EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Fox	**v**	**Babcock Aerospace Limited**

Heard at: Cambridge Employment Tribunal

On: 31st January, 1/2/3 February & 1st March 2022

Before: Employment Judge King

Appearances

For the Claimant: In person

For the Respondent: Ms Cowen (counsel)

JUDGMENT

1. The claimant's claim for automatically unfair dismissal is not well founded and is dismissed.
2. The claimant's claim for unfair dismissal is not well founded and is dismissed.
3. The claimant did not suffer from an unlawful deduction from his wages and this claim is dismissed.
4. The claimant's claim for breach of contract in respect of overtime is not well founded and is dismissed.

REASONS

1. The claimant was unrepresented but assisted by his wife and Squadron leader James, a friend. The respondent was represented by Ms Cowen (counsel). I heard evidence from the Claimant. I heard evidence from Mr Paul Atkins, Mr Ian Brannick and Mr Rowland Fielder on behalf of the Respondent.

2. The Claimant and Respondent exchanged witness statements in advance and prepared an agreed bundle of documents which ran from page 1 to page 868.

3. There was an issue over evidence in that documentation in respect of the breach of contract and unlawful deductions claims was provided for during the hearings and overnight. This arose from the claimant's evidence and that it was apparent that he relied on a document saved on the respondent's system which had not been provided for as part of the disclosure. The claimant became very distressed when we went through the documents that were located overnight and passed out during the hearing. The claimant suffered from health conditions and we accordingly took time out of the hearing to enable the claimant to continue. The claimant was adamant he was well enough to proceed and in order to continue with a fair hearing, a number of steps were taken to assist the claimant in giving his evidence after the long adjournment. The claimant was permitted to have his wife sit with him and locate pages in the bundle and offer support but she was unable to assist with answering the questions. This also meant that she could request additional breaks if the claimant had not done so but she felt additional breaks were required outside those the tribunal had already built in. We were able to conclude the evidence during the original listing window but had to hear submissions on a later date.

4. The claimant was also assisted in his submissions by his friend Squadron Leader James who was permitted to address the tribunal with the claimant's pre-prepared statement by way of closing submissions as the claimant's health had deteriorated. The claimant could then add to this orally and indeed did so when he was given the opportunity to do so. The respondent also relied on written submissions and addressed the Tribunal orally.

5. At the outset the claims were identified as a claim for ordinary unfair dismissal, automatic unfair dismissal for having made a protected disclosure and an unlawful deduction from wages/breach of contract claim in respect of overtime that was unpaid or underpaid.

6. During the course of the proceedings, the claimant withdraw all but one of his protected disclosures as he stated that only one was a protected disclosure. I took some time with him to ensure that this was intended and explained the law on protected disclosures and that they did not necessarily have to be made to the employer to get protection. After this the claimant maintained that he only relied on one protected disclosure as set out below. This narrowed the issues in the case.

The issues

7. The issues as to liability were identified at the outset of the hearing. The parties had prepared an agreed list of issues in the claim for the Tribunal which we reviewed and agreed as follows:

Jurisdiction

8. The claimant claims damages in respect of alleged losses arising from alleged breaches of contract dating back to 2009. To the extent that the claimant claims breach of contract in respect of any breach alleged to have occurred prior to 26 May 2014, should those claims be struck out on the basis that the Tribunal does not have jurisdiction to consider them, the limitation period for such claims being six years? (s5 Limitation Act 1980). The claimant accepts that his breach of contract claim is subject to a limit of 6 years.

9. To the extent that any claim in respect of a deduction from wages arises in respect of alleged deductions occurring more than 2 years prior to presentation of the claimant's claims (ie prior to 26 May 2018), should those claims be struck out on the basis that the Tribunal does not have jurisdiction to consider them (s23 (4A) of the Employment Rights Act 1996)? The claimant accepts that his unlawful deduction from wages claim is subject to a limit of 2 years.

Whistleblowing

10. The claimant contends that he made the protected disclosures shown at paragraphs (a) to (g) below. It is the claimant's case that the information he claims to have disclosed tended to show a failure of a legal obligation (namely a breach of copyright) had occurred, was occurring or was likely to occur. Did any of the alleged disclosures take place and if so did any of them meet the definition of a protected disclosure in terms of s43A of the Employment Rights Act 1996 ("ERA")?
    a. **Protected disclosure 1 -** That on 5 August 2019, he informed Elaine Wells, Media Services Manager, verbally, that Adam Johnson, Media Developer, was using dozens of downloaded logos (a list of the logos to be found on the operating computer in the hard drive) and altering them off Google to complete a task the claimant had given him from Jill Matterface, The claimant

claims he told Elaine Wells that as she had recommended Adam to the claimant, and Adam was only continuing practices that she encouraged and allowed in Graphics she needed to talk to him to explain why it is not acceptable. The claimant claims this was in connection with a job request put to Colin Barnes regarding putting the ICAN branding on an already commercially published Pro Wise Interactive Board Manual. The claimant claims he had told her that any Written work was IP and came under the new IP Copyright protection Act, as the respondent are publishing the work on line her normal stance on IP and Copyright i.e being behind armed guards, could no longer apply regarding the respondent's digitally published work. "Unless we produce it we do not brand it.". The claimant contends that the disclosure was intended to show a breach of copyright law. (withdrawn by the claimant)

b. **Protected disclosure 2** - That on 19 August 2019, he informed Carolyn Crocker, HADES Region 3 Business Support Manager, verbally, that Adam Johnson had provided him with images for publication on the respondent's website and that those images incorporated other images (namely the Union Flag, RAF 100 branding, RAF Typhoon Display Team Branding, RAF badges and a Jaguar car) which the Claimant claims required a specific licence. The claimant contends that the disclosure was intended to show a breach of copyright law. (withdrawn by the claimant)
c. **Protected disclosure 3 -** That on 20 August 2019 [not 2020] he sent an email to Paul Atkins, Operations Manager, HADES RAFC Cranwell, expressing concern about the capacity and capabilities of staff he believed to be unqualified and their being put in place without interview. The claimant contends the disclosure was intended to show a breach of the Babcock Code of Conduct Policy. (withdrawn by the claimant)
d. **Protected disclosure 4 -** That on 10 September 2019, he informed Elaine Wells, verbally, that he saw Adam Johnson copying over copyrighted images of a Hawker Hind and a Bristol Blenhiem for a 3fts painting on the graphics machine. The claimant contends that the disclosure was intended to show a breach of copyright law. (withdrawn by the claimant)
e. **Protected disclosure 5** - That on or around 15 August 2019 at a computer meeting with C4i Trenchard, he informed W/Cdr Harrison and S/Ldr Gibbon, verbally in the presence of Jill Matterface, Squadron Leader, SO2 Project Mercury, and Elaine Wells, that Jill Matterface had instructed Mick Tweedie, Section Leader C4i, to purchase Educational Licences from SoftBox. The claimant contends that the disclosure was intended to show a

