'lied to by company managers as to the presence of asbestos in the factory'. In a section headed, 'The assertion in the email that you were lied to by CBUK managers as to the presence of asbestos in the factory' Ms Boon set out what she said were her findings in several numbered paragraphs running to 6½ pages. They concluded with the following statement:

> 'I have concluded therefore, on balance, that when you told the HSE that CBUK supervisors '…gave a toolbox talk on asbestos and said there was none on the shop floor, when someone pointed out there was all the toolbox

> talks went missing' you were giving information which you must have known as untrue. You were telling the HSE a deliberate lie.'

145. There then followed a section headed, 'The assertion in the email to the HSE that you were 'threatened with discipline for mentioning asbestos'. Under that heading Ms Boon set out her findings over 3½ pages, concluding with the following statement:

> 'I have therefore concluded that when you told the HSE on 3 October 2019 that you had been threatened with disciplinary action for mentioning asbestos, you were giving information which was substantially incorrect. I have considered carefully whether this might have been the result of a genuine and honest mistake on your part but have concluded that this is unlikely to be the case. You are unlikely to have misheard or misunderstood what was said to you at the meeting about such an important matter, and in any event there is no doubt that Richard Parker's letter cannot be said to contain any threat to you. It is difficult to see how you could have genuinely felt that you were being threatened with disciplinary action when those threats were not made. I have concluded therefore, on balance, that when you told the HSE that you had been 'threatened with discipline for mentioning asbestos' you must have known that what you were saying was not true. This was another deliberate lie.'

146. Ms Boon went on to deal with some other issues that had been raised in the disciplinary proceedings by the claimant before concluding with a section headed 'Sanction' in which she said she had considered the claimant's lengthy service and his clean disciplinary record, but said that he had not put forward any mitigating circumstances, that the nature of the claimant's actions was totally unacceptable and potentially very damaging, that the claimant's intention in making the comments was malicious and that was 'wholly incompatible with your position as a CBUK employee'; that the claimant needlessly exposed CBUK to the risk of regulatory action and the risk of substantial reputational damage, had needlessly harmed the company's relationship with the GMB and had caused consternation and concern amongst certain sections of the workforce. She referred to the claimant having 'maintained a wholly untenable denial of wrongdoing' and having taken no responsibility or expressed no remorse. She concluded by saying that summary dismissal was the only appropriate sanction, that the claimant was dismissed with immediate effect and that the claimant had the right of appeal to Mr Droogan.

147. Ms Boon's letter to the claimant is carefully worded, detailed and comprehensive. It refers extensively to the evidence on which her conclusions were based. The evidence she gave at this hearing as to her reasons for dismissing the claimant was consistent with that letter.

148. There was some ambiguity in the way in which the respondent framed the allegations against the claimant when he was told he was facing a disciplinary

investigation in that the letter of 26 February 2020. Specifically, the letter referred to an allegation that the claimant had made an untrue statement that he was 'lied to by company managers as to the presence of asbestos in the factory'. As recorded above, however, Mr Elliott clarified this specific allegation in the disciplinary hearing on 1 April 2020. The letter recording Ms Boon's conclusions began by repeating the allegations as they had been framed in the 26 February letter. In light of how Mr Elliott explained the allegation to the claimant in the course of the disciplinary proceedings and the way in which Ms Boon framed her conclusions, we are satisfied that it was the following two statements alone that were the cause of concern:

148.1. the claimant's statement to the HSE that CBUK supervisors '…gave a toolbox talk on asbestos and said there was none on the shop floor, when someone pointed out there was all the toolbox talks went missing'; and

148.2. the claimant's assertion to the HSE that he was 'threatened with discipline for mentioning asbestos'.

149. It has been suggested in these proceedings that there was personal animosity directed to the claimant from Ms Boon. We do not accept that was the case. We accept that they had had disagreements in the past and that Ms Boon had previously said the claimant was 'deluding himself' in the context of pay negotiations. We also accept that at one point the claimant raised a grievance against Ms Boon, which he subsequently withdrew. It is also apparent that there was a significant degree of frustration amongst the managers in relation to the way the claimant had addressed concerns about asbestos, to the extent that the company had made a formal complaint to the GMB. We were also referred to, amongst other things, correspondence indicating that senior managers discussed the claimant's communication with the HSE before the disciplinary investigation in terms that revealed deep dissatisfaction with the claimant's actions in contacting the HSE, Ms Dover's communication with the HSE in which she said that the claimant's approach to health and safety had been 'extremely confrontational', and the fact that disciplinary action had previously been taken against the claimant. It has been suggested that the outcome of the disciplinary investigation was prejudged, Ms Boon having used the claimant's communication to the HSE as an excuse to dismiss someone who was considered a thorn in the respondent's side. Looking at the evidence in the round, we are satisfied that the outcome of the disciplinary proceedings was not prejudged.

150. Mr Smith submitted that, even if Ms Boon concluded that what the claimant said to the HSE was incorrect, she cannot have genuinely believed that the claimant deliberately lied to the HSE because she could only reach that conclusion if she had 'eliminated the possibility' that he had simply made a mistake. In his oral submissions Mr Smith referred to the absence of 'conclusive' evidence or proof. We do not accept that those submissions accurately represent the approach we must take in making findings of fact as to the reason for dismissal. The question is whether Ms Boon had a suspicion, amounting to a belief, that the claimant had

deliberately lied to the HSE. We find that she did. The letter Ms Boon sent to the claimant setting out her reasons for the claimant's dismissal is evidence that she specifically considered whether the claimant might have simply made a mistake, weighed the evidence, and formed a belief 'on balance' (as Ms Boon herself put it in the letter setting out her reasons) that the claimant had lied rather than been mistaken. It is irrelevant to our finding as to the reason for dismissal whether or not the evidence that Ms Boon had when she reached that decision was such that it was capable of conclusively proving dishonesty by the claimant or eliminating the possibility of mistake on his part.

