EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Smith	v	Wren Kitchens Limited

Heard at: Sheffield (by CVP) **On**: 15, 16, 17, 18 and 19 August 2022

Before: Employment Judge A James
Ms L Anderson-Coe
Ms J Noble

Representation

For the Claimant: In person

For the Respondent: Mr A Willoughby, counsel

JUDGMENT

(1) The claim for unfair dismissal (s.94 Employment Rights Act 1996) is not upheld and is dismissed.
(2) The claim for whistle-blowing dismissal (s.103A Employment Rights Act 1996) is not upheld and is dismissed.
(3) The claims for whistle-blowing detriment (s.47B Employment Rights Act 1996) are not upheld and are dismissed.

REASONS

The issues

1 The agreed issues which the Tribunal had to determine are set out in Annex A.

The proceedings

2 The claimant commenced Acas Early Conciliation on 25 January 2022. That was concluded on 27 January. The claim form was issued on 29 January 2022. The response form was submitted on 28 February 2022.

3 A preliminary hearing for case management purposes took place on 6 April 2022 before Employment Judge Miller, at which this hearing was arranged. The issues were identified and case management orders were made.

The hearing

4 The hearing took place over five days. Evidence and submissions on liability were dealt with on the first four days. It was arranged that, on the fifth day, the Tribunal would give its decision and reasons and, if the claimant was successful, would go on to deal with remedy. In light of the decision on liability, no remedy issues arise. The respondent did however make an application for costs. A separate judgment has been issued in relation to that application.

5 The Tribunal heard evidence from the claimant; and from Joshua Batson, former Junior 3D Artist, and Daniel Woodcock, Software Test Analyst. For the respondent, the Tribunal heard evidence from Molly Melia, HR Advisor; Alex Willoughby, Head of IT Infrastructure; Conor Laville, IT Director; Nicholas Finch, 3D Artist Team Lead; and Rowena Ramage, HR Business Partner. A witness statement was provided from Stephen Hodges, Head of Software Development who was not able to attend the hearing as he was on annual leave. We refer to Mr Batson's evidence in the fact findings below. Mr Woodcock did not join the employment of the respondent until three months after the claimant had been dismissed. Whilst the Tribunal does, appreciate the effort made by Mr Woodcock to make himself available for cross-examination at the hearing, the Tribunal did not consider his evidence of any material assistance in relation to the actual issues before the Tribunal. Hence no reference is made to Mr Woodcock's evidence below.

6 There was an agreed trial bundle of 692 pages. The claimant produced a supplementary bundle containing 35 pages. Whilst that bundle was not agreed, Mr Willoughby did not object to it being put before the Tribunal on the basis that the Tribunal would only look at documents in that bundle referred to during the hearing. Further, the respondent's witnesses could comment on the bundle in evidence in chief if required and if any comments on those documents took the respondent by surprise, the claimant could be recalled to give evidence on the point. In the event, that was not necessary.

7 Since he represented himself at the hearing, the Judge explained to the claimant at the outset of the hearing, and at regular intervals thereafter, the procedure that would be adopted during the hearing. The claimant was encouraged to ask any questions, at any stage, if he did not understand what was happening during the hearing. Considerable latitude was given to the claimant, in relation to the presentation of evidence by himself and his witnesses. For example, Mr Batson was allowed to refer to a document in the supplementary bundle, even though the Tribunal had not been referred to that document in his evidence in chief. In relation to the questions asked by the claimant in cross examination, the Tribunal did not find most of the questions relevant to the issues. Whilst the Judge did try to keep interventions to a minimum, it was nevertheless necessary, in fairness to the respondent, to ask the claimant to move on to a new line of questioning on a number of occasions, on the basis that the questions being asked were not relevant to the issues

before the Tribunal and the answers to those questions were not therefore going to assist the Tribunal to determine those issues.

Findings of fact

Commencement of employment

8 The claimant started work for the respondent on 1 May 2018. He was employed as a 3D Artist. His place of employment was the respondent's head office, located in Barton-upon-Humber.

9 The Respondent is a privately owned UK designer, manufacturer and retailer of kitchens. It has showrooms across the UK and employs over eight thousand people.

Contract of employment

10 The contract of employment which was signed by the claimant on 20 August 2021 contains the following terms.

11 Clause 9 – 'Rules':

> *You are required at all times to comply with our rules, policies and procedures in force from time to time including those contained in the Employee Handbook. A copy of the Handbook will be issued to you during your onboarding/induction and further copies will be available from the HR Department.*

12 Clause 10 – Holidays

> *Your holiday dates must be agreed at least four weeks in advance with us. No more than 10 days' holiday may be taken at any one time in any 8 week period unless prior consent is obtained from your Line Manager. We may require you to take (or not to take) holiday on particular dates, including during your notice period. …*
>
> *You cannot carry forward untaken holiday from one holiday year to the following holiday year unless you have been prevented from taking it in the relevant holiday year by one of the following: a period of sickness absence or statutory maternity leave, paternity, adoption, parental or shared parental leave. In cases of sickness absence, carry-over is limited to four weeks' holiday per year less any leave taken during the holiday year that has just ended.*

13 Clause 13 – notice period

> *We shall be entitled to dismiss you at any time without notice or payment in lieu of notice if we have a reasonable belief that you have committed a serious breach of your obligations as an employee, or if you cease to be entitled to work in the United Kingdom.*

The 'Term sheet' attached to the contract confirms that the notice entitlement of the claimant, after the end of his probationary period and up to the completion of four years employment, was one month's notice.

14 Clause 17:

> *Your attention is drawn to the disciplinary and grievance procedures applicable to your employment, which are contained in the Employee*

Handbook. These procedures do not form part of your contract of employment….

We reserve the right to suspend you for no longer than is necessary to investigate any allegation of misconduct or neglect against you or so long as is otherwise reasonable while any disciplinary procedure against you is outstanding.

15 Clause 31 – other terms of employment:

31.1 Observe Site Rules: You must at all times observe and comply with Site rules and procedures which are located and displayed around the building. In particular, you must at all times ensure that you: only enter the Company's premises through the designated areas and keep to the designated walkways; scan in and out using the Company's time and attendance system; and register vehicles for the relevant car parks.

16 The Disciplinary Rules applicable to the claimant's contract include the following examples of gross misconduct:

- Theft, or unauthorised removal of our property or the property of an employee, contractor, supplied, customer or member of the public;

- Unacceptable use of obscene or abusive language (including language of a discriminatory nature) or other unacceptably offensive or inappropriate behaviour

- Repeated or serious disobedience of instructions, or other serious acts of insubordination; and

- Serious neglect of duties, or a serious or deliberate breach of your employment contract or operating procedures.

Covid lockdown

17 In March 2020, the first Covid lockdown commenced. The claimant was furloughed until May 2020. He was asked by Mr Hodges if he would be happy to return to a small skeleton crew/team and continue working on a specific project he had been tasked with. On his return, the claimant had some concerns about the safety of himself and other staff, due to the close proximity of the staff to each other. The claimant had some concerns about the potential impact on the health of his grandparents, who he was living with at the time, if he contracted Covid. His grandparents were self isolating, and his grandmother in particular was considered to be vulnerable, due to a chronic obstructive pulmonary disease. He did not raise those concerns with management at the time.

18 At the time of the first lockdown, the claimant was in a relationship with a woman who is based in Texas, USA. Their relationship ended not long afterwards.

Emails from the claimant's ex-partner

19 On 6 October 2020 the respondent received an email from the claimant's ex-partner. The email contained the following allegation:

> *I can attest that on multiple occasions Adam Smith has voiced his dissatisfaction with working for Wren Kitchens and has claimed that when he quits he will take all of the content he has created for the*

> *company and sell it for his own personal gain. He has also threatened to delete the code he has created for the company once he leaves in order to sabotage his colleagues. Adam Smith has also admitted to me that he uses company time and equipment to work on personal projects unrelated to his work for Wren Kitchens.*

20 The email also contained alleged threatening and abusive comments by the claimant, although the veracity of those comments is disputed. Rowena Ramage and Owen Jackson discussed the matter with the claimant during an investigatory interview on 27 October 2020. The purpose of the investigation was to discuss the allegations that the claimant had made inappropriate comments regarding the business and the removal of confidential business information should he resign from his position. The other alleged comments were not discussed. The claimant was sent a copy of the minutes of the meeting, which he signed to confirm they were a true and accurate reflection of the meeting.

21 On 29 October 2020, a letter was sent to the claimant confirming that no formal action would be taken in relation to the email. Ms Ramage was satisfied that the claimant had been open and transparent during the meeting. The claimant was advised that his manager would have an informal conversation with him regarding the use of the company's branded images on his personal portfolio without permission.

