Case Numbers: 1601148/2019
1601704/2020
1601905/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr A Marcelo

Respondent: Powys Teaching Health Board

Heard at: Cardiff **On:** 4, 5, 6, 7, 8, 11, 13, 14 (in chambers) & 15 July 2022

Before: Employment Judge S Jenkins
Mrs J Beard
Mrs M Walters

Representation
Claimant: In person
Respondent: Mr J Walters (Counsel)

JUDGMENT having been sent to the parties on 19 June 2022, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

Claims

1. The hearing was to consider the Claimant's claims arising from three claim forms. The first was issued on 15 August 2019, whilst the Claimant was still employed, and included claims of direct race discrimination, direct sex discrimination, victimisation, and protected disclosure detriment. The second was issued on 22 April 2020, again whilst the Claimant was employed, in which he advanced further claims of the same type but in relation to later events. The third claim was issued on 16 September 2020, after the Claimant's employment had ended, and included claims of constructive unfair dismissal, both under sections 94 and 103A of the Employment Rights Act 1996, as well as further claims of direct race discrimination and victimisation.

Evidence

2. On behalf of the Claimant we heard evidence, both via written witness statements and orally, from the Claimant himself, and from Mrs Lorna

Collamazza, Hotel Services Supervisor; and Mrs Helen Marsh, formerly Hotel Services Supervisor. We also heard evidence in the form of a written statement from Mr Antonio Cayetano, Porter. As Mr Cayetano did not attend the hearing and could not be cross-examined, there was little weight we could attach to his statement which, in any event, was not directly relevant to the issues we had to consider.

3. On behalf of the Respondent we heard evidence, via written witness statements and orally, from Mrs Carol Shillabeer, Chief Executive; Mr Andrew Cresswell, Assistant Director for Support Services; Mr Duncan Crawley, Quality Service Improvement Manager; Mrs Julie Rowles, Executive Director of Workforce and Organisational Development; Mr Jamie Marchant, Director of Environment; Mr Pete Hopgood, Director of Finance, Information and IT Services; Ms Rani Mallison, formerly Board Secretary; Mrs Helen Farr, formerly Facilities Co-ordinator; Ms Jackie Jones, formerly Workforce and Organisational Development Business Partner; Mrs Andrea Williams, Facilities Supervisor; and Mrs Sally Davies, Facilities Co-ordinator.

4. We considered the documents in the hearing bundle, spanning some 3,363 pages in total, to which our attention was drawn. We also considered the parties' submissions provided in writing and orally.

Issues

5. Several preliminary hearings had taken place in relation to these cases, three of which had addressed the issues upon which adjudication was to be required arising from each claim. Following a direction issued at the final preliminary hearing on 8 June 2020, those issues were amalgamated into one document which was to be found at Supplemental Bundle, pages 211 to 219.

6. It had been directed at one of the preliminary hearings that this hearing would focus on liability only, i.e. on whether or not the claims succeeded. If any did, then the compensation and/or other remedy to be ordered would be considered at a subsequent remedy hearing

Law

Direct Discrimination

7. Section 13(1) Equality Act 2010 provides that:

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

8. Section 23(1) then notes that there must be "*no material difference between the circumstances relating to each case*" when undertaking the comparison.

9. With regard to the Claimant's claims of direct discrimination, we noted, with regard to the burden of proof, that Section 136 of the Equality Act 2010

("EqA") provides that we would first need to consider whether there were any facts from which we could decide, in the absence of a non-discriminatory reason from the Respondent, that an act of unlawful discrimination had taken place. If so, the burden would then shift to the Respondent to demonstrate a non-discriminatory explanation.

10. In this regard, the appellate courts have regularly made clear, for example the Court of Appeal in ***Khan -v- The Home Office*** **[2008] EWCA Civ 578** and the EAT in ***Chief Constable of Kent Constabulary -v- Bowler*** **(UK EAT 0214/16)**, that Tribunals should avoid a mechanistic approach to the drawing of inferences.

11. We were also conscious that the Court of Appeal, in ***Madarassy -v- Nomura International PLC*** **[2007] ICR 867**, had noted that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, and that they are not, without more, sufficient material from which a Tribunal can conclude that, on the balance of probabilities, a Respondent had committed an unlawful act of discrimination.

12. We also had to consider whether the Claimant had been treated less favourably than a comparator in circumstances which were not materially different. As we have noted, section 23 EqA notes that, for the purposes of the comparison required in a direct discrimination claim, there must be no material difference between the circumstances relating to each case, and that includes the Claimant's and any comparator's abilities.

Victimisation

13. With regard to the victimisation claim, the Respondent accepted that the three asserted protected acts, emails sent on 7 and 20 December 2018, and submission of the Claimant's first claim form in August 2019, were protected acts for the purposes of Section 27 EqA. We therefore had to consider whether the Claimant had been treated to his detriment as a result of having made the protected act or acts, i.e. that the protected act or acts had been the cause, or at least a material cause, of the detrimental treatment. In that regard we noted the guidance provided in respect of detriment in the House of Lords decision of ***Shamoon -v- Royal Ulster Constabulary*** **[2003] IRLR 285**, that a detriment arises if a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which they had to work.

Protected disclosure

14. We noted that the Respondent accepted that the Claimant's emails of 7 and 20 December 2018 amounted to protected disclosures, but that it did not accept that the Claimant's letter of 29 May 2020 could be categorised in the same manner.

15. In deciding whether a disclosure is protected by law, a Tribunal has to have regard to:

- Whether there has been a disclosure of information.
- The subject matter of disclosure in accordance with Section 43B ERA 1996, asserted by the Claimant in this case to be health and safety endangerment.
- Whether the Claimant had a reasonable belief that the information tended to show one of the relevant failures in Section 43B ERA 1996.
- Whether the Claimant had a reasonable belief that the disclosure was in the public interest.

16. With regard to disclosure of information, the Employment Appeal Tribunal ("EAT"), in Cavendish Munro Professional Risks Management Limited -v- Geduld [2010] ICR 325, drew a distinction between the making of an allegation, which would not be said to disclose information, and the giving of information in the sense of conveying facts. However, the Court of Appeal in Kilraine -v- London Borough of Wandsworth [2018] ICR 1850, noted that the two categories are not mutually exclusive, and that the key guidance from Geduld was that a statement which was devoid of specific factual content could not be said to be a disclosure of information.

17. With regard to reasonable belief, we needed to be satisfied that the information tended to show a relevant failure in the reasonable belief of the worker, i.e. in this case the Claimant. The EAT, in Korashi -v- Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, directed that that involved applying an objective standard to the personal circumstances of the discloser. The EAT also noted, in Darnton -v- University of Surrey [2003] ICR 615, that the Claimant does not need to be factually correct and need only demonstrate that they have a reasonable belief.

18. With regard to public interest, we were mindful of the guidance provided by the Court of Appeal, in Chesterton Global Limited -v- Nurmohamed [2017] EWCA Civ 979, that noted that the following matters would be relevant:

- The numbers in the group whose interests the disclosure served.
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.
- The nature of the wrongdoing disclosed.
- The identity of the alleged wrongdoer.

Section 47B claim

19. In relation to the first two protected disclosures, and the third, If we were satisfied that a protected disclosure had been made, we would have to consider whether a detriment had arisen. The issue of detriment has arisen regularly in relation to claims under anti-discrimination legislation, and we noted that the Court of Appeal, in Ministry of Defence -v- Jeremiah [1980] ICR 13, confirmed that it meant "putting under a disadvantage", and, in Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, that it involved "a disadvantage of some kind".

Causation

20. We noted that both the claims arising from alleged protected disclosures involved an element of causation. The claim under Section 47B relates to detriment "on the ground" of the disclosure, and the claim under Section 103A involves the "reason or principal reason" for the dismissal.

