EMPLOYMENT TRIBUNALS

Claimant: **Mr R Domaradzki**

Respondent: **Fire Integrity Limited**

Heard at: **East London Hearing Centre**

On: **20, 22, 26 and 27 April 2022**

Before: Employment Judge Jones
Mr D Ross
Mr K Sleeth

Representation
Claimant: Mr S Butler (Counsel)
Respondent: Mr R Clement (Counsel)

JUDGMENT

The claimant made no protected disclosures.

The claimant was not unfairly or constructively dismissed.

The claimant resigned on 16 July 2020.

The complaints listed at 7.1.1, 7.1.2, 7.1.4, 7.1.6 and 7.1.7 of the list of issues were brought to the Tribunal outside of the time limit set in section 123 of the Equality Act 2010 and the Tribunal has no jurisdiction to hear them.

The complaint of race discrimination at items 7.1.3 and 7.1.5 of the list of issues fails and is dismissed.

The respondent provided the claimant with a statement of employment particulars in accordance with section 1 Employment Rights Act 1996.

REASONS

This was the claimant's complaint that he had been automatically unfairly dismissed by the respondent for making protected disclosures, that he had suffered detriments as a result of those disclosures and that he also suffered direct race discrimination. The claimant also complains that the respondent failed

to provide him with written terms and conditions of employment. The respondent resisted the complaints. It also denied dismissing the claimant.

The Tribunal apologises to the parties for the delay in writing up this judgment and reasons. The delay has been due to the pressure of work on the judge.

Evidence

The Tribunal had an agreed bundle of documents. The Tribunal heard live evidence from the claimant and from Leon Mullaney, CEO and the claimant's line manager and from Barry Kelly, also a partner in the business who worked as an estimator. The Tribunal had witness statements from all the witnesses.

The Tribunal made the following findings of fact from the evidence. We have only made findings of fact on those matters in dispute that are necessary for us to decide the issues in the case.

Findings of fact

The claimant is of Polish descent. He was born in Poland and has Polish nationality. He compares himself with his colleagues who are all of British and/or Irish nationality/citizenship.

The claimant began full-time employment with the respondent on 1 April 2016. He had previously worked for respondent as a consultant Contracts Manager from 2009 on an ad hoc basis.

The FIRAS scheme

The respondent is a company that provides and installs passive fire protection products within the construction industry. We heard about the FIRAS scheme during the hearing. The FIRAS scheme document in the bundle describes itself as follows:

> *2.1 These requirements relate to the FIRAS scheme of independent assessment and certification of contractors who install passive fire protection products and systems and they form part of any and all agreements entered into with any party for the purposes of the scheme.*
>
> *2.2 This scheme does not preclude contractors from installing non-fire protection products (such as non-fire rated doorsets, thermal insulation or air sealing products) which are not intended to provide passive fire protection.*
>
> *2.3 Installation is deemed to include the installation and (where applicable) maintenance of passive fire protection products and systems. Contractors shall take responsibility for all aspects of their installation.*
>
> *The scheme is operated and controlled under the name of FIRAS by Warringtonfire, the authority under which certification against the scheme requirements is awarded.*
>
> *2.4 All bona fide contractors involved in the installation of passive fire*

protection products/systems may apply for certification against the scheme's requirements.

Some of the main features of the scheme are as follows: -

- Where applicable, fire protective systems for structural steelwork shall be installed in accordance with proven specifications, manufacturer's instructions/recommendations and/or the requirements identified in the ASFP Yellow Book;

- No contractor shall mix-and-match materials of different manufacture to resolve particular fire protection requirements, unless supported by third party certification, test evidence or an independent fire performance assessment provided in accordance with the current PFPF Guide to Undertaking Assessments in Lieu of Fire Tests.

- All contractors shall employ suitably trained/skilled/competent staff. An initial pre-certification office audit will be followed by inspections of site work relevant to the scope of FIRAS Certification the contractor has achieved. During these site inspections the contractor's Contracts managers/site supervisors and technicians' competence shall be assessed relevant to the certified scope.