22 A further email was received by the respondent from the claimant's ex-partner on 4 November 2020. Ms Ramage took the view that whilst the email sent by Mr Smith to Ms Garcia was written in an unpleasant tone and used vulgar language, this was not related to his employment with the respondent. Therefore it was decided that no further action needed to be taken about it by the respondent. The Tribunal accepts the evidence of Mr Hodges, Ms Melia, Mr Finch, Mr Willoughby and Mr Laville that Ms Garcia's emails were not forwarded to them at any stage during the claimant's employment.

Family bereavement

23 In November 2020 the claimant's grandmother died of Covid-19 related causes. The claimant suffered a grief reaction and his mental health suffered. He obtained a fit note confirming that he was not fit for work for two weeks. After he returned to work, he broke down during a conversation with Matthew Jones and Nicholas Finch in a private area. The claimant was subsequently absent from work due to ill health from 10 December 2020.

Email requesting furlough

24 On 27 January 2021, Owen Jackson emailed Ms Ramage, stating that the claimant had returned to work on the Monday and Tuesday of that week but had not turned up for work on the Wednesday. Instead, he sent a message asking to go on furlough. The claimant's message read:

> *I want HR to furlough me please. That office is not safe. The AC is on. it's not supposed to be - people are breaking government guidelines constantly.*
>
> *Two people are leaving because they morally can't work for the company. I'm having panic attacks when I get home I don't want to pass Covid on to my mum and step father and lose more people in my family.*

The claimant's request to be placed on furlough was declined, because there was still a business requirement for his role to be carried out. In those circumstances furlough was not applicable.

25 Ms Ramage met with the claimant on 29 January 2021. During the meeting, Ms Ramage explained the measures being taken by the respondent to protect the health of staff. She shared with him the risk assessment carried out by the respondent. The advice from HSE was that the risk of air conditioning spreading the coronavirus was extremely low, where a fresh air supply is used. Ms Ramage explained to the claimant why he could not lawfully be furloughed.

26 It was apparent to Ms Ramage during the conversation that the claimant was still feeling the effects of grief. So she subsequently sent an email to the claimant attaching a leaflet regarding occupational health, and providing web page addresses for various support organisations including the Samaritans, Mind and the NHS Mental Health Helpline.

27 It is the claimant's case that he shared photographs, which he had taken on 29 January 2021, with Ms Ramage at that meeting. The Tribunal was provided with copies of those images, as part of the bundle. The claimant alleges that they show that the Covid regulations were being breached. On the balance of probabilities the Tribunal finds that those images were not shared with Ms Ramage. We found Ms Ramage's evidence in relation to the issues before us to be more reliable than that of the claimant. On the balance of probabilities, the Tribunal concludes that had those images been shared, the claimant would have sent those images by email to Ms Ramage so there would have been a record of that. The images were shared with the respondent on 24 September 2021, when they were attached to the email of that date to Ms Ramage (see below). The Tribunal therefore concludes that had they been discussed at the meeting, they would have been emailed to Ms Ramage. Further, we consider that Ms Ramage would have referred to the photographs in her email of 29 January 2021. Yet further, this fact would have been included in the claimant's witness statement, rather than being raised 'on the hoof', at this hearing.

Return to work – 1 March 2021

28 The claimant returned to work on 1 March 2021. In March 2021, Owen Jackson, who at that stage was the claimant's line manager, left the business. Nicholas Finch became the Senior 3D artist in the team and the line manager of Mr Smith and his colleagues in that team.

29 On 19 March 2021, Mr Hodges spoke with the claimant about his working hours. He subsequently sent an email confirming that if the claimant was taking a 30-minute lunch break each day, he needed to be on site for eight hours 30 minutes e.g. between 09.00 and 17.30 or 08.30 and 17.00.

First disciplinary investigation – 26 March 2021

30 On 26 March 2021, Samuel Nixon emailed Mr Hodges regarding concerns about the claimant. The email stated:

> *I've got concerns about the work Adam Smith is producing and his time logging.*
>
> *The first problem is the time logging. This is something that despite multiple attempts to get him on board with, he doesn't do. Recently he has started*

logging 8h exactly onto one development task which as we all know is not accurate (I'm not sure he's done an 8-hour day in the office in weeks).

I'm also worried about what he is actually working on. Every day this week his update in standup has been that he is working on TDA-6112.

31 Mr Nixon also provided Mr Hodges with a copy of messages which had been sent by the claimant to Mr Nixon when he had enquired about the progress of a task and the time allocated against it. In that email, the claimant said to Mr Nixon: "*corporate clinical Sam, you seem to have found some creativity in your reply I'd have thrown a little assonance in there*". This was considered by Mr Hodges as unprofessional and disrespectful behaviour towards a colleague.

32 Also on 26 March 2021, Mr Finch emailed Mr Hodges, raising the following concerns:

- *Consistently late, doesn't do the daily hours required.*
- *Doesn't Log Time or Scan in in the morning or evening.*
- *Takes unnecessary breaks to the Photography studio, Smoking Shelter or general wondering around the office, some times venturing off for an hour.*
- *Not a team player, doesn't review work or follows the basic work procedures.*
- *Disrespectful and Disrupting to the team, constantly distracting others and there work (sic)*
- *Attitude towards others, does not take constructive criticism or authority well.*
- *Dramatic inconsistency in work dependent on whether he enjoys it or not.*

33 On 26 March 2021, an investigatory hearing was conducted by Mr Hodges regarding allegations of gross misconduct by the claimant. No warning appears to have been given to the claimant that he was being asked to attend an investigation meeting. Assuming that is the case, the Tribunal has some concerns in relation to that; and the respondent may wish to consider this for future hearings. Ultimately however, the claimant was, as set out below, told what the allegations were against him; and he had an opportunity to answer those allegations. The notes confirm that the claimant was happy to proceed. They also show that the claimant did not raise any Covid-related concerns during the meeting. Those notes were subsequently provided to the claimant, and he signed to accept them as a correct record.

34 Mr Hodges considered that there was a case to answer. Therefore, on 29 March 2021, the claimant was invited to attend a disciplinary hearing to consider four allegations of potential gross misconduct, namely:

- *Repeatedly arriving to work late and leaving early, after having several conversations regarding your timekeeping;*
- *Failing to consistently use the face scanners;*
- *Falsifying your time logs by failing to record your daily tasks accurately;*
- *Logging an unreasonable amount of time against tickets, resulting in a false view of your working time.*

Included with the letter were documents relating to those allegations.

Further sickness absence

35 The claimant subsequently commenced a period of sickness absence on 30 March 2021 for anxiety and stress.

36 The claimant stated during the Employment Tribunal preliminary hearing on 6 April 2022 that he had raised allegations about alleged breaches of Covid Regulations in March 2021 in an email to Ms Ramage and Owen Jackson; and that he informed Mr Finch and Mr Hodges he had sent that email. The claimant accepted during this hearing that the email he is referring to was sent on 24 September 2021. The contents of that email are discussed further below.

Return to work – August 2021

37 The claimant returned to work on 16 August 2021. A return to work plan was put in place. That followed a discussion about the plan with the claimant on 2 August, and an email on 6 August confirming the content of the plan. That stated:

> *As discussed, we require you to work from the office initially, after 4 weeks, Nicholas will review this and see if you working from home would be an option. In the review, Nicholas will meet with you to see how you are doing, see if you have achieved certain tasks set by Nicholas and see if your timekeeping has improved.*

38 Following his return to work, the claimant was provided with a laptop. As the above email demonstrated however, the respondent's position was that the question of home working would be reviewed after four weeks. The issuing of a laptop did not show that agreement to home working was inevitable.

39 The claimant alleges that colleagues were told not to speak to him on his return to work. The Tribunal prefers the evidence of Mr Finch on this point. Mr Finch's evidence was that far from instructing three members of staff not to speak to the claimant on his return from sick leave, he and other members of the team made reasonable efforts to ensure Mr Smith was reintegrated into the team on his return to work. Mr Batson's evidence was that the instruction to 'ignore' the claimant was given to him by Mr Finch on 9 September 2021. He told Rowena Ramage during her grievance investigation, on 4 November 2021 (see below), that he had been told not to engage in conversation with the claimant by Mr Finch. He told Ms Ramage:

> *Nick told me I believe it was because Adam was working remotely for the first time and if I recall that was the last time I saw him.*

40 The claimant was in fact at work on 9 September (see page 370), not working remotely. So Mr Batson would have seen him on that day. The claimant was not at work on 10 September as he was off sick. The last day the claimant was in the office was actually 16 September. At no stage was the claimant given permission to work from home. On the balance of probabilities therefore, bearing in mind the content of the notes of the interview with Mr Batson on 4 November, the Tribunal finds that Mr Batson's recollection as to the date is mistaken. The Tribunal finds that the instruction was given on 17 September, after the claimant had been suspended.

