Case No: 2301131/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE K ANDREWS**
MEMBERS:	**Ms C Bonner** **Ms C Upshall**

BETWEEN:

Mr W Seis

Claimant

and

Keltbray Limited (1)
Mr K Werynski (2)

Respondents

ON:	**2- 5 November 2021** **7 & 8 February 2022 in chambers**

Appearances:
For the Claimant: **Mr I Browne, Counsel**
For the Respondent: **Mr J Allsop, Counsel**

RESERVED LIABILITY JUDGMENT

The unanimous decision of the Tribunal is that the claimant was subjected to detriment by both respondents because he made protected disclosures.

A remedy hearing will take place on **12 May 2022**. Further directions in this regard are below.

REASONS

1. In this Judgment references to the respondent are to the first respondent. Any references specifically to the second respondent are made clear.

2. The claimant complains that he has been subjected to a number of detriments as a result of him having made protected disclosures. Accordingly the liability issues arising are:

    a. Did he make a protected disclosure? The claimant relies upon oral complaints to the second respondent on 27 October 2019, to Goldmills agency on 28 October 2019 and to the Health & Safety Executive (HSE) on 31 October 2019.

    b. Was he subjected to detriments on the ground that he had made protected disclosures? The alleged detriments relied upon are:
        i. verbal harassment including threats, insults, shouting and intimidating comments by the second respondent and other employees of the first respondent;
        ii. physical abuse by the second respondent who pushed the claimant and tried to snatch his mobile phone;
        iii. withholding subsequent assignments and work from the claimant;
        iv. the stigmatisation and blacklisting the claimant on the job market; and
        v. failure to investigate the claimant's concerns.

Relevant Law

3. Section 47B of the Employment Rights Act 1996 gives a worker the right not to be subjected to any detriment by the employer "on the ground" that he or she has made a protected disclosure.

4. The burden of proving that, on the balance of probabilities, there was a protected disclosure, a detriment and the respondent subjected the claimant to that detriment rests initially on the claimant. If he can do that, the burden will shift to the respondent to prove that he was not subjected to the detriment on the ground that he had made the protected disclosure.

5. Any disclosure of information which in the reasonable belief of the worker making the disclosure tends to show one or more of the matters listed at section 43B(1) of the 1996 Act, and is reasonably believed to be made in the public interest, will be a qualifying disclosure. That list includes that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and that the health and safety of any individual has been, is being or is likely to be endangered.

6. In order for a statement or disclosure to be a qualifying disclosure, it has to have a sufficient factual content and specificity such as is capable of tending to show one of those matters (Kilraine v LB of Wandsworth ([2018] IRLR 846). This is a matter of fact for the Tribunal to determine on the evidence heard. It must identify, albeit not in strict legal language, the breach relied upon (Fincham v H M Prison Service EAT 0925 & 0991/01).

7. Whether a worker had the required reasonable belief (of both what the information tended to show and whether the disclosure was being made in

the public interest) is judged taking into account that worker's individual circumstances. Accordingly, whether the belief is reasonable must be subject to what a person in their position would reasonably believe to be wrong doing (Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 and Chesterton Global Ltd v Nurmohamed [2017] IRLR 837).

8. The information does not have to be true but to be reasonably believed to be true, there must be some evidential basis for it. The worker must exercise some judgment on his or her own part consistent with the evidence and resources available (Darnton v University of Surrey [2003] ICR 615).

9. To be protected a qualifying disclosure has to be made in accordance with one of six permitted methods of disclosure which include to the person's employer (section 43C(1)(a)).

10. As to the link between the protected disclosure and the action taken, the former need not be the only or main reason for the latter provided it had a material (i.e. more than trivial) influence (Fecitt v NHS Manchester [2012] ICR 372).

11. Detriment is not defined in the legislation but it is clear from authorities on the meaning of the same word where it appears in the Equality Act 2010 that something will amount to a detriment where a reasonable person would or might take the view that the act or omission in question gives rise to some disadvantage which need not necessarily involve some physical or economic consequence (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).