- On-going surveillance of all certified scope installation work at a level to be determined by FIRAS relevant to the contractor's activity levels. An initial 12 months' probationary period will commence from the first day of the company's approval for certification. This is to ensure all relevant criteria contained in this document have been met by the contractor. This will be monitored during the course of the first 12 month period. Any serious deviations from the terms of this document may result in the company's certification being suspended or removed pending clarification of the issue.

- Initial audit of office-based routines / procedures / systems shall be followed by annual surveillance audits of office systems.

- All registered companies are required to notify FIRAS of all contracts containing passive fire protection works awarded using the FIRAS Contracts in Hand form irrespective of the value and/or duration of the contract works.

- A Certificate of Conformity shall be produced on completion of a contract, which will close the live Contract in Hand on the FIRAS database.

- Certificates of Conformity not issued will be deemed as a non-conformance. All contracts in hand and certification shall only be issued by the certified entity. Certification issued shall only relate to installations carried out by the contractor in accordance with the terms of this document.

- Having demonstrated conformance to these scheme requirements, contractors will be awarded certification and added to the FIRAS Register of Contractors for passive fire protection products and systems.

From those details of the scheme we find that belonging to the FIRAS certification scheme is a voluntary matter. It is a form of third-party accreditation. There is no legal obligation to belong to it or to comply with its certification scheme in order to be an installer of passive fire protection products. The respondent belonged to FIRAS and used its certification process for applicable work. The evidence was that this was a good thing to do for the business and a way to get recognition for the quality of the work. It was an industry attempt to improve standards within the industry in the aftermath of disasters such as the 2017 Grenfell Fire in which many people lost their lives.

Whenever the respondent wins a contract, the directors, usually Mr Kelly, would conduct an assessment of the work to be done. The senior contracts manager would then hold a pre-contract meeting in which they would address logistics around the job including, what element of fire protection is required on this job, the fire ratings of the products that was to be installed, consideration of what specified products have to be used or whether it is contractors' choice. There would also be drawings to consider.

As the respondent has chosen to subscribe to the FIRAS scheme, it would upload all of the information coming out of the pre-contract meeting on to the FIRAS database. The respondent would complete the drop-down menus with all the details including the phases of the project, the manager of the project, and any possible variations or extra works that might be needed. Every piece of information pertaining to the installation of the fire protection would be uploaded to the FIRAS portal. As the project moves to the handover phase, it becomes a complete picture of the contract. Additional information is sometimes uploaded from the site. At the end, the respondent would apply for all of that information to be formulated into a certificate of conformity. That certificate would list what was originally planned and any of the changes made during the job. The certificate can be downloaded from the portal. It would also be added to the electronic records of all the installations the respondent had undertaken within the scheme. The record would also include photos and a pin drop on a PDF to the location of the work.

In addition to the certificate, the FIRAS record would give a complete picture of the job, which the client could pass on to building control to show the standard and detail of the work done.

As a member of FIRAS, the respondent would have approximately 20% of its work audited every year. There is also an annual office audit to check systems and three site visits a year. The respondent is a member of FIRAS as it wants to be part of the drive for improvement in the industry.

The claimant was a contracts manager for the respondent and an experienced employee in this role. As a contracts' manager, the claimant's job was to carry out estimates, surveys, set up jobs including the risk assessments, produce method statements, organise installers, order materials and access. The claimant had a team working under him to carry out those tasks. The claimant was a senior member of staff.

The claimant had a good working relationship with his line manager, Leon

Mullaney. We had evidence that they socialised together, had met each other's families and had an informal way of communicating with each other in their text message exchanges. Both Mr Mullaney and Mr Kelly described the claimant's relationship with Mr Mullaney as a '*tempestuous'* one. The claimant's communications with Barry Kelly were more formal. Mr Kelly and Mr Mullaney were shareholders and directors of the respondent.

