



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr I Polonski  
**Respondent:** Cordant Recruitment Limited t/a PMP Recruitment

**Heard at:** Leeds Employment Tribunal (hybrid)  
**Before:** Employment Judge Deeley, Mr Howarth and Mrs Anderson-Coe (attending via CVP videolink)

**On:** 4-7 July 2022

**Representation**  
**Claimant:** in person  
**Respondent:** Mr Brill (Solicitor)

## WRITTEN REASONS

**JUDGMENT** having been sent to the parties on 15 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 at the hearing on 7 July 2022 and in Mr Polonski's email of 7 July 2022, the following written reasons are provided:

### INTRODUCTION

#### Tribunal proceedings

1. This claim was case managed at an interim relief hearing conducted by Employment Judge O'Neill on 12 February 2021 and three previous Preliminary Hearings conducted by:
  - 1.1 Employment Judge Smith on 2 July 2021; and
  - 1.2 Employment Judge Jones on 22 September 2021 and 22 November 2021.
2. We considered the following evidence during the hearing:
  - 2.1 a joint file of documents and the additional documents referred to below;
  - 2.2 witness statements and oral evidence from:

2.2.1 Mr Polonski; and

2.2.2 Mr Cottrill (the respondent's site manager).

3. During the hearing, additional documents (consisting of full copies of email chains) were disclosed by the parties at the request of the Tribunal and added to the hearing file with the parties' consent.
4. We also considered the oral submissions from both representatives.

### **Adjustments**

5. We asked the parties if there were any adjustments that they wished us to consider. Neither party asked for any adjustments, other than a break at 1pm each day for medical reasons. We informed the parties that they could ask for additional breaks at any time.

### **Anonymity and restricted reporting orders**

6. Mr Polonski requested written reasons after we provided our oral reasons at the end of the hearing of this claim. We asked Mr Polonski if he wished to request an anonymity or any similar orders, in light of the nature of the medical evidence that he had provided to us regarding his depression. Mr Polonski stated that he did not wish to apply for any such orders.

### **CLAIMS AND ISSUES (see Annex 1 at the end of this document)**

7. Employment Judge Jones prepared a list of issues (or questions for the Tribunal to decide) on 22 November 2021. A copy of this list is attached at **Annex 1**.
8. We note that Mr Polonski had previously brought a claim of either ordinary unfair dismissal and/or automatic unfair dismissal (related to protected disclosures). This claim was struck out because Mr Polonski had not been dismissed by the respondent, but instead had been removed from his assignment to a third party (Amazon). In addition, Mr Polonski had been employed by the respondent for less than two years at the time of the events relevant to his claim.

### **RELEVANT LAW (see Annex 2 at the end of this document)**

9. The Tribunal has considered the legislation and caselaw set out at **Annex 2**, together with any additional legal principles referred to in the parties' submissions.

### **FINDINGS OF FACT**

10. The Tribunal is required to reach findings of fact on the balance of probabilities, having considered the evidence.

### **Context**

11. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit*

*Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

12. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

*"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

13. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

## Background

14. The respondent ("**PMP**") is a recruitment agency that supplies temporary labour to a range of clients, including Amazon in the UK. The number of staff required by clients depends on the client's business needs and volume of work, both of which fluctuate over time and are not within PMP's control.
15. We note that in the retail sector, the months running up to Christmas and the period post-Christmas are normally the busiest period of the retail sector's year. We also note that the period during which these events took place was late 2020 and early 2021. This was the first Christmas period after the start of the Covid-19 pandemic in March 2020, during which online shopping had increased significantly. We also accept Mr Cottrill's evidence that it is normal for the volume of work sub-contracted by Amazon to PMP to reduce significantly after each Christmas period.
16. Mr Polonski was employed by PMP as a 'Flexible Colleague'. His contract (which he signed electronically on 17 September 2020) stated that:

### *"3. JOB TITLE, DUTIES AND ASSIGNMENTS*

*3.1. You are employed as a Flex Colleague to undertake the job role(s) specified on the Assignment Details Form for your first Assignment with the Company or such other suitable job role(s) as agreed with you on an assignment by assignment basis.*

*3.2. The Company will endeavour to obtain and provide suitable Assignments to you but in any event promises to make available to you a minimum of 336 hours of work (the "Minimum Hours") in any year. For the avoidance of doubt all hours made available to you by the Company shall count towards the discharge of the Minimum Hours, whether or not those hours are in fact worked by you...*

...

3.10. You acknowledge that the nature of the Company's and Client businesses means that there may be periods when no suitable Assignments are available. You agree that your suitability for any available Assignments shall be determined solely by the Company, and subject to clause 3.2, the Company shall incur no liability to you should it fail to offer you Assignments to undertake work in the above category, or in any other category.

3.11. Prior to and/or at the same time as an Assignment is offered to you the Company shall inform you of; the identity of the Client,

and if applicable, the nature of their business; the date the work is to commence and the duration or likely duration of the work; the type of work, work location; working hours; the rate of remuneration that will be paid and any expenses payable to you; and any risks to health and safety known to the Client in relation to the Assignment and the steps the Client and/or the Company has taken to prevent or control such risks....

...

#### 4. PLACE OF WORK

4.1. You have no permanent place of work, and in accordance with the demands of the business, it is expected that you will be required to work at a series of Client sites on a regular basis in order for the proper performance of your duties under this Agreement.

...

#### 5. REMUNERATION & PENSION

5.1. You will receive at least the Minimum Pay Rate for all Assignments, which will change in line with any Government legislation regarding national minimum or living wages, as amended from time to time. The actual rate of pay will be notified to you on a per Assignment basis for each hour worked during an Assignment...

5.2. Subject to any statutory entitlement under the relevant legislation and clause 3.2, you are not entitled to receive payment from the Company for time not worked on Assignment, whether in respect of holidays, illness, rest periods, formal and informal rest breaks, or absence for any other reason unless otherwise agreed.

...

#### 10. TERMINATION

10.1. The Company will endeavour to provide notice to terminate your Assignment, however due to the nature of the Company's business activities, it is accepted that the Company may be required to terminate an Assignment at any time either with or without prior notice and the Company will incur no liability. For the avoidance of doubt, the termination of an Assignment will not terminate this Agreement unless expressly stated, and your employment will remain continuous during periods you are not working on Assignment..."

17. Mr Polonski was assigned to work at Amazon's LBA8 site (the "**Leeds Site**"), starting on 1 October 2020 (the "**Amazon Assignment**"). He was not provided with an end

date for the Amazon Assignment. The Leeds Site was an Amazon warehouse in Leeds.