151. We are satisfied that the only reason Ms Boon decided to dismiss the claimant was that she believed that the claimant had deliberately lied to the HSE on 3 October 2019 by saying the following two things:

151.1. that CBUK supervisors '…gave a toolbox talk on asbestos and said there was none on the shop floor, when someone pointed out there was all the toolbox talks went missing'; and

151.2. that he was 'threatened with discipline for mentioning asbestos'.

152. We accept Ms Boon's evidence and find that had the claimant not made those two statements, or had Ms Boon not concluded that the claimant was telling deliberate lies when he made those statements, Ms Boon would not have dismissed the claimant.

153. Although Mr Elliott was involved in the disciplinary proceedings, we are satisfied that the decision was Ms Boon's alone and that she gave the matter a great deal of thought before reaching her conclusion. Although it is evident that there had been some discussions in the Executive Team about the claimant's email to the HSE, we are satisfied that Ms Boon took the decision independently of anybody else in the management team.

154. Upon learning of the decision, Mr Wilson immediately notified the company that the union was challenging the decision to dismiss the claimant. On 20 May 2020 the claimant submitted a letter of appeal against his dismissal to Mr Droogan. In his appeal letter [429] the claimant took issue with Ms Boon's findings. He criticised Ms Boon for giving Mr Blewitt's statement less weight due to him not being questioned because he was on sick leave. He also criticised for Ms Dover for, he said, holding an informal meeting without indicating the true intent of the meeting. In addition, he criticised the company for not discussing the matter with an official employed by the union before taking action as advised and referred to paragraph 30 of the ACAS Code.

155. The following day Mr Droogan became aware that Mr Wilson had written a letter to GMB members at the company [554]. The letter was headed 'Dave Stockdale Dismissal' and said the GMB was going to mount a legal challenge to the

claimant's dismissal. In that letter Mr Wilson said the claimant had been 'sacked…over an email he sent to the Health and Safety Executive regarding concerns that had been raised with him on asbestos by GMB members'. Mr Wilson expressed the opinion that the claimant had been 'sacked because he was successfully doing his trade union duties that you elected him to do'. Mr Wilson said, 'In order to reverse this decision and get him back to work, we need to support him and vote to lodge a dispute and ballot for strike action, to apply pressure on the company'. Enclosed with the letter was a document which Mr Wilson asked members to complete to say whether or not they supported the claimant and wished to proceed with a ballot for strike action. Mr Wilson said: 'I believe every member needs to support Dave and vote for action otherwise the company will be successful in undermining the union, your reps, and you to continue to fight for your health and safety at work.'

156. Mr Droogan, with assistance from Ms Boon, drafted a letter which he sent to all CBUK employees on 22 May 2020 [557]. Mr Droogan began his letter of 22 May 2020 by saying:

> 'I am taking this unusual step of writing to every employee in these challenging times, due to the misleading and incorrect information in a letter written by the GMB union on 20 May 2020 to their members within Cleveland Bridge, which has potentially far-reaching consequences for all employees. The letter from the GMB was regarding the recent dismissal of David Stockdale, chargehand.'

157. Mr Droogan went on to express disappointment that the GMB had 'chosen to ignore the confidentiality and protocol regarding David's hearing and pending appeal…'. He also said:

> 'We are also hugely disappointed that the GMB have also chosen to ignore the clear and considerable evidence collated and in contrast, present a false view of the facts…The GMB are also wrong in their assertion that the decision to dismiss David had anything to do with his status or duties as a GMB union representative. By his own admission, David acted without the instruction or guidance of the GMB or its members and took the actions which resulted in his dismissal…We would never normally comment publicly on the facts of any individual disciplinary matter, but the GMB's clear intention to pursue highly damaging industrial action leaves us with no choice but to set the record straight.'

158. Mr Droogan then went on to set out what he described as 'the relevant facts'. In that section of the letter he said:

> 'David communicated with the HSE on 3 October 2019. Whilst he was perfectly entitled to raise legitimate concerns, he took the opportunity to infer to the HSE that CBUK management had acted dishonestly by changing its

> story as to the presence of asbestos on site and by removing documents which demonstrated that it had done so. He also told the HSE that he would be disciplined if he continued to raise health and safety concerns. All of this was clearly not true, and David knew it was not true…'.

159. The letter went on to set out the background and some details of the investigation and said:

> 'The outcome of this lengthy and exhaustive process was that David was found to have made two statements to the HSE which he knew to be untrue. This was an act of gross misconduct and his employment was terminated as a result. David was dismissed for knowingly advancing a false and damaging position to the HSE. David was not dismissed for reporting the company to the HSE. David was not dismissed for carrying out his union duties…'

160. Mr Droogan went on to say that industrial action would come at a significant cost to the business and would undermine everything that they had worked hard to achieve over the last five years, that the company's reputation would be damaged resulting in the potential loss of contracts which would result in reduced business activity, withdrawal of investment and place jobs at risk.

161. In these proceedings we need to determine (a) Mr Droogan's sole or main purpose in sending this letter (and specifically whether it was to penalise the claimant for writing to the HSE on 3 October the previous year); and (b) whether Mr Droogan's decision to send that letter was materially influenced by what the claimant said when he wrote to the HSE on 3 October the previous year.

162. Although we did not hear evidence from Mr Droogan, evidence of his motivation in sending that letter can be found in his written statement, what he said in his letter and in the evidence given by Ms Boon, who helped write the letter.