breach of software licensing regulations. (withdrawn by the claimant)

f. **Protected disclosure 6 - That on 4 November 2019, he showed Elaine Wells a video animation he had created and a forum address and screen grab dated August 16th 2019 which he claims showed that a Jaguar image used by Adam Johnson was not a 3d model (as the claimant claims Adam Johnson had alleged) but a photograph which had been worked over. The claimant contends that disclosure of the animation and email tended to show a copyright infringement in the form of an eagle head on the tail of a typhoon aircraft which Mr Johnson claimed had been designed by him (at Vector Portal). The claimant contends that the Jaguar image was uploaded and therefore required a confirmatory e-mail from the Jaguar photograph owner granting Adam Johnson permission to commercially use the photograph. The claimant contends that the absence of such permission was a breach of Part 4 of the Digital Economy Act 2017 which he claims is a criminal offense under section 107 of the 1989 Copyright and Patents Act.** (only protected disclosure relied on by the claimant)

g. **Protected disclosure 7** - That on 18 November 2019, he showed Paul Atkins and Lynn Mckinnon, HR Advisor, the video animation and screen grab referred to at g) above, the email referred to at 1c) above dated 20 August 2019, and also provided them with confirmation from software manufacturers, which indicated that RAFC Cranwell was not an educational establishment and, as such, could not use discounted licenses. The claimant contends that this disclosure tended to show a breach of intellectual property and software licensing regulations. (withdrawn by the claimant)

11. If the claimant did make a protected disclosure in terms of s43A of the Employment Rights Act 1996, was the claimant's dismissal unfair contrary to s103A of the ERA? In particular, was the reason (or principal reason) for the claimant's dismissal that he had made any such protected disclosure as alleged at (a) to (g) above?

12. If the claimant's dismissal was unfair contrary to s103A of the ERA, is it just and equitable in the circumstances to reduce compensation awarded in accordance with s49 (6A) of ERA?

Unfair dismissal

13. Was the claimant dismissed for a potentially fair reason within s98 of Employment Rights Act 1996? The respondent relies upon s98 (2) (b) of Employment Rights Act 1996 namely the employee's misconduct. In the alternative, the respondent relies on s98(1)(b) of ERA namely that there was a breakdown in trust and confidence between the claimant and the respondent which was a substantial reason justifying dismissal.

14. Did the respondent act reasonably in treating the reason relied upon as a sufficient reason for the claimant's dismissal pursuant to s98 (4) ERA? In particular was the claimant's dismissal both procedurally and substantially within the range of reasonable responses?

15. By way of further clarification of the allegations made by the claimant in his claim form, he alleges the following:
    a. Elaine Wells passed information regarding his disclosures to Adam Johnson leading to bad feeling within the team and which resulted in a physical assault on him by Chris Yarrow on 7 August 2019.
    b. Both Elaine Wells and Adam Johnson set out to get rid of him.
    c. That Ian Brannick unreasonably relied upon interviews and discussions with Elaine Wells, Paul Atkins, Jill Matterface and Ben Terry which had occurred prior to his disciplinary investigation
    d. That Ian Brannick made a false report to the Appeals Manager, Mr Fielder

16. If the Tribunal find any procedural shortcoming (which was not cured on appeal) which rendered the dismissal unfair, would the claimant have been dismissed in any event had a fair procedure been followed and is it just or equitable to award the claimant any compensation? (Polkey)

17. In the event that the Tribunal finds the dismissal unfair, did the claimant contribute to his own dismissal by culpable or blameworthy conduct and is it just or equitable to award the claimant any compensation in such circumstances? (S123 (6) and S122 (2) ERA)?

Unlawful deductions from wages/breach of contract

18. What were the claimant's normal hours of work? The respondent will contend that the claimant was paid his annual salary for working a 39 hour week and that those hours represented his normal hours. The claimant will contend that his annual salary was in respect of a 37 hour week and that those were his normal working hours.

19. Is the claimant entitled to any further payments in respect of hours that he worked beyond 37 hours between 24 January 2018 and 24 January 2020? If yes, what rate of payment applied for such hours worked? In particular, was the claimant entitled to payment at his basic rate or at the rate of time and a half (the "overtime rate") for hours worked over 37 hours per week during that period?

20. Has the claimant suffered unlawful deductions from his wages in that he contends the respondent owes him the sum of £2283.80 in respect of unpaid overtime for the period 24 January 2018 and 24 January 2020 for hours worked over 37 hours per week during that period? As per paragraph 2 above, the Respondent will say that any claim in respect of alleged deductions prior to 26 May 2018 is out of time. The claimant accepts that his unlawful deduction from wages claim is subject to a limit of 2 years.

21. The claimant claims that he is owed the sum of £33,528.32 for alleged breaches of contract occurring between 12 July 2009 and 12 November 2019. As above, the respondent will say that any claim for breach of contract in respect of alleged breaches occurring prior to 26 May 2014, is out of time. With regard to any claim for breach of contract between 26 May 2014 and 12 November 2019, the claimant is called upon to provide specification as to the nature of the specific breach including the specific contractual provision alleged to have applied at the time, the nature of the breach and the exact calculation showing how any sums claimed have been calculated. The claimant accepts that his breach of contract claim is subject to a limit of 6 years.

22. The claimant claims that he is entitled to outstanding payments (reflecting an increase in his rate of pay to £40,000 when he took the role of a Senior Media Developer) for the period 5 February 2019 to 31 March 2019 and during which time he alleges that he performed that role.

23. To the extent that any alleged deductions, or series of deductions, occurred more than three months prior to presentation of the claimant's claim, does the Tribunal have jurisdiction to consider them?

The Law

Automatic unfair dismissal

24. The claimant firstly brings his claim as an automatic unfair dismissal as the reason or principal reason for his dismissal was that he made a protected disclosure.

25. The law is contained in s43A to s43C of the Employment Rights Act 1996 as follows:

26. S43A ERA 1996 - 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.

27. s43B ERA 1996 - 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.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part “ the relevant failure ”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

28. s43C ERA 1996 - Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a) to his employer, or

(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.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

29. S.103A Employment Rights Act ('ERA') says

"*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*"

Unfair dismissal

30. Dismissal under s95 Employment Rights Act 1996 not being in dispute, the claimant has the right not to be unfairly dismissed by the respondent under s94 Employment Rights Act 1996.

31. S98 Employment Rights Act 1996 states that:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

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

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), 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.

32. The respondent argues contributory conduct in respect of the unfair dismissal so with regard to the protected disclosure provisions and the automatic unfair dismissal claim s 49(5) Employment Rights Act 1996 is relevant and in respect of the ordinary unfair dismissal claim so s123 (6) Employment Rights Act 1996 concerning the compensatory award and s122(2) ERA 1996 in respect of the basic award.

33. s49(5) Employment Rights Act 1996 states:

"Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding."