18. PMP were (and still are) the only recruitment agency that supply temporary labour to Amazon at the Leeds Site and they are responsible for managing their employees who are working at the Leeds Site. PMP supplied around 1500-2000 PMP employees to work at the Leeds Site from October to late December/early January on temporary assignments.
19. PMP has a site manager, several shift supervisors and other administrative staff who are based at the Leeds Site. Mr Cottrill was the site manager at the time of these events. PMP's shift supervisors included Harshal (whose surname was not confirmed during the hearing), Mr John Smith and others. Mr Cottrill stated that there would normally be two to three shift supervisors from PMP at the Leeds Site at any particular time. These were in addition to any of Amazon's own managers working at the Leeds Site.
20. We understand that Mr Polonski's contract of employment with PMP is continuing because neither Mr Polonski nor PMP have ended that contract. However, PMP has not assigned Mr Polonski to any clients (including Amazon) since January 2021.
21. However, Mr Polonski is currently employed directly by Amazon as a permanent Amazon employee working a fixed shift pattern, consisting of three shifts per week.

#### **Mr Polonski's evidence regarding his depression**

22. Mr Polonski has suffered from depression since 2009 and he continued to suffer from depression as at the date of this hearing. Mr Polonski described his depression as 'coming in waves' and said that his symptoms fluctuated from day to day.
23. We accept Mr Polonski's oral evidence regarding his depression, including his evidence regarding three particular periods since 2009:

**23.1 2009** – Mr Polonski stated that he went missing for a three day period in 2009 after a difficult time in a previous job. He said that he was found by police and that he still cannot account for that three day period. Mr Polonski said that he had a slow period of recovery during which he needed assistance to drink, had to re-learn to hold a pen, read and write and had to re-learn how to interact with other people.

**23.2 2016** – Mr Polonski was assessed for a Personal Independence Payment ("PIP") by the DWP in 2016. The assessment scores record that as at 2016 Mr Polonski needed prompting by another person to:

23.2.1 prepare or cook a simple meal;

23.2.2 wash or bathe and to dress; and

23.2.3 engage in social interaction with other people.

**23.3 Late 2020/ early 2021** – Mr Polonski stated that as at this time he was not taking any medication. However, he continued to need his wife's assistance. For example, he stated that his wife would:

23.3.1 regularly help him to prepare for work – he commented that sometimes he would lose track of time; and

23.3.2 assist him with food preparation and prepare his clothing.

24. Mr Polonski also provided two letters from his doctor:

24.1 his GP's letter of 17 June 2019, which stated that he had suffered a 6 month history of depression as at 8 June 2019 and that he had been prescribed fluoxetine; and

24.2 his GP's letter of 15 December 2021, which stated that he had consulted his doctor for the last seven years regarding his depression. The letter stated that Mr Polonski had tried various medications, including citalopram and fluoxetine, and that he had been offered cognitive behavioural therapy.

### **Impact of Mr Polonski's depression on his ability to communicate**

25. Mr Polonski has stated as part of his complaint of discrimination arising from disability that his depression exacerbates any stress that he suffers and that when he is stressed, he cannot express himself well in English. We note that the GP's letters provided by Mr Polonski do not refer to this issue.

26. Mr Polonski's CV was included in the hearing file. This records that he has English language qualifications including ESOL (English for Speakers of Other Languages) qualifications and had previously worked for other employers including 10 years at West Yorkshire Police.

27. However, we accept Mr Polonski's oral evidence that:

*"...if I am under stress – I cannot phrase/put sentences together – that affects me at work as well. It's almost literally – when I'm feeling fine, then I'm able to express myself quite okay in English – but if I'm under stress, I literally shut down and am unable to say much at all.*

*At my workplace – my management are very aware and familiar with what's happening with me and they communicate very well and regularly ask me how I am. If they notice that I'm not able to express myself – they give me a bit of time out so I can re-charge."*

### **Respondent's knowledge of disability**

#### ***Health questionnaire***

28. PMP requires candidates to provide their details via an online form, which is part of their Cordant Connect website. Candidates provide their personal contact details, their working hours availability, the distance that they are able to travel and other information before they start any assignments. Mr Polonski completed the online form on 17 September 2020.

29. The online form included a health questionnaire. The health questionnaire included specific questions about diabetes, stomach or intestinal disorders, conditions that cause difficulties sleeping, chronic chest disorder and conditions for which an individual is taking medication. It did not contain a specific question about depression

or mental health conditions. Mr Polonski ticked 'no' in response to each of the questions and did not disclose any medical information.

30. Mr Polonski stated in his evidence that PMP completed the questions on his behalf, after a video discussion between him and a member of their recruitment team. However, we have concluded that whilst Mr Polonski may have had a video discussion with PMP after he applied for the role, it is unlikely that a PMP recruiter would have completed the form on his behalf. We accept Mr Cottrill's evidence that PMP had moved all of their recruitment online because of the Covid-19 pandemic. In addition, the form is designed to be completed by the candidate rather than a PMP agent (e.g. there is a button with the title "Chat with us" at the end of the health questionnaire).
31. Mr Polonski signed his contract of employment and Work Assignment information electronically on 17 September 2020, i.e. the same day that he completed the online form.

### ***Discussions with management***

32. Mr Polonski stated that he told Harshal (one of PMP's Shift Supervisors) that he suffered from depression. In response to the Tribunal's questions, he stated that he was referring to Harshal when he said that management were aware and familiar with what was happening to him, that they noticed if he was unable to express himself and that they regularly asked how he was and gave him 'time out' if he needed to re-charge.
33. PMP said that:
- 33.1 Harshal no longer works for PMP and that Mr Polonski did not name which manager he said was aware of his difficulties communicating whilst stressed (although we note that Harshal was named in relation to Mr Polonski's whistleblowing complaints);
  - 33.2 if Mr Polonski had told Harshal that he suffered from depression or that his ability to communicate in English with his managers was affected by stress, then Harshal would have told Mr Cottrill.
34. We concluded that Mr Polonski did tell Harshal that he suffered from depression. We also concluded that Harshal was aware that Mr Polonski experienced difficulties in communicating in English when he was stressed. The key reasons for our conclusions are:
- 34.1 Mr Cottrill stated that the supervisors did not need to escalate all matters to him. For example, he said that Mr Polonski's email in November regarding his Covid-related absence should have been pass to administrative team, rather than to him;
  - 34.2 contrary to Mr Cottrill's evidence, it is clear that the shift supervisors did not always raise matters with him relating to health concerns. For example, Mr Cottrill was not aware of Mr Polonski's email of 11 January 2021, in which Mr Polonski complained of stomach pain and asked to change his working hours and duties;

- 34.3 Mr Polonski's evidence was that Harshal and the other shift supervisors were aware of his depression and dealt with it well on day to day basis. Mr Polonski said that it only became a particular problem when tried to discuss issues with management (because the stress of explaining those problems affected his ability to express himself in English).