21. With regard to claims under Section 47B, the Court of Appeal. in NHS Manchester -v- Fecitt [2012] IRLR 64, noted that causation involved something which materially influenced the treatment, and, in Section 103A claims, the Supreme Court, in the case of Royal Mail Limited -v- Jhuti [2019] UK SC 55, indicated that ordinarily Tribunals would look no further than the reasons of the decision maker, but that where the reason was hidden from the decision maker they could look behind that invention.

Constructive Unfair Dismissal

22. In a constructive unfair dismissal case such as this, the leading authority remains ***Western Excavating (ECC) Limited -v- Sharp*** **[1978] ICR 221**, which noted that three matters fall to be considered:

(i) Was there a repudiatory breach of contract?
(ii) If so, did the Claimant resign in response to that breach and not for another reason?
(iii) If so, did the Claimant nevertheless affirm the contract, whether by delaying too long in resigning, or by words or actions which demonstrated that she chose to keep the contract alive?

23. The breach in this case was asserted to be a breach of the implied term of mutual trust and confidence. Whilst the ability to pursue a constructive dismissal claim based on that implied term had been established by the Employment Appeal Tribunal as far back as 1981 in the case of ***Woods -v- WM Car Services (Peterborough) Limited*** **[1981] ICR 666**, it was expressly approved by the House of Lords in ***Malik -v- BCCI SA (in compulsory liquidation)*** **[1997] ICR 606**, where Lord Steyn confirmed that it imposed an obligation that the employer shall not, "*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".

24. It has been clear, since ***Woods*** in 1981, that any breach of the implied term of mutual trust and confidence will be a repudiatory breach. However, as noted in ***Malik***, the conduct has to be such that it is likely to "destroy or seriously damage" the relationship of trust and confidence.

25. The prevailing law of constructive dismissal has been more recently summarised by the Court of Appeal in ***Omilaju -v- Waltham Forest London Borough Council*** **[2005] ICR 481**, where Dyson LJ explained it as follows:

"*1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.*

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H—35D (Lord Nicholls) and 45C—46E (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage *the relationship (emphasis added).*

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik, at p 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).*

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

*"**[480]** Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship.""*

26. Dyson LJ continued at paragraph 15:

"*The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1986] ICR 157. Neill LJ said (p167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p169F:*

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do

so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?" *(See Woods v W.M. Car Services (Peterborough) Ltd. [1981] ICR 666.) This is the "last straw" situation.*"

27. The approach to be taken in last straw cases was considered by the Court of Appeal in ***Kaur -v- Leeds Teaching Hospitals NHS Trust*** **[2019] ICR 1**, where Underhill LJ stated, at paragraphs 45 to 46:

"*If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the Omilaju test), it should not normally matter whether it had crossed the Malik threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so.*

"Fourthly, the "last straw" image may in some cases not be wholly apt. At the risk of labouring the obvious, the point made by the proverb is that the additional weight that renders the load too heavy may be quite small in itself. Although that point is valuable in the legal context, and is the particular point discussed in Omilaju, it will not arise in every cumulative breach case. There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the Claimant seeks to rely on them just in case (or for their prejudicial effect)."

28. Underhill LJ then set out, at paragraph 55, a number of questions that the Tribunal should ask itself in a constructive dismissal claim:

"*I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the

Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic though of course answering them in the circumstances of a particular case may not be easy."

29. As noted by Underhill LJ's reference to "(or partly in response)" at paragraph 55(5), the repudiatory breach need not be the only reason why the employee resigns, it is sufficient if it played a part in the resignation.

30. As set out in s95(1)(c) of the Employment Rights Act 1996 ("ERA"), an employee can resign with or without notice, a restatement of the common law in the form of ***Western Excavating (ECC) Ltd v Sharp*** **[1978] ICR 221**, where Lord Denning MR said, at paragraph 226B, "*The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice*."

Findings

31. Before noting our findings, we made some preliminary observations. First, in terms of the evidence we heard from the witnesses, we generally found the evidence of the Respondent's witnesses to have been delivered openly and straightforwardly, with much of it finding corroboration in the contemporaneous documents, and we therefore largely preferred the evidence of those witnesses.

32. Although we formed that opinion, it does not mean that we considered that the Claimant was untruthful in the evidence he provided. We considered that he genuinely believed that matters had developed in the way he advanced them, and that he felt that he had been badly treated by the Respondent.

33. However, we found no real basis for that belief, and felt that the Claimant was someone who was unwilling to accept that matters were not how he perceived them, even when it would have been apparent to a neutral observer that that was the case. An example of this was the Claimant's insistence that liquid nitrogen was used in the northern part of the Respondent's area, which he contended was supported by email communications from those based in that area. However, those communications only arose because the Claimant had himself forwarded communications sent to him by others. There was no evidence to suggest that others had sought the input of those from the northern part of the Respondent's area directly.

34. In our view, the Claimant was someone who had a tendency to view matters through a prism of unfairness, when the reality was that there was nothing to suggest that he had been treated unfairly.

35. Having outlined that approach to our consideration of the evidence, our findings of fact were as follows.

36. The Claimant joined the Respondent in 2016 and he was employed as the Facilities Manager in the south of Powys, at Band 7. In that role, he was responsible for five hospitals. His counterpart in the north of Powys was Mr Campbell Strefford. They were both line managed by Mr Duncan Crawley, Head of Facilities until late 2019.

37. The Claimant directly line-managed Facilities Co-ordinators (Band 5), Mrs Sally Davies at Llandrindod Wells, and Mrs Helen Farr at Bronllys, up to June 2019. They, in turn, managed Facilities Supervisors (Band 3).

38. Whilst the Claimant had an unblemished disciplinary record and had broadly positive appraisals, issues existed relating to his management style, particularly relating to Mrs Davies and Mrs Farr, but also relating to other employees.

39. There were also issues between the Claimant and Mr Strefford, although the Claimant in his oral evidence described Mr Strefford as a friend. Nevertheless, the issues between them led Mr Crawley to write to them in December 2017 to remind them of his expectations and that he did not expect to witness "*hostile behaviours such as rudeness, inappropriate complaining, sarcasm, and insubordination (rebelliousness/disobedience/defiance/non-compliance)*".

40. Mr Crawley confirmed, in unchallenged evidence, that the Claimant was resistant to any changes in work or work systems, and would react through negative body language, by dominating conversations inappropriately, and by enforcing his personal views on others.

41. The Claimant lodged a grievance against Mr Strefford in June 2018, which was not upheld. The grievance officer noted however that she had "*significant concerns about the leadership and management within the Facilities Directorate*". She noted that there was evidence of inadequate team working, and that relationships at the senior level were very strained.

42. In 2018, Mrs Julie Rowles, the Respondent's Head of Workforce and Organisational Development, who had been asked to take over responsibility for the Facilities function, commissioned an external consultancy to review the Facilities service in order to determine whether it was operating effectively. The report found that the major cause of the issues was "*a fundamental lack of operational management*".

43. During 2018, Mr Crawley continued to be concerned about the Claimant's behaviour, and noted, in an email to Mrs Rowles in July 2018, that he was going to raise those concerns with him. They included concerns that the

Claimant would bypass him, would publicly undermine him, would act beyond his authority, and would criticise or challenge instructions.

44. Concerns were also brought to Mrs Rowles' attention in October 2018 about the Claimant's relationship with Mrs Farr, which required Human Resources input. Mrs Farr also herself brought concerns to HR's attention at the end of November 2018, regarding upset the Claimant had caused to Mrs Andrea Williams, who had just commenced work as a Facilities Supervisor.

45. Mrs Rowles held a meeting with the Claimant and Mr Crawley on 3 December 2018, as she had identified concerns about relationships within the senior Facilities team and was concerned about how relationships were being managed and the effect on the wider team.

46. On 6 December 2018 the Claimant sent an email to Mr Crawley and raised what he described as an "alledge [*sic*] disturbing practice", regarding Mrs Farr. It was alleged that she had failed to interview a bank staff member, Antonio Cayetano.