34. S122(2) Employment Rights Act 1996 states:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

35. S123 (6) Employment Rights Act 1996 states:

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

36. Regard must also be had to the ACAS Code of Practice on Discipline and Grievance (COP1).

Unlawful deduction from wages/breach of contract

37. The Claimant has the right not to suffer unauthorised deductions from his wages under s13 of the Employment Rights Act 1996 which provides that:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

38. S23 Employment Rights 1996 provides:

> (1) A worker may present a complaint to an employment tribunal—
>
> (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
>
> (b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),
>
> (c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or
>
> (d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or

payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

39. S24 Employment Rights Act 1996 provides:

(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,

(b) in the case of a complaint under section 23(1)(b), to repay to the worker the amount of any payment received in contravention of section 15,

(c) in the case of a complaint under section 23(1)(c), to pay to the worker any amount recovered from him in excess of the limit mentioned in that provision, and

(d) in the case of a complaint under section 23(1)(d), to repay to the worker any amount received from him in excess of the limit mentioned in that provision.

(2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

40. Counsel for the respondent in her skeleton argument also made reference to a number of cases to which I have had regard as they are key cases in these areas of law in any event. These were as follows:

Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325
Kilraine v London Borough of Wandsworth [2016] IRLR 422
Babula v Waltham Forest College 2007 ICR 1026
Chesterton Global Ltd v Nurmohamed [2018] ICR 731
Fecitt v NHS Manchester [2012] ICR 372
BHS v Burchell [1978] ICR 303
Iceland Frozen Food v Jones [1982] IRLR 439
Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714
Rigby v Ferodo Ltd [1988] ICR 29
Royal Mail Group v Jhuti [2020] ICR 731

Findings of fact

41. The claimant started work for the respondent on 1st April 2018. His employment TUPE transferred from Serco where the claimant had been an employee since 20th July 2009.

42. A meeting took place in March 2019 whereby the claimant was offered the role of Senior Media Developer for the ICAN team being developed, on an annual salary of £40,000 for 37 hours flexitime. His holiday would remain as per the Serco contract but under new Babcock terms and conditions. The claimant accepted the role on this basis. The role commenced on the 1st April 2019. Prior to this the claimant's working hours were 39 hours as at the point of the TUPE transfer his request to reduce the hours in the contract from 39 to 37 was refused. On the balance of probabilities his working hours at that time were 39 hours.

43. On the 1st of April 2019 the ICAN team was established and Adam Johnson joined the team on the 10th of June 2019 as a Media Developer.

The claimant reported to Paul Atkins as Operations Manager via the Media Team Manager (also called the media services manager) Elaine Wells.

44. The claimant's role involved him working on what was known as the Region 3 Hades contract. The ICAN Team was responsible for the production of digital assets for instructors in RAFC Cranwell College. Also in the team was Chris Yarrow, who was employed as a Motion Media Capturer. Squadron Leader Jill Matterface of RAF Cranwell was the project leader for the project and worked with the ICAN team including the claimant.

45. The claimant was clearly very knowledgeable with regards to copyright having gained specialist knowledge in this area during his career. The claimant's original case was that he made a series of protected disclosures as follows:

- 5th August 2019 the claimant made protected disclosure 1
- 15th August 2019 the claimant made protected disclosure 5
- 19th August 2019 the claimant made protected disclosure 2
- 20th August 2019 the claimant made protected disclosure 3
- 10th September 2019 the claimant made protected disclosure 4
- 4th November 2019 the claimant made protected disclosure 6.
- 18th November 2019 the claimant made protected disclosure 7.

46. Given that the claimant withdrew all but the protected disclosure made on 4th November 2019, I have not made findings of fact as to whether these protected disclosures occurred as a matter of fact nor gone onto conclude whether they meet the statutory definition for a protected disclosure as they are no longer relevant to the issues. The protected disclosure relied upon as being made on 4th November 2019 is dealt with below. It is however fair to the claimant to say he had concerns about the technical capabilities of his direct reports and that he did have discussions to this effect with Elaine Wells during this period irrespective of whether these were protected disclosures or not.

47. There was a meeting on 7th August 2019 where the claimant raised issues with Adam Johnson and copyright. There is dispute about what happened in this meeting. The claimant alleges he was assaulted. Elaine Wells said that the claimant shouted at her, told her to shut up and wagged his finger in her face. The claimant accepts he replied to his manager "you fool that's not what I said". The claimant accepts that he was shouting and it got really heated and that Chris Yarrow was the mediator standing

between him and Elaine Wells. The claimant said he was probably pointing his finger but denied wagging it in her face.

48. It Is clear from the claimant's subsequent correspondence in December 2019 that when he refers to assault, he means a verbal assault took place since he uses those words. The reference to physical assault in the list of issues should in fact be a reference to verbal assault. Further, the claimant emailed the respondent on 8th August 2019 complaining about issues over the management structure but made no reference to any assault. insofar as the claimant relies on this assault for the unfair dismissal claim I do need to make findings of fact about it. I accept that there was an altercation on 7th August 2019 as all of those present refer to it. It is clear but there was shouting at the meeting but since the claimant has made admissions about his own conduct at this meeting, I do not accept that he was the one that was verbally assaulted. I accept that there was an altercation but that his own conduct contributed to the situation.

49. On 9th October 2019 Jill Matterface emailed Paul Atkins as she had some concerns about the ICAN team. There were issues over visibility and communication and the claimant led the delivery for the team.

50. On 25th October 2019 Adam Johnson emailed Paul Atkins as he wanted to raise something with him in person. Due to delays caused by personal leave this meeting was delayed until the 30th October 2019. I did not hear from Adam Johnson as a witness but I did hear from Paul Atkins who was a credible witness. I accept his evidence that Adam Johnson raised concerns with him about the claimant's behaviour and that he was upset but did not wish to make the matter a formal complaint at that stage. This is important due to the timing of the meeting.

51. On 4th November 2019 the claimant attended a meeting with Jill Matterface. Jill Matterface sent an email to Paul Atkins the following day outlining her summary of what happened at the meeting. She was in essence the customer and I have no reason to doubt the contents of that email and further it presents a balanced view of both sides. She outlined that the meeting should have been an hour to discuss the project but in fact turned into a four hour plus mediation session between Adam Johnson and the claimant. She commended that the team on the videos and supporting graphics and commended the claimant on his tone and approach which was the most professional she had seen to date.

52. The email set out that her and Elaine Wells concluded last night that the claimant and Adam Johnson could no longer work together and Adam would be working in graphics until the respondent could replace his role

within the ICAN team. The email set out a number of points about the conduct of both Adam Johnson and the claimant and that Adam Johnson had raised his voice at the claimant on a number of occasions and that the claimant "to his credit dealt better with it than he would have done previously". The email expressed frustration that she as the customer was left dealing with the relationship issues within the team which should be handled by the respondent.

53. As a result, it was around this time that Adam Johnson moved away from the ICAN team to the graphics area of the media section and therefore Paul Atkins did not progress the complaints Adam Johnson made verbally on 30th October 2019 to a more formal footing.