163. The evidence contained in Mr Droogan's witness statement was that his sole motivation for writing the letter was to correct what, to his mind, were clear and important inaccuracies in the version of events which Mr Wilson had put forward to the workforce, and to make it clear that Mr Stockdale's former colleagues were able, if they wished, to support Mr Stockdale without engaging in damaging industrial action. He said he wrote the letter not to punish or penalise the claimant but in order to give the full picture to those who were going to be voting on strike action. That evidence was supported by Ms Boon, who, as we have noted above, helped Mr Droogan to write the letter.

164. We do not accept the evidence in Mr Droogan's statement uncritically given that it has not been tested by cross-examination. However, we reject Mr Smith's submission that no weight at all should be given to Mr Droogan's statement: there is no evidence that he stayed away from the Tribunal in order to avoid giving evidence: we were told he was unwell and there is no evidence to the contrary. In any event,

the letter Mr Droogan sent to the workforce contains compelling evidence of his reasons for writing ie to set the record straight and correct what was considered to be a misleading account of the reasons for the claimant's dismissal.

165. Mr Smith submitted that the fact that Mr Droogan included detail of the reasons for dismissal, and the fact that he sent his letter to everybody in the workforce, rather than only GMB members who were being balloted, should lead us to infer that Mr Droogan's motivations were not to set the record straight but rather to penalise the claimant. We do not accept that submission. It is consistent with Mr Droogan's stated aims that he would want to ensure the workforce had the full picture so they could form their own view of whether or not the company had acted unfairly in deciding whether they wished to support strike action which could damage the company's business and, ultimately, their own interests. The fact that Mr Droogan wrote to the wider workforce rather than just those being asked to take industrial action is consistent with his stated aims given that the respondent did not know who the union members were.

166. Had the union not sent its letter to its members in May, Mr Droogan would not have sent his letter to the workforce. The sole or main purpose of sending the letter was not because the claimant wrote to the HSE the previous year, or, for that matter, because the claimant was a union representative or because of anything he had done in that capacity. It was to set the record straight and clarify what Mr Droogan considered to be inaccuracies in Mr Wilson's letter to GMB members in the hope that that would avoid industrial action and consequent damage to the business.

167. In so far as the decision to send the letter was influenced by what the claimant had said to the HSE, we are satisfied that it was only those parts of the email to the HSE that Ms Boon had found to be deliberate falsehoods that played a part in and influenced Mr Droogan's decision to contact the workforce and it was the belief that they were deliberate falsehoods that influenced Mr Droogan to set the record straight about the reasons for dismissal.

168. Having written to the workforce in those terms, Mr Droogan decided it would no longer be appropriate for him to deal with the claimant's appeal because he felt his independence in the matter had been compromised. They did not have anyone suitable to hear the appeal within the business. The respondent asked their legal advisers if they knew of someone who could hear the appeal. Mr Allison was subsequently identified as an independent business-person who would be appropriate to deal with the appeal. Mr Allison has no connection with the respondent company. We are satisfied that Mr Allison was independent of the company. He did not know the managers in the company and had not had dealings with them.

169. The appeal hearing was initially fixed for 14 July 2020. However, in the meantime the claimant made an application to the Employment Tribunal for interim relief, and the hearing was listed for hearing on the same day. The appeal hearing

was therefore postponed until 21 June 2020. The claimant was kept informed of the arrangements for his appeal throughout.

170. Mr Allison prepared for the appeal hearing by reviewing the documents supplied to him as set out in his witness statement. The claimant's appeal hearing took place on 21 July 2020. The hearing was recorded, and a transcript was subsequently produced. It is clear to us from that transcript, from Mr Allison's outcome letter and from the evidence he gave at this Tribunal, that he considered the claimant's appeal with great care and thoughtfulness, and with a thorough grasp of the evidence and arguments.

171. During the appeal hearing the claimant and Mr Wilson took Mr Allison through the claimant's grounds of appeal. Following the appeal hearing Mr Allison decided he needed to do a further investigation. This involved speaking with Ms Dover, reviewing emails the claimant had given him, i.e. emails that the claimant had sent to Mr Wilson on 17 and 19 September, and reviewing the changes the claimant had made to the statement he gave to Mr Oakes.

172. We are satisfied that Mr Allison reviewed all the evidence he had been provided with and considered it painstakingly, drawing his own conclusions. He wrote to the claimant on 20 August 2020 setting out the outcome of the appeal hearing [517]. Mr Allison decided to uphold Ms Boon's conclusion that the claimant had committed gross misconduct and that summary dismissal was the most appropriate outcome.

173. Certain of the issues we have to determine in these proceedings require us to reach our own conclusion as to whether the claimant genuinely believed that what he said to the HSE was substantially true. In this regard we make the following further findings of fact.

174. One factual issue in dispute is whether the claimant and/or Mr Blewitt accused managers of lying about the absence of asbestos at any stage before the claimant contacted the HSE in October 2019. The claimant and Mr Blewitt both said they did not do so. We find it more likely than not that the claimant accused managers of lying about the absence of asbestos when he and Mr Blewitt spoke to Mr Parker on 30 April 2019 and said to Mr Oakes' during the course of his investigation that he felt he had been lied to. Our reasons for reaching that conclusion include the following.

174.1. Mr Parker's account of that conversation in his email 7 days later refers to the claimant and Mr Blewitt having said they had been lied to by the business.

174.2. Mr Oakes' record of what the claimant said during his investigation indicates that the claimant said he felt he had been lied to. Although the claimant commented on that record of his interview when he was later given

a copy of the statement, he did not make any annotations to correct that part of the record.

175. Mr Smith suggested in submissions that the claimant saying he 'felt he had been lied to' is not the same as alleging that managers had lied. We disagree – there is no difference in substance.