41 The Tribunal has noted that Mr Batson did not formally agree the notes. He was however given a reasonable opportunity by Ms Ramage, to set out how he felt they were inaccurate. He was told on 8 November:

Should you feel that the notes are not an accurate representation of the meeting, by all means you can note your thoughts on a separate document, and I will ensure that it is kept along with the original copy of the notes.

Mr Batson declined the opportunity to do so.

42 Due to his lengthy sickness absence, the claimant still had 17 days annual leave to take, on his return to work. The respondent's holiday year runs from 1 October to the end of September. It is not the respondent's usual practice to allow holiday to be carried over from one year to the next. But Mr Finch arranged with HR that, given the claimant's sickness absence, he would be allowed to carry over 7 days into the next holiday year. He authorised 10 days leave during August and September, when team capacity allowed.

43 In a text conversation on 29 August 2021, Mr Finch confirmed to the claimant:

Hey mate, just had a look at the calendar and what's coming in, I have had to reject some of those unfortunately, namely the ones during the second and third weeks of September In the middle, i have kept the book ended dates (Mondays and Fridays) off for you but with the amount of work coming in I need you in the office to help assist during the mid weeks, 4 days I have declined so you still have 2/3rds off that you asked for.

44 The Tribunal accepts that this message is slightly confusing. However, the holiday days which Mr Finch had rejected were confirmed in an email sent to the claimant on 30 August 2021. That email specifically confirmed that the claimant's request for leave on 6, 7, 17 and 20 September 2021 had been refused. That email also flagged continuing concerns about the claimant not arriving at work on time; that he should arrive at work before 9.00 am; and complete his contractual working hours each day (8.5 hours, including a 30 minute lunch break).

<u>First disciplinary hearing – 9 September 2021</u>

45 On 7 September 2021, the claimant was informed by letter, delivered by hand, that there would be a formal disciplinary hearing on 9 September 2021 to discuss the allegations set out in the letter of 29 March 2021. The hearing duly took place on 9 September and was conducted by Tom Dibb, Head of IT Services. The claimant admitted to the allegations. The claimant states in his witness statement (paragraph 47) that he had been told by Mr Finch that if he just accepted the allegations he would be left alone. The Tribunal rejects the claimant's evidence in that regard, which it does not find to be reliable. The clamant did not in any event put this allegation to Mr Finch during cross examination. Further, the claimant signed the notes of the meeting confirming that he agreed they were a correct record.

46 The claimant was told at the conclusion of the hearing that he would be given a Final Written Warning. He was sent a copy of the Final Written Warning (FWW) on 10 September 2021. The warning was to remain live for a period of 12 months. The reasons given for the warning were that the claimant:

Repeatedly arrived late for work and leaving early, after having a number of conversations and informal warnings regarding his time keeping;

Failed to use the face scanners;

Falsifying time logs by failing to record his daily tasks accurately

Logging an unreasonable amount of time against the task tickets, resulting in a false view of his working time.

47 As noted above the claimant was absent from work on 10 September 2021. Mr Finch was notified of his pending absence the evening before.

16 September 2021 incident

48 On the afternoon of 16 September 2021, Ms Ramage was sent an email by Mr Hodges, setting out continuing concerns about the claimant's time management and apparent continuing failure to arrive at work on time and fulfil his contractual hours. Records were provided for the period 23 August to 16 September 2021. The records showed that on none of the days had the claimant arrived before 9.00 am; and on all but two days he had worked less than 8.5 hours. Mr Hodges sought support from HR as to how best to address this continuing issue, given that identical behaviour had resulted in the issuing of the FWW.

49 Also on 16 September 2021 an incident occurred between the claimant and Steve Hodges. Towards the end of the day, Mr Hodges had informed the claimant that he would not be allowed to work from home, due to the continuing issues with his timekeeping and logging of working time. The claimant was upset at being notified of this since he had hoped that working from home would be agreed. He expressed his dissatisfaction to Mr Hodges who said words to the effect that it appeared that they were 'at a stalemate'.

50 The claimant placed his work laptop in his bag. He subsequently entered a meeting room, without invitation, in which Mr Hodges and Mr Finch were discussing various management issues, including the refusal to allow the claimant to work from home. The claimant stated in an aggressive tone to Mr Finch, while aggressively indicating towards Mr Hodges, words to the effect of: '*Nicholas I've got my laptop in my bag, tell this idiot I'm working from home*'.

51 Prior to company equipment being taken from site, two forms are provided to an employee and counter signed by a manager with sufficient authority. The first is a 'receipt of company property agreement' which lists the equipment issued and the employee's responsibilities regarding the equipment. The second is a 'removal of items from site form', which remains with the equipment and is checked by security on exit from the respondent's premises. Neither of those documents had been issued to the claimant. He did not therefore have permission to remove the laptop from the respondent's premises.

Failure to attend work – 17 September 2021

52 The claimant did not attend work on 17 September. The claimant states in his witness statement that he thought he was on holiday; but that is inconsistent with the words used by him on 16 September that he would be working from home. It is also inconsistent with the contents of the email of 30 August.

53 On 17 September a telephone call took place between the claimant and Mr Finch. During that conversation, the claimant is alleged by Mr Finch to have referred to Mr Hodges as 'a prick'. In an email sent by Mr Finch on 22 September 2021 to HR, he confirmed that word was used. At this hearing, the claimant denied referring to Mr Hodges as 'a prick'. In his witness statement,

(CWS56) he argues that such a word is '*not in his vocabulary*'. However, during the investigation meeting on 22 September 2021, just five days after that conversation, the claimant told Ms Melia, '*he genuinely could not remember*' if he had used that word. The Tribunal concludes that the claimant did refer to Mr Hodges as 'a prick'. Given the inconsistencies in his evidence, the tribunal finds more reliable the evidence of Mr Finch, which is backed up by an email sent a few days later. The Tribunal notes in passing that specific reference to the use of that word is not made in section of the dismissal decision letter setting out the reasons for the decision. It is not readily apparent therefore that the respondent relied on the use of that word when deciding to dismiss the claimant.

54 On 17 September 2021, Jamie Bastow sent an email to Ms Ramage regarding the incident on 16 September 2021. The email confirmed:

> *I saw Adam Smith approaching the meeting room door, which is nothing out of the ordinary, but my attention was soon drawn to him when he started speaking in a raised voice. As it was very quiet in the main office and Adam didn't actually enter the meeting room, he merely opened the door, I could clearly hear what he was shouting. It was "I am taking my laptop and you can tell this idiot I'm working from home tomorrow". During this exchange, he gesticulated towards Stephen in a threatening manner when using the word "Idiot" which really focused my attention even further to the point that I was completely ignoring Bryony in case I needed to step in should Adam have escalated things even further. Fortunately, he didn't, and Adam then marched off and Stephen (clearly a little shellshocked by what had just happened) followed soon after. Initially it was looking like he was trying to catch Adam before he left, but Adam moved quite swiftly and Stephen stopped at the IT Services desks.*

Suspension of the claimant – 17 September 2021

55 On 17 September 2021 the claimant was suspended. Attempts were made by the respondent to serve the suspension letter personally on Mr Smith, in line with their usual practice. When those efforts failed, the letter was sent to the claimant's personal email address instead.

56 The suspension letter confirmed a number of allegations of potential gross misconduct. The claimant was instructed not to contact other employees of the respondent, without seeking permission first from the respondent. Correspondingly, other team members were instructed by Mr Finch not to communicate about work matters with the claimant. They were told that if they were approached by the claimant, they should direct those queries to Mr Finch. For the reasons set out above, we have rejected Mr Batson's evidence that this instruction was given on 9 September.

Investigatory meeting – 22 September 2021

57 The claimant was invited to attend an investigatory meeting into the allegations. That meeting was chaired by Molly Melia, HR Adviser and took place on 22 September 2021. The claimant attended and the allegations were discussed. The claimant accepted he was still turning up to work 5 to 10 minutes late following the issue of the FWW; he accepted he had called Mr Hodges 'an idiot' (but denied that the use of that word was offensive in the context in which it was used); and he accepted he did not have authorisation

to take the laptop off site (although he also argued he did not know the procedure to obtain authorisation). As noted above, in relation to the allegation that the claimant referred to Mr Hodges as 'a prick' on 17 September, the claimant stated: '*I genuinely cannot remember*'.

58 Ms Melia concluded that there was a case to answer. She produced notes of the meeting which were sent to the claimant to agree. The notes record, and the Tribunal accepts, that the claimant indicated his agreement to the notes by email.