54. It is within the context of the meeting on 4th November 2019 that the claimant says he made a protected disclosure this is that "*he showed Elaine wells a video animation he had created and a forum address and screen grab dated August 16th 2019 which he claims showed that a Jaguar image used by Adam Johnson was not a 3d model (as the claimant claims Adam Johnson had alleged) but a photograph which had been worked over. The claimant contends that disclosure of the animation and email tended to show a copyright infringement in the form of an eagle head on the tail of a typhoon aircraft which Mr Johnson claimed had been designed by him (at Vector Portal). The claimant contends that the Jaguar image was uploaded and therefore required a confirmatory e-mail from the Jaguar photograph owner granting Adam Johnson permission to commercially use the photograph. The claimant contends that the absence of such permission was a breach of Part 4 of the Digital Economy Act 2017 which he claims is a criminal offense under section 107 of the 1989 Copyright and Patents Act.*"

55. I accept as a matter of fact that this meeting happened on 4th November 2019 and that the claimant did indeed show Elaine Wells the video animation and images and that he did allege that Adam had breached copyright regarding the ICAN logo. Aside from the claimant's evidence this is confirmed by Jill Matterface in the email of 5th November 2019 that he did refer to such matters. She does however confirm that she did not see the evidence the copyright infringement to which the claimant referred. Nevertheless, on the balance of probabilities I accept that the claimant did raise copyright breaches on this day. It is clear that this was recorded in the email of the 5th of November 2019 and passed on to Mr Atkins and Elaine Wells who discussed the email the same day. The respondent did not call Elaine Wells to counter the claimant's evidence. He was extremely passionate about the matter in his evidence. The claimant

demonstrated what he considered to be a breach of copyright and made it clear that this was in respect of Adam Johnson and what the issue was.

56. On 13th November 2019 an incident took place in the studio. The claimant was involved. Chris Yarrow had raised health and safety concerns about the set up of the filming apparatus in the studio. He had made some recommendations about simple purchases which he felt would enable the team to work more safely. Chris Yarrow took Elaine Wells to the studio to show her his proposals following on from his raising of health and safety concerns.

57. The claimant came into the studio and was upset about Chris Yarrow having raised these concerns. The claimant started pointing towards Elaine Wells and she asked him to calm down. He pointed his finger in her face and shouted that he was "sick of this" and Chris stood between Elaine and the claimant to try and diffuse the situation. His chest made contact with the claimant in an accidental knock but this was minor and unintended.

58. The claimant shouted at Elaine Wells and Chris Yarrow to stay where they were. Cross words were exchanged between the parties and the claimant swung a piece of equipment around whilst he spoke. The claimant blamed Elaine Wells for the situation. The noise was such that a passing member of staff entered the studio and told the parties to keep the noise down.

59. On 15th November 2019 Adam Johnson wrote an email to Paul Atkins referring to that conversation weeks earlier and that having considered the matter he wished to raise a formal complaint about the claimant's behaviour. He referred to bullying and harassment carried out by the claimant and that had witnessed both hostile and toxic behaviour that he found offensive and abusive to both himself and colleagues.

60. On the 18th of November 2019 the claimant was suspended by Paul Atkins.

61. On 19th November 2019 Chris Yarrow raised a written complaint by email about the claimant's behaviour which described the incident in the studio in detail as well as a number of other accusations about the claimant's conduct towards both himself and colleagues as being abusive and unprofessional. The email raised concerns about the claimant's conduct towards Chris Yarrow where he was told that if he was not good enough to do his job he would be transferred down to photography. He said that he had been told his skills were poor and that he was not capable of listening or learning. He further said that he was told his profession is full of liars.

Another allegation referred to the claimant calling Chris Yarrow gay, a girl, and a “tard”.

62. The claimant’s suspension was confirmed in writing by letter dated 19th November 2019. This confirmed an investigation was being conducted into allegations of the claimant being verbally abusive and intimidating towards colleagues and bringing the company name into disrepute and causing reputational damage in that they had received complaints from a customer regarding his behaviour towards them and his colleagues.

63. On 4th December 2019 the claimant was interviewed as part of the investigation by Paul Atkins. The claimant expressed his concerns that the process was pre-judged and that Elaine Wells was trying to get rid of him. He accepted he had been annoyed and had been ranting and raving but that there was a reason for this and he had no help. He accepted that he had told Chris Yarrow as a joke that if he didn't buck up he would be back in photography.

64. The claimant further accepted in the interview that he called graphics colleagues “muppets” in the past. He accepted that he had called Linda Lowing a water pikey because she wanted to live on a boat. During the course of the employment tribunal hearing the claimant denied using the word Pikey and said instead it was pavee this was a term he would equally used to describe himself given his heritage. As set out below however, he did not challenge this as part of the notes of the meeting which were before the dismissing officer.

65. As part of the investigation, the claimant accepted he had called Chris Yarrow a girl but that that was a joke. He admitted that his behaviour had been really bad but that he had been driven to it. When discussing the incident in the studio the claimant confirmed he was really mad and annoyed on that day. He felt that the situation was engineered. He accepted that he had prevented Chris Yarrow and Adam Johnson from taking notes whilst he was talking to them. He said that they were not to take notes while he was teaching and that he had said to Adam you can't do the job it's as simple as that and it was about his training techniques.

66. The claimant further confirmed that he considered photography to be a lying deceitful practise based on fabrication. Again, he said this was a joke and banter. He accepted he had used the term chimpanzee to Chris Yarrow but again that it was banter. Again, in the meeting he raised the issues of copyright and that he had concerns over working practises. In total the meeting lasted almost three hours.

67. Following the meeting the claimant was sent a copy of the notes which were not verbatim and he provided his comments on the same. He edited these extensively and it is from this edited and agreed notes that I have taken the record of what was said since the claimant agreed it at that time.

68. On 7th December 2019 the claimant wrote to Paul Atkins with a statement about the complaints. This ran to 8 pages setting out his version of events and a number of the allegations. This was not included by Paul Atkins in his investigation report that was subsequently sent as set out below and as a result the disciplining officer did not have sight of the same before taking his decision.

69. On 9th December 2019 the claimant wrote to Paul Atkins with some additional information. He provided additional information about the matters of concern he had raised with Elaine Wells and that he was willing to continue his role and train the two individuals provided Adam Johnson's unlawful copyright actions were dealt with. He wanted the issues regarding software licencing to be sorted. The claimant accepted that his bad temper at the situation had not been acceptable but it had been a direct result of no equipment, no support and unrealistic demands on new kit and processes that have yet to be tested for production. He suggested a meeting between the relevant parties to try and fix the situation. Again, this document did not form part of the investigation report and was not before the disciplinary officer when he took his decision.

70. Paul Atkins as investigating officer interviewed all of the relevant witnesses and colleagues of the claimant. Having reviewed all the evidence Paul Atkins concluded that the claimant should proceed to a disciplinary hearing. Paul Atkins provided an investigation report with all the evidence he had compiled from the interviews and sent this to Ian Brannick by email dated 13th December 2019 as he was to hear the disciplinary. There were a number of instances of verbally abuse or intimidatory conduct towards the colleagues set out in the investigatory report for the disciplinary officer to consider.