47. A further email was sent by the Claimant to Mr Crawley on 7 December 2018, which he contended, and which the Respondent accepted, was a protected disclosure and a protected act. Within the email, the Claimant raised several issues. One involved an allegation that Mrs Davies had not given Mr Cayetano bank hours since a new bank staff member had been hired. The Claimant stated that the new bank staff member was being favoured unfairly with more than his share of vacant shifts, and asserted that Mrs Davies was biased and prejudiced against employees from ethnic minorities. As a result of this email Mr Crawley attempted to contact Mrs Jackie Jones in HR, but was unable to do so.

48. On 20 December 2018 the Claimant emailed Mrs Jones directly. The Claimant again contended, and the Respondent again accepted, that that was a protected disclosure and a protected act. He forwarded his email of 7 December to Mr Crawley, and also raised additional matters. One was that Mrs Davies had rejected two candidates he had put forward for a Hotel Service Supervisor post at Llandrindod Wells. A second was that Mrs Farr had not interviewed an applicant for a post as she had previously interviewed him and knew his answers from a previous application. It subsequently transpired that that applicant was Mr Cayetano.

49. Mr Crawley emailed Mrs Jones again on 24 January 2019, noting that they had not acted on the Claimant's email of 7 December and offering to arrange a meeting with the Claimant to discuss further. Mrs Jones replied on 31 January 2019, noting that he majority of the issues the Claimant had raised would come out in "the fact finding investigation".

50. That was a reference to a fact-finding that Mrs Rowles had felt should be set up in relation to the issues that had arisen in the Facilities team. She had emailed the Claimant and Mr Crawley on 2 January 2019, as a follow up to the meeting on 3 December 2018, asking for an update on how the actions agreed in that meeting had been taken forward. However, Mr

Crawley reported, by email on 6 January 2019, that a meeting between the Claimant and Mrs Davies had not been "i". He also noted, without specifying any detail, that he had received a "*worrying email*" from the Claimant.

51. Mrs Rowles commissioned a fact-finding investigation which began on 25 February 2019. An external HR consultant, Cerys Ashley, was commissioned to undertake it. The Terms of Reference for the investigation noted that there had been several recent issues involving working relationships in Facilities, involving five named individuals. These were; the Claimant, Mrs Davies, Mrs Farr, Mrs Williams and Mrs Helen Marsh.

52. Ms Ashley produced her fact-finding report on 17 May 2019, having interviewed the five individuals. Following its receipt, Mrs Rowles requested that disciplinary investigations be undertaken in relation to allegations concerning the Claimant, Mrs Farr and Mrs Davies.

53. Mrs Rowles also concluded that continuing with the existing management arrangements was a risk for everyone involved in the process, and therefore made the decision to remove the Claimant's line management role for Mrs Davies and Mrs Farr. Bearing in mind that an allegation had also been made about Mrs Farr by Mrs Marsh, who reported to her, Mrs Rowles also took the decision to separate them, with Mrs Farr focusing on Cleaning and Mrs Marsh focusing on Catering.

54. In order to facilitate the separations, the Claimant was asked to work from Brecon, where he already had an office, and to take responsibility for the hospitals at Brecon and Ystradgynlais. Mr Crawley took over temporary line management responsibilities at the other three hospitals in the Claimant's area.

55. On 10 June 2019 Mrs Rowles met with the Claimant and explained that she was removing his line management responsibilities and why. The Claimant told Mrs Rowles that he understood why this was being done. Mrs Rowles also confirmed that a disciplinary investigation would be undertaken into allegations against him.

56. Mrs Farr and Mrs Davies were similarly informed that disciplinary investigations would be undertaken into allegations against them. Mrs Farr was also informed that she would no longer line manage Mrs Marsh, although that was not confirmed until July, when Mrs Marsh returned from holiday. Letters were sent to all three individuals on 12 June 2019, confirming the investigations, and that they would be undertaken by Ms Ashley.

57. In view of the changes to line management that had been made, the Claimant's access to staff details, for example to approve holiday requests, on the Electronic Staff Record (ESR) at the three sites he had ceased to manage was removed. That seemed to go slightly further, as it transpired that the Claimant did not have ESR access for a new recruit at Brecon, but that appeared to have arisen through error rather than deliberately.

58. At about the same time as the changes to the Claimant's line management responsibilities were implemented, the Respondent took on a new managerial staff member, Mr John Morgan, who was originally engaged as a bank worker. By this stage, Mr Strefford had left employment and Mr Morgan ultimately took on his duties, i.e. he was complementary to the Claimant's underlying role. In the short term however, he took over responsibility for managing both Mrs Farr and Mrs Marsh at Bronllys, whilst Mr Crawley managed Mrs Davies at Llandrindod Wells.

59. During this period, the Claimant's office at Bronllys was not being used. Mr Morgan was, at that time, sharing an office there with Mrs Farr, but it was not appropriate for that to continue as he moved to line manage her. The Claimant's office was therefore temporarily used by Mr Morgan, with the Claimant's personal possessions being boxed up.

60. The Claimant raised concerns regarding the room change on 14 June 2019 in an email to Mr Crawley, pointing out that he had a lot of stuff in his room at Bronllys which he would need to get first. Mr Crawley acknowledged that, by agreeing that it was a fair point. However, it transpired that the Claimant's possessions had already been boxed up. In the event, those possessions remained boxed up in the Bronllys office until the Claimant's management responsibilities across all five sites were restored in December 2019.

61. The Claimant then raised a grievance on 17 June 2019 by letter to Mrs. Shillabeer, the Respondent's Chief Executive. In this he complained about being discriminated against and victimised, and attached his emails of 7 and 20 December 2018.

62. Mrs Shillabeer replied to the Claimant on 12 July 2019. She noted that a number of the Claimant's allegations appeared to relate to matters that were the subject of the disciplinary investigation being undertaken. She confirmed that she had forwarded the Claimant's letter to Ms Ashley to ensure that all issues related to the ongoing disciplinary investigation would be known to her, and so that any new issues or allegations could be properly identified and investigated by her. She confirmed that Ms Ashley had been asked to do that concurrently with the disciplinary investigation.

63. Ms Ashley had in fact been commissioned to investigate matters on 26 June 2019. She was asked to establish the facts of the allegations set out in the Claimant's letter of 17 June 2019, and to arrive at a view on whether he had been subjected to any discriminatory conduct or decisions. It was noted that, given that some of the issues involved Mrs Rowles and other HR staff members, it was recommended that the report should go to Ms Rani Mallison, the Board Secretary.

64. During her investigations, Ms Ashley liaised with Ms Mallison over the arrangements for interviewing witnesses. One potential witness was Mrs Lorna Collamazza, a Hotel Services Supervisor at Ystradgynlais. Ms Mallison initially contacted Mrs Collamazza by letter on 24 July 2019 to

invite her to a meeting with Ms Ashley on 6 August 2019. However, Ms Ashley subsequently indicated that she did not need to speak to Mrs Collamazza and the meeting was cancelled. Ms Ashley ultimately felt that she should speak to Mrs Collamazza, and did so by telephone on 2 October 2019. Mrs Collamazza did not provide any evidence relevant to the Claimant's subsequent claims, the conversation focusing on an issue not involving the Claimant.

65. The Claimant was due to meet Ms Ashley on 22 August 2019, having already met with her on 18 July 2019. However, he wrote to Mrs Shillabeer on 21 August 2019 asking for a different investigator to be assigned to consider his concerns. Mrs Shillabeer considered the Claimant's request but felt that it was reasonable to continue with the existing external investigator. She wrote to the Claimant on 13 September 2019 to advise him that his concerns raised regarding allegations of discrimination were very serious and confirming they would be investigated in parallel with the disciplinary investigation. Mrs Shillabeer confirmed that Ms Ashley was an external independent investigator, and that she felt that she would be able to provide an independent and balanced investigation.