**Mr Polonski's complaints regarding his stomach pain**

35. Mr Polonski emailed PMP's general email address for the Leeds Site on 11 January 2021 to complain that he was suffering from stomach pain. Mr Polonski's email stated:

*"Good afternoon my name is Igor Polonski (id:poloigor ). I want ask help please, second time I have absences abcens becouse I have second time pain in stomok ( stomok Muscles ), think current job issue. I very happy in my job on Amazon, and I want continue my job for future , please I want ask help to change my current job to the line scanning, happy to any hours shift."*

36. Mr Smith (a shift supervisor) responded to Mr Polonski's email and arranged for him to work a reduced number of shifts.

37. Mr Polonski stated that he had previously raised concerns regarding his stomach pain with Harshal at the PMP management desk at the Leeds Site. He said that Harshal told him to 'go home'. PMP denied that Mr Polonski had previously raised this with Harshal and they said that:

37.1 Mr Polonski was not required to lift any heavy weights on his own – the Leeds Site induction training stated that employees should not lift package weighing 15 kg or more;

37.2 Mr Polonski had not sought assistance from the on site First Aid team;

37.3 Harshal did not raise this issue with Mr Cottrill;

37.4 PMP's managers would not tell an employee to 'go home' – it would be the employee's choice to leave site.

38. Mr Polonski said in response that his complaint was that he suffered from stomach pain due to the heavy workload during his shift, not because he was lifting heavy weights or following any accident.

39. We noted that paragraph 6.1.9 of PMP's amended Grounds of Resistance said that Mr Polonski's sickness absences during the Amazon Assignment related to Covid and a complaint of stomach problems. We considered the electronic records of Mr Polonski's working hours during the Amazon Assignment (which were not disputed by either party) and noted that Mr Polonski's absences on 24 November and 25 November were due to Covid issues (as set out in Mr Polonski's email to Mr Mitchell Kempster at PMP on 24 November 2020).

40. Mr Polonski had three other absences:

40.1 31 October 2020 – Mr Polonski left the Leeds Site at 20.20, 40 minutes before he was scheduled to leave work at 21:00. He was then on sick leave on 3 and 4 November 2020;



- 40.2 on 10 December 2020 – Mr Polonski left the Leeds Site after 17 minutes and was recorded as “UK sick partial unpaid” for the rest of the day; and
  - 40.3 11 January 2021 (relating to his stomach pain, as set out in his email of the same date) – Mr Polonski left the site and was absent on sick leave for the rest of the day.
41. We concluded that it is likely that on 10 December 2020, Mr Polonski complained of suffering from stomach pain to the PMP management desk and he was told that he could go home early if he felt unwell. The reason why we concluded that Harshal did not tell Mr Polonski to ‘go home’ is because Mr Polonski’s email of 11 January 2021 does not refer to any manager or supervisor telling him to go home.
42. We also concluded that Mr Polonski’s complaints related solely to his own stomach pain and not to any difficulties affecting any other staff. Mr Polonski accepted in his oral evidence that he was the only person suffering from stomach pain. Mr Polonski stated that he told Harshal that other employees were ‘tired’ because of the heavy workload. However, we do not accept that Mr Polonski raised this with Harshal because he does not refer to this in his email of 11 January 2021.

**Mr Polonski’s complaints regarding his scheduled shifts for 1-11 December 2020**

43. Amazon’s working week starts on a Sunday and finishes on a Saturday each week. Mr Polonski and PMP agreed that shifts for PMP employees working at the Leeds Site were normally allocated a couple of days before the start of the working week. Mr Polonski stated that shifts were normally allocated on the Thursday, Friday or Saturday for week commencing on the Sunday immediately following those days. Mr Cottrill stated that shifts are normally confirmed on the Friday for the week commencing on the Sunday immediately following, but that sometimes it would take until the Saturday to confirm shifts.
44. We note that Amazon operate an app called the “**A to Z app**” which all of Amazon’s employees and any PMP employees can load on to their mobile phones. The A to Z app is in a calendar format and shows:
- 44.1 all shifts which the employee has already worked with the dates blocked out in a solid colour;
  - 44.2 all shifts which are provisionally scheduled and/or which have been confirmed with the dates blocked out in diagonal stripes. The A to Z app does not distinguish between shifts which are provisionally scheduled and shifts which have been confirmed; and
  - 44.3 any shift that an employee is currently working highlighted with a bold circle and a single diagonal stripe.
45. There is one key difference between the information on the A to Z app provided to permanent Amazon employees and PMP employees (who work at Amazon on temporary assignments). Permanent Amazon employees have a fixed shift pattern. Mr Polonski showed us the A to Z app on his mobile phone during the hearing and we saw that:
- 45.1 he had worked on a fixed shift pattern during June 2022 and early July 2022; and

- 45.2 he was scheduled to continue working on that fixed shift pattern for the remainder of July 2022 and for August 2022.
46. By way of contrast, the screenshot of the A to Z app that Mr Polonski provided for the hearing file showed that as at Friday 4 December 2020 for the month of December:
- 46.1 he had already worked on 1, 2 and 3 December 2020;
  - 46.2 he was currently working on 4 December 2020; and
  - 46.3 he was scheduled to work from 5-11 December 2020. However, as noted above, the app did not state whether Mr Polonski's shifts from 5-11 December 2020 were shifts that were provisionally scheduled or shifts that were confirmed.
47. We accept Mr Cottrill's evidence in relation to PMP employees that:
- 47.1 PMP's office-based administrator, based at the Leeds Site, is responsible for arranging shifts for PMP employees. This task is not undertaken by any PMP managers or shift supervisors;
  - 47.2 Amazon provide hours of work that they want PMP to use PMP employees to fulfil each Wednesday for the week starting on the following Sunday;
  - 47.3 PMP then provisionally schedules the shifts manually on Amazon's My Time system – on this system the PMP administrator can only see the shifts scheduled for one week at a time;
  - 47.4 PMP then looks at a summary page on PMP's own systems. This summary page will throw up red flags if the shifts that are provisionally scheduled would breach any Amazon working time policies; and
  - 47.5 the administrator would then manually delete any shifts that would otherwise breach those working time requirements.
48. We accept Mr Polonski's evidence that:
- 48.1 the shifts that were provisionally scheduled for him to work from 1-11 December 2022 meant that he was scheduled to work eleven shifts in a row. This was in breach of Amazon's working time policies which stated that any member of staff (including PMP's employees) must not work more than seven days in a row and/or more than 60 hours per week;
  - 48.2 he complained twice to the PMP desk managers about the number of shifts that he had been scheduled, but that no changes were made to his shifts. We concluded that he probably raised this with PMP on Wednesday 2<sup>nd</sup> and Thursday 3<sup>rd</sup> December 2020, because PMP did not provisionally schedule shifts until Wednesday;
  - 48.3 Mr Polonski raised his concerns with Rob and Anna (whose surnames are unknown but who were both Amazon Managers at the Leeds Site at that time) on Friday 4 December 2020. All three of them approach the PMP desk on that day and raised Mr Polonski's concerns about the number of shifts that had been scheduled; and