71. By letter dated 13th December 2019, the claimant was invited to a disciplinary hearing on 19th December 2019. By email dated 14th December 2019 the claimant notified the respondent that he was taking two weeks annual leave using his time off in lieu (TOIL) and extra time on his timesheet as well as holiday allowance as he needed to get time away from the situation. He told the respondent he was taking the two weeks being the 16th to 20th December 2019 and then the 6th to 10th January 2020 with the gap in between already being designated company leave and that he would be uncontactable from Monday 16th December.

72. Notwithstanding the timing of the notification and that it was not a request for leave but an indication it was just being taken in any event, the respondent cancelled the disciplinary hearing and confirmed this would be rescheduled for the week commencing 13th January 2020. This was confirmed by email on 16th December 2019 from Paul Atkins and the claimant's wife acknowledged receipt of the same on his behalf.

73. A further invitation to a disciplinary hearing was sent by letter dated 6th January 2020 to the claimant. The claimant was asked to attend the disciplinary hearing on Thursday 16th January 2020. The allegations remained the same as those raised with the claimant at the point of suspension including being verbally abusive and intimidating behaviour towards colleagues. In advance of the meeting the claimant was provided with copies of the two complaints from Chris Yarrow and Adam Johnson together with copies of all the interviews with all the witnesses and the investigation report itself.

74. The disciplinary hearing took place on 16th January 2020. The claimant was not accompanied at the meeting but he was given the chance to be. In advance of the disciplinary hearing the claimant sent a number of documents to Ian Brannick. These included replies to each of the statements by Adam Johnson and Chris Yarrow. The disciplinary hearing lasted 7 1/2 hours and the claimant was given the opportunity to raise any matters upon which he wished to rely. Notes were taken at the meeting. The claimant again had the opportunity of reviewing the notes and edited them quite extensively. Again, the record of the meeting is taken from these notes as they were agreed by the claimant. In addition, the claimant provided Ian Brannick with a lengthy document electronically containing a number of sticky notes as part of that hearing regarding his evidence which is in the agreed bundle.

75. Following the disciplinary hearing, the respondent conducted further interviews with witnesses on 22nd January 2020 dealing with issues raised or queries of the disciplinary officer. These were, however, not shared with the claimant in advance of the reconvened meeting and he was not given the opportunity to comment on the same.

76. A further disciplinary hearing was arranged as the purpose of that meeting was enable the decision to be communicated to the claimant. The disciplinary hearing concluded on 24th January 2020 and the claimant was summarily dismissed in the meeting for gross misconduct.

77. The respondent confirmed the decision to dismiss in a letter to the claimant dated 30th January 2020. The respondent confirmed that the decision was that the claimant had been verbally abusive, intimidating toward his colleagues as had been alleged and that there was extensive evidence to support this and indeed admissions on the claimant's own part. The respondent upheld the allegation that the claimant had told his colleagues he could have them sacked or moved out of roles they were employed to do. It held that the claimant had called Linda Lowing a Pikey and referred to colleagues as monkeys. It further found that the claimant did call Chris Yarrow a girl and a "Tard". The latter he described in the Tribunal hearing as being not a reference to "retard" and being mentally slow but a reference to the quality of work and he did provide some evidence this was a phrase Chris Yarrow also used in his work capacity to describe work not people. The respondent found that the claimant accepted he did call his colleague an idiot and demanded that they stay put during the studio incident. Having considered the respondent's disciplinary policy, the respondent concluded the claimant's actions constituted gross misconduct.

78. Turning to the second allegation this was not upheld and dismissed. The respondent found no formal complaint had been raised and therefore the allegation that the claimant brought the company name into disrepute and caused reputational damage was dismissed.

79. Ian Brannick felt that dismissal was the only option. He concluded that if the claimant had genuine concerns, then they should have been escalated through the proper channels rather than behaving in the way he did. Ian Brannick's evidence was clear that he did not dismiss the claimant for having made protected disclosures, I accept that. He also considered sanctions short of dismissal and took into account the claimant's long unblemished record.

80. During the disciplinary process, the claimant suggested that for nine years had been forced to work 39 hours a week by Elaine Wells rather than the 37 hours of which he was contracted to do so. He suggested that over 1000 plus hours had been stolen from him as a result. During this hearing the claimant accepted his contractual hours were 37 hours a week and that overtime would only be paid if it was authorised. The claimant confirmed during evidence that at no point was any overtime expressly authorised by any member of the management team.

81. During the course of the hearing there was repeated discussion about studio time and not contract time. The claimant would work what I was required to complete the particular filming project but then would attend

work late the following day as a result for example. The claimant had large freedom as to hours. The claimant also accepted in evidence that when he had worked additional hours he took time off in lieu. This is further evidenced by his email during the disciplinary process when he did this which caused delay in the disciplinary hearing taking place.

82. The claimant accepted in evidence that he could not claim both TOIL and salary for the same additional hours but maintained that he should have been given a choice between the two. The claimant kept his own time records which were located as additional disclosure during the course of the hearing. There were records kept for payroll and records kept for projects but the two did not necessarily concur. There was no evidence that the claimant did work 39 hours on a regular basis under the new contract but that he did additional hours for which he then took time off in lieu (TOIL).

83 Nevertheless, the respondent did pay the claimant the sum of £3,872.66 less deductions for tax and national insurance for overtime between the period 24th January 2018 to 24th January 2020 after his employment had terminated. Paul Atkins' unchallenged evidence was that there is no evidence the overtime was either worked or due but he took a pragmatic approach to try to avoid a protracted dispute with the claimant and took his word for it in an attempt to resolve matters. He did not accept that any payment was contractually due but rather this was in essence a payment made on a discretionary basis as a gesture of goodwill.

84. The claimant in his closing submissions sought an additional £2,283.60 for the same period as he claimed the wrong rate had been used for the payment. He also alleged £1,666.66 for the payrise for the new role from 5th February 2019 to 31st March 2019. He did not start in this role until 1st April 2019.

85. The claimant raised additionally breach of contract concerning a failure to support his MA studies when the first time this had been particularised was in the written closing submissions and there was no evidence on that matter. This was also in respect of historic overtime unclaimed prior to the TUPE transfer. These sums were given a new figure of £33,528.32.

86. The claimant appealed his dismissal by letter dated 6th February 2020 which was sent by email on 7th February 2020 and in a subsequent undated letter to Helen Cotton. He also provided the appeal officer with a number of emails to be considered as part of his appeal.

87. An appeal hearing was held with the claimant on 19th February 2020. Rowland Fielder was appointed as the appeal officer. The appeal hearing lasted over two hours.