66. In the latter part of 2019, Mr Crawley had discussions with Mrs Rowles regarding his own role as Head of Facilities. Due to health issues, it was agreed that, as a reasonable adjustment for him, Mr Crawley's role would change to Support Services Improvement Manager and that he would move from a Band 8B role to a Band 7 role. As a result, he no longer managed the Claimant after 1 October 2019. Mr Andrew Cresswell in fact became the Claimant's line manager from October 2019. Following the change of Mr Crawley's role, the Respondent decided to continue without a Head of Facilities, the funding for the Head of Facilities post being realigned to fund the Support Services Improvement Manager role, with the surplus being used to offset cost pressures in the Support Services budget.

67. The Claimant raised concerns with Mr Cresswell about the changes to Mr Crawley's role in an email of 27 November 2019. He pointed out that a Facilities Co-ordinator vacancy had been filled by way of an expression of interest, and that the Head of Facilities role had not been offered internally in that manner, which he felt had put him at a disadvantage. Mr Cresswell replied the following day, noting that the Head of Facilities role had been left vacant due to cost pressures and pending changes to the management structure, and that if the post continued in the new structure it would be advertised in accordance with the Respondent's recruitment policy.

68. In 2018, the Claimant and Mr Strefford had been requested not to attend Chat to Change ("C2C") meetings and instead to focus on essential operational meetings. Chat to Change is a collaborative staff meeting to discuss initiatives to support the improvement of services. However, following Mr Morgan's recruitment, he was invited to attend a C2C meeting, the person inviting him being unaware of the earlier decision, and Mr Morgan attended one C2C meeting. The Claimant was unhappy that Mr Morgan had attended, and, as soon as Mr Crawley was advised of that, he directed that Mr Morgan should not attend in future. The Claimant

subsequently complained about the issue to Mr Cresswell, complaining of discriminatory treatment. Mr Cresswell confirmed that the Claimant and Mr Morgan could both attend C2C meetings in future.

69. A delay in the investigations, caused by the ill health of Ms Ashley, arose in Autumn 2019, and the Claimant was informed by Mrs Shillabeer, in a letter of 1 November 2019, that she expected the report in "*the coming weeks*".

70. Ms Mallison had, in fact, received the Claimant's grievance report, i.e. the report into the issues raised by the Claimant in his letter 17 June 2019, on 2 October 2019. However, Ms Ashley had written the report as a fact-finding report and not as a grievance report, as requested. She was therefore asked to revise the report to ensure that it was a grievance report and to make clear whether there was evidence available in response to the complaints the Claimant had raised. Ms Ashley then produced a second report on 6 December 2019. Following receipt of that report, a grievance hearing was arranged for 27 January 2020, and Ms Mallison wrote to the Claimant on 18 December 2019 to confirm that.

71. In relation to the disciplinary investigations, Ms Ashley completed the Claimant's report on 12 December 2019, Mrs Davies' report on 24 January 2020 and Mrs Farr's report on 5 November 2020. The last report was delayed by Ms Ashley's ill health and was completed by a different external investigator.

72. Mr. Cresswell, who had been appointed as the disciplining officer for all three investigations, assessed the evidence and concluded that there were no disciplinary cases to answer. In relation to the Claimant, Mr Cresswell wrote to him on 16 December 2019 to confirm that, and that he should resume his management responsibilities across all five sites from 19 December 2019.

73. As a result of that, the Claimant recommenced his line management of Mrs Davies. However, she was uncomfortable with the Claimant returning to manage her due to the fact that the disciplinary case against her was ongoing, which included allegations that the Claimant had made against her. Mrs Davies raised her concerns with Ms Jones on 19 December 2019, and she replied on 23 December 2019, noting that she had discussed matters with Mr Cresswell, and that arrangements would be made for mediation or something similar in the New Year between Mrs Davies and the Claimant.

74. That mediation was not arranged, and, in January 2020, the Claimant attempted to arrange a 1:1 meeting with Mrs Davies. She was again uncomfortable with that, and again passed her concerns to Ms Jones. She discussed matters with the Claimant and advised that the meeting should be postponed in light of the impact it was having on Mrs Davies, Whilst the Claimant did not agree, feeling that he should be allowed to manage Mrs Davies and meet with her, the meeting was ultimately postponed, and, despite an attempt by the Claimant to re-schedule it for a week later, did not ultimately take place.

75. When the matter was brought to Mr Cresswell's attention, he felt that an option to resolve the difficulties was to temporarily redeploy Mrs Davies to Llanidloes where she, in fact, lived, and where there was a vacancy. Mr. Cresswell discussed the proposed move with the Claimant before speaking to Mrs Davies. The Claimant indicated that he did not agree with Mr Cresswell's suggestion and that he felt that Mrs Davies should have been dealt with formally.

76. Mrs Davies was however offered the opportunity to relocate. Initially she declined, and Mr Cresswell provided the Claimant with a draft letter that he proposed to send to Mrs Davies outlining that she would therefore need to remain in the current position and be managed by the Claimant. However, before that letter was sent, Mrs Davies agreed to move to Llanidloes. Some two months later that move was confirmed to be permanent.

77. On 20 January 2020, the Claimant submitted a further grievance document with 90 points outlining further complaints about the Facilities department and how his grievance had been handled. Mrs Shillabeer was concerned that the new document contained matters not raised in the Claimant's 17 June 2019 letter, and, in order that a comprehensive review of the Claimant's allegations could be undertaken, it was necessary to postpone the hearing on 27 January 2020. She wrote to the Claimant on 22 January 2020 to confirm that, and to ask the Claimant if his preference would be for all allegations in both letters to be considered together, or would be for two separate hearings to be held. The Claimant confirmed, by email later that day, that he wanted all the issues raised to be heard together.

78. Ms Mallison then reviewed the Claimant's additional concerns and condensed them into a document which covered all points and how they would be dealt with, in order to ensure that appropriate Terms of Reference for the investigation could be established. She sent those to the Claimant on 4 March 2020, with a letter outlining the position. In that letter, Ms Mallison pointed out that, in her view, not all of the Claimant's 90 points were appropriate to be considered as part of an internal grievance, as some raised concerns about the way the Respondent had responded to the Claimant's first tribunal claim. She requested that the Claimant review her assessment of the points to ensure that her summary was accurate and comprehensive.

79. The Claimant and Ms. Mallison then exchanged emails to discuss the assessment of the Claimant's grievance points and the need for a second investigation.

80. Within an email on 18 March 2020, the Claimant requested sight of a transcript of a meeting between Mr Cayetano and Ms Ashley, having been sent transcripts of meetings Ms Ashley had had with several other employees. However, those transcripts related to meetings Ms Ashley had undertaken in relation to the Claimant's grievance and her disciplinary investigation into the allegations against him, whereas her meeting with Mr

Cayetano had taken place as part of the disciplinary investigations in relation to the allegations against Mrs Davies and Mrs Farr.

81. Ms. Mallison sought legal advice and then took the decision not to provide the Claimant with a copy of the transcript as she considered that he was not entitled to view it in line with data protection obligations. She explained that to the Claimant in an email on 20 March 2020, and did so again in an email on 23 March 2020. The Claimant responded on 1 April 2020 reiterating that his concerns related to his letter of 17 June 2019.

82. Following Mr Creswell's return from annual leave in March 2020, an issue arose relating to the management of Health and Safety risks in relation to the storage and handling of liquid nitrogen. Mr Cresswell discussed the issue with the Respondent's Health & Safety Officers, Anthony Holt and Paul Tranter, on 11 March 2020.

83. The storage and handling of liquid nitrogen had, in fact, been a subject of discussion for much of the preceding five years, with documents in the bundle showing that discussions took place about it in 2015 and again in 2017. The Respondent had not implemented a formal policy relating to liquid nitrogen as it was not classified as a medical gas, instead relying on British Compressed Gases Association Codes of Practice. It appeared to us that there was something of a lack of ownership of the issue within the Respondent's organisation, with it being unclear as to whether it fell to be addressed as a health and safety matter or as a medical devices matter.