176. A key issue for us to decide is what the claimant was told about the April 2019 toolbox talk by his colleagues before he contacted the HSE in October 2019. We note the following:

176.1. There are a number of inconsistencies between what the claimant said in his witness statement and what Mr Blewitt and Mr Waller said in theirs; between what the claimant said in his witness statement and what he said at this hearing when questioned; and between what Mr Waller said in these proceedings and what he said during the course of the disciplinary proceedings involving the claimant. We did not find any of them to be reliable witnesses.

176.2. For example, in his witness statement at paragraph 16 the claimant said that both Mr Blewitt and Mr Walker went to speak to him after the toolbox talk given by Mr Hardy and that he, the claimant, 'was informed that Mr Hardy had said that there was no asbestos on the shop floor but then he had said that he knew this statement to be incorrect'. In his witness statement for these proceedings, however, Mr Waller said nothing about having told the claimant about what had happened in the toolbox talk. He made no mention of having discussed the toolbox talk himself with the claimant at any time prior to the claimant contacting the HSE on 3 October 2019. Mr Blewitt's witness statement to this Tribunal also differed from that of the claimant in that he made no mention of Mr Waller having gone with him to speak to the claimant after the toolbox talk. Nor did Mr Blewitt say in his witness statement that he told the claimant, when he spoke to him on the day of the toolbox talk, that Mr Hardy had initially said in the toolbox talk that there was no asbestos on the shop floor.

176.3. Furthermore, when being questioned on his evidence the claimant claimed that, on 30 April 2019, he had been told not only by Mr Blewitt and Mr Waller but by most of the 10 men on F Bay that Mr Hardy had given a talk saying that there was no asbestos on the shop floor but he knew this was not correct. When asked why he had not said that in his statement the claimant, after initially not answering the question, said that there was a lot that he did not put in his statement and that he could have put lots more in. He also suggested that someone had said to him that he should 'put so much in the statement and then the rest you can say at court'. It seems highly unlikely to us that the claimant had been advised to omit from his statement such an important piece of evidence. More likely, it seems to us, is that the reason the

claimant did not include this piece of information in his statement is that it simply did not happen.

176.4. The inconsistencies in the evidence caused us to doubt that any of the claimant's colleagues told the claimant, before he contacted the HSE, that Mr Hardy had initially said, during the April 2019 toolbox talk, that there was no asbestos on the shop floor or that the script he was given to read suggested that was the case. Those doubts were compounded by the fact that Mr Parker's email of 7 May 2019 makes no reference to the claimant or Mr Blewitt, or anyone else, claiming that Mr Hardy had initially said there was no asbestos on the shop floor.

176.5. However, it is apparent from the notes taken by Mr Oakes during his investigation in May 2018 that the claimant said then that in a recent toolbox talk on asbestos 'the lads were told that there was no asbestos on the shop floor'.

177. Given what the claimant said to Mr Oakes on 14 May 2019, we find it more likely than not that somebody, at some point before 14 May 2019, had told the claimant that, at a recent toolbox talk on asbestos, the men in one of the bays had been told that there was no asbestos on the shop floor. We find it more likely than not that it was Mr Blewitt who told the claimant that, given that Mr Blewitt himself told Mr Oakes the following day that Mr Hardy had told staff there was no asbestos in the factory during a toolbox talk. We do not believe that Mr Waller also told the claimant this at any time before the claimant contacted the HSE. We find that nobody else told the claimant, before he contacted the HSE on 3 October 2019, that Mr Hardy had given a toolbox talk in 2019 in which employees were told that there was no asbestos on the shop floor.

178. Nor, we find, had anyone told the claimant, before he contacted the HSE on 3 October 2019, that any of the other supervisors had given a toolbox talk in 2019 saying there was no asbestos on the shop floor. Although the claimant produced an email from Mr Heasman during his disciplinary process suggesting that he had given a toolbox talk which stated that there was no asbestos on the shop floor, that email was only sent to the claimant during the disciplinary proceedings and Mr Heasman subsequently said that he was talking about a different toolbox talk some years earlier. There is no evidence that Mr Heasman said anything to the claimant between 30 April 2019 and 3 October 2019 that could have led the claimant to believe that Mr Heasman had given a toolbox talk in those terms in 2019.

179. Another issue we need to determine is whether, when the claimant contacted the HSE, he genuinely believed that what he told the HSE about the toolbox talks going missing was true. In this regard we make the following observations and findings:

179.1. The claimant did not say, either during the disciplinary hearing or during this hearing, that anyone had told him that all the toolbox talks had gone missing.

179.2. Although Mr Wilson suggested in the disciplinary proceedings that the claimant had been told by others that all the toolbox talks had gone missing, he did not say who had told the claimant that or when they had done so.

179.3. The claimant's evidence on cross examination was inconsistent. At one point he suggested that when he told the HSE that 'all the toolbox talks went missing' he had meant to say one of the toolbox talks went missing (i.e. the F bay one). He then changed his position, saying that he believed all the toolbox talks had gone missing and the reason he believed this was because he had asked for them and they had not been provided to him.

179.4. The claimant knew, from Mr Oakes' report, that Mr Oakes had not been able to locate a toolbox talk for F bay. He also knew that Mr Oakes, in that report, had speculated that it had probably not been signed for some reason. Indeed, the claimant must have known that it was not unusual for the workforce to refuse to sign a toolbox talk if they objected to something that was said in it. It must have been obvious to the claimant that that was the most likely explanation for the absence of any record sheet for F bay.

179.5. We find the claimant did not believe the talk to the maintenance team had gone missing because he had seen it annexed to Mr Oakes' report.

179.6. The claimant suggested in this hearing that he had asked Mr Oakes about all the other toolbox talks and that Mr Oakes had 'shrugged'. The claimant did not say when he made that request, or in what context. There is no record in the note of Mr Oakes' interview with the claimant on 14 May 2019 of the claimant having said anything at that time and we find that he did not. Looking at the evidence in the round, we find that the claimant did not ask Mr Oakes for sight of the other toolbox talks before he contacted the HSE on 3 October 2019.