Appeal against FWW

59 On 23 September 2021 the claimant emailed Ms Ramage to say that he wanted to appeal against the decision to issue him with a Final Written Warning. The request was considered by Ms Ramage. The claimant was told that the timescale for an appeal was five days, and that had lapsed. The claimant argued in response that the letter was sent to the wrong address and that he had already advised Mr Dibb of his wish to appeal on 10 September in an email to him. The address was however, the one the company had for the claimant and the one on his fit notes. The respondent had not been informed of any change to that address. Ms Ramage decided in those circumstances to deal with the appeal in writing.

24 September 2021 email – alleged whistle-blowing

60 On 24 September 2021, the claimant sent an email to Ms Ramage attaching a zip file. The covering email alleged that the disciplinary allegations against him were for reasons other than lateness. He stated:

> *This is not just to do with regards to lateness but my stance towards his agenda for vocally speaking and raising the concerns I have regarding my welfare, salaries, title, and responsibilities and his clear favoritism for other teams and members of staff. This all started with the comment I made to Sam Nixon (Corporate Clinical Sam) and now I am having to face the repercussions of making my opinions known of how I am treated at the workplace for whistleblowing. I feel the focal point of my lateness has been formed as a reasonable excuse to discipline me to keep me in line. As I thought accepting the discipline would relieve the pressures from higher management to leave me alone, that I had learned my lesson and I was put back in line.*

61 The email did not specifically allege that the claimant was being bullied by Mr Nixon and Mr Finch. The email does however say:

> *For whatever reason, at the time Sam Nixon felt he had to bullishly try and dominate the situation and authenticate his new position as BA (Business Analyst) falsely correcting me in a demeaning tone on Microsoft teams.*

62 There was no mention of bullying by Mr Finch. In contrast the email does state:

> *I'm very tired and exhausted being vindicated with the inability to work from home like the rest of my colleagues because of this discrimination which Stephan Hodges exudes towards me, unsurprisingly I am aware he doesn't like me because of how difficult I may seem in this portrayal. I would like to be treated as equal to the rest of my colleagues and have the ability to work from home with the tasked responsibilities to be reflected in my salary fairly as discussed, to also not be told I am an appreciated member of staff and a*

valued employee to then later be asked to leave and bullied of the business three days later. I believe Stephen Hodges is fully aware of the mind games he is playing as he thinks is now at a "stalemate" I expressed to him personally how this has affected my mental wellbeing, unequivocally I feel he had no empathy for me and wants me just to leave. I put forward the question why would anyone like to come to a workplace where they don't no longer feel part of.

63 Nor is any specific reference made in the email of 24 September to the claimant raising protected disclosures about alleged breaches of the Covid regulations. Attached to the email were photographs showing the layout of the office and people sitting or standing next to each other. The photographs are dated 29 January 2021. Finally, no suggestion is made in the claimant's email that managers were biased against him because of the contents of the emails sent to the respondent by his ex-partner in October and November 2020.

64 The Tribunal finds that the claimant did not at any stage raise with Mr Willoughby, or Mr Laville, any concerns regarding alleged breach of Covid regulations in relation to him, or by other members of staff. Nor did the claimant raise such matters with Mr Finch. During cross examination, Mr Finch was taken by the claimant to page 364, in which he stated in a text conversation that he was: '*off work currently for stresses and anxiety caused [by] being [in] the office*'. The claimant argued that should have put Mr Finch on notice of his Covid related concerns. Mr Finch disagreed. Understandably so, in the Tribunal's judgment, since those words were in no way sufficient to alert Mr Finch that the claimant felt anxious and stressed due to a perception that Covid Regulations were being breached.

65 The claimant alleges that he told Mr Finch and Mr Hodges on the same day, that he had sent the email. Mr Finch denies that. Given all of the foregoing, the Tribunal finds the evidence of Mr Finch more reliable on this issue.

66 On 27 September 2021 the claimant was invited to attend a disciplinary hearing on 5 October 2021. Alex Willoughby was asked to chair the hearing. The letter confirmed:

> *The hearing has been convened to consider allegations of Gross Misconduct, namely:*
>
> *• Conducting yourself in an unacceptable manner towards a senior manager within the IT department by acting aggressively and referring to them as an 'idiot', before;*
>
> *• Walking off site with unauthorised Company property, namely your laptop and its charger, after being informed you had no authorisation to work from home prior to you leaving site that day;*
>
> *• Continuing to show unacceptable behaviour towards this senior manager by referring to him as a 'prick' and making negative comments regarding their conduct around the office to another senior member of the IT department;*
>
> *• Committing further serious breaches of the Company's policies and procedures, by;*
>
> *• Continuing to arrive to work late and leaving early, after further conversations and formal warnings regarding your time keeping, and;*

• Failing to consistently use the facial scanners, after addressing this in your previous disciplinary hearing.

The above-mentioned matters would normally be regarded as Gross Misconduct, in line with the following sections of the Company Disciplinary Rules:

• 4.2.5 Serious breach of confidence;

• 4.2.6 Serious breach of the Company's policies or procedures;

• 4.2.7 Theft, or unauthorised removal of our property;

• 4.2.13 Physical assault, actual or threatened violence, behaviour/aggression which provokes violence or behaviour intended to intimidate/undermine others;

• 4.2.14 Unacceptable use of obscene or abusive language (including language of a discriminatory nature) or other unacceptably offensive or inappropriate behaviour;

• 4.2.20 Repeated or serious disobedience of instructions, or other serious acts of insubordination;

• 4.2.21 Refusal to carry out reasonable management instructions.

Appeal against FWW

67 On 28 September 2021, Ms Ramage wrote to the claimant. She informed him that although his appeal was out of time, she had decided to deal with his appeal against the Final Written Warning of 9 September 2021 in writing. Her letter set out the reasons for rejecting his appeal. The letter confirmed:

The disciplinary hearing was arranged as a result of persistent lateness after being reminded of this on several occasions and failing to use the facial recognition scanners consistently.

The evidence considered within the disciplinary demonstrates that out of the 13 occasions you did successfully clock in and out between 01.09.20 – 30.10.20 and 01.03.21 – 26.03.21, you did not fulfil your contractual hours on any day.

During this time frame there was also a possible 64 working days and you only clocked in and out on 13 of those occasions. Reviewing the disciplinary evidence and everything you have submitted below; you have not presented any reasonable justification for the persistent lateness and constant misuse of the facial scanners. None of the points raised or evidence provided would have any bearing on the disciplinary decision, furthermore, I note that some of your below concerns and attached documentation are from several weeks if not months before the disciplinary hearing and none of this evidence was presented at that stage for the consideration of the disciplinary officer.

Additionally, the disciplinary officer was Tom Dibb, Head of IT Services who is completely independent to your team and again, the information you have provided is not anything he would have been aware of in terms of your concerns with Stephen Hodges, salary, other colleagues, title or responsibilities and as such would not have impacted the decision that was made in any way.

Confirmation of grievance

68 The claimant was also told by Ms Ramage that some of the matters he had raised were not appropriate to consider as part of the disciplinary appeal. The claimant was asked to confirm whether or not he would like to raise those matters as a grievance instead. He confirmed that he did.

69 A letter was sent to the claimant by Ms Ramage on 29 September 2021. The letter invited the claimant to a grievance hearing on 4 October 2021. The letter summarised the claimant's grievance issues as being:

> • *You believe you are being discriminated against for asking Stephen Hodges, Head of Software Development for a higher salary;*
>
> • *Not being furloughed or allowed to work from home during the pandemic;*
>
> • *You believe that a recent disciplinary process has been instigated as a result of you raising concerns regarding your welfare, salaries, titles, responsibilities and have stated that you are "having to face the repercussions of making opinions known of how you are treated in the workplace for whistleblowing".*

The claimant did not seek to argue that this summary of grievance issues was incorrect.

70 At the claimant's request, the grievance hearing was rearranged to 7 October 2021 via Microsoft Teams. That meeting went ahead as planned. Ms Ramage subsequently carried out a detailed investigation (see further below).

Disciplinary hearing

71 The claimant requested that the disciplinary hearing due to take place on 5 October be rearranged. The respondent agreed to do so and changed the date of the hearing to 12 October. A further invitation to a disciplinary hearing was issued on 30 September 2021, which set out the same allegations as in the original disciplinary hearing letter. The claimant did not attend the hearing at 10 am. He told the respondent that he thought the hearing was due to take place at 2.00 pm.