Evidence

12. We heard evidence from the claimant and also his former colleague Mr F Alexandru-Stroe.

13. For the respondents we heard from:
    a. Mr G Molloy, Director of Goldmills;
    b. Mr L Kroll, asbestos removal subcontractor;
    c. Mr D Frost, Managing Director of the first respondent; and
    d. the second respondent, Mr Werynski.

14. We were greatly assisted by the services of Ms Budzynska, interpreter, who at various times assisted the claimant, Mr Kroll and the second respondent when they gave evidence.

15. We had an agreed bundle of documents before us a number of which had references to alleged offers to settle this claim. Any privilege attached to those documents has been waived.

16. We viewed a number of videos allegedly recorded by the claimant at the site as follows:
    a. on 29 August 2019 at 20.12, 20.15, 20.17, 21.21 & 21.55;

b. on 10 October 2019 at 22.17; and
c. on 27 October 2019 at 18.28,18.31, 18.33, 18.34 & 18.35.

17. Counsel made oral submissions on the conclusion of the evidence.

18. On 15 November 2021, after the Tribunal had reserved its decision, solicitors acting for the claimant emailed the Tribunal. in line with the ongoing duty of disclosure they attached the claimant's complaint to the HSE and its response received on 10 November 2021. The respondent objected to the late inclusion of that evidence. They stated, rightly, that both parties had given their closing submissions and that the claimant had had ample opportunity to collate, and exchange, evidence and it was not acceptable for it to be presented at this stage. They pointed out that the respondent had not had any opportunity to cross examine the claimant on the document nor make any submissions on it. The claimant's solicitor in turn replied making submissions as to why the document should be considered.

19. On my instruction on 17 December 2021 the Tribunal wrote to the parties stating that the claimant's referral to the HSE was, if genuine, plainly a relevant document and offering to convene a further hearing if the respondent wanted an opportunity to cross examine the claimant as to its genuineness and/or the claimant's explanation of why it had been disclosed so late. The respondents' solicitor replied on 20 December 2021 confirming that they did not require an opportunity to further cross-examine the claimant and simply asked the Tribunal to take into account the points already made with regard to the late disclosure of the further evidence.

20. Accordingly we did so consider the further evidence at the outset of our in chambers deliberation. We concluded that the documents supplied were entirely relevant and despite the very late disclosure, it was in accordance with the overriding objective to take them into account.

21. The respective positions of the parties on the facts of this case are diametrically opposed. The claimant says that the second respondent instructed the team of agency workers to breach health and safety rules regarding the removal of asbestos in the most blatant way and that he videoed the offending behaviour. The respondent says that no such instruction was given and the claimant has staged the videos. They say that audits show the site was extremely well run and the allegations made by the claimant are simply implausible and false.

22. This is not a case where the fundamental difference in their positions can be explained by failing memory, misunderstanding or grey areas. The videos were either staged or they were not and the answer to that is largely, though not completely, determinative of the issues in this case. (The position regarding the metadata of the videos was never fully clarified although the claimant acknowledged that it would be possible to manipulate it to show an inaccurate date/time for the videos but said that he did not do that.)

23. It follows that the credibility of witnesses is particularly important as is the content of and impression given by the videos (particularly those from 27 October).

24. There is no doubt that there were several inconsistencies between the claimant's solicitor's pre-action letters, his particulars of claim, his further particulars, his witness statement and his oral evidence. Our collective view is that was a product of less than careful preparation of the pleadings rather than dishonesty on his part and also errors of omission rather than contradiction. Whilst recognising the importance of the formally pleaded case we consider that the most accurate statement of the claimant's position was the evidence he gave in cross examination, using his own words in his mother tongue.

25. In assessing the credibility of the claimant the respondent asks us to take into account that he has a history of making such allegations and then seeking compensation. The claimant denied this and there was no credible evidence relied upon by the respondent to substantiate the allegation. Indeed Mr Molloy said that he was aware the claimant had raised an issue on a job in Erith but it was resolved and he carried on working there for a little while afterwards. Mr Molloy was not aware of any settlement negotiations. We have discounted this allegation.