179.7. In the course of the claimant's disciplinary proceedings, when Mr Abbott was being interviewed, the claimant claimed Mr Oakes' had said in his 'statement' (by which we infer the claimant meant his report of the previous year) that 'he could not get hold of the bays.' Mr Oakes had not said that at all in his report. Indeed he had said the opposite ie that the toolbox talks for other bays were available.

179.8. We accept that the claimant did ask Mr Crooks, his own supervisor, for a copy of the toolbox talk at some point, and this may well have been before 3 October 2019. When he did so, Mr Crooks told the claimant that he had given it back because he had been told not to give the talk. Even if that

conversation took place before 3 October 2019 the claimant had no reason to believe that talk had 'gone missing'.

180. The evidence strongly suggests that, when the claimant contacted the HSE in October 2019, the claimant did not believe that all of the 2019 asbestos toolbox talks had gone missing. We have considered whether the claimant might have, nonetheless, genuinely, albeit unreasonably, believed that what he was telling the HSE was true. Relevant to this is the question of whether the claimant had any motivation for deliberately misrepresenting what had happened to the HSE. In this regard, we note that the claimant was upset by the criticism of him in the Oakes report. He was also, we find, annoyed by the fact that he had been prevented from raising asbestos-related issues in meetings in late September and early October 2019 and had referred in an email to Mr Wilson to 'sorting them out'.

181. Looking at the evidence in the round, we find it more likely than not that the claimant knew that what he was telling the HSE about toolbox talks going missing was untrue.

182. The claimant has given no explanation for making this false statement to the HSE: he has maintained throughout that he believed it to be true, a position which we have rejected. There was no suggestion, for example, that the claimant got carried away in the heat of the moment and exaggerated events for effect. Looking at all the evidence, we find it more likely than not that this was a deliberate falsehood told by the claimant to paint a false picture of the respondent's actions and tarnish its reputation.

183. There is also a dispute between the parties as to whether the claimant genuinely believed he had been threatened with discipline for mentioning asbestos.

184. In his statement Mr Blewitt said, 'there were numerous threats of disciplinary action if we did not comply and if we failed to leave the matter alone'. However, his statement contains no detail of those 'numerous threats', and on cross examination Mr Blewitt simply said, 'I've set out what I can remember'. We do not accept Mr Blewitt's evidence that there were 'numerous threats of disciplinary action.'

185. Both the claimant and Mr Blewitt make a specific allegation that they were threatened with disciplinary action if they disclosed the Oakes report to anybody else, including Mr Wilson. They say that threat was made in one of the meetings they had with Mr Parker and Ms Dover in July and August 2019 to discuss the Oakes report. In this regard we note the following:

185.1. Ms Dover and Mr Parker gave statements during the course of the disciplinary proceedings saying they had not made any such threat. We place limited weight on those statements given that those two individuals were not called as witnesses.

185.2. The only people who were present at that meeting who have given evidence in this hearing were the claimant and Mr Blewitt. Their evidence was broadly consistent with what they said during the course of the claimant's disciplinary proceedings, although we note that at the disciplinary hearing the claimant could not recall whether this had been said by Ms Dover or Mr Parker. However, we found neither the claimant nor Mr Blewitt to be reliable witnesses in these proceedings.

185.3. Of much greater evidential weight, we find, is Mr Parker's letter of August 2019 [180]. That was a thoroughly detailed letter which was clearly intended to minute and record points that had been discussed at recent meetings. It referred to the claimant and Mr Blewitt having asked if they could show Mr Wilson the report and being told that they could not do so. Had either Mr Parker or Ms Dover said that it would be a disciplinary matter to do so, it is surprising that that was not mentioned in the letter.

186. Weighing all the relevant evidence, we find that neither Ms Dover nor Mr Parker said that the claimant or Mr Blewitt would or may be disciplined if they disclosed Mr Oakes' report to anybody else, including Mr Wilson. Nor, we find, did the claimant believe that they had made such a threat.

187. We do accept that the claimant could reasonably have interpreted Mr Parker's letter of 6 August 2019 (and the complaint to the GMB of 12 August 2019) as including an implied threat of future disciplinary action if the claimant were to repeat his allegation that managers had failed to disclose the location of suspected asbestos-containing materials and/or had deliberately misled the workforce about the presence or absence of such materials on site. We find, however, that the claimant did not genuinely believe that that implied threat extended to possible disciplinary action for any mention of asbestos in the future. In reaching that conclusion we bear in mind the fact that Mr Shimmin prevented the claimant from discussing asbestos-related issues during meetings in August and September 2019. Mr Shimmin did not, however, suggest in those meetings that raising those matters was a matter of misconduct; rather, he told the claimant that, if he wanted to raise such matters again he must raise them directly with senior managers.

188. We have considered whether the claimant's statement to the HSE that he had been 'threatened with discipline for mentioning asbestos' might have been simply a case of the claimant lapsing into hyperbole. Given that this was not the only untrue statement in the claimant's report to the HSE, and in light of our conclusions above as to the claimant's reasons for making his false statement about toolbox talks going missing, we find that the claimant's incorrect statement about a threat of discipline was not merely a case of the claimant exaggerating matters for effect. Nor was it a mere error of judgement: it was, we find, a deliberate falsehood designed to add colour to the picture he had painted of an employer trying to supress the facts about asbestos in the workplace.