84. Training, via BOC, took place for porters who were involved in the handling of liquid nitrogen, decanting it from storage containers, or dewars, into the devices to be used by medical professionals in procedures. That was originally applicable over a three year period, but BOC changed its processes in 2018 so that the training certificates needed to be renewed annually. That meant that, by May 2019, all or virtually all, of the Respondent's porters, in the two centres where liquid nitrogen was used, Brecon and Llandrindod Wells, needed to be re-accredited.

85. At that time, the Claimant remained in charge of the five southern sites, which included both Brecon and Llandrindod Wells. He did not arrange for the training of porters to be renewed, although nor did any of the other employees involved in the management of porters at those sites do so. However, for the remainder of 2019 and into 2020, the Claimant reported, as part of the Respondent's risk register, that training of porters had been completed.

86. When the issue was raised in March 2020, the Claimant noted that the decanting of liquid nitrogen by porters would have to cease with immediate effect due to the expired training.

87. Mr. Cresswell then enquired of the Claimant, in an email on 20 March 2020, as to when he had become aware that the porters did not have current accreditation to handle liquid nitrogen. The Claimant did not reply.

88. Mr. Creswell felt that a disciplinary investigation should be initiated against the Claimant because there was evidence that the Claimant had provided assurance that porters handling liquid nitrogen had specialist training for this task supported by a current certificate of accreditation when they had not. He reported those concerns to Ms Mallison and Mrs Rowles on 27 March 2020, and undertook a suspension risk assessment which indicated that the Claimant should be suspended due to the risk that he could interfere with the investigation.

89. As Mr Cresswell was potentially involved in any disciplinary investigation as a witness, it was decided that Mr Jamie Marchant would act as the Disciplining Officer. He met with the Claimant on 13 May 2020 and informed him that he would be suspended whilst the allegations were investigated. He confirmed that in a letter the same day.

90. On 13 May 2020, when suspending the Claimant, Mr. Marchant requested that the Claimant return his ID badge, laptop and keys, and not contact employees. That was in accordance with the Respondent's normal practice and was included in a suspension script prepared for Mr Marchant.

91. In the meantime, on 4 May 2020, Ms Mallison, conscious that she had not heard from the Claimant in relation to her last email of 13 March 2020 relating to the terms of reference for dealing with his second grievance, emailed the Claimant to inform him that an independent HR consultant, Mr Rob Baker, had been commissioned to investigate the second grievance, and that a hearing would be scheduled once Mr Baker's investigation had concluded.

92. Mr Baker emailed Ms. Mallison on 18 May 2020 to advise that the Claimant had not responded to him to discuss his grievance, and that he had given the Claimant a deadline of Thursday 21 May 2020 to respond, or he would have to move ahead without his involvement.

93. On 18 May 2020, following the Claimant's suspension and the notification of the allegations against him in relation to the decanting of liquid nitrogen, the Claimant wrote to Mrs Shillabeer. He raised concerns about unfavourable treatment from Mr Cresswell in not raising any concern about liquid nitrogen with him previously, and about bullying by Mr Marchant for giving him less than an hour's notice of the meeting in which he was suspended. He also raised a concern that Mr Marchant should not be involved in the investigation as he had had chaired Medical Gases Committee meetings in which the storage and handling of liquid nitrogen had been discussed.

94. The Claimant also contended that there had been failures by Mr Marchant, and by Mr Tranter and Mr Holt, as Health and Safety Officers, and by the Quality and Safety Manager, in relation to the handling of liquid nitrogen.

95. The Claimant sated that the letter was written *"in finding informal resolution purpose only but if it is still not possible and the formal allegations against me is not change or dropped these formal complaints will be sent this week following All Wales Grievance Policy Procedures*". In cross-examination the

Claimant accepted that the letter was an attempt by the Claimant to avoid the disciplinary allegations. Mrs. Shillabeer responded to the Claimant on 19 May 2020 reiterating her position as set out in an earlier letter, that it was important that the disciplinary investigation concluded in order that the facts relating to the allegations against the Claimant could be established.

96. The Claimant sent a further letter to Mrs Shillabeer on 29 May 2020, which was contended by the Claimant to be a protected disclosure. That contained very much the same points as had been included in the Claimant's letter of 18 May 2020, but they were referred to as "*formal complaints*".

97. Mrs Shillabeer sent a response by letter dated 13 June 2020. She confirmed that fact finding investigations would be opened into all allegations raised against all the persons identified by the Claimant. She confirmed that Wayne Tannahill, Associate Director of Capital & Estates, would undertake those investigations, and he would report his findings to Pete Hopgood, Director of Finance & IT. She also confirmed that, upon the conclusion of Mr Baker's investigation into the Claimant's second grievance, a meeting would be held to consider all three grievances raised by the Claimant, i.e. those raised on 18 June 2019, 20 January 2020 and 29 May 2020.

98. Following the complaints from the Claimant, Ms Mallison considered that it was necessary to change the Disciplinary Officer in the Claimant's disciplinary investigation from Mr Marchant to Mr Hopgood, and she confirmed that by email on 16 June 2020.

99. Ms. Mallison also emailed Mr Tannahill on that date to confirm that he was required to conduct the fact-finding investigations into the allegations that the Claimant had raised. Notwithstanding that the Claimant's employment ended shortly after that, Mr Tannahill completed his fact-finding investigations in September 2020 and concluded that there were no cases to answer.

100. Mr. Hopgood first made contact with the Claimant on 23 June 2020 when he wrote to advise him that he would be replacing Mr Marchant as the Disciplining Officer. He then wrote to the Claimant again on 25 June 2020, repeating the disciplinary allegations against him, noting that an independent investigator had been appointed, and arranging a Skype meeting with her for 2 July 2020.

101. On the same day, Mr Hopgood undertook a further suspension risk assessment and concluded that the original risk had reduced as the investigation had started, and therefore that the Claimant could return to his substantive role.

102. However, on 23 June 2020, a Support Services Coordinator, conducting an audit of frozen food in Bronllys Hospital, had discovered out of date frozen food in a kitchen which was under the responsibility of Mrs Marsh who, in turn, reported to the Claimant.

103. Mr Creswell was informed of the issue and he went to the kitchens late on the afternoon of 23 June, to understand what had happened. He spoke to Mrs Marsh and requested the inspection logs from her. She produced the logbooks and it appeared that there were no records of checks on frozen food at Bronllys Hospital kitchen from September 2019 onwards. Mr Cresswell informed Mrs Marsh that the issue would be investigated.

104. Mr. Creswell had a meeting with Mrs Rowles on 24 June 2020 and they then conducted a suspension risk assessment for Mrs Marsh. They decided that they did not need to suspend her, and that she should be temporarily redeployed. Mr Cresswell met Mrs Marsh that day to inform her that a disciplinary investigation would take place and that she would be relocated. In the event, after a week Mrs Marsh commenced a period of sickness absence, and remained absent until she left on ill health retirement grounds.

105. Mr Cresswell also considered that it would be appropriate for the Claimant to be investigated for the out-of-date frozen food issue, as he had overall responsibility for the kitchen at Bronllys Hospital for most of the relevant time.

106. Mr. Hopgood was advised of the frozen food allegation on 25 June 2020. It was felt that the allegation was serious enough to warrant further exploration under the disciplinary procedure.

107. Mr. Hopgood had by then reviewed the Claimant's suspension and had considered that the Claimant could return to work. However, because of the new allegation he felt the Claimant should return to a different area whilst there was an investigation into the new allegation, because there could be a risk that he would interfere with the investigation. He concluded that the Claimant should be redeployed into a role within the Estates department at Bronllys. He confirmed the position regarding the suspension, the additional allegations relating to the frozen food, and the redeployment, to the Claimant in a telephone conversation on 25 June 2020, and confirmed that in a letter of the same date.