26. There were also inconsistencies in particular in the second respondent's case and evidence, not least his insistence that he did not know anyone called Stefan and that he did not believe Mr S Wodzynski to be known as Stefan. The significance being that the claimant says you can overhear him calling out Stefan in one of the videos (18.31 on 27 October 2019) which if true would show that he was very much in the vicinity and would have known what was going on. The second respondent's evidence was that Mr Wodzynski was not called, and he did not know a, Stefan. That was clearly disproved by his own written statement made on 27 November 2019. In submissions the respondent said this could be explained by a lapse of memory especially given the number of people the second respondent has worked with in the intervening time. His evidence however had been an emphatic denial rather than saying he could not remember.

Findings of Fact

27. I had the benefit of sitting with experienced non legal members but even so we all found this an exceptionally difficult case in which to make findings of fact. There was no single narrative that made complete sense. The allegations made by the claimant are very serious and clearly could have significant implications for all parties. Consequently we paid very careful attention to the detail of all the oral evidence and spent most of our first day in chambers simply rereading all the statements and the cross examination of all witnesses.

28. Having done that exercise and assessed all the evidence, both oral and written, and the submissions made by the parties, we find on the balance of probabilities the following to be the relevant facts.

29. Background and asbestos procedures

30. Between 15 August and 27 October 2019 the claimant was engaged by Goldmills agency and supplied to the first respondent who were engaged by Ensafe who in turn were contracted by Tesco to work at its Luton site providing asbestos removal services. The claimant only worked nightshifts. The second respondent is an employee of the first respondent (and had been for more than 5 years) and was an experienced site supervisor. The work was due to be completed by 8 November 2019.

31. Two shifts worked at the site – day and night each with a supervisor. The day shift ran from 8am to 5pm and the night shift from 6pm to 4am (though they would often finish earlier). During each shift there would be a one hour lunch break and additional short breaks during which the workers would either go to the on site canteen or go into town. The second respondent said it would be possible for someone to stay within the enclosure during a break but if they did, they would be visible by anyone still present on the site.

32. The supervisors would usually be present before the shift formally began, in all likelihood for up to an hour before. There was usually a handover between the day and night shift supervisors at 5pm. When there was no shift present the site would be locked by a gate with an entry code although all the workers would have that entry code.

33. Asbestos removal is potentially an extremely dangerous operation and is subject to detailed regulations and guidance. Sites at which asbestos is being removed are also subjected to both routine and unannounced audits. Whenever the site is in use an independent analyst is present to carry out checks of the levels of asbestos in the atmosphere.

34. The parties agree that the way the site should have been run (and the respondent says was so run) is that:

    a. in the basement area there was an area where asbestos was present. An enclosure was built to prevent it escaping whilst it was decontaminated. That enclosure is airtight and 1,000 gauge polythene is used to secure the area by either being securely attached to a timber frame or the floor and walls. Mr Wodzynski was the supervisor within the enclosure on the night in question. There are vision panels within the polythene and also CCTV cameras covering any area not visible from one of those panels. Those CCTV images are visible on screens outside the enclosure as a live feed but are not recorded;

    b. anyone working within the enclosure wears a red protective suit and a full face mask with a respirator. They also carry a device on their belt which measures the level of asbestos in the atmosphere. Anyone working outside the enclosure but within the contaminated area wears a white suit and half face mask;

c. access between the enclosure and the outside area is through a series of bag locks. Any waste from within the enclosure is first sealed into a red bag which is then placed inside another clear bag and those bags are removed through the bag lock and placed into a sealed skip for disposal. Any items that are too large or too heavy to be disposed of in that way, are wrapped in the heavy duty polythene on a pallet and stored within the enclosure until the work has been completed and the site has been certified as clean by the independent analyst, the enclosure removed and the wrapped waste taken directly to a sealed skip;

d. behind the enclosure but extracting air from it, there is also a manometer which is used by the independent analyst to regularly test the levels of asbestos leakage in the air;

e. when water is used to dampen the asbestos (which minimises the risk of asbestos getting into the atmosphere), that water is then filtered and disposed of in double bags; and

f. all workers in the relevant area have to change into and out of their protective suits in the decontamination unit (DCU) where they also shower. That process has to be repeated at the beginning and end of every shift and any breaks.