88. By email dated 4th March 2020 the claimant was informed that his appeal was unsuccessful and sent a copy of the appeal outcome letter dated 2nd March 2020. Rowland Fielder considered that nothing the claimant provided mitigated the behaviours he had displayed in the workplace. He concluded that the claimant had used inappropriate derogatory abusive and intimidating behaviour towards his colleagues and that dismissal in those circumstances was justified. Rowland Fielder dismissed his grounds of appeal in their entirety.

89. The claimant presented his claim on the 26th of May 2020 following a period of early conciliation from the 30th of March 2020 to the 30th of April 2020.

Conclusions

90. My conclusions based on my findings of fact are set out below taking each issue in turn.

Whistleblowing

Did the claimant make a protected disclosure?

91. It is the claimant's case that the information he disclosed tended to show a failure of a legal obligation (namely a breach of copyright) had occurred, was occurring or was likely to occur. The claimant withdrew all of his protected disclosures contained in the list of issues save for protected disclosure 6 on 4th November 2019.

92. The matter that was said to be a protected disclosure remaining was that on 4 November 2019, and the claimant's position on this is that he showed Elaine Wells a video animation he had created and a forum address and screen grab dated August 16th 2019 which he claims showed that a Jaguar image used by Adam Johnson was not a 3d model (as the claimant claims Adam Johnson had alleged) but a photograph which had been worked over. The claimant contends that disclosure of the animation and email tended to show a copyright infringement in the form of an eagle head on the tail of a typhoon aircraft which Mr Johnson claimed had been designed by him (at Vector Portal). The claimant contends that the Jaguar image was uploaded and therefore required a confirmatory e-mail from the Jaguar photograph owner granting Adam Johnson permission to

commercially use the photograph. The claimant contends that the absence of such permission was a breach of Part 4 of the Digital Economy Act 2017 which he claims is a criminal offense under section 107 of the 1989 Copyright and Patents Act.

93. I accepted the claimant's evidence that this meeting did take place on this day. In order to be a qualifying disclosure it must include information and there is a distinction between this and a mere allegation as per *Cavendish Munro Professional Risks Management Ltd v Geduld [2010]*. Given the claimant's evidence that he showed Elaine Wells the video and emails and explained that Adam Johnson was in breach of copyright, I conclude that the claimant did disclose information.

94. In accordance with *Kilraine v London Borough of Wandsworth [2016]* I am satisfied having heard the evidence that the identified statement meets the standard of information and this is a matter for the Tribunal. The claimant showed Elaine Wells the animation and the detail around it, he did not merely make the allegation that there had been a breach of copyright without the detail. He made such an allegation in the meeting on the same day with Jill Matterface but as he did not show her the same information he showed Elaine Wells I do not consider this disclosure to be of information but a mere allegation.

94. The respondent's position is that there was not a breach of copyright. Whether or not the claimant was right in this regard does not require me to make a finding of fact on this as in accordance with *Babula v Waltham Forest College [2007]* it does not matter if the claimant was mistaken in this regard. The claimant has demonstrated that this was his genuine belief. He had knowledge of copyright obligations and he was extremely passionate about the topic during the course of the hearing. Whether he was right or wrong is irrelevant, he clearly believed that he had uncovered a breach of copyright and brought it to Elaine Wells' attention. He believed that the respondent was in breach of its legal obligations concerning copyright.

95. As his manager within the ICAN team, Elaine Wells meets the definition for the qualifying prescribed person within the meaning of s43C Employment Rights Act 1996.

96. The final part of the test for a qualifying disclosure is that it must be in the public interest. The claimant's disclosure was wider than being just about the claimant being affected himself. The team were employed to do a job and to provide material for the client. If the claimant was right and they were doing so in breach of copyright laws then this would in my view meet

the test for public interest disclosure as it is impacting both on the end client and the public when the material is used in due course as well as the interested parties who would have a claim for copyright breach. It is about far more than the claimant personally. I consider in the circumstances that the disclosure was in the public interest.

97. I conclude that the claimant did make a protected disclosure on 4th November 2019.

Was the reason (or principal reason) for the Claimant's dismissal that he had made the protected disclosure?

98. The claimant was dismissed for conduct reasons on the respondent's case. This conduct was by and large accepted by the claimant in the minuted meetings.

99. In accordance with *Fecitt v NHS Manchester [2012]* the principle reason operating the mind of the employer at the time of the dismissal must be the protected disclosure. The disclosure has to be the primary motivation for the dismissal. I accepted Ian Brannick's evidence that the protected disclosure did not factor in that decision. The reasons given by the decision maker are key in accordance with *Royal Mail Group v Jhuti [2020].* There is no evidence of controlling mind behind the decision to dismiss and Ian Brannick had in his mind the admissions to the conduct and whether there was anything that could mitigate this.

100. Here, the protected disclosure was made on 4th November 2019. However, concerns had been raised about the claimant's conduct prior to the protected disclosure being made. On 9th October 2019 the customer had raised concerns about the team. Adam Johnson who was of course the subject of the protected disclosure, had already verbally raised with Paul Atkins his concerns on 30th October 2019. He had sought an earlier meeting and had reached out to Paul Atkins on the 25th October 2019. There is no evidence to suggest that Adam Johnson in some way knew the allegation was coming and this was the reason why he raised concerns about the claimant first. The claimant does not suggest he raised this matter with anybody previously. At this stage, Adam Johnson raised it verbally as he did not wish to make it formal and further, the matters about which he complains are accepted by the claimant to a large degree in the disciplinary process. This is not a case where the content of the complaint was not accepted by the claimant.

101. The claimant accepted the majority of the allegations concerning his conduct during the course of the disciplinary process. The allegations do

not portray the claimant in a positive light. These concerns had been ongoing for some time before the protected disclosure was made. The written complaint by Adam Johnson came after the protected disclosure but he had already made verbal complaints along the same lines.

102. In addition, there was an incident in the studio on 13th November 2019 which subsequently prompted a second written complaint by Chris Yarrow. I have considered whether the making of the protected disclosure caused the circumstances in which the incident took place in the studio and that written complaint. I consider that the incident in the studio was not connected directly to the protected disclosure. The incident in the studio involved Elaine Wells and Chris Yarrow whereas the protected disclosure was about Adam Johnson to Elaine Wells. The claimant clearly had a difficult relationship with both Adam Johnson and Chris Yarrow but this was not related to the protected disclosure but his accepted conduct towards them and this was the cause of the incident in which the matter escalated to the point the respondent had to deal with the behaviour exhibited. If anything the cause of the incident in the studio on 13th November 2019 was the concerns that Chris Yarrow had raised about health and safety and that the claimant on his own evidence was very annoyed that day. He felt that by going to Elaine Wells that Chris Yarrow had gone over his head and he thought the concerns were not justified when he had set the studio up.

103. In light of the above, I do not find the claim for automatically unfair dismissal as a result of the claimant having made a protected disclosure to be well founded. The reason for the claimant's dismissal was not that he made the protected disclosure and therefore this claim must fail and is dismissed. The claimant also brings an unfair dismissal claim which I will now go on to consider.