- 48.4 Mr Polonski's shifts for Sunday 6<sup>th</sup> and Monday 7<sup>th</sup> December 2020 were cancelled by PMP shortly after he spoke to the PMP desk on Friday 4<sup>th</sup> December 2020. As a result, Mr Polonski was no longer scheduled to work eleven shifts in a row.
49. However, we have concluded that the reason why Mr Polonski's shifts for Sunday 6<sup>th</sup> and Monday 7<sup>th</sup> December 2020 were cancelled was not because he raised any concerns. We concluded that these were cancelled because PMP's systems flagged that this would be a breach of Amazon's working time policies.
50. We note that Mr Polonski would not have been aware of PMP's normal practices when allocating shifts. This is because the A to Z app does not distinguish between shifts which have been provisionally scheduled by PMP and those that PMP have confirmed.
51. We also note that Mr Polonski accepted in his evidence that he was only complaining about the shifts that he had been scheduled to work, rather than those of any other employees.

### **Removal of Mr Polonski from the Amazon Assignment**

52. Amazon instructed PMP to remove a total of 385 of PMP's employees from their assignments at Amazon between 7 January 2021 and 10 April 2021. The decisions regarding which PMP employees would be removed and in what order were taken by Amazon. We were provided with several emails in the hearing file from Luke Ellis (Workforce Staffing Manager at Amazon), instructing PMP to remove employees whose names were set out in the lists attached to the emails. Mr Polonski was number 98 out of 385 of those aggregated lists. We note that Mr Ellis was the Workforce Staffing Manager for the region and did not work from the Leeds Site on a day to day basis, although he did attend the Leeds Site from time to time.
53. Mr Ellis instructed PMP to hand the release letters to all employees working a shift that day, informing them that they would be removed from their assignments at Amazon. The email of 18 January 2021, which included Mr Polonski on the list of 90 employees to be released by 24 January 2021 stated:

*"The release list has been compiled based the information below -*

- *Comments from Managers*
- *Absence and conduct warnings*
- *Rankings*
- *Overall behaviour onsite*
- *Volume*

### **Overview**

*Please be aware that these associates will be released by via a face to face with the PMP team. Associates will be handed their letter and thanked for the hard work they have done over the peak period.*

*These associates will start to be informed today of their release and will be effectively offboarded in PS latest Sunday 24th January.*

*@PMP-I cannot stress enough the importance of this process and getting it right the first time.*

*Please make sure you provide myself with the release tracker (attached) everyday so I could update the relevant stakeholders. All letters are attached, if associates are not on shift, please call these associates and thank them for their time with LBA8. Associates are eligible for CBUS coding if they choose to leave straight away. Please ensure you provide a buffer to your EPT..."*

54. The Tribunal Panel asked Mr Cottrill how Amazon decided which employees to remove at which point in time. We accept Mr Cottrill's evidence that Amazon ranks employees using a system of 'negative marking':

54.1 if an employee has a 'clean record' in terms of conduct, behaviour, safety and absence, they are ranked as an "A" employee;

54.2 if an employee does not have a 'clean record', then they are ranked according to the number of concerns raised.

55. Mr Cottrill was not privy to the full detail of Amazon's ranking system, however he was able to provide an overview in his oral evidence of the factors referred to in Mr Ellis' emails attaching the lists of employees to be removed. These factors included:

55.1 an employee's conduct or behaviour;

55.2 any comments received from Amazon's Operations management;

55.3 safety incidents;

55.4 absences, including:

55.4.1 sickness absence – he noted that on the fourth occasion of sickness absence, an employee is issued with a warning or 'record of concern'; and

55.4.2 unauthorised absence (including 'no call/no show' (i.e. where an employee does not turn up for work and does not call to explain why they have not attended work) and 'late in/early out' (i.e. when an employee is late starting their shift or finishes their shift early).

56. Mr Cottrill also clarified that the reference to 'Volume' in Mr Ellis' email of 18 January 2021 was a reference to the volume of work that Amazon forecasted and that it was not related to any individual's conduct, capability or performance.

57. Mr Smith emailed Mr Polonski on 19 January 2021, informing him that his Amazon Assignment would end. The email was marked 'by hand' and stated:

*"On behalf of everyone at Amazon and everyone here in LBA8-SC (Leeds, UK) we would like to thank you for being such an important part of our team during a busy 2020. We have delivered to many customers and none of this could happen without the hard work and commitment you have shown.*

*As this period ends and we start to see the volume of work decrease, we need to reduce the number team members. As a result of this your assignment with Amazon will be coming to an end.*

*Your last working day on your Amazon assignment will be 21/01/2021. 15 mins before the end of your last shift, your agency manager will be located near the exit at the Thank You desk.*

*Please head out to meet with them as you would at the end of your normal shift. They will be available to answer any questions you may still have, share with you any important information and to collect your badge.*

*Please do not clock out - this will be completed for you at the time your shift was due to end.*

*Please speak with your AM or Agency Manager if you need any help or more information about this.”*

58. Mr Polonski sent messages to the PMP manager mobile phone asking to speak to a manager about his situation on 22, 23 and 25 January 2021. Mr Polonski also emailed Mr Smith on 25 January 2021 stating that he wanted to ask some questions. Mr Polonski stated:

*“I not have information about status of my job in amazon LBA8 and how much company pay me for last week job”.*

59. Mr Polonski was informed that the manager was on holiday. Mr Polonski then emailed Mr Kempster twice on 26 January 2021 stating:

*“I not have information about status of my job on amazon LBA8 what happen? What happen next? an how much company pay me for last week job...”*

60. Mr Kempster responded on 26 January 2021, stating:

*“I have tried ringing you twice this morning and in the interest to speak to you could you confirm the best telephone number to reach you on including a timeframe better to catch you on.*

*I have reviewed a few pieces on this and want to clarify just a few points, this is an end of assignment from Amazon LBA8 and is driven by the reduction in volume which in turn means a reduction in the requested headcount for PMP Recruitment, your employment is still active with PMP Recruitment and you can seek alternative assignments via our website ([www.pmprecruitment.co.uk](http://www.pmprecruitment.co.uk)). Based on your length of tenure with Amazon Assignment you were less than 26 weeks service meaning you can reapply for Amazon Assignment after serving 8 weeks gap in service from this assignment.*

*I would also express that ensuring your absence is under control better upon assignments will support you further as I am aware you were given a Record of concern in regards to your attendance levels and you were contemplating was this role for you at one stage, I am glad you have now disclosed you were happy on assignment with Amazon and would hope to see you in the future on assignment here.*

*Over your 16 weeks tenure you were scheduled for approximately 610 hours, of which for either voluntary time off or sickness absence you only completed 450 hours of work, which gives on average 28 hours worked per week, where you have stated in your email you worked 45 hours per week, please review your knowledge of what*

*you believed to have worked each week so we can ensure this matches your records with ours. At this stage I will assume through conversations with my local team and our systems with no pay queries this information to be fully correct.*

*Look forward to your response with a contact number to discuss this fully over the phone.”*

61. Mr Polonski and Mr Kempster then had a discussion by phone, following which Mr Kempster emailed Mr Polonski on 27 January 2021 stating:

*“After discussions on the phone, I fully understand your situation with a wife that is currently unemployed and young family, as advised on the phone currently with volume reduction we do not have the availability in Amazon but once gap in service and increase request from Amazon you are more than happy to reapply.*

*Currently as discussed we do have positions available within 20 miles for you to travel and I know this maybe to far but there is opportunities for you on our website.*

*You mentioned a government support you have been made aware of from friends, as advised please reach out to the job center to support you with any questions on the government supporting network. Your employment is still active and you can seek alternative employment.*

*Please continue to look for updated job adverts on our website.”*

62. As stated earlier in this Judgment, there is no dispute regarding the accuracy of the electronic records of Mr Polonski’s working hours and absences during the Amazon Assignment. Mr Kempster stated that Mr Polonski had received a record of concern (i.e. a first absence warning). Mr Polonski did not dispute the number of his sickness absences in his email response to Mr Kempster or during this hearing.

## **APPLICATION OF THE LAW TO THE FACTS**

63. We will now apply the law to our findings of fact.

### **Disability status (s6 EQA)**

64. We have concluded that Mr Polonski’s depression amounted to a disability for the purposes of s6 of the Equality Act 2010 (“**EQA**”) at the relevant time. In particular:

64.1 Mr Polonski’s depression amounted to a mental impairment;

64.2 his depression had a substantial (defined in the EQA as ‘more than minor or trivial’) impact on his ability to carry out day-to-day activities at various times from 2009 onwards, including:

64.2.1 his ability to concentrate, for example to keep track of time;

64.2.2 his ability to carry out basic tasks such as getting washed, dressed and preparing meals; and

64.2.3 his ability to interact with other people;

64.3 Mr Polonski did take medication from time to time for his depression and received cognitive behavioural therapy. He was not taking any medication at the time of the events that are subject to this complaint (i.e. from October 2020 to 21 January 2021). We did not have a full copy of Mr Polonski’s

medical records and he was unable to specify the periods when he was taking medication. However, we heard clear evidence that Mr Polonski's depression had a substantial impact on his ability to carry out normal day to day activities, regardless of any mitigation of his symptoms when he was taking medication; and

- 64.4 the effects of the impairment were long-term, in that they lasted more than 12 months from the time of his first episode in 2009 and/or they were likely to recur.

### **Discrimination arising from disability (Equality Act 2010 section 15)**

65. Employment Judge Jones described Mr Polonski's complaint of discrimination arising from disability as follows:

*“Discrimination arising from disability under section 15 and 39(1)(d) of the Equality Act 2010 (EqA) in respect of the termination of Mr Polonski's assignment to work at Amazon on 21 January 2021. Mr Polonski says that he has depression which exacerbates his stress and that when he raised complaints with his managers, his stress meant he could not express himself well in English. He believes this led to his managers selecting him, or not removing him, from the list of employees whose placement at Amazon was to end on 18 January 2021.”*

66. The legal questions that we have to consider are dealt with below:

*Did the respondent treat Mr Polonski unfavourably by terminating his employment with Amazon on 18 January 2021?*

67. We concluded that Mr Polonski was treated 'unfavourably' when his assignment to Amazon was terminated on 18 January 2021. We note that the word 'unfavourably' does not require any comparison with other non-disabled individuals.

*Did Mr Polonski's inability to express himself adequately in English arise from stress and, if so did that arise from his disability?*

68. We concluded that Mr Polonski did experience difficulties in communicating in English when subject to stress and that this did arise from his disability, as set out in detail in our findings of fact.

*Was the unfavourable treatment because of any of those things? If so, are they sufficiently connected to fall within the meaning of section 15(1)(a) of the EqA?*

69. However, we concluded that Mr Polonski's assignment to Amazon was not terminated because he was unable to express himself well in English when subject to stress. Mr Polonski's difficulties did not have a 'significant impact' on his removal from the Amazon assignment. Three hundred and eighty-five of Mr Polonski's colleagues' assignments to Amazon were terminated during January to April 2021

as part of Amazon's 'ramp down' of operations after the busy Christmas trading period. All PMP employees were ranked by Amazon, using specific criteria. Mr Polonski was ranked number 98 on the list due to his level of absence (which was not related to his depression).