35. The site had been the subject of several audits (in a period when the second respondent was in post though none apparently during the nightshift) as follows:

    a. 3 July 2019 by the HSE;

    b. an unannounced audit on 23 July 2019 by the Asbestos Removal Contractors Association which resulted in the award of the highest mark possible;

    c. an audit by Tesco on 31 July 2019;

    d. an ISO inspection in August 2019; and

    e. audits by Mr Frost on 29 July 2019 and 25 October 2019.

    No issues of concern were identified.

36. Despite all these positive audits, within 2 weeks of starting at the site the claimant had concerns about the working practices and took his mobile phone into the enclosure to make video recordings. He acknowledges this was against the rules but he took it in inside a specialist plastic bag that is used when filming underwater so it did not become contaminated but could still produce clear footage. (It was only at the Hearing that the claimant clarified the dates of these earlier videos having previously said that they were all taken on 27 October.)

37. The videos

38. We watched the videos more than once during the Hearing and again during our deliberations. We conclude that the five videos described by the claimant as taken on 27 October 2019 between 18.28 and 18.35 were taken then and were not staged. Our reasons for this conclusion are:

    a. the second respondent's site diary tells us that the workers went through the DCU and started working at around 18.30 (he confirmed that the times stated in the diary are not exact);

    b. the respondents' own case is that Mr Wodzynski told the second respondent towards the beginning of the shift that he had seen the claimant with his phone in the enclosure taking photos (taking video footage could easily be confused with taking photos). This is therefore consistent with the claimant's case (and the metadata he relies upon) that he was using his phone in the enclosure at that time;

    c. it would be very difficult - if not close to impossible - for the claimant and his colleagues to stage such activity without anybody else noticing. The area in question was very visible to anyone passing outside the enclosure through both the visibility panel and CCTV;

    d. it was not just the claimant involved in the making of the videos. Over the course of the five videos there are four other individuals visible as well as general background noise and in one case somebody off-camera calling out 'Stefan'. No explanation has been offered by the respondents as to why colleagues of the claimant would cooperate with him to stage such events. There seems to have been no benefit to them in doing so and the subsequent investigation (such as it was, described below) made no effort to identify them. If they truly had conspired with the claimant in this way we would expect both the agency and the respondents to have been anxious to identify them;

    e. Mr Alexandru-Stroe's evidence corroborated the claimant's evidence that the polythene was cut. He seems to have had no motive for supporting the claimant. They are not particularly friendly and his evidence was extremely candid (for example he readily admitted that at times rules relating to asbestos would be broken and corners cut so that workers could go home early) and was willing to say when he did not see or know something that would have supported the claimant's case;

    f. the second respondent acknowledged that he had not seen any evidence to suggest the claimant had staged the videos and no one else had said anything to him to suggest that they had seen that; and

    g. whilst recognising that this is a subjective view, the video footage does not look staged. As already mentioned there are a number of people visible and in one video there is an individual in the background doing an apparently entirely unrelated activity. Again

there is also background noise (whereas if it had been staged at a time outside of the regular shift as the second respondent suggested one might expect the background to be quiet) and the activity looks natural.

39. In reaching this conclusion we have taken into account the respondent's argument that there was no reason for the second respondent to instruct the activity shown in the 27 October videos (removing contaminated bricks through a large hole cut in the polythene enclosure) to take place - there was no time pressure to conclude the job, there was no benefit to him and in fact in some respects disposing of waste this way was more difficult than following the prescribed procedures. We have also considered that the evidence of the readings taken from the various monitors does not appear to show any increase in asbestos levels in the atmosphere. The claimant speculated in his evidence as to how that might have happened but more importantly, on the respondent's own case even if it was staged the polythene clearly had been cut and therefore one might expect to see an increase in the readings (if cutting the polythene would result in such an increase) in any event. We were not referred to any such increase. Mr Frost also confirmed in his evidence that the breaches shown in the video may not show an elevated reading due to the negative pressure in the environment and the fact that the contaminated materials were within wrapping.