72 The disciplinary hearing was subsequently rearranged to 19 October at 10 am. It was chaired by Alex Willoughby, Head of IT Infrastructure. The letter sent to the claimant following the hearing summarises the claimant's response to the allegations as including the following:

> • *You explained the definition of an 'idiot', and that you believe it not to be an offensive phrase; …*
>
> • *You stated that it is not your problem if someone was to be offended by you referring to them as an 'idiot';*
>
> • *You explained that Stephen had said to you 'it's a stalemate now mate' in a previous conversation, and that you personally thought the choices he was making were idiotic;…*
>
> • *You then explained that if people were offended by you referring to them as an 'idiot', that you were offended by the hearing being condescending;*

• You then went on to state you understood, as you stated in your last hearing, that the facial scanners are used to clock in and out at the beginning and end of your working day;…

• You did not agree that you had committed a serious repeated disobedience of instructions in relation to attending work on time as the reasons for your lateness were personal ones; …

• You stated that Stephen has no creativity in terms of understanding what you do, and that as a result 'all respect for him has gone out of the window'; …

• You explained that you then walked back to your desk and put the Company laptop and charging cable into your case and proceeded to walk down the aisle towards the meeting room you stated you knew Nicholas Finch and Stephen Hodges would be in;

• You stated that you believed the 'duo themselves' were putting a plan in place to get an outburst from you to leave the Company;

• You explained that you then walked up to the meeting room door, opened it and looked at Nicholas whilst stating 'I have my laptop, I've got it in my bag tell this idiot I am working from home' whilst pointing at Stephen Hodges to make it clear; …

• I asked if you could confirm the meeting you had with Stephen Hodges prior to this incident whereby he had informed you that you weren't authorised to work from home, as well as questions relating to you having no authority to take the Company property off site, to which you answered 'no comment';

• I also asked you to explain to me your understanding of the Code of Conduct, in which you also answered no comment; …

You did not believe you had breached the Code of Conduct in relation to the way you had acted in your dealings with Stephen Hodges as you stated you had treated him with the absolute respect for his position, a man and a human being; …

• You confirmed you had received an email from Nicholas Finch on 30 August 2021 declining your holiday request for Friday 17 September 2021;

• You stated that you failed to attend work on Friday 17 September as Nicholas Finch had made it confusing for you regarding your holiday days'; …

• When asked why you had continued to commit serious breaches in relation to your working hours and the facial scanners, following on from your previous disciplinary hearing, you stated that you did not acknowledge any accusations that were made against you,

73 The claimant alleges that Mr Willoughby stated during the disciplinary hearing that he would '*put all mental health aside*'. The claimant subsequently requested in an email to the note taker that this reference be included in the minutes. The amended minutes record that Mr Willoughby asked the claimant: '*if you take mental health out of the equation do you think your language in the way you spoke to Steve was appropriate*?' The claimant maintained that Mr

Willoughby had stated in terms that he was going to disregard the claimant's mental health. The Tribunal prefers the evidence of Mr Willoughby on the point and accepts that the amended minutes are accurate.

74 Before arriving at his decision, Alex Willoughby checked the accuracy of the notes of the meeting and took them into account; he considered the claimant's allegation that Mr Hodges had bullied him; he considered the statements that formed part of the evidence pack; and looked again at the CCTV stills.

Decision to dismiss – 9 November 2021

75 Having done so, Mr Willoughby concluded that the claimant had; i) been aggressive and hostile towards Mr Hodges ii) used inappropriate language iii) disobeyed a reasonable management instruction not to attempt to work from home iv) removed company property (a laptop) from site without authorisation.

76 He concluded that those actions amounted to gross misconduct and that dismissal was the appropriate sanction. Mr Willoughby was aware that the claimant had received a previous final written warning. Whilst he took that into account in relation to the claimant's continued failure to work the correct hours, Mr Willoughby took the view that the claimant's conduct on or around 16 September 2021 was in any event sufficiently serious to amount to gross misconduct in its own right.

77 Mr Willoughby decided therefore that the appropriate sanction was dismissal without notice. The claimant was summarily dismissed on 9 November 2021 by letter, which was emailed to and received by him on the same day.

Decision on grievance

78 On 10 November 2021 Rowena Ramage informed the claimant that his grievances had not been upheld. Prior to doing so, Ms Ramage carried out an extensive investigation, including interviews with various other members of the claimant's team including Mr Batson, and with Mr Finch and Mr Hodges.

Appeal against dismissal

79 The claimant appealed against the decision to dismiss him. Neither in the appeal letter, nor in the appeal hearing itself, did the claimant allege (as he has during this Tribunal hearing) that his dismissal was related to him raising protected disclosures about breaches of the Covid Regulations; that his dismissal was linked to emails from his ex-partner; or that the minutes of the meeting were not accurate.

80 The claimant attended a disciplinary appeal hearing which was chaired by Mr Connor Laville, the IT director, on 24 November 2021. The purpose of the appeal was to review the decision to dismiss, and establish whether there were any grounds to review the findings, to revoke the decision, or to vary the sanction applied.

81 Mr Laville concluded that the decision to dismiss the claimant should be upheld. The claimant was provided with a written appeal outcome on 13 December 2021. The letter confirmed the main points of the claimant's appeal as follows:

> *You were given every opportunity to explain why you were appealing against the decision of the Disciplinary Hearing, and I have summarised the key grounds of your appeal below:*

• You believed that the actions of Stephen Hodges, Head of Software Development, and Nicholas Finch, Lead 3D artist were premeditated in terms of removing you from the business to have an emotional rise from yourself;

• You believed you had been unfairly dismissed and had been held at a discriminatory stance, you have been subject to a defamation of character as you have been accused of theft and there has been misinformation regarding your ongoing situation;

• You thought that your mental health hadn't been considered or understood in that you had disclosed these issues with your managers but that you received no human response regarding this;

• You believe the HR Department, namely Rowena Ramage, handled your situation disgracefully and that when you received your grievance outcome that this was wrongfully directed, and the fault was aimed towards yourself;

• You feel you have been subject to malevolent actions from the management team in regard to you being able to work from home, and that by not allowing you to do so has played with your livelihood and feelings in an unfair manner;

• You did not believe the appeal hearing was conducted in the formal way you expected it to be conducted in as you were unaware you would be asked to supply evidence and counter every point made against the allegations;

82 Mr Laville's decision to uphold the decision to dismiss was based on the following reasons (see Mr Laville's witness statement, paragraph 17, which was not seriously challenged in cross examination and which the Tribunal accepts as true):

- *There was no evidence to support the allegation that Mr Hodges or Mr Finch had acted inappropriately or tried to trigger an 'emotional rise' from the claimant.*
- *The claimant had by his own admission called Mr Hodges an idiot and removed the company laptop from the premises without obtaining the necessary authorisation & permission. He rejected the allegation that the claimant had been subject to any defamation.*
- *He concluded that the claimant had been well supported in relation to his mental health and that support was continuing. He did not find any evidence to support the claimant's allegation that the claimant's mental health impacted on Alex Willoughby's decision to dismiss him.*
- *He rejected the claimant's allegation that the HR Department had handled the dismissal process poorly. To the contrary, he found that the process had been handled properly, and that the claimant had made unsubstantiated allegations against Ms Ramage.*
- *He concluded that the refusal of permission to allow the claimant to work from home was a direct result of the claimant's poor timekeeping and inability to fulfil his contracted hours. The decision was therefore a*

reasonable one; whereas the claimant's reaction to being informed of the decision by Mr Hodges was wholly unacceptable.

- *Finally, he concluded that the claimant had been clearly informed about the process for any appeal and that the appeal would consider any reasons and any evidence the claimant put forward as to why he felt the outcome was flawed or unfair. The 11 November 2021 letter made clear the process for any appeal.*

Relevant law

Unfair dismissal

83 The legal issues in an unfair dismissal case are derived from section 98 of the Employment Rights Act 1996 (ERA). Section 98(1) provides that it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or capability or for some other substantial reason.

84 Section 98(4) provides:

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

85 The reasonableness of the dismissal must be considered in accordance with s.98(4). Tribunals have been given guidance by the EAT in *British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303*. There are three stages in a conduct dismissal:

85.2 did the respondent genuinely believe the claimant was guilty of the alleged misconduct?

85.3 did they hold that belief on reasonable grounds?

85.4 did they carry out a proper and adequate investigation?

86 Whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of *Burchell* are neutral as to burden of proof and the onus is not on the respondent (*Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693*).

87 In deciding whether it was reasonable for the respondent to dismiss the claimant for that reason, case law has determined that the question is whether the dismissal was within the so-called 'band [or range] of reasonable responses ('the range'). 'The range' does not equate to a perversity test. See *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, [1983] ICR 17 at 24-25*; *Foley v Post Office [2000] ICR 1283 at 1292D – 1293C*, per Mummery LJ, with whom Nourse and Rix LJJ agreed.) The Employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. Instead, the Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which '*a reasonable employer might have adopted*'. An ET must focus its

attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process (*West Midlands Co-operative Society Ltd v Tipton* [1986] 1 AC 536)) and not on whether in fact the employee has suffered an injustice. (The logical conclusion of which is that a Tribunal might consider that the dismissal was unjust, but was nevertheless 'fair'.)