70. Mr Polonski's complaint of discrimination arising from disability therefore fails and is dismissed.

### **Protected disclosure detriment**

71. Employment Judge Jones described Mr Polonski's complaints of detriments related to protected disclosures as follows:

*“Subjecting Mr Polonski to the detriment of removing him from the assignment to work at Amazon on 21 January 2021 on the ground he had made public interest disclosures, under section 47B of the Employment Rights Act 1976 (ERA).”*

72. The legal questions that we have to consider are dealt with below:

### ***Did Mr Polonski make one or more disclosures of information?***

73. Employment Judge Jones identified the things that Mr Polonski states he raised as follows:

**Disclosure 1:** *“Expressing to his managers that he had stomach pains due to heavy workload on several occasions verbally and in an email on 11 January 2021 (as identified by Mr Polonski at paragraph 1 of the Case Summary of Employment Judge Smith and the written statement submitted by Mr Polonski for this hearing)?”*

**Disclosure 2:** *“Expressing his concern on 4 December 2020 to Harshal that the requirement for Mr Polonski to work back to back shifts for 11 consecutive days was unlawful (as identified at paragraph 3 of the Case Summary of Employment Judge Smith).”*

74. PMP accepted that if such disclosures were made, they were made to PMP as Mr Polonski's employer.

75. We concluded that:

75.1 **Disclosure 1** - Mr Polonski did complain that he had stomach pain due to heavy workload both verbally to Harshal on 10 December 2020 and in his email of 11 January 2021 to the general PMP address for the Leeds Site (which was dealt with by Mr Smith);

75.2 **Disclosure 2** - Mr Polonski did state on three occasions (i.e. Wednesday 2<sup>nd</sup>, Thursday 3<sup>rd</sup> and Friday 4<sup>th</sup> December 2020) to Harshal and other managers at the PMP desk at the Leeds Site that working shifts for 11 consecutive days was unlawful.

### ***Did he believe that:***

- i) the information at 9.1 tended to show that the health or safety of any individual had been, was being or was likely to be endangered?***



- ii) ***the information at 9.2 tended to show that a criminal offence had been, was being or was likely to be committed or a person had failed, was failing or was likely to fail to comply with any legal obligation?***

***If so, was that belief reasonable?***

76. We concluded that:

- 76.1 **Disclosure 1** - Mr Polonski did believe that Disclosure 1 tended to show that his health and safety had been, was being or was likely to be endangered. This was because Mr Polonski believed that the pain in his stomach muscles was caused by a heavy workload during his shifts, as demonstrated by the fact that he asked Mr Smith to reduce his shifts and change his duties in his email of 11 January 2021. We also concluded that this belief was reasonable – Mr Polonski did not have a previous history of stomach pain.
- 76.2 **Disclosure 2** – Mr Polonski believed that working eleven consecutive shifts was a breach of PMP's working time obligations to its employees. We note that working eleven consecutive shifts is not in fact a breach of the Working Time Regulations 1998 ("**WTR**") weekly rest periods (which state that employers may decide to provide workers with one uninterrupted rest period of not less than 48 hours in each 14 day period, rather than two 24 hour rest periods in a fortnight – see Regulation 11(2) of the WTR). However, Mr Polonski was not aware of the WTR. Mr Polonski was aware that working eleven consecutive shifts would be a breach of Amazon's working time policies (which applied to PMP employees working at the Leeds Site) and this was confirmed by the Amazon managers (Rob and Anna) that he approached regarding his concerns. We have therefore concluded that Mr Polonski's belief was reasonable.

***Did he believe the disclosure of information was made in the public interest?  
If so, was that belief reasonable?***

77. However, we have concluded that Mr Polonski did not believe that the disclosure of information was in the public interest or (if he did) that such belief was not reasonable because:

- 77.1 **Disclosure 1** - We concluded that Mr Polonski's complaints related solely to his own stomach pain and not to any difficulties affecting any other staff. Mr Polonski accepted in his oral evidence that he was the only person suffering from stomach pain. Mr Polonski stated that he told Harshal that other employees were 'tired' because of the heavy workload. However, we do not accept that Mr Polonski raised this with Harshal because he does not refer to this in his email of 11 January 2021.
- 77.2 **Disclosure 2** – Mr Polonski accepted in his oral evidence to the Tribunal that he was only complaining about the shifts that he had been scheduled

to work. There was no suggestion that Mr Polonski was complaining about his colleagues' scheduled shifts.

**Detriment (Employment Rights Act 1996 section 48)**

78. Even if our conclusion on the question of public interest is incorrect, Mr Polonski's complaint of detriment would fail. This is because neither Disclosure 1 nor Disclosure 2 had a material influence on the termination of Mr Polonski's assignment at Amazon.
79. We concluded that Mr Polonski's assignment to Amazon was not terminated because he raised either Disclosure 1 or Disclosure 2. Three hundred and eighty-five of Mr Polonski's colleagues' assignments to Amazon were terminated during January to April 2021 as part of Amazon's 'ramp down' of operations after the busy Christmas trading period. All PMP employees were ranked by Amazon, using specific criteria. Mr Polonski was ranked number 98 on the list due to his level of absence.
80. In addition, PMP dealt with the concerns that Mr Polonski raised as part of Disclosures 1 and 2:
- 80.1 PMP reduced Mr Polonski's shifts, as requested in his email of 11 January 2021. Mr Polonski did not raise any concerns regarding stomach pain or his workload with PMP after 11 January 2021;
  - 80.2 Mr Polonski's confirmed shifts in early December 2020 did not require him to work 11 consecutive days because his provisionally scheduled shifts on 6 and 7 December 2020 were cancelled.
81. Mr Polonski's complaint of detriment related to protected disclosures therefore fails and is dismissed.

**CONCLUSIONS ON LEGAL COMPLAINTS**

82. For the reasons set out above, Mr Polonski's complaints of discrimination arising from disability and detriment related to protected disclosures fail and are dismissed. We found that the reason why Mr Polonski's assignment to Amazon was terminated was because of his Amazon ranking, which related to his sickness absence record. Mr Polonski's difficulties in communicating in English when he was stressed did not have a significant impact on his removal from the Amazon assignment. In addition, Mr Polonski's disclosures (even if they were deemed protected disclosures) had no material influence on his removal from the Amazon assignment.
83. Although this is not strictly relevant to Mr Polonski's complaints, we would like to add that we are not suggesting that Mr Polonski was somehow to blame for his own sickness absences. We concluded that Amazon ranked employees (and instructed PMP to remove them from the Amazon assignment) based on objective criteria, including PMP's employees' levels of sickness absence regardless of the reason for that absence. Mr Ellis (on behalf of Amazon) then instructed PMP which of PMP's employees should be removed from their assignment with Amazon and in what order they should be removed. We would also like to add that we accept that Mr Polonski

worked hard during his time as a PMP employee at Amazon and that Amazon was happy with his performance. This is evidenced by the fact that Mr Polonski now works as a permanent Amazon employee.