40. As far as the earlier videos are concerned, we agree that it is much more possible that they could have been staged given the areas in which they were taken and the lack of involvement by other people. Having concluded that the videos on 27 October were not staged, however, we are inclined to believe that neither were the earlier ones.

41. 27 October 2019

42. On 27 October 2019 the claimant attended at the site to work on the night shift commencing at 6pm. He was one of 14 workers all supplied by Goldmills working on that shift. Eight workers, including the claimant, were working inside the enclosure and three were working outside but still within the basement. There was also a team working on the first floor which included Mr Kroll.

43. Ms Flynn, the independent analyst, was present to carry out air monitoring. Her reports show that between 18.01 and 19.01 leak air monitoring adjacent to the airlock/bag lock was at 0.0010 fibres per ml and between 22.06 and 23.06 was at the same level. The respondent says that these are well within acceptable levels (0.2 being the safe limit) and if the polythene enclosure had been cut they would have been higher.

44. The claimant says however that these are still dangerous levels if someone is not wearing a mask and that because of the wetting process there was less asbestos in the air.

45. Also on 27 October 2019 Mr Alexandru-Stroe's personal monitor was recorded between 22.06 and 23.06 and showed acceptable levels of fibres per ml. He however was outside the enclosure throwing bricks into the skip and both he and the claimant said that they were told to put these monitors in plastic bags to keep the readings down.

46. As was the respondent's usual practice the second respondent conducted a team meeting, known as a 'Toolbox talk' at the commencement of the shift.

47. There is a dispute between the claimant and the second respondent as to what was said during that talk. The claimant says that the second respondent gave an instruction that the polythene and timber frame should be cut in order to remove contaminated bricks. The second respondent denies saying this. He says that the only instructions given were as recorded on the written record of the talk. Mr Alexandru-Stroe was present at the talk but did not give evidence about its contents. Mr Kroll was also present but said he did not remember anything like this being said.

48. Given our conclusion that the video taken on 27 October shortly after this talk is genuine, we find it more likely than not that the second respondent did indeed give this instruction during the talk.

49. We also find that upon hearing this instruction the claimant expressed his dismay to the second respondent by saying something along the lines of 'you must be joking' (albeit in Polish) and making it clear that he did not agree with the instruction. The second respondent's response included something along the lines of the claimant being paranoid. In coming to this conclusion we considered very carefully the claimant's oral evidence which did vary as to exactly when he made this comment (he did say that he could not now remember exactly when he said what, either during the talk or after he had taken the videos) as well as what was subsequently said on his behalf by his solicitors and the HSE's note of his report to them.

50. As the second respondent did not retract the instruction the claimant again took his mobile phone into the area and took the videos already described which clearly show that the polyethene had been cut and contaminated bricks were being removed in breach of the relevant rules.

51. Mr Wodzynski then reported to the second respondent that the claimant was using his phone in the enclosure. The claimant left the enclosure and having showered there was a confrontation between him and the second respondent the nature of which is also in dispute.

52. Again there has been some variation in the claimant's accounts and in his oral evidence he confirmed that there had been no physical confrontation and no other managers were present. He maintained however that the second respondent had tried to grab his phone and swore at him and also said something like 'I will destroy you' and 'you won't work again'.

53. Mr Kroll's written evidence was that at no point on that day did he see the second respondent be abusive to the claimant, pushing or try to grab his phone. He did confirm in his oral evidence however that he had been working on the first floor after the Toolbox talk and accepted that would not have seen any argument even if it did happen. Mr Alexandru-Stroe's evidence was that he saw the claimant and the second respondent clearly having an argument and that the claimant was very distressed but he did not see any pushing or grabbing. He could not understand what was being said as they were talking in Polish. Mr Wodzynski's written statement made the following day referred to there being a 'hotted conversation'.

54. The second respondent's evidence was that there was no argument but because he had previously had to speak to claimant about his attitude and performance (which the claimant denied saying there had only ever been one issue regarding his boots) and he had now taken a phone into the enclosure, he told the claimant that he was being let go from the site, gave him his papers and said that he would not be getting any further work from the respondent. He denied that the claimant had said anything about it being unacceptable to work as directed and as he had done a number of courses on how to speak to workers he knew better than to argue and that he would back off and let the situation calm down. He said that it was in fact the claimant who had threatened him saying he would make him lose his job.