88 The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from their employment for a conduct reason. The objective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed, including the investigation (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA*).

89 In reaching their decision, Tribunals must also take into account the Acas Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the Tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render them liable to any proceedings.

Protected disclosure detriment/dismissal

90 Workers have the right under s.47B ERA 1996 not to be subjected to a detriment on the grounds that they have made a protected disclosure.

91 Pursuant to s.103A ERA 1996, a dismissal will be regarded as an automatically unfair dismissal if the reason or, if more than one, the principal reason for the dismissal is that the employee made a protected disclosure.

92 A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the types of wrongdoing or failure listed in s.43B(1)(a) to (f) of the ERA 1996. The Claimant relies in respect of each disclosure on s.43B(1)(d). That is, he asserts that he disclosed information that he reasonably believed was in the public interest and tended to show that the health and safety of any individual has been, is being or is likely to be damaged.

93 In ***Williams v Michelle Brown AM***, UKEAT/0044/19/00 at paragraphs 9 and 10, HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> *"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.*

Unless all five conditions are satisfied there will not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn its reasoning and conclusions in relation to those which are in dispute."

94 As for what might constitute a disclosure of information for the purposes of s.43B ERA, in ***Kilraine v London Borough of Wandsworth*** [2018] ICR 1850 CA, Sales LJ provided the following guidance:

"30. The concept of 'information' as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Longstaff J made the same point in the Judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between 'information' on the one hand and 'allegations' on the other […]

31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute 'information' and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.

[…]

35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in the ***Cavendish Munro*** *case did not meet that standard.*

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by the Tribunal in the light of all facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in ***Chesterton Global Ltd v Nurmohamed*** *[2018] ICR 731, para 8, this has both a subjective element and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."*

[…]

41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in the ***Cavendish Munro*** *case [at paragraph 24], the worker brings his manager down to a particular ward in*

a hospital, gestures to sharps left lying around and says 'You are not complying with health and safety requirements', the statement would derive force from the context in which it was made and taking in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of the whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner."

95 The issues arising in relation to a Claimant's beliefs about the information disclosed were reviewed by Linden J in ***Twist DX v Abbott (UK) Holdings Ltd*** (UKEAT/0030/30/JOJ), from which the following principles emerge:

95.1 Whether at the time of the alleged disclosure the Claimant held the belief that the information tended to show one or more of the matters specified in s.43B(1)(a)-(f) ("**the specified matters**") and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs [para.64].

95.2 It is important for the ET to identify which of the specified matters are relevant, as this will affect the reasonableness question [para.65].

95.3 The belief must be as to what the information 'tends to show', which is a lower hurdle than having to believe that it 'does show' one or more of the specified matters. The fact that the whistle-blower may be wrong is not relevant, provided his belief is reasonable [para.66].

95.4 There is no rule that there must be a reference to a specific legal obligation and/or a statement of the relevant obligations or, alternatively, that the implied reference to legal obligations must be obvious, if the disclosure is to be capable of falling within s.43(B)(1)(b). The cases establish that such a belief may be reasonable despite the fact that it falls so far short of being obvious as to be wrong [para.95].

96 The Court of Appeal considered the 'public interest' test in ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731. The following principles emerge.

96.1 The Tribunal must ask: did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest? [Para.27]. That is the subjective element.

96.2 There is then an objective element: was the belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest [para.28].

96.3 The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. According to Underhill LJ (at para. 29):

> *"That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify after the event by reference to specific matters which the Tribunal finds were not in his head at the time, he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential and not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable."*

96.4 While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it [para. 30].

96.5 'Public interest' involves a distinction between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest [para. 31].

96.6 It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest [para.36].

97 When considering the question of the Claimant's reasonable belief, it is to be remembered that motive is not the same as belief: ***Ibrahim v HCA International Ltd*** [2020] IRLR 224.

98 Section 47B(1) ERA 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. 'Detriment' is not defined in the ERA 1996, but applying discrimination case law, the concept is a broad one and there will be a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment: ***Jesudason v Alder Hay Children's NHS Foundation Trust*** [2020] IRLR 374.

99 The initial burden of proof is on the Claimant to establish that a protected disclosure was made and that the ground or reason (that is more than trivial) for detrimental treatment is the protected disclosure. Thereafter, by virtue of s.48(2) ERA 1996, the Respondent must be prepared to show why the detrimental treatment was done and inferences may be drawn in the event that the Respondent's explanations are unsatisfactory.

100 While the threshold of establishing a qualifying disclosure may be relatively low, it is essential that causation is properly considered. In a detriment case, determining whether a detriment is on the grounds that the worker has made a protected disclosure, requires an analysis of the mental processes (conscious or unconscious) of the employer acting as it did: ***Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust*** [2019] 9 WLUK 556. It is not sufficient to demonstrate that 'but for' the disclosure, the employer's act or

omission would not have taken place. The protected disclosure must have materially influenced the employer's treatment of the worker: ***NHS Manchester v Fecitt & Ors*** [2012] IRLR 164. It is not enough to consider whether the act was 'related to' the disclosure in some looser sense.

101 In a dismissal case under s.103A of the ERA 1996, there are two questions to be answered: Did the employee make a protected disclosure? If so, was the making of that protected disclosure the reason or principal reason for the dismissal?

Conclusions

102 The Tribunal has applied the law to the facts in order to determine the issues. In the interests of keeping these reasons to a manageable length, not every single fact relied on is repeated. The Tribunal will deal with each of the issues in turn.

Unfair dismissal

103 It is agreed that the claimant was dismissed (Issue 1.1).

Issue 1.2 - What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

104 The Tribunal has found as a fact that Mr Willoughby concluded that the claimant had; i) been aggressive and hostile towards Mr Hodges; ii) used inappropriate language; iii) disobeyed a reasonable management instruction not to attempt to work from home; iv) removed company property (a laptop) from site without authorisation.

105 The Tribunal has also found that Mr Willoughby concluded that those actions amounted to gross misconduct and decided that dismissal was the appropriate sanction for that misconduct. In those circumstances, the Tribunal concludes that the reason for the claimant's dismissal was the conduct set out above and that Mr Willoughby genuinely believed that the claimant had committed that misconduct.

Issue 1.3 – was the reason or principal reason for dismissal that the claimant made a protected disclosure?

106 The Tribunal deals below with the question as to whether or not the claimant made any protected disclosures. In any event, the Tribunal is satisfied that the reason for the claimant's dismissal was his conduct, for the reasons set out above. It had nothing to do with any of the alleged protected disclosures or the content of the email of 24 September 2021.

Issue 1.4 - if the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

Issue 1.4.1 - there were reasonable grounds for that belief

107 The tribunal concludes that there were reasonable grounds for that belief. The emails provided to HR by Mr Finch, Mr Bastow and Mr Hodges, together with the CCTV stills, confirmed that the claimant had referred to Mr Hodges as an

idiot, whilst acting in an aggressive manner. The claimant admitted using that word towards Mr Hodges, but unreasonably maintained that his use of the word was not offensive. In the Tribunal's judgment, the use of the word idiot about a senior manager in the circumstances in which it was used on 16 September was clearly derogatory. It was therefore reasonable for the respondent to conclude, on the basis of its investigation, that the use of the word idiot was derogatory and offensive.

108 Mr Hodges had made it clear during the preceding meeting with the claimant, that he was not going to be allowed to work from home. That was because of justified ongoing concerns in relation to the claimant's timekeeping and working hours. By stating that he would be working from home on 17 September, the claimant was disobeying a clear and reasonable management instruction that he should work in the office. As for the unauthorised removal of the laptop, the proper process had not been carried out or completed in relation to the laptop. In circumstances where the claimant did not have permission to work from home, he had no actual or implied authorisation to remove the laptop from the respondent's premises either.

Issue 1.4.2 - at the time the belief was formed had the respondent carried out a reasonable investigation?

109 The Tribunal concludes that at the time the belief was formed, the respondent has carried out a reasonable investigation. The suspension letter set out the allegations. The claimant was interviewed about those allegations at the investigation interview on 22 September. The minutes of the investigation meeting were sent to the claimant and agreed by him.

110 The claimant was subsequently sent a letter inviting him to a disciplinary hearing, which set out the allegations against him, and attached the documents relied on by the respondent in relation to those allegations. The hearing was rearranged on two occasions, to ensure that the claimant's defence could be heard. The claimant was given a reasonable opportunity to answer the allegations against him, and to provide any relevant evidence to counter those allegations. The key facts were not in any event in dispute.