Conclusions

Unfair dismissal claims

Reason for Dismissal

189. We have found that the decision to dismiss the claimant was taken by Ms Boon alone.

190. The reason Ms Boon dismissed the claimant was that she believed that the claimant had deliberately lied to the HSE on 3 October 2019 by saying the following two things:

190.1. that CBUK supervisors '…gave a toolbox talk on asbestos and said there was none on the shop floor, when someone pointed out there was all the toolbox talks went missing'; and

190.2. that he was 'threatened with discipline for mentioning asbestos'.

191. Ms Boon dismissed the claimant because she concluded that both of those statements were untrue, that the claimant had known they were untrue when he made them, and that he made them intending to mislead the HSE and damage the company.

Complaint of automatic unfair dismissal under s103A ERA

Were the statements for which the claimant was dismissed a protected disclosure?

192. We have found that the claimant was dismissed solely for the two specific statements he made to the HSE which Ms Boon believed the claimant knew to be untrue.

193. The claimant's complaint that he was dismissed on the ground that he made a protected disclosure can only succeed if one or both of the two statements for which he was dismissed constituted a protected disclosure.

194. In order for those statements to be a protected disclosure they must satisfy the following two criteria:

194.1. they must constitute a qualifying disclosure; and

194.2. they must have been made in accordance with one of section 43C to section 43H of ERA. In this case the claimant relies on section 43F and section 43C(1)(b)(ii).

195. Dealing with section 43F first, it is not in dispute that the HSE is a prescribed body for the purposes of that section. However, to come within that section a

claimant must, at the time he made his disclosure, have reasonably believed that the information disclosed and any allegations contained in it were substantially true.

196. The information disclosed in the alleged protected disclosures that resulted in dismissal is the following information:

196.1. that supervisors 'gave a toolbox talk on asbestos and said there was none of the shop floor, when someone pointed out there was all the toolbox talks went missing'; and

196.2. that the claimant had been threatened with discipline for mentioning asbestos.

197. With regard to the first of those statements to the HSE, we have found as a fact that the claimant did not genuinely believe that all the toolbox talks had gone missing. Even if he believed that one of the supervisors (Mr Hardy) had given a talk saying there was no asbestos on the shop floor, he did not believe that all the toolbox talks had gone missing. That statement was a core component of the allegation made to the HSE: the claimant was implying that managers had tried to mislead the workforce and then, when found out, tried to cover their tracks. We find that the claimant did not believe the information disclosed, and the allegation it contained, were substantially true.

198. With regard to the statement about being threatened with discipline for mentioning asbestos, we have found that the claimant did not believe this statement to be true. We have also found that, when he made his statement to the HSE, he was not merely exaggerating matters for effect but instead was telling the HSE a deliberate falsehood to paint a false picture of the respondent's actions and tarnish its reputation. Again, we find that the claimant did not believe the information disclosed, and the allegation it contained, were substantially true.

199. That being the case, the disclosures made by the claimant were not made in accordance with ERA s43F.

200. To come within ERA s 43C(1)(b)(ii) the claimant must have believed that the relevant failure related solely or mainly to a matter for which the HSE has legal responsibility.

201. The 'relevant failure' in this case related to the allegation that toolbox talks went missing and the allegation that the claimant had been threatened with discipline for mentioning asbestos. Mr Smith did not explain to us how those alleged failures related to a matter for which the HSE had legal responsibility. It is apparent that s43C(1)(b)(ii) is designed to cover qualifying disclosures that are made to someone who did not themselves do the act or omission that constitutes the relevant failure but whom the law makes vicariously liable for those acts or omissions. That clearly

does not include the HSE in this case. If it is the claimant's case that the HSE had 'legal responsibility' in some other sense, that case was not put at the hearing.

202. That being the case, we conclude the disclosures made by the claimant were not made in accordance with ERA s 43C(1)(b)(ii).

203. In any event, we find that, given the claimant knew the statements that led to his dismissal to be false, he cannot have reasonably believed they were made in the public interest. Therefore, the statements that led to the claimant's dismissal were not qualifying disclosures within the meaning of ERA s43B.

204. It follows that the disclosures for which the claimant was dismissed were not protected disclosures within the meaning of that term in ERA s43A and, therefore, the reason the claimant was dismissed was not that he made a protected disclosure.

205. For those reasons the claimant's complaint that he was unfairly dismissed by virtue of ERA s103A fails.

Complaint of automatic unfair dismissal under TULR(C)A s152

206. Ms Boon dismissed the claimant because she believed the claimant lied to the HSE by saying the following two things to the HSE:

206.1. that CBUK supervisors '…gave a toolbox talk on asbestos and said there was none on the shop floor, when someone pointed out there was all the toolbox talks went missing'; and

206.2. that he was 'threatened with discipline for mentioning asbestos'.

207. Mr Brochwicz-Lewinski submits that the claimant was not dismissed because he took part in the activities of an independent trade union, for the following two reasons:

207.1. When the claimant communicated with the HSE on 3 October, he was not taking part in the activities of an independent trade union but rather was acting on his own account.

207.2. The claimant's dismissal was, in any event, not because, when he contacted the HSE he was taking part in the activities of the union, but for the distinct reason that he had deliberately lied to the HSE.

208. With regard to the second of those submissions, we have found that the claimant made intentionally misleading statements to the HSE when he said that all the toolbox talks had gone missing and that he had been threatened with discipline for mentioning asbestos. We have found that, in doing so, the claimant implied that managers had tried to mislead the workforce and then, when found

out, tried to cover their tracks and that he did so to paint a false picture of the respondent's actions and tarnish its reputation.

209. This was not merely a case of the claimant lapsing into hyperbole and exaggerating matters for effect. It went further than being an error of judgement. We conclude that the claimant acted dishonestly and in bad faith. We find that the claimant acted wholly unreasonably in making those statements to the HSE.