108. When Mr. Hopgood spoke with the Claimant via telephone on 25 June 2020, the Claimant requested that he put the information in writing, and stated that Mr Hopgood he should have given him written warning of the discussion. Mr. Hopgood explained that he was only following policy and advice and had wanted to inform the Claimant as soon as possible in person, via a phone call, of the new allegations, before following up in writing, to keep him fully informed.

109. The following day, 26 June 2020, the Claimant wrote to Mrs Shillabeer. He noted the events of the previous year or so and referred to his conversation with Mr Hopgood. He referred to the Respondent's "*actions and non-actions…as the last straw of making [his] role untenable*" and that due to what he stated had been a repudiatory breach of trust and confidence he was resigning with immediate effect.

110. The Claimant had however already secured a job in an English NHS Trust. He confirmed under cross-examination that he had been offered that post on 11 May 2020 and had accepted it on the same day. He also accepted that he had applied for that job some time earlier than that but could not remember precisely when. He confirmed that he had been able to speak to his new employer following his decision to resign from the Respondent with immediate effect, and started work for that new employer on 29 June 2020.

111. Mrs Shillabeer wrote to the Claimant on 30 June 2020 with her response. She noted that she was disappointed that the Claimant had felt it necessary to resign in advance of the Respondent being able to resolve his complaints internally, and she summarised the current status of the various investigations. The Claimant replied to Mrs Shillabeer the following day confirming that his resignation stood.

Conclusions

112. Applying our findings and the applicable legal principles to the issues we had to decide, our conclusions were as follows. Whilst the List of Issues, being an amalgamation of the issues identified separately in respect of the Claimant's three claims, was not entirely easy to follow, we used that as our framework and we refer to paragraph numbers in that List.

Public interest disclosure / "Whistleblowing"

113. Bearing in mind that the Respondent accepted that the Claimant's two emails of 7 and 20 December 2018 were protected disclosures, the first issue for us to address was set out in paragraph 8 of the List of Issues, and was whether any of the asserted detriments set out in that paragraph were made out. That involved us considering three matters in respect of each alleged detriment: whether it happened in fact; if it did, whether it amounted to a detriment; and if it did, whether it had been done on the ground of the Claimant's protected disclosures. Taking each of the seven asserted detriments in turn, our conclusions were as follows.

    (i) As a matter of fact, on 10 June 2019 the Respondent did remove line management duties for Mrs Farr and Mrs Davies from the Claimant. We were also satisfied, applying the Shamoon test, that that could be considered to be a detriment. However, we were not satisfied that what had happened had been on the ground that the Claimant had made protected disclosures.

    The evidence indicated that Mrs Rowles, the person who took the decision to remove the line management duties from the Claimant, was not aware of the two disclosures. In any event, the decision was taken in relation to the issues that had arisen regarding the Claimant's conduct, and acutely arose out of the complaints made against the Claimant by Mrs Farr and Mrs Davies, and we could see nothing which connected it to the Claimant's disclosures.

    (ii) This allegation fell very much into the same area as sub-paragraph (i).

Again, the Claimant was, as a matter of fact, relocated from Bronllys Hospital to Brecon Hospital, and we were again satisfied that that could be considered to have been a detriment. Again however, for the same reasons, we saw no connection between that decision and the Claimant's protected disclosures.

(iii) Again, this sub-paragraph falls very much into the same area as sub-paragraphs (i) and (ii). With regard to the removal of the access to the electronic staff records for three sites, the wording of the issue almost addresses the matter itself. It states that the removal of that access was in consequence of the Claimant's reduced management responsibility from five sites to two, and our view was that that was very much the case; the removal of access to the electronic staff records was done because the Claimant was, from that point, only managing staff at two sites and therefore had no need of access to the records of staff working at the other three sites. We could therefore see no connection of the removal of the access with the Claimant's disclosures.

We did not consider that the appointment of a site manager to manage Bronllys Hospital was a detriment to the Claimant. His management duties were confined to Ystradgynlais and Brecon at the time, and it was the removal of his responsibilities at Bronllys which was a potential detriment to him, and not the appointment of a site manager to that location. In any event, had we considered that the appointment of the site manager at Bronllys had been a detriment, we would again have found no connection of that to the Claimant's disclosures.

(iv) Again, as a matter of fact, other staff were allowed to occupy the Claimant's office at Bronllys, and his belongings were placed in a box. We did not, however, consider that this amounted to a detriment to the Claimant as he was not occupying that office and could have had no expectation that it would remain unoccupied whilst he was located elsewhere. The placement of his belongings in a box was for the protection of them and could not, in our view, be considered to be a detriment. However, in any event, we would not have considered that any detriment that may have arisen in this regard had had any connection to the Claimant's disclosures.

(v) Again, as a matter of fact, on 12 June 2019, the Respondent did instigate an investigation into the Claimant, and again, that was to the detriment of the Claimant. However, for the same reasons as applied in relation to our conclusion at sub-paragraph (i) above, we did not consider that the instigation of the investigation was on the ground of the Claimant's disclosures. Again, that decision was taken by Mrs Rowles, who had no knowledge of the Claimant's disclosures. Furthermore, the investigation was into matters which had been raised independently by other employees about the Claimant, and the Respondent commissioned investigations into other employees in relation to complaints raised by the Claimant himself.

(vi) The Respondent did not follow its Raising Concerns Policy in relation to the matters raised by the Claimant, but instead commissioned an investigation into those concerns, amongst other matters, which was undertaken by an independent HR consultant. We did not consider that dealing with the Claimant's concerns in that manner, as opposed to dealing with them under the Raising Concerns Policy, amounted to a detriment. In any event, had we considered that it did, the same reasoning in relation to the connection of that decision with the disclosures would have arisen, as it was a decision taken by Mrs Rowles, who, as we have already noted, was not aware of the Claimant's disclosures.

(vii) We were not satisfied that the precise wording of this sub-paragraph was made out in fact, as the Respondent did not exclude a witness statement from Mrs Collamazza, and she did speak to the investigator at the start of October 2019. We sensed however, that the Claimant's specific complaint was that evidence was not taken from Mrs Collamazza at the particular time during the investigation process. Having seen Mrs Collamazza's ultimate evidence however, we did not consider that this amounted to any form of detriment as the evidence provided by Mrs Collamazza to Ms Ashley had no bearing on the Claimant's concerns. We noted in any event that Ms Jones, in informing Mrs Collamazza in August 2019 that the investigator did not wish to speak with her, was only passing on the directions of that independent investigator. We would not therefore have concluded that, had any detriment arisen, it would have been on the ground of the Claimant's disclosures.

114. We then moved on to consider paragraphs 9 to 14 of the List of Issues, which required us to consider whether the Claimant's formal complaint to Mrs Shillabeer, by letter dated 29 May 2020, was a protected disclosure. In that regard, we were satisfied that the letter whilst worded fairly generally, did raise a health and safety issue, as the Claimant did refer to the management of liquid nitrogen putting users' lives in danger. We were also satisfied that that would have been in the public interest.

115. However, we needed to be satisfied not that a concern had been mentioned, but that that amounted to a disclosure which was reasonably believed by the Claimant to show that the health and safety of an individual was being or was likely to be endangered. In that regard, we noted that whilst the Claimant had been involved in communications surrounding the management of liquid nitrogen as far back as 2017, he had not seen fit to raise any concern with the Respondent about any deficiencies in the Respondent's policies and procedures, or in the management of liquid nitrogen generally, over the subsequent three year period.

116. In addition, the Claimant only wrote the letter when himself under investigation for concerns about the lack of training of porters in relation to the handling of liquid nitrogen. He specifically noted in his letter of 18 May 2020, which contained very much the same allegations about individuals in

relation to deficiencies in the management of liquid nitrogen, that he was writing to find informal resolution only, and that it would only be if that was not possible, and if the formal allegations against him were not changed or dropped, that the formal complaints would be sent.