111 The claimant was subsequently sent a copy of the notes of the disciplinary hearing. The one amendment he asked for was made. Following the decision to dismiss him, a detailed letter was sent to the claimant, setting out the reason for his dismissal. The claimant was provided with the opportunity to appeal, and the dismissal letter set out the appeal process i.e. that the appeal should be made in writing, addressed to Conor Laville, within 5 working days from the receipt of the letter, stating the reasons for the appeal.

112 The claimant was given an opportunity to set out his case at the appeal hearing. He did not provide any further evidence to Mr Laville at the appeal hearing. It was incumbent on the claimant to provide further evidence, if he had any, relevant to the disciplinary issues, which had not initially been considered. Further, it was incumbent on the claimant to set out why the decision to uphold the allegations was unfair and unreasonable; and/or why the sanction of dismissal was unfair and inappropriate. He stated at the beginning of the appeal hearing:

In terms of evidence, I won't be supplying any as I feel like I supplied enough evidence and I have reiterated myself many times. Hopefully you can see

from all the notes that have sent across, I have kept to my story. I have been unfairly dismissed as well as having been held at a discrim[in]atory stance.

113 At the conclusion of the appeal hearing the claimant stated

I think I have covered everything that I think is necessary, let's see what comes of this appeal. I thought this was going to be more formal of an approach to discuss it with you to see if you understood the situation that had happened. I didn't know it was going to be a case of where it was more of a supply evidence and counter every single point made against me and every allegation. I feel like there was a bombardment of points against me. I don't want to keep reiterating the story, I feel you are now well aware of the story is (sic). There are 2 sides to the story and then there's the truth, I think there has been an unfairness in the dismissal.

114 Mr Laville carried out the appeal process in a fair manner. Mr Laville's decision on the appeal was confirmed in writing and set out in considerable detail his reasons for upholding the decision to dismiss.

115 The Tribunal notes that the claimant adopted a similar stance regarding evidence in relation to this hearing. When asked why he did not refer to alleged breaches of Covid Regulations in documents sent to the respondent, for example, the claimant he stated that he did not realise he had to provide evidence; or that there was too much information to provide in one document or email. Without the claimant making his alleged concerns about breaches of the Covid Regulations known to the respondent, the respondent could not reasonably be expected to do anything about those alleged concerns. Nor could they be accused of dismissing him because of those concerns.

116 Further, the onus was on the claimant to put before the Tribunal the evidence on which he relied. Allowances have been made during this hearing for the fact that the claimant has represented himself. However, dealing with Employment Tribunal claims fairly, requires fairness to be done to both parties. The respondent cannot be expected to respond to allegations that have not been brought to its attention, either in witness evidence, or in documents supplied in advance of the hearing.

Issue 1.4.3 – did the respondent otherwise act in a procedurally fair manner?

117 The Tribunal has nothing further to add to what is set out above.

Issue 1.4.4 was the dismissal within the range of reasonable responses?

118 The Tribunal concludes that the claimant's dismissal was within the range of reasonable responses. Most of the key facts were not in dispute. The respondent reasonably concluded that the claimant's actions amounted to gross misconduct. The claimant's mental health issues were taken into account, as were his length of service and good performance. The claimant did not seek to apologise for the use of the word 'idiot' towards Mr Hodges and denied he had acted in an aggressive manner. He unreasonably tried to argue that his use of the word idiot was justified and was not offensive. In these circumstances, the Tribunal concludes that the respondent acted fairly in treating the misconduct as a sufficient reason to dismiss the claimant for misconduct and that decision falls squarely within the range of reasonable responses.

<u>Protected disclosure</u>

Issue 3.1 - did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide

Issue 3.1.1 and 3.1.1.1 - the claimant says he made disclosures on these occasions

Issue 3.1.1.1 – in or around March 2021, the claimant sent an email to Rowena Ramage and Owen Jackson with the following information

Issue 3.1.1.1.1 - evidence of breaches of covid restrictions in the workplace by people including the director and senior developer (Katy Fisher)

119 During this hearing, the claimant has accepted that he did not send an email in March 2021. He relied instead, for the first time, on an email sent on 24 September 2021 to Ms Ramage, in which he set out his reasons for appealing against the decision of Mr Dibb to issue him with a final written warning.

120 As noted in our findings of fact, that email did not contain any disclosures of information relating to Covid. Reference was made to the claimant being a 'whistle-blower', but without setting out any specifics as to how and why he was a whistle-blower.

Issue 3.1.1.1.2 - reports of concerns of other team members about breaches of Covid restrictions;

121 The Tribunal has found that the email of 24 September 2021 did not contain disclosures of information in relation to reports of concerns of other team members about breaches of Covid restrictions.

Issue 3.1.1.1.3 - that the claimant was being subject to bullying by Sam Nixon and Nicolas Finch

122 The Tribunal refers to the findings of fact above in relation to the passages in the email of 24 September 2021, alleging that Mr Nixon had '*falsely corrected him*' in a demeaning tone on Microsoft Teams. Whilst the email alleged that Mr Hodges was discriminating against him compared to other employees, by refusing to allow him to work from home, and that was having a serious effect on his mental health, there was no such disclosure of information in relation to Mr Finch. In the circumstances, the Tribunal concludes that there was a disclosure of information in relation to Mr Nixon, but not in relation to Mr Finch.

Issue 3.1.1.2 - on the same date, did the claimant tell Nicolas Finch and Steve Hodges that he had sent the email to Rowena Ramage?

123 The Tribunal has found as a fact that the claimant did not inform Mr Hodges or Mr Finch that the email had been sent. In any event, simply telling Mr Finch and Mr Hodges that an email had been sent, does not amount to a disclosure of the information contained in it.

Issue 3.1.2 - did the claimant disclose information?

124 The Tribunal concludes on the basis of the above reasons, that in the email of 24 September 2021, the claimant only disclosed information regarding alleged bullying by Mr Nixon.

Issue 3.1.3 – did the claimant believe the disclosure of information was made in the public interest? Issue 3.1.3.1 The claimant says that he made the disclosures for the benefit of himself and for the benefit of other workers, some of whom he believed to be vulnerable.

Issue 3.1.4 - was that belief reasonable?

125 The Tribunal concludes that the claimant did believe that the disclosure of information was made in the public interest. However, the Tribunal concludes that it was not reasonable for the claimant to believe that it was. The information disclosed about the alleged bullying by Mr Nixon related to one isolated incident. Whilst the claimant was entitled to report that, the reporting of it was likely to benefit him alone. There was no public interest in him doing so.

Issue 3.1.5 - did the claimant believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered?

126 The Tribunal concludes that the claimant believed that the disclosure of information tended to show that his health and safety had been or was being or was likely to be endangered.

Issue 3.1.6 - was that belief reasonable?

127 The Tribunal concludes however that this belief was not reasonable. The information disclosed related to a discrete incident. It was not reasonable for the claimant to consider that his health and safety was thereby endangered.

Issue 3.2 - if the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

128 No further conclusions are necessary on that point.

129 Whilst the Tribunal has concluded that the claimant did not make any protected disclosures, for the sake of completeness, we go on to deal briefly with the other issues relating to this part of his claim.

Issue 4. Detriment (Employment Rights Act 1996 section 48)

Issue 4.1 Did the respondent do the following things:

Issue 4.1.1 - when the claimant returned from sick leave in August 2021, Nicholas Finch told three other members of staff not to communicate with the claimant and those members of staff did stop communicating with the claimant.

130 See the Tribunal's findings of fact. This alleged treatment did not occur.

Issue 4.1.2 - on or around 2 September the claimant asked to be paid for holiday that he had been unable to take during the leave year. The leave year finished in September. Nicholas Finch refused to pay the claimant for untaken holiday, but said he could carry it over. The claimant says that the respondent had no genuine intention of letting him take the carried over holiday.

131 See our findings of fact. The claimant was told that a payment in lieu could not be made. He was however told that he could carry the holiday over, and the Tribunal concludes that Mr Finch had a genuine intention of letting him do so. So only the first part of this allegation is made out.

Issue 4.1.3 - on or around 16 September 2021, Nicholas Finch cancelled the claimant's holiday on 17 September 2021 in order to confuse the claimant. The claimant subsequently did not come into work because he believed it to be a day's holiday.

132 The Tribunal refers to the findings of fact above. Mr Finch did not cancel this holiday on or around 16 September. Mr Finch's email of 30 August confirmed that this holiday had not been approved in the first place.

Issue 4.1.4 - the respondent had agreed that the claimant could work from home and was in the process of setting up his computer to do that. At the 11th hour on or around 16 September 2021, Steve Hodges said he needed to leave the business and was not allowed to work from home.