Unfair dismissal

Was the claimant dismissed for a potentially fair reason within s98 of ERA?

104. The respondent relies upon s98(2)(b) of the Employment Rights Act 1996 namely the employee's misconduct. In the alternative, the respondent relies on s98(1)(b) of the Employment Rights Act 1996 namely that there was a breakdown in trust and confidence between the claimant and the respondent which was a substantial reason justifying dismissal.

105. As set out above I do not find that the claimant was dismissed because he made a protected disclosure. The respondent charged the claimant

with misconduct offences towards his colleagues which he largely accepted during the course of the disciplinary process. I therefore accept the respondent's primary submission that the claimant was dismissed for misconduct. it is a clear misconduct case in which the claimant accepted at least in part his wrongdoing.

Did the Respondent act reasonably in treating the reason relied upon as a sufficient reason for the Claimant's dismissal pursuant to s98 (4) ERA?

106. This requires me to consider whether the claimant's dismissal was both procedurally and substantially within the range of reasonable responses. The claimant made some direct allegations as to why he challenged the fairness of the dismissal which I will deal with first as follows:

a. Elaine Wells passed information regarding his disclosures to Adam Johnson leading to bad feeling within the team and which resulted in a physical assault on him by Chris Yarrow on 7 August 2019.

   I do not accept this allegation as a matter of fact. The only disclosure relied upon is the November 2019 matter which has been upheld but this post dates the first complaints about his own conduct and the alleged assault in August 2019. This is wrongly described here as a physical assault when the claimant has described it as a verbal assault. I accept that the team did not work well together but that this was due to at the claimant's behaviour towards those more junior colleagues and the wider team which he accepts.

b. Both Elaine Wells and Adam Johnson set out to get rid of him.

   The claimant had worked with Elaine Wells for a longer period with no issues. There is no evidence to support the assertion that this was a preconceived notion to orchestrate the dismissal. The claimant committed conduct which he accepted and which was unacceptable in the work place. This was the reason for his dismissal.

c. That Ian Brannick unreasonably relied upon interviews and discussions with Elaine Wells, Paul Atkins, Jill Matterface and Ben Terry which had occurred prior to his disciplinary investigation.

   There is no evidence to support this allegation. The investigation took place over a period of time and evidence in interviews which were provided to Ian Brannick. Given the claimant's own

admissions he did not have any reason to bring anything else into the matter. Ian Brannick was aware of issues in the team as he was a senior manager but the issues were clearly documented as part of the investigation. The individuals were interviewed and whilst they do refer to older allegations there is no evidence anything not documented and provided to the claimant in advance of the meeting was relied upon. This allegation also makes little sense as the claimant was in fact asking him to rely on such conversations in connection with the protected disclosures but Ian Brannick felt that whatever the issues were there was no excuse for the behaviour exhibited and any concerns the claimant had should have been raised through the proper internal channels.

d. That Ian Brannick made a false report to the Appeals Manager, Mr Fielder

Even after hearing the evidence it is not clear what this allegation is and the false report alleged to have been made. This would of course not be relevant to the dismissal in any event as the dismissal pre-dates any appeal.

107. Turning now to the fairness of the dismissal, I remind myself that it is not for the tribunal to substitute its view for the respondent, it must merely satisfy itself that dismissal fell within a range of reasonable responses. It is not for me to establish the guilt or innocence of the claimant in these proceedings. It is about what the respondent knew or ought to have know at the relevant time and the respondent's actions in this case. The question of the claimant's conduct then becomes relevant on the issue of contributory fault.

108. The test in Bhs v Burchell [1978] is whether the respondent held a reasonable belief in the claimant's misconduct on reasonable grounds following a reasonable investigation. The respondent carried out an investigation and interviewed all the key witnesses in this case. The claimant was interviewed at length and made a number of key admissions as to the allegations in this case.

109. A different manager heard the investigation to the other stages and the claimant was permitted to be accompanied at the disciplinary hearing and appeal but chose not to do so. The notes were sent to the claimant to be agreed in advance of the next stage and he had the opportunity and as a matter of fact he did edit the notes and add additional points to the same.

110. I have considered whether the respondent should have used a more independent investigator than the line manager who had received the initial complaints but do not consider this fatal as they would ultimately have interviewed the same witnesses and the result would have been the

same as the key evidence in this case may have started from others but was corroborated by the claimant's own admissions.

111. The claimant was given copies of all the investigation interviews as it proceeded to the next stage. Ian Brannick did not simply take the evidence before him he asked for additional investigations to be completed and the process was not rushed.

112. By the time it came to the disciplinary hearing the claimant had the evidence against him. I was concerned that Paul Atkins did not furnish Ian Brannick with the claimant's evidence of 7th and 9th December 2019 as part of his investigation report. This was additional information that the claimant wanted him to have and this was not passed onto the person making the decision which is a flaw in the process.

113. However, the claimant was given a disciplinary hearing which was extraordinarily long at 7.5 hours and ample opportunity to have his say. The claimant further provided a sticky note document with his comments on the investigation report. I do not find that this failure meant the process was fundamentally flawed in the circumstances. The employer must act reasonably and does not need to carry out perfection or explore every conceivable avenue and this is particularly where the conduct is admitted as there is less to investigate.

114. Nevertheless, there was a detailed investigation which resulted in an investigation report. The investigation report was balanced as it did not recommend all of the allegations proceed. The second substantive allegation as to bringing the company into disrepute was dropped at the disciplinary stage and the proceedings centred around the allegations towards colleagues. The proceedings were not pre-judged or rushed otherwise Ian Brannick would not have permitted the claimant to hold the floor for over 7 hours in the disciplinary hearing. There was a suggestion that he did not have his chance to say what he wanted which I do not accept, it was a very long meeting.

115. An employer does not have to establish guilt in the misconduct of the employee and prove he did "it" beyond all reasonable doubt. An employer must only establish on the balance of probabilities that an employee committed the act of misconduct. An employer must form that belief following a reasonable investigation and it must be a reasonable belief in all the circumstances.

116. Here, as set out above, the claimant made a number of admissions as to his conduct including calling Linda Lowing a Pikey (which changed to water pavee), calling Chis Yarrow a girl and using the term tard but not as a substitute for "retard". He admitted that he had shouted, he had pointed his finger at Elaine Wells and that he has used the terms "muppets" and "chimpanzees" and that photography as a profession was full of lies and deception. He accepted he had said that Adam Johnson could not do his job and that he told Chris Yarrow he could be moved to photography if he did not buck up. Given the number of admissions by the claimant during

the process the respondent clearly held a belief in the claimant's misconduct on reasonable grounds following a reasonable investigation.

117. There was then an appeal with another manager who had not been involved to date and who considered all the evidence and met with the claimant. It was not a rehearing but here there were no fundamental procedural flaws to be cured. The claimant had a meeting and had a chance to have his say. This stage concluded a reasonable process. The process was compliant with the ACAS Code of Practice on Discipline and Grievance (COP1).