55. In light of the corroborating evidence from Mr Alexandru-Stroe and Mr Wodzynski, and our finding as to the genuineness of the video, we prefer the claimant's account that there was a heated conversation, that both parties swore - given the environment and likely cultural norm within industry - and they threatened each other with repercussions. We find that there was no physical confrontation and although given the context it is perhaps likely that that the second respondent tried to grab the claimant's phone, we cannot find on the evidence before us that that was more likely than not.

56. <u>Events after 27 October 2019</u>

57. On the following day the claimant telephoned Mr Molloy and told him he had been let go by the second respondent, that he had been unhappy with their working practices and he had some videos to show him. He then emailed the videos to Mr Molloy who watched them and then spoke to Mr Finkin the respondent's contract manager.

58. Mr Molloy called the claimant after about 15 minutes. His evidence was that he did so to check that he was okay. The claimant says that in the second conversation Mr Molloy said the respondent had offered him three days' pay to resolve the issue. Mr Molloy said he did not remember making such an offer. We found Mr Molloy's evidence on this specific point to be less than compelling and find that he did convey an offer of three days' pay to the claimant.

59. Mr Molloy's further evidence was that the claimant said he wanted £15,000 to settle otherwise he would make a report to the HSE. The claimant's evidence was he did refer to £15,000 but only in the context of the second respondent's threat to destroy him and being offered three days' pay. He said the £15,000 was not in the nature of blackmail or a bribe but more an indication of how much he would expect to lose. We accept the claimant's position in this regard.

60. On 31 October 2019 the claimant contacted the HSE. The extract from their database shows that he alleged the respondent had broken the law regarding asbestos disposal and that his concern was that the second respondent had cut the poly wall of the enclosure and pulled out dirty pallet trucks. He said he had videos and wanted the job stopped as soon as possible. It appears that the HSE requested copies of the video from the claimant on the following day together with further details but no reply was received and the case was closed on 5 November 2019. There was no evidence to suggest that the HSE contacted the respondents.

61. Mr Finkin attended the site and conducted a very brief initial investigation which led to the production of Mr Wodzynski's hand written statement referred to above.

62. On 6 November 2019 solicitors instructed by the claimant wrote to the respondent and subsequently provided copies of the video evidence. The letter set out an account of events on 27 October 2019 and alleged that they amounted to a very serious breach of the relevant regulations. It also stated that the claimant was 'currently contemplating making a full report and disclosure to HSE' whereas it is clear that that complaint had already been made. They also stated that the claimant was considering making his evidence available to the press and that it was a matter of both internal and public importance amounting to whistleblowing. They indicated an intention to make a claim for detriment in the Tribunal 'unless the matter is resolved amicably at its early stage' and the letter concluded:

    'Our Client is open to an amicable solution to his case, however if no settlement is achieved promptly Mr Seis will take further steps which will include but may not be limited to issue a claim against the company.'

63. This prompted an investigation by Mr Frost in conjunction with HR in the process of which the second respondent's statement dated 27 November 2019 was produced. He also interviewed the day shift supervisor and the on site analyst. He accepted in his evidence that he quickly concluded that this was an attempt to extort money rather than a genuine complaint and therefore he did not do any further investigation. He did not interview any other team members. No notes were taken and no written report compiled. Having carefully considered Mr Frost's evidence we find that although he was mistaken, he genuinely believed that the claimant had staged the video with a view to obtaining compensation from the respondent.

64. Mr Molloy confirmed in his evidence that once he heard the respondent thought the claimant had staged the video, Goldmills carried out no

investigation. We find this particularly surprising given that even if the video had been staged, the other individuals involved had been supplied by the agency to the respondent and presumably continued to be so supplied.

65. Solicitors instructed by the respondent replied on 18 December 2019 denying all liability and making it clear that the respondent's case was that the claimant had staged the video.