133 We refer to the findings of fact above. The email of 6 August 2021 from Vanessa Sinclair, HR Assistant to the claimant, confirmed that he would be required to work from the office and that after four weeks, Mr Finch would review that to see if working from home would be an option. It was made clear to the claimant that home working was dependent on him achieving certain tasks and his timekeeping being improved. We have found that Mr Hodges said words to the effect that they appeared to be at a stalemate. It was not stated in the claimant's witness statement before this Tribunal that Mr Hodges told the claimant that he needed to leave the business. Even on the basis of the claimant's own witness evidence therefore, that specific allegation is not made out.

Issue 4.1.5 - the respondent took disciplinary proceedings against the claimant and unreasonably accused him of stealing a laptop

134 The respondent did take two sets of disciplinary proceedings, the first in March 2021, and the second on 17 September 2021, commencing with the claimant's suspension. The respondent did not however 'unreasonably accuse him' of stealing a laptop. The allegation was in fact:

> *Walking off site with unauthorised Company property, namely your laptop and its charger, after being informed you had no authorisation to work from home prior to you leaving site that day;*

135 It was stated that could amount to:

- *4.2.7 Theft, or unauthorised removal of our property;*

The Tribunal concludes that the claimant was being accused of unauthorised removal of the laptop, not the theft of it.

Issue 4.1.6 - during the disciplinary, did Alex Willoughby tell the claimant that he should disregard his mental health conditions, meaning that they did not make any difference.

136 The Tribunal refers to the findings of fact above. Those words were not used by Mr Willoughby.

Issue 4.1.7 – was the information presented by the respondent at the disciplinary hearing inaccurate and inaccurately recorded?

137 The Tribunal refers to the findings of fact above. The information was accurately presented and recorded. One amendment was requested by the claimant, and that amendment was made.

Issue 4.2 - by doing so, did it subject the claimant to detriment?

138 To summarise the above, the only alleged treatment which the Tribunal has found as a fact occurred, are not making a payment in lieu of holiday in

September 2021 (Issue 4.1.2); and the taking of disciplinary proceedings in March and September 2021 (Issue 4.1.5).

139 The Tribunal concludes that not making a payment in lieu of holiday was not a detriment. The claimant was instead allowed to carry those holidays over. Had his employment continued, he would have been allowed to take those holidays. On the termination of his employment, the claimant was entitled to a payment in lieu and it is assumed that such a payment was made (on the basis that there is no holiday pay claim before the Tribunal).

140 The Tribunal concludes that by the taking of disciplinary proceedings, the claimant was subjected to a detriment.

Issue 4.3 - if so, was it done on the grounds that the claimant made a protected disclosure?

141 The Tribunal notes that most of the alleged detriments predated the alleged disclosure of information. As a matter of logic, there could therefore be no connection between the alleged disclosure, and those alleged detriments.

142 As for issue 4.1.2 – not making a payment in lieu – even if the decision was made on or after 24 September 2021 (which is probably not the case) that was in any event as a result of the application of the terms of the contract, and European case law. It had nothing to do with the discrete and isolated allegation of bullying of the claimant by Mr Nixon.

143 The first set of disciplinary proceedings predated the alleged disclosures of information. Again therefore, as a matter of logic, there could be no causal connection between them. As for the instigation of the second set of proceedings, the same logic applies.

144 Since the Tribunal has found that the claimant did not make any protected disclosures, it is not strictly speaking necessary to come to any conclusion as to any causative link between the continuation of the second set of disciplinary proceedings and the alleged disclosures in the 24 September 2021 email. For the sake of completeness however (and to the extent that the claimant alleges that the continuation of the disciplinary proceedings after 24 September 2021 was due to the disclosure of information in the email of that date), the Tribunal concludes that there is no causative link between the continuation of those proceedings, resulting in the claimant's dismissal, and the disclosures of information made. The disciplinary proceedings were both instigated and continued against the claimant, because the respondent had reasonable grounds for alleging that he was potentially guilty of gross misconduct. The claimant's dismissal for that misconduct was, the Tribunal has concluded, fair in all the circumstances, and had nothing to do with the contents of his email of 24 September.

145 For all of the above reasons, all of the claimant's claims fail and are dismissed.

Employment Judge A James
North East Region

Dated: 23 August 2022

Case Number: 1800294/2022

Sent to the parties on:

20 September 2022

For the Tribunals Office

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.

Annex A – Agreed List of Issues

1. Unfair dismissal/whistle-blowing dismissal
   1.1. It is agreed that the claimant was dismissed.
   1.2. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
   1.3. The claimant says that the reason or principal reason for dismissal was that the claimant made a protected disclosure? If that was the reason, the claimant will be regarded as unfairly dismissed.
   1.4. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
      1.4.1. there were reasonable grounds for that belief;
      1.4.2. at the time the belief was formed the respondent had carried out a reasonable investigation;
      1.4.3. the respondent otherwise acted in a procedurally fair manner;
      1.4.4. dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal
   2.1. Does the claimant wish to be reinstated to their previous employment?
   2.2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
   2.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
   2.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
   2.5. What should the terms of the re-engagement order be?
   2.6. If there is a compensatory award, how much should it be? The Tribunal will decide:
      2.6.1. What financial losses has the dismissal caused the claimant?
      2.6.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
      2.6.3. If not, for what period of loss should the claimant be compensated?
      2.6.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
      2.6.5. If so, should the claimant's compensation be reduced? By how much?
      2.6.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
      2.6.7. Did the respondent or the claimant unreasonably fail to comply with it?
      2.6.8. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
      2.6.9. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
      2.6.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.6.11. Does the statutory cap of fifty-two weeks' pay or £89,493 apply?

2.7. What basic award is payable to the claimant, if any?

2.8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Protected disclosure

3.1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1. What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

3.1.1.1. In around March 2021, the claimant sent an email to Rowena Ramage and Owen Jackson with the following information

3.1.1.1.1. evidence of breaches of covid restrictions in the workplace by people including the director and senior developer (Katy Fisher);

3.1.1.1.2. reports of concerns of other team members about breaches of covid restriction;

3.1.1.1.3. that the claimant was being subject to bullying by Sam Nixon and Nicolas Finch

3.1.1.2. On the same date, the claimant told Nicolas Finch and Steve Hodges that he had sent the email to Rowena Ramage.

3.1.2. Did he disclose information?

3.1.3. Did he believe the disclosure of information was made in the public interest?

3.1.3.1. The claimant says that he made the disclosures for the benefit of himself and for the benefit of other workers, some of whom he believed to be vulnerable

3.1.4. Was that belief reasonable?

3.1.5. Did he believe it tended to show that:

3.1.5.1. the health or safety of any individual had been, was being or was likely to be endangered;

3.1.6. Was that belief reasonable?

3.2. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

4. Detriment (Employment Rights Act 1996 section 48)

4.1. Did the respondent do the following things:

4.1.1. When the claimant returned from sick leave in August 2021, Nicholas Finch told three other members of staff not to communicate with the claimant and those members of staff did stop communicating with the claimant.

4.1.2. On or around 2 September the claimant asked to be paid for holiday that he had been unable to take during the leave year. The leave year finished in September. Nicholas Finch refused to pay the claimant for untaken holiday, but said he could carry it over. The claimant says that the respondent had no genuine intention of letting him take the carried over holiday.

4.1.3. On or around 16 September 2021, Nicholas Finch cancelled the claimant's holiday on 17 September 2021 in order to confuse the claimant. The claimant subsequently did not come into work because he believed it to be a day's holiday.

4.1.4. The respondent had agreed that the claimant could work from home and was in the process of setting up his computer to do that. At the 11th hour on or around 16 September 2021, Steve Hodges said he needed to leave the business and was not allowed to work from home.

4.1.5. The respondent took disciplinary proceedings against the claimant and unreasonably accused him of stealing a laptop.

4.1.6. During the disciplinary, Alex Willoughby told the claimant that he should disregard his mental health conditions, meaning that they did not make any difference.

4.1.7. The information presented by the respondent at the disciplinary hearing was not accurate and was not accurately recorded.

4.2. By doing so, did it subject the claimant to detriment?

4.3. If so, was it done on the grounds that [s/he made a protected disclosure / other prohibited reason]?

5. Remedy for Protected Disclosure Detriment

5.1. What financial losses has the detrimental treatment caused the claimant?

5.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.3. If not, for what period of loss should the claimant be compensated?

5.4. What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

5.5. Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

5.6. Is it just and equitable to award the claimant other compensation?

5.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.8. Did the respondent or the claimant unreasonably fail to comply with it?

5.9. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

5.10. Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

5.11. Was the protected disclosure made in good faith?

5.12. If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?