210. That being the case, we find that the claimant was not dismissed because, when he contacted the HSE he was taking part in the activities of the union, but for the distinct reason that he had deliberately lied to the HSE.

211. Therefore, the claimant's claim that his dismissal was automatically unfair by virtue of TULR(C)A s152 is not made out.

212. In light of that conclusion, it is unnecessary to address the first of Mr Brochwicz-Lewinski's submissions.

Complaint of automatic unfair dismissal under s100 ERA

213. It is common ground that the claimant was a representative of workers on matters of health and safety at work within the scope of ERA s100(1)(b).

214. The issue for us to decide is whether the reason (or the principal reason) the respondent dismissed the claimant was that the claimant performed functions of such a representative by making his written report/complaint to the HSE on 3 October 2019.

215. Ms Boon dismissed the claimant because she believed the claimant lied to the HSE by saying the following two things to the HSE:

215.1. that CBUK supervisors '…gave a toolbox talk on asbestos and said there was none on the shop floor, when someone pointed out there was all the toolbox talks went missing'; and

215.2. that he was 'threatened with discipline for mentioning asbestos'.

216. For reasons already explained, we have concluded that the claimant acted wholly unreasonably in making the statements identified above to the HSE. That was a belief also held by Ms Boon.

217. That being the case, we find that the claimant was not dismissed because, when he contacted the HSE, he performed functions as a health and safety representative, but for the distinct reason that he had deliberately lied to the HSE.

218. The claimant's claim that his dismissal was automatically unfair by virtue of ERA s100 is not made out.

Ordinary Unfair Dismissal

219. The reason for dismissal was as set out above.

220. That was a reason related to the claimant's conduct and was therefore a potentially fair reason within section 98(2) ERA.

221. Before reaching her conclusions, Ms Boon carried out an investigation that was extremely thorough. The claimant criticises her for not interviewing Mr Blewitt. We accept that decision was within the range of reasonable responses open to a reasonable employer given that Mr Blewitt was on sick leave. We find that Ms Boon carried out as much investigation as was reasonable before reaching her conclusions.

222. We turn now to the question of whether MS Boon had reasonable grounds for believing that the claimant had lied to the HSE.

223. Mr Smith suggested Ms Boon did not investigate the whereabouts of the toolbox talks and that she cannot, therefore, have had reasonable grounds for thinking they had not gone missing. We reject that submission. During her investigation Ms Boon spoke to Mr Oakes, Mr Hardy, Mr Parker, Mr Jackson, Mr Crooks and Mr Abbott about the whereabouts of toolbox talks. Mr Oakes told Ms Boon that when he did his investigation in 2018, all of the toolbox talks had been available except for those for F bay and prep. That was consistent with what he had said in his report of July 2018. Ms Boon was sent copies of the signature sheets for the bays other than F bay and was given an explanation for the absence of a signature sheet for F bay (Mr O'Kane and Mr Hardy both said the men had refused to sign it) and prep (Mr Abbott and Mr Crooks both said the talk was not given to that team).

224. Ms Boon also investigated what had been said in the toolbox talks, speaking with Mr Hardy, considering the information in Mr Oakes' report, and speaking to those put forward by the claimant as witnesses.

225. In addition, she investigated the claimant's claim that he had been threatened with discipline for talking about asbestos. She was given conflicting accounts about that matter from, on the one hand, the claimant and Mr Blewitt and, on the other hand, from Mr Parker and Ms Dover.

226. It is evident that Ms Boon concluded that:

226.1. managers and supervisors had not given toolbox talks in April/May 2018 saying that there was no asbestos on the shop floor;

226.2. toolbox talks had not gone missing;

226.3. the claimant had not been threatened with disciplinary action for talking about asbestos; and

226.4. the claimant's statements to the HSE about those matters had been incorrect.

227. Those were all conclusions that were within the band of reasonable conclusions open to a reasonable employer on the evidence available.

228. Ms Boon did not simply conclude that, because the claimant had made statements that were, in her belief, factually correct, the claimant must have been lying. Rather, she considered the possibility that the claimant might have genuinely but mistakenly believed his statements to the HSE about those matters were true. Having addressed her mind to that issue, she decided, on balance, that the claimant had not believed what he was saying was true and that he had deliberately lied.

229. Mr Smith submitted that if (as we have found) Ms Boon genuinely believed that the claimant deliberately lied to the HSE, that was not a reasonable belief because Ms Boon cannot have 'eliminated the possibility' that the claimant had simply made a mistake. In his oral submissions Mr Smith referred to the absence of 'conclusive' evidence or proof. We do not accept that those submissions accurately represent the approach we must take. The question we must ask is not whether Ms Boon could be sure that the claimant had lied or that the only possible (or the only reasonable) explanation was that he had done so. The question is whether Ms Boon had reasonable grounds for believing that it was more likely that the claimant had lied than that he was mistaken. We find that she did. The letter Ms Boon sent to the claimant setting out her reasons for the claimant's dismissal is evidence that she specifically considered whether the claimant might have simply made a mistake, weighed the evidence, and formed a belief 'on balance' (as Ms Boon herself put it in the letter setting out her reasons) that the claimant had lied rather than been mistaken. That was a decision that it was reasonable for Ms Boon to reach on the evidence she had.

230. During the disciplinary process it was suggested that Mr Blewitt's evidence should have been given more weight. We reject that criticism of the respondent. Ms Boon had to decide how much weight to give to the evidence of Mr Blewitt in light of all the evidence available to her.

231. It has also been suggested that it was unreasonable for Ms Boon to rely on the conclusions of Mr Oakes' July 2018 report in reaching her own conclusions. We reject that criticism; it was not outside the range of reasonable responses for Ms Boon to take into account Mr Oakes' findings as she did.

232. We are satisfied that Ms Boon had reasonable grounds for believing the claimant to have lied to the HSE when making the statements he did to the HSE.