117. In our view, whilst the Claimant may have had some concerns over the Respondent's approach to the management of liquid nitrogen, he did not reasonably believe that they amounted to an endangerment of health and safety. Had he done so, he would have raised them directly and openly, and not, as some form of leverage against the Respondent to be used to avoid the allegations he was facing. We did not therefore consider that the Claimant's letter of 29 May 2020 amounted to a protected disclosure.

118. Nevertheless, we moved on to consider the asserted detriments set out at paragraphs 25 to 27 of the List of Issues, noting that the Claimant had earlier made disclosures which the Respondent accepted were protected disclosures.

119. With regard to the asserted detriment at paragraph 25, as a matter of fact the Respondent did start investigation into new allegations against the Claimant concerning out of date frozen food on around 25 June 2020. We were also satisfied that the commencement of that investigation would have been to the detriment of the Claimant. We did not however, consider that there was any indication that the commencement of that investigation had been on the ground of the Claimant's protected disclosures, whether those made in December or, notwithstanding our view that it was not a protected disclosure, made in May.

120. The decision to instigate the investigation was undertaken by Mr Cresswell, who had had no involvement with the Claimant's earlier concerns raised in December 2019. Mr Cresswell also, at the same time, commissioned an investigation into Mrs Marsh, the other employee with potential responsibility for food storage.

121. With regard to the asserted detriment at paragraph 26, the decision to redeploy the Claimant pending the new investigation was part and parcel of the decision to commence it, and our conclusions were the same.

122. With regard to paragraph 27, again, as a matter-of-fact, the Respondent did instigate the disciplinary process without providing the Claimant with any advance notice. However, there would be no expectation, whether under the Respondent's own policies or under the ACAS Code of Practice, that an employer would provide an employee with advance notice that an investigation was to be commenced. We did not therefore consider that any detriment arose in that regard. Again, however, had we considered that it had, we would not have considered that it had any connection to any disclosures that the Claimant may have made.

<u>Direct discrimination</u>

123. The Claimant complained of several matters which he contended amounted

to less favourable treatment on the ground of either race, sex or both. We deal with each of those allegations in turn.

124. With regard to paragraph 31, the Claimant's line management responsibilities were removed and, similarly to our conclusions with regard to the protected disclosure claim that that amounted to a detriment, we considered that that amounted to unfavourable treatment of the Claimant.

125. However, for the purposes of the Claimant's direct discrimination claims we had to consider whether that treatment was less favourable than the Respondent would have afforded to an appropriate comparator. In that regard, for the purposes of the Claimant's race discrimination claim he compared his position with Mr Crawley, and in relation to his sex discrimination claim he compared his position with that of Mrs Farr and Mrs Davies. In neither case, did we consider that the comparisons were valid.

126. With regard to Mr Crawley, we saw no evidence that any formal complaint, or indeed anything beyond a minor concern, had been raised against him by the Claimant at any stage, and certainly he was not, at any stage, the subject of a disciplinary investigation. That contrasted with the Claimant, against whom formal complaints had been made, and in relation to which a disciplinary investigation had been commissioned. We did not therefore consider that the Claimant had been treated less favourably by reason of his race.

127. With regard to the sex discrimination claim, whilst the Claimant did raise formal allegations about the behaviour of Mrs Farr and Mrs Davies, that was in circumstances where he, as their manager, was complaining about them as employees who reported to him. That contrasted with Mrs Farr and Mrs Davies and the complaints they raised about the Claimant himself, as they were making complaints about their manager. Again therefore, we were not satisfied that that Mrs Farr and Mrs Davies were appropriate comparators to the Claimant.

128. In any event, to the extent that complaints were made by other employees about either Mrs Farr or Mrs Davies as managers, which, although not the Claimant's contention, would nevertheless have involved similar circumstances to those that applied in relation to the Claimant, the Respondent took very much the same action. The Claimant was removed from his line management of Mrs Farr and Mrs Davies when they complained about him, and Mrs Farr was removed from the line management of Mrs Marsh when she complained about her. Whilst there was a difference, in that the Claimant was required to confine his duties to two sites, whereas Mrs Farr stayed working at the same site, the intended outcome was the same in each case, i.e. that both ceased to manage the person who had made complaints against them whilst those complaints were being investigated. Again therefore, we saw no less favourable treatment of the Claimant in this regard on the ground of his sex.

129. We then considered the allegations of less favourable treatment set out in paragraph 34 of the List of Issues. Our conclusions in relation to the five

contended items of less favourable treatment were as follows.

(i) As a matter of fact the Respondent did decide to suspend the Claimant on around 13 May 2020, pending an investigation into allegations that the Claimant had put porters in danger in decanting liquid nitrogen without training. He contended that that amounted to less favourable treatment than that afforded to Mr Marchant, Ms Kendrick and Mr Tranter, whom he asserted all had responsibility for liquid nitrogen. However, Ms Kendrick, as Quality and Safety Manager, and Mr Tranter, as Health and Safety Officer, whilst having broad responsibility for health and safety matters within the workplace, had no specific responsibilities with regard to the management of liquid nitrogen.

Similarly, Mr Marchant, whilst having some involvement in discussions regarding liquid nitrogen, as the chair of the Medical Gas Governance Group, had no specific responsibility in relation to the management of risk around that issue.

By contrast, the Claimant had responsibility, as Facilities Manager, for ensuring that porters involved in the management of liquid nitrogen were properly trained and accredited. He had also provided assurances to the Respondent in relation to the monthly consideration of its Risk Register that training was in place when that was not in fact the case.

In our view, the circumstances of the Claimant and those of Mr Marchant, Ms Kendrick and Mr Tranter were materially different, and therefore the decision to suspend the Claimant did not amount to less favourable treatment of him on the ground of his race.

(ii) Again, as a matter of fact, the Claimant's badge, laptop and keys were taken from him, and he was not allowed to speak to any other employee during the investigation. The Claimant again compares himself with Mr Marchant, Ms Kendrick and Mr Tranter. However, they are even less able to be considered as appropriate comparators to the Claimant in relation to this allegation as, in addition to not having direct responsibility for the management of liquid nitrogen by porters, they were not suspended. The actions taken by the Respondent were simply a consequence of the decision to suspend the Claimant, and we again therefore did not consider that they amounted to less favourable treatment of the Claimant on the ground of his race.

(iii) As noted in relation to the Claimant's protected disclosure detriment claim, the Respondent did start an investigation into new allegations against the Claimant regarding out-of-date frozen food. In relation to this allegation, the Claimant relies on a hypothetical comparator. However, there was an actual comparator for the Claimant in relation to these allegations, Mrs Marsh. She was more directly involved in the management of frozen food than the Claimant, being involved in

the management of catering at the Bronllys site. An investigation was also commenced in relation to the frozen food issue in relation to her, and she was therefore treated in exactly the same way as the Claimant. In addition, there was no evidence to suggest that the Claimant, in his role as Facilities Manager, would have been treated any differently in this regard had he been white. We did not therefore consider that this allegation involved any less favourable treatment of the Claimant on the ground of his race.

(iv) This allegation was part and parcel of the third allegation, in that the decision to redeploy the Claimant arose out of the decision to commence the investigation. Again, the Claimant relied on a hypothetical comparator, but we saw nothing to suggest that the Claimant would have been treated any differently had he been white.

(v) As we have noted in relation to the Claimant's protected disclosure detriment claim, there was no obligation or expectation on the Respondent to provide advance notice to an employee that a disciplinary investigation was to be undertaken. We did not therefore consider that this allegation involved any unfavourable treatment of the Claimant, let alone any less favourable treatment.