118. In accordance with *Iceland Frozen Food v Jones [1982] IRLR 439* I should also consider whether dismissal was within the range of responses for the conduct alleged. It matters not what I think but I have to be satisfied that a reasonable employer would dismiss and that dismissal was not outside the range of reasonable responses give the allegations.

119. Ian Brannick's evidence was dismissal was not the automatic outcome. In this case there was admitted conduct and Ian Brannick did not accept that anything raised by the claimant excused the behaviour the claimant exhibited to others. Ian Brannick considered the admissions but also that the claimant he felt had little or no insight into the way his words/actions impacted on others and that it was not possible for a lesser sanction to be given as a result.

120. Being verbally abusive or exhibiting intimidating behaviour to colleagues as alleged here falls within gross misconduct both in the respondent's policy and as a matter of common sense and everyday practice. Dismissal for these matters was not outside the range of reasonable responses. Not all employers would dismiss in these circumstances but some would and this is as high a threshold as the respondent is required to meet.

121. Given the above, I do not find that the claimant was unfairly dismissed. I do not need to go onto consider the other issues but even if I had found that the failure to pass on the 7/9 December information was a procedural shortcoming (which was not cured on appeal) which rendered the dismissal unfair, I would have found that the Claimant would have been dismissed in any event had a fair procedure been followed and that this was 100% likely as the issue was minor.(Polkey) For the avoidance of doubt if I had got to the issue of contributory fault the contribution would have been high.

Unlawful deductions from wages/breach of contract

What were the Claimant's normal hours of work?

122. The respondent contends that the claimant was paid his annual salary for working a 39 hour week and that those hours represented his normal hours. The claimant contends that his annual salary was in respect of a

37 hour week and that those were his normal working hours. I accept that contractually the claimant's normal working hours were 37 hours as this was referred to expressly in his contract from 1st April 2019. Prior to this the position is less certain but at the point of TUPE transfer the claimant was working and had agreed to a 39 hour week. Therefore, until the 1st April 2019 the contractual hours were 39 hours a week. At this point it became 37 hours a week.

Is the Claimant entitled to any further payments in respect of hours that he worked beyond 37 hours between 24 January 2018 and 24 January 2020?

123. Given my findings above and the evidence in this case the claimant was not entitled to be paid when he worked in excess of 37 hours a week after 1st April 2019. Between 24th January 2018 and 31st March 2019 the claimant was paid to work 39 hours and not entitled to additional pay for additional hours worked. The claimant was not hourly paid but salaried and this comes with the expectation that some additional hours may be required and this is the world of work.

124. Even if the claimant laboured a false misapprehension as to what was required in the role there are two fatal flaws to the claimant's argument. Overtime was expressly required to be authorised. The claimant accepted in evidence that it never was expressly authorised. This would mean there are no sums due.

125. The claimant had a lot of freedom as to the hours worked and there were references to the claimant working "studio time" rather than his "contracted hours". As a result, if he ever worked additional hours and I accept that he did, he was given time off in lieu (TOIL) which he chose when to take and never complained about. The claimant accepted that he could not have TOIL and be paid for the same time so again this would render any additional hours as having no payment. His point then became that he should have the choice. He did have a choice as to whether to complain about his hours or simply take the TOIL and he did the later. There was no complaint ever made about working hours. If there was any valid breach of contract claim here then in any event, the claimant would have waived the breach by instead taking the TOIL and never complaining just accepting the arrangement and his salary.

126. Even, if there was a claim (which I have established there was not) this would have been at the normal basic hourly rate and not the additional higher rate as the overtime was not authorised.

127. The claimant should take some comfort in the fact the respondent made a

payment when it did not have to do so. Paul Atkins paid him for the additional two hours for two years as a gesture of goodwill and he received £3,672.66 before deductions for tax and national insurance after his employment was terminated. Given the findings this was not due so was a gesture of goodwill. Further, there is no doubt in my mind that had he not taken TOIL in December 2019 he would have been dismissed earlier so by taking TOIL instead of being paid for the overtime, his salary was paid for an additional few weeks as it delayed his inevitable dismissal.

Has the Claimant suffered unlawful deductions from his wages in that he contends the Respondent owes him the sum of £2283.80 in respect of unpaid overtime for the period 24 January 2018 and 24 January 2020 for hours worked over 37 hours per week during that period?

128. For the same reasons as above, there has been no breach of contract nor an unlawful deduction from wages for this period. The claimant's unlawful deductions claim is also subject to time limits. Even if I could accept the deductions were monthly and every month without a three month gap to break the chain, the claimant cannot go back prior to two years from the presentation of the claim which is actually 26th May 2018 rather than January 2018. However, there are no sums due as set out above for the reasons already stated.

The Claimant claims that he is owed the sum of £33,528.32 for alleged breaches of contract occurring between 12 July 2009 and 12 November 2019.

129. The respondent asserts that any claim for breach of contract in respect of alleged breaches occurring prior to 26 May 2014, is out of time and I agree. There is a limitation for such claims of 6 years and the sums sought are outside the limits of what an Employment Tribunal can asward in any event.

130. With regard to any claim for breach of contract between 26 May 2014 and 12 November 2019, the claimant was requested to provide information as to the breach by the respondent. This information came in the closing submissions which related to a MA and studies. The claimant has not provided any evidence about any such claim. I have heard no witness evidence about it from him or through questioning the respondent's witnesses, I have not been referred to any documents and the claim must therefore fail as the claimant has not proven his case.

131. Even if I had seen any such evidence, I would have doubts as to whether

the claim is a valid one brought within these proceedings as the original claims related only to overtime and not anything to do with MA studies. Again, there is no evidence of any complaint made at the time and if the respondent was in some way in breach of the contract, then the claimant would have affirmed that breach by continuing to work under it for many many years.

The Claimant claims that he is entitled to outstanding payments (reflecting an increase in his rate of pay to £40,000 when he took the role of a Senior Media Developer) for the period 5 February 2019 to 31 March 2019 and during which time he alleges that he performed that role.

132. The evidence is quite clear that the role took effect from 1st April 2019 and the claimant agreed to the contract on this basis. The claimant's hours reduced under the new contract to 37 hours and he had a pay rise as he seeks the difference in the increase in pay. At no point at the time did the claimant raise this with the respondent. The claim has no merit. There is no breach of contract. Even if it did have any merit as an unlawful deductions claim, the tribunal would not have jurisdiction to hear the claim. It should have been brought within three months of 31st March 2019 and it was not. The claimant has not led any evidence as to why it was not brought within that time frame.

133. Given the above the claimant's claims for unlawful deductions from wages and breach of contract fail and are dismissed.

134. As the claimant has not been successful in any of his claims before the Tribunal the remedy hearing listed has been vacated and the parties will get a notification of that in due course.

Employment Judge King

Date: ……31.05.22……..

Sent to the parties on: 31.05.2022

For the Tribunal Office