## DEPOSIT ORDERS

84. Mr Polonski paid two deposit orders prior to the final hearing of his claim:

- 84.1 £25 for a deposit order relating to his complaint of disability discrimination made by Employment Judge Smith at the preliminary hearing on 2 July 2021 (the “**Disability Discrimination Deposit Order**”); and
- 84.2 £200 for a deposit order relating to his complaint of detriment arising from protected disclosures. This deposit order was made by Employment Judge Jones at the preliminary hearing on 22 November 2021 (the “**Protected Disclosures Deposit Order**”).

85. The reasons given by Judge Smith for the Disability Discrimination Deposit Order were as follows:

*“The Claimant is employed by the Respondent which is an employment agency. The Claimant was placed by the Respondent with Amazon. The alleged acts or omissions the Claimant relies upon are the acts or omissions of Amazon. Amazon is not a party to these proceedings.”*

86. Judge Smith also stated in his summary of the preliminary hearing on 2 July 2021:

*“Finally in terms of disability discrimination I made a deposit order against the Claimant because it was clear that on the Claimant’s own case as explained to me he was complaining of the treatment he received at Amazon, not treatment from the Respondent. Amazon is not a respondent to these proceedings. I did not make a strike out order as I have no such power at this hearing. I carefully explained to the Claimant the consequences of proceeding after a deposit order has been made. If the Claimant is un-successful in respect of the matters to which the deposit order relates he will not only lose his deposit but may well face a claim for costs from the Respondent. If the Claimant does not pay a deposit and those complaints will be treated as dismissed.”*

87. The reasons given by Judge Jones for the Protected Disclosures Deposit Order were as follows:

*“The reason for the making of the order is that the Tribunal considers the claims have little reasonable prospect of success because the claimant’s placement was terminated with 380 other employees following a downturn in demand after Christmas by Amazon and the case that it was the decision of the respondent and that it was attributable to the reasons advanced by the claimant is weak and unlikely to be succeed. In addition, the first disclosure does not appear to have been made, in the reasonable belief of the claimant, in the public interest.”*

88. We have considered whether Mr Polonski’s complaints of discrimination arising from disability and protected disclosure detriment failed for substantially the reasons given by the Judge Smith and Judge Jones in their respective deposit orders (as per Rule 39(5) of the Employment Tribunal Rules of Procedure). We concluded that:

- 88.1 Mr Polonski's complaint of discrimination arising from disability failed for entirely different reasons to those set out by Judge Smith in the Disability Discrimination Deposit Order. We note that at the final hearing, the respondent's representative agreed with this conclusion;
- 88.2 Mr Polonski's complaint of protected disclosure detriment failed for substantially the same reasons as those set out by Judge Jones in the Protected Disclosures Deposit Order.
89. We therefore ordered that:
- 89.1 Mr Polonski's deposit of £25 (relating to the Disability Discrimination Deposit Order) should be refunded to him; and
- 89.2 Mr Polonski's deposit of £200 (relating to the Protected Disclosures Deposit Order) should be paid to PMP.
90. We also note that PMP's representative confirmed shortly before the end of this hearing that they do not wish to make a costs application under Rules 76 of the Employment Tribunal Rules of Procedure, despite the effect of Rule 39(5)(a) (paying party treated as acting unreasonably).

**Employment Judge Deeley**

**19 July 2022**

**WRITTEN REASONS SENT TO THE PARTIES  
ON**

27 July 2022

**Public access to Employment Tribunal judgments**

Judgments and written reasons for judgments, where they are provided, are published in full online at [ETJ](#) shortly after a copy has been sent to the parties in the case.

## **Annex 1 – List of Issues (prepared by Employment Judge Jones at the preliminary hearing on 22 November 2021)**

### **The Complaints**

1. The claims are:
  - 1.1 Discrimination arising from disability under section 15 and 39(1)(d) of the Equality Act 2010 (EqA) in respect of the termination of Mr Polonski's assignment to work at Amazon on 21 January 2021. Mr Polonski says that he has depression which exacerbates his stress and that when he raised complaints with his managers, his stress meant he could not express himself well in English. He believes this led to his managers selecting him, or not removing him, from the list of employees whose placement at Amazon was to end on 18 January 2021.
  - 1.2 Subjecting Mr Polonski to the detriment of removing him from the assignment to work at Amazon on 21 January 2021 on the ground he had made public interest disclosures, under section 47B of the Employment Rights Act 1976 (ERA).
2. At the hearing Mr Polonski raised his concern about matters which had arisen in October 2021 when he applied for new work at Amazon, but after he explained these, these are new matters which would have to be addressed in separate proceedings.

### **The Issues**

#### **Disability**

3. Did Mr Polonski have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
  - 3.1 Did he have a mental impairment in the form of depression?
  - 3.2. Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
  - 3.3 If not, did Mr Polonski have medical treatment, including medication, or take other measures to treat or correct the impairment?
  - 3.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
  - 3.5 Were the effects of the impairment long-term? Did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur?

### **Discrimination arising from disability (Equality Act 2010 section 15)**

4. Did the respondent treat Mr Polonski unfavourably by terminating his employment with Amazon on 18 January 2021?
5. Did Mr Polonski's inability to express himself adequately in English arise from stress and, if so did that arise from his disability?
6. Was the unfavourable treatment because of any of those things? If so, are they sufficiently connected to fall within the meaning of section 15(1)(a) of the EqA?
7. If so, was the treatment a proportionate means of achieving a legitimate aim?
8. Did the respondent know or could it reasonably have been expected to know that Mr Polonski had the disability? From what date?

### **Protected disclosure**

9. Did Mr Polonski make one or more disclosures of information as follows:
  - 9.1 Expressing to his managers that he had stomach pains due to heavy workload on several occasions verbally and in an email on 11 January 2021 (as identified by Mr Polonski at paragraph 1 of the Case Summary of Employment Judge Smith and the written statement submitted by Mr Polonski for this hearing)?
  - 9.2 Expressing his concern on 4 December 2020 to Harshal that the requirement for Mr Polonski to work back to back shifts for 11 consecutive days was unlawful (as identified at paragraph 3 of the Case Summary of Employment Judge Smith).
10. Did he believe the disclosure of information was made in the public interest?
11. Was that belief reasonable?
12. Did he believe that the information at 9.1 tended to show that the health or safety of any individual had been, was being or was likely to be endangered?
13. Did he believe that the information at 9.2 tended to show that a criminal offence had been, was being or was likely to be committed or a person had failed, was failing or was likely to fail to comply with any legal obligation?
14. Was that belief reasonable?
15. If Mr Polonski made a qualifying disclosure, it was a protected disclosure because it was made to Mr Polonski's employer?