66. In accordance with the second respondent's statement on 27 October 2019 the claimant has never been engaged to work on the respondent's sites again. Further, Mr Molloy who continues to be the account manager for the respondent, confirmed that his agency has not supplied the claimant for work with any other company since these events. His evidence was simply that he did not have any work for him despite also confirming that there is a very high demand for experienced asbestos subcontractors. Again, we found Mr Molloy's evidence less than compelling.

67. The claimant has alleged that he did obtain similar work via another agency with Clifford Devlin but that after 12 days he was fired for no reason. His evidence was that he had been told that the managers at Clifford Devlin play golf with Mr Frost and he believed that the reason for his termination was because he had made the protected disclosures. Both the respondents denied that this was the case and Mr Frost's evidence was that he had never played golf in his life.

68. It is surprising that the claimant has not been able to obtain work in this specialist area in which experienced workers are in demand and we recognise that it is an industry where it is likely that the key players know each other and informal networks exist. There is no evidence before us however - apart from speculation - that either of the respondents had actively sought to stigmatise or blacklist the claimant in that market. We have considered whether there is any material from which we could draw such an inference but conclude there is not.

Conclusions

69. Having made those findings of fact our conclusions are as follows.

70. The claimant made protected disclosures on 27 October 2019 orally to the second respondent during the Toolbox talk (when he said 'you must be joking' or similar in response to the instruction to cut the polythene) and during the confrontation after he left the enclosure. Given the very specific context of the instruction given by the second respondent and the fact that it was such a blatant breach of the relevant health and safety rules, the claimant's reaction had sufficient content and specificity to amount to a protected disclosure. He also clearly had reasonable belief that the instruction amounted to the necessary breach and he made the disclosures in the public interest.

71. For the same reasons he also made protected disclosures:

a. to Mr Molloy on 28 October 2019 in their conversation and when he sent him the videos; and

b. to the HSE on 31 October 2019.

72. Whether the claimant made these disclosures in good faith is relevant only to the question of remedy. We have not found on the facts any inappropriate pressure put by the claimant or his solicitors on the respondent to settle such as to indicate a lack of good faith. It cannot be the case that by indicating a willingness to settle a claimant then risks an effective remedy under their statutory protection.

73. The claimant was subjected to detriments in that:

a. he was subjected to threats, insults and shouting by the second respondent on 27 October 2019 (the impact of this on the claimant in the context of a mutual argument will however be taken into account in determining remedy);

b. the respondent withheld subsequent assignments and work from him; and

c. the respondent failed (properly) to investigate his concerns.

The remaining claimed detriments have not been found on the facts.

74. As for whether the claimant was subjected to the found detriments on the ground that he had made protected disclosures we conclude:

a. there was no link between the disclosure to the HSE and the detriments as the respondent was unaware of that disclosure at the time;

b. the threats etc by the second respondent and the withholding of work by the respondent were clearly on the ground that he made the disclosures on 27 & 28 October 2019; and

c. the failure to investigate properly was not on the ground that he made the disclosures but because of a genuine (albeit mistaken) belief by Mr Frost that the claimant had staged the video and was seeking to extort money from the respondent. (We note that no claim has been brought against Goldmills who we would have found did fail to investigate properly.)

75. <u>Remedy Hearing</u>

76. A remedy hearing has been listed for **12 May 2022** commencing at **10am** at London South Employment Tribunal, Montague Ct, 101 London Rd, Croydon, CR0 2RF. If the parties are able to reach agreement without the need for a further hearing they shall please inform the Tribunal as soon as possible. Otherwise, the following directions apply.

77. On or before **14 April 2022** the claimant shall send to the respondents a statement setting out the remedy he seeks and his efforts to mitigate his loss together with copies of any additional supporting documents and an updated schedule of loss.

78. On or before **28 April 2022** the respondents shall send to the claimant any witness statements and counter schedule of loss upon which they wish to rely in relation to the remedy sought together with copies of any additional documents they say are relevant to the issue.

79. The parties shall seek to agree a bundle of documents for use at the remedy hearing and file one electronic and three hard copies no later than **10 May 2022.**

_____
Employment Judge K Andrews
Date: 16 February 2022