233. The claimant has made a number of criticisms about the procedure followed by the respondent.

234. In these proceedings the respondent was criticised for delaying starting a disciplinary investigation. We do not accept that such criticism is valid. The respondent initially sought to have an informal discussion with the claimant before deciding whether to take disciplinary action. We accept that that was a reasonable approach to take. Ms Dover had been trying to meet with the claimant since November 2018. The respondent cannot be criticised for the fact that that discussion did not take place until January 2019 given that the claimant initially delayed meeting with the respondent so that Mr Blewitt could attend, then a period of sick leave prevented the meeting being arranged, with further delays then being caused by Christmas holidays.

235. It has been suggested that the claimant was ambushed by Ms Dover in holding the meeting in January to discuss the allegations because the claimant did not know what that meeting was about. We have found as a fact that the claimant did know what the meeting was about. The claimant was not ambushed.

236. The claimant also complains that the respondent did not contact the union before the factfinding meeting in January. We find that this criticism is misplaced. The ACAS Code says '30. Where disciplinary action is being considered against an employee who is a trade union representative the normal disciplinary procedure should be followed. Depending on the circumstances, however, it is advisable to discuss the matter at an early stage with an official employed by the union, after obtaining the employee's agreement.' The language of the second sentence ('it is advisable') stands in contrast to other parts of the Code where ACAS describes what employers (and employees) 'should' do. We consider the difference in language to be intentional. It was not unreasonable for the respondent not to have contacted Mr Wilson at the GMB to discuss concerns about the claimant's contact with the HSE before Ms Dover discussed the matter with the claimant. The respondent's decision not to do so did not infringe the Code. In any event, the claimant knew for some time that Ms Dover had been wanting to speak to him about his contact with the HSE and could himself have spoken to Mr Wilson ahead of their meeting, had he wished to do so, and Mr Wilson could have contacted the respondent in turn before the meeting it he had then considered it appropriate to do so.

237. Regarding the procedure generally, we are satisfied that the respondent carried out an extremely thorough and careful investigation; Ms Boon considered with care what the claimant, and his representative Mr Wilson, had to say before reaching a decision. The claimant was allowed to call witnesses; he was present when they were interviewed; he was given every opportunity to put his case. The claimant also had the benefit of a thorough appeal carried out by someone who was independent of the respondent. We are satisfied that the disciplinary process, including the investigation, was reasonable.

238. We are satisfied that Ms Boon carefully considered whether dismissal was an appropriate sanction. In doing so she took into account the claimant's long service and clean disciplinary record. She, decided, however that the claimant had acted maliciously, had taken no responsibility nor expressed any remorse for his actions and had damaged the company's relationship with the GMB, conclusions that were open to her on the facts she had found. In light of those conclusions, summary dismissal fell squarely within the range of reasonable responses open to a reasonable employer.

239. In all the circumstances, the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

240. The claim of unfair dismissal fails.

Wrongful Dismissal

241. We have found that when he contacted the HSE on 3 October 2019 the claimant knowingly made false statements. We find he did so dishonestly to paint a false picture to tarnish the reputation of the company. That, we find, was a fundamental breach of contract. It was gross misconduct in response to which the respondent was entitled to – and did – terminate the claimant's contract of employment without notice.

242. In his closing submissions Mr Smith suggested, for the first time, that the respondent was not permitted to terminate the claimant's contract without notice because the respondent had affirmed the contract by delaying taking disciplinary action. That was not an issue that had been identified for determination in the agreed list of issues. Nor was it something that had been put to Ms Boon when she was giving evidence. When we raised this with Mr Smith he accepted this was not an issue that was before the Tribunal and that the sole issue was whether the claimant had in fact committed a repudiatory breach of contract.

243. The claim of wrongful dismissal, therefore, fails.

Detriment – Mr Droogan's email

Complaint of detriment contrary to section 146 TULR(C)A 1992

244. The claimant's case is that, by sending a letter to the CBUK workforce on 22 May 2020 about his dismissal, Mr Droogan subjected the claimant to detriment for the sole or main purpose of penalising him for taking part in the activities of an independent trade union by writing to the HSE on 3 October the previous year.

245. We have found that the sole or main purpose of Mr Droogan writing to the workforce in May 2020 about the claimant's dismissal was not to penalise the claimant because he wrote to the HSE the previous year, or, for that matter, because the claimant was a union representative or because of anything he had done in that

capacity. It was to set the record straight and clarify what Mr Droogan considered to be inaccuracies in Mr Wilson's letter to GMB members in the hope that that would avoid industrial action and consequent damage to the business.

246. Therefore, the complaint that Mr Droogan subjected the claimant to detriment contrary to s146 TULR(C)A 1992 by writing to the workforce is not made out.

Complaint of detriment for making a protected disclosure contrary to section 47B ERA

247. The claimant's alternative case is that, by sending a letter to the CBUK workforce on 22 May 2020 about his dismissal, Mr Droogan subjected the claimant to detriment on the ground that the claimant made a protected disclosure when he wrote to the HSE on 3 October the previous year.

248. We have found that, in so far as the decision to send the letter was influenced by what the claimant had said to the HSE, it was only those parts of the email to the HSE that Ms Boon had found to be deliberate falsehoods that played a part in and influenced Mr Droogan's decision to contact the workforce and it was the belief that they were deliberate falsehoods that influenced Mr Droogan to set the record straight about the reasons for dismissal.

249. For the reasons already explained we have found that those statements made by the claimant to the HSE were not protected disclosures.

250. Therefore, the complaint that Mr Droogan subjected the claimant to detriment contrary to s47B ERA by writing to the workforce is not made out.

Employment Judge Aspden

Date: 14 February 2022