However, we noted, in any event, that the Claimant compared himself with Mrs Marsh in relation to this allegation, stating that Mrs Marsh was given proper notice of an investigation. The only sense in which that was accurate was that Mrs Marsh had been in the presence of Mr Cresswell when he had first become concerned about the out of date food issue, and therefore would have been aware that it was something he viewed seriously. However, in relation to her being informed that a disciplinary investigation would be undertaken, Mrs Marsh was told about that without advance notice. The only difference between the Claimant and Mrs Marsh in that regard, was that Mrs Marsh was told in person, whereas the Claimant was told over the phone, but that was simply because Mrs Marsh was present on site, whereas the Claimant was at his home in Cornwall. Again therefore, we did not see that any less favourable treatment on the ground of the Claimant's race had arisen.

130. We then moved to consider the allegations of less favourable treatment set out at paragraphs 41 to 44 of the List of Issues.

131. With regard to paragraph 41, we were not satisfied that the Respondent had deliberately failed to advertise and fill the vacant position of Head of Facilities. The Respondent took the decision, in light of Mr Crawley's move, that it would do without a Head of Facilities. That was a decision which the Respondent was entirely in a position to make, and which meant that there was nothing to advertise and nothing to fill. No unfavourable treatment of the Claimant therefore arose in relation to this, let alone any less favourable treatment.

132. With regard to paragraph 42, the Claimant was indeed denied the

opportunity of attending the C2C meetings from 2018 onwards, but that arose in circumstances where both the Claimant and Mr Strefford, a white employee, were treated in identical fashion.

133. The Claimant asserts that his comparator in this regard should be Mr Morgan. Mr Morgan did in fact attend one C2C meeting, which the Claimant did not. However, that was only because the person administering the C2C meetings was unaware that any restrictions had been placed on Facilities Managers. When Mr Crawley became aware that Mr Morgan had attended he imposed a similar restriction on him, and Mr Cresswell, when he became aware of the issue, allowed both the Claimant and Mr Morgan to attend if they wished to do so. There was therefore no less favourable treatment of the Claimant by reason of his race.

134. With regard to paragraph 43, Mrs Davies was allowed to decline to attend her 1:1 meeting with the Claimant in January 2020. However, that was in circumstances where Mrs Davies was making it plainly clear that she was distressed by the prospect of meeting the Claimant in the circumstances that then applied of her still being under investigation in relation to allegations raised by the Claimant. In our view, this was an entirely reasonable and appropriate decision, which avoided the potential for further issues of concern arising for either Mrs Davies or for the Claimant himself. We did not therefore consider that there was any unfavourable treatment of the Claimant in this regard.

135. However, even if there was, there was no evidence to suggest that a white manager would have been treated any differently, i.e. that Mrs Davies would have been required to attend a 1:1 meeting with a white manager. We again therefore did not consider that there was any less favourable treatment of the Claimant in this regard by reason of his race.

136. With regard to paragraph 44, the Claimant appeared to be looking to compare his treatment in June 2019, when he was required to relocate to Brecon, with Mrs Davies's position in January 2020, when she was allowed to choose whether or not to relocate to Llanidloes. We were not satisfied that the two sets of circumstances were comparable, bearing in mind that they occurred some six months apart. Regardless of that however, Mrs Davies' position in January 2020 was materially different to the Claimant's position in June 2019. She was faced with working with a manager who had raised complaints about her, which was not the Claimant's position in June 2019. Again therefore, we were not satisfied that this allegation amounted to less favourable treatment of the Claimant on the ground of his race.

137. The Claimant also raised those last two matters, i.e. the ability for Mrs Davies to decline to attend her 1:1 meeting, and the Claimant's lack of an ability to choose whether to relocate or not, as assertions of direct sex discrimination, the comparator again being a hypothetical comparator in relation to the former allegation, and Mrs Davies in relation to the latter allegation. For the same reasons as we considered in relation to the race discrimination claims, we did not consider that these allegations involve less

favourable treatment on the grounds of the Claimant's sex. We did not consider that the circumstances of comparison were appropriate, but, in any event, we did not consider that they involved unfavourable treatment or any comparatively less favourable treatment.

Victimisation

138. We noted that the Respondent accepted that the Claimant had done protected acts in the form of his emails of 7 and 20 December 2018, and his first tribunal claim commenced in August 2019. The initially asserted detriments were those set out in paragraph 8 as detriments relating to the Claimant's protected disclosures. For exactly the same reasons as we set out in relation to the claims when considered as protected disclosure detriments, we did not consider that any of the asserted detriments amounted to victimisation because of any or all of the Claimant's protected acts.

139. The other detriments contended to amount to victimisation under paragraphs 63 to 66 were identical to the Claimant's allegations of less favourable treatment on the ground of race set out at paragraphs 34(i) and 34(ii) and the complaints of detrimental treatment on the ground of protected disclosures set out at paragraphs 25, 26 and 27. Again, for the same reasons as we considered meant that the allegations did not give rise to less favourable or detrimental treatment when considered in respect of those claims, we formed the same view in relation to the Claimant's victimisation claim. We did not consider that any of the matters contended involved detrimental treatment because of any or all of the Claimant's protected acts.

Constructive unfair dismissal

140. With regard to the ten sub-paragraphs of paragraph 71, which the Claimant contended amounted to a breach of the implied term of trust and confidence, we concluded as follows.

(i) We did not consider that the Respondent had, in any sense, delayed resolving investigations into the Claimant's grievances for some 12 months. They had indeed taken 12 months, whereas the Respondent's policy suggested that grievances would be concluded within a matter of some six weeks. However, due to the matters that required investigation, it was always likely that considerably longer than that would be required. In addition, a delay of about two months arose at the end of 2019, due to the ill-health of the investigator, and significant delays arose due to the Claimant's submission of his second grievance in January 2020, a week before the grievance hearing was intended to take place. Discussions ensued between the Claimant and Ms Mallison over the subsequent six weeks as to the scope of the investigation into the second grievance, and there was then a gap of a further two months when a reply was awaited from the Claimant, and the Claimant did not then participate with the

investigation following his suspension in May 2020.

(ii) We did not consider that Mrs Shillabeer failed to respond to the Claimant's request for a different investigator. She clearly did respond, but simply did not accede to that request and we did not consider that anything unreasonable arose in that regard.

(iii) As we have noted, Ms Mallison did deny the Claimant's request for a copy of a transcript of the meeting between Mr Cayetano and Ms Ashley. However, that was because that meeting took place as part of the disciplinary investigations in relation to Mrs Farr and Mrs Davies and not as part of the Claimant's grievance. He therefore had no entitlement to sight of that transcript, and it was not unreasonable for the Respondent to deny his request.

(iv) - (vii) All these did happen in fact, but, for the same reasons as informed our conclusions that those events did not amount to detrimental or less favourable treatment, we did not consider that the Respondent acted unreasonably in relation to any of them.

(viii) - (x) These needed to be taken together. Whilst the Claimant's policy did anticipate that an employee's representative would be involved in a decision to redeploy the employee as an alternative to suspension, we noted that that information was provided to the Claimant by Mr Hopgood in a telephone conversation in which Mr Hopgood informed the Claimant first that his suspension in relation to the liquid nitrogen investigation was to be lifted, but also informed him that an investigation into the frozen food allegation would be undertaken. He then informed him that, as a result of that, redeployment was to be required. In the circumstances, bearing in mind that the Claimant was not at work and was, in fact, at home, a considerable distance away from his place of work, we did not consider that the Respondent acted unreasonably.

141. Overall therefore, we did not consider that the Respondent had behaved in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the two parties.

142. In any event however, we did not consider that the Claimant resigned in response to any such breach. As we have noted, he had accepted his position with his new employer in early May 2020, having applied for that job some weeks before that. In our view, it was not a matter of if the Claimant was going to leave the Respondent, it was only a matter of when, and the Claimant had made his decision to leave some way before what he contended to be the last straw on 25 June 2020.

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Employment Judge S Jenkins
Date: 16 August 2022

REASONS SENT TO THE PARTIES ON 18 August 2022

FOR THE TRIBUNAL OFFICE Mr N Roche