### **Detriment (Employment Rights Act 1996 section 48)**

16. Was the termination of Mr Polonski's placement at Amazon a detriment?
17. If so was it an act or deliberate failure to act of the respondent on the ground that Mr Polonski had made one or more of the above a protected disclosures?

**Remedy for Protected Disclosure Detriment/Discrimination**

18. What financial losses has the detrimental treatment caused Mr Polonski?
19. Has Mr Polonski taken reasonable steps to replace his lost earnings, for example by looking for another job?
20. If not, for what period of loss should Mr Polonski be compensated?
21. What injury to feelings has the detrimental treatment caused Mr Polonski and what sum in compensation is appropriate for that?
22. Is it just and equitable to award Mr Polonski other compensation?
23. Did the respondent or Mr Polonski unreasonably fail to comply with ACAS Code of Practice on Disciplinary and Grievance Procedures such that the award should be increased or decreased by up to 25%?
24. Was the protected disclosure made in good faith?
25. If not, is it just and equitable to reduce Mr Polonski's compensation by up to 25%?

## Annex 2 – Relevant Law

### DISCRIMINATION ARISING FROM DISABILITY (S15 EQA)

1. The right not to suffer discrimination arising from disability is set out at s15 of the EQA:

#### **15 Discrimination arising from disability**

- (1) *A person (A) discriminates against a disabled person (B) if –*

- (a) *A treats B unfavourably because of something arising in consequence of B's disability, and*

- (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

- (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

2. The EAT in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 (paragraph 96) held that s15 requires the Tribunal to consider “two distinct causative issues” when considering whether the ‘something’ alleged arose in consequence of B’s disability. The EAT set out the issues as follows:

*“(i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B’s disability?”*

*The first issue involves an examination of the putative discriminator’s state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the ‘something’ was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.”*

3. In *Pnaisner v NHS England* [2016] IRLR 170, the EAT provided guidance to Employment Tribunals when considering complaints of discrimination arising from disability. This can be summarised as follows:

- 3.1 the Tribunal should decide what caused the treatment complained of – or what the reason for that treatment was;

- 3.2 there may be more than one cause. The “something” might not be the sole or main cause but it must have a significant impact;

- 3.3 motives are irrelevant; and

- 3.4 the Tribunal should decide whether the cause is “*something arising in consequence of*” the individual’s disability. There could be a range of causal links under the expression “*something arising in consequence of...*”

4. The Tribunal must apply an objective test when considering whether there was a proportionate means of achieving a legitimate aim, having regard to the respondent’s workplace practices and organisation needs (see, for example, the EAT’s decision in *City of York Council v Grosset* (UKEAT/0015/16), as approved



by the Court of Appeal ([2018] EWCA Civ 1105). We note that the Tribunal must make its own assessment as to whether 'proportionate means' have been used to achieve a legitimate aim.

## PROTECTED DISCLOSURES

5. Complaints relating to whistleblowing detriments are dealt with in the ERA.

### **Qualifying disclosures**

6. A protected disclosure is defined by s43A ERA as a 'qualifying disclosure' under s43B ERA:

#### **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, or is likely to be deliberately concealed.

7. S47B of the ERA sets out a worker's right not to be subjected to a detriment on the ground that they have made a protected disclosure.

#### **47B Protected disclosures**

(1) 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.

...

(2) ...this section does not apply where –

...

(b) the detriment in question amounts to dismissal...

....

8. The Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] IRLR 846, held that a disclosure must contain sufficient information if it is to form a 'qualifying disclosure' for the purposes of s43B of the ERA.

9. The individual must also reasonably believe that the disclosure tends to show one or more of the categories set out under s43B(1). The Tribunal must consider:

9.1 whether Mr Polonski genuinely believed that the disclosure tended to show one of the categories listed in s43B (*Darnton v University of Surrey* [2003] IRLR 133); and

- 9.2 whether such belief was objectively reasonable in the circumstances (see, for example, *Phoenix House Ltd v Stockman* [2017] ICR 84 EAT).
10. The term 'likely' (eg in 'likely to be endangered' under s43B(1)(d)) was considered in *Kraus v Penna Plc* [2004] IRLR 260 to mean 'probable or more probable than not'. The Court of Appeal held that this was a higher standard than simply 'a possibility or a risk'.

**What amounts to a detriment?**

11. The test of whether an act or omission could amount to a 'detriment' is the same as for a discrimination complaint. The House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 held that whether an act amounts to a detriment requires the Tribunal to consider:
- 11.1 would a reasonable worker take the view that he was disadvantaged in terms of the circumstances in which he had to work by reason of the act or acts complained of?
- 11.2 if so, was the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?
12. We note that the Court of Appeal in *Deer v University of Oxford* [2015] IRLR 481, held the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.
13. However, the House of Lords in *Shamoon* also approved the decision in *Barclays Bank plc v Kapur & others (No.2)* [1995] IRLR 87 that an unjustified sense of grievance cannot amount to a 'detriment'.
14. We also note that in the context of whistleblowing, a detriment for the purposes of the legislation can occur even *after* the relevant relationship with the employer has been ended or terminated (see *Woodward v Abbey National plc* [2006] EWCA Civ 822, [2006] IRLR 677, [2006] ICR 1436).

**Reason for the detriment**

15. The key question is whether the making of a protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the individual (*Fecitt v NHS Manchester* [2012] IRLR 64). This requires the Tribunal to consider the mental processes (conscious and unconscious) of the person who either acted or deliberately failed to act in respect of the detriment.
16. In certain cases, the courts have drawn a distinction between the making of a disclosure and the manner in which the complaint was made or pursued. For example, in *Panayiotou v Chief Constable of Hampshire Police* [2014] IRLR 500, the EAT upheld a decision by a tribunal that a police officer's dismissal was because of his long-term sickness absence and his obsessive pursuit of complaints. The EAT said that his dismissal 'in no sense whatsoever' connected with the public interest disclosures that he had certainly made earlier. The judgment of Lewis J stresses that such a finding is entirely logical and is not confined to 'exceptional cases':

*"There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."*

**Burden of proof and drawing of inferences – detriment claims**

17. In *International Petroleum Ltd and others v Ospioy and others* EAT 0058/17, the EAT set out the correct approach to whistleblowing detriment complaints as follows:
  - 17.1 the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he is subject is either his health and safety complaint and/or his protected disclosure;
  - 17.2 s48(2) ERA then requires the employer to show why the detrimental treatment was done. If the employer fails to do so, inferences may be drawn against the employer. However, these inferences must be justified by the Tribunal's findings of fact.