Written terms and conditions

On 8 January 2018, Mr Mullaney sent the claimant a WhatsApp message in which he described a possible future for the business and the claimant's role within it. The claimant referred to this in his evidence as a '*gentleman's agreement'* between himself and Mr Mullaney. Mr Mullaney stated

> *'Barry gone in 2020/21 - we clean out FI wait for retention's, meanwhile we set you two up FIUK of which me in Barry are silent partners with you two..... Then you'd run everything and we back you up if needed - keep our faces on board for clients like JLP etc and we have nothing to do with running it whatsoever.... You'll take your money as divis split your shares with misses so tax-free on 40% rest made up Paye and divis. Then dividends as chunks. Or however you want it.. I'll stay until 2025/26 on salary then divs - then I go you buy me out of the business... That way we pull out of FI on 10% tax - then you do the same 5-10 years later to whoever else or just close it down and take the accumulated profit. It's making 600K net profit per year at least. So could pull out the accumulative and sell it cheap like 2mill - accumulated profit over 10 years is 6mill - obvs if we carry on like this... Basically if we carry on like this it's a winner for us all however it pans out. So put that in your pipe and smoke it motherfucker!'*

We find that it was an expression of Mr Mullaney's confidence in the business as well as the claimant and Mr Ralley's abilities. It was not an offer of shares in the company. It was not a record of an agreed way forward but a statement of Mr Mullaney's vision for the company. It was an expression of intention, if things worked out as expected. This was something they spoke of on a regular basis and Mr Mullaney confirmed in evidence that he had told the claimant that if things continued as they were, the claimant would become a shareholder in the business at some point in the future. This WhatsApp message was not a contract. It was a statement that if things continued as they were, with profits increasing as they were, Mr Mullaney could see a future in which the claimant could take over the business/obtain shares in the company and he and Mr Kelly could step back. He projected this might happen sometime between 2022 and 2025. There was no set date when this would happen as we would expect to see in a contract and no further detail. The claimant considered this to be a binding agreement and he saved the message so that he could refer to it later.

It was not clear whether the respondent realised at the time that the claimant considered that he had a binding agreement to take over the company in the near future. The claimant did not respond to the WhatsApp message to let the respondent know that he had received it or that he accepted it, if he considered that it was a contractual offer.

In 2018 the claimant asked the respondent to provide him with a written contract.

Text messages in the bundle between the claimant and Mr Mullaney, referred to the claimant wanting to become an employee because of the need for security and for paid holidays.

When the claimant became a full-time employee, he arranged with Mr Mullaney that his net wage would be £2,900 per month. The claimant was in debt and needed that amount to cover his debts and leave sufficient income for him and his family to live on. His main concern was that his monthly wage was £2,900 per month and there are emails and text messages in the bundle which confirm this.

In April 2018, the respondent asked its HR service, Mentor, to create and send draft contracts to the claimant and Mr Ralley. Those documents were meant to be the start of a conversation with them which would end with them both having signed contracts of employment.

The claimant's evidence was that he spoke to Ashley Ralley, the other senior contracts manager, who is the claimant's comparator in this case and Mr Ralley told him that he had been given a personalised contract. He read part of it to him over the telephone. Mr Mullaney confirmed that Mr Ralley was sent a draft contract at the same time as the claimant. If Mr Ralley had a completed, signed contract, that means that at some point, he received the draft contract from the respondent, discussed it and agreed terms with the respondent. He was then given a personalised document. We did not see a copy of the document that Mr Ralley read to the claimant. The claimant did not see the document either and we did not hear from Mr Ralley in evidence. Mr Mullaney was adamant that if the respondent had given Mr Ralley a contract at that time, it would have been the same document as the one sent to the claimant for his consideration as Mentor had been asked to send draft contracts to both of them. At the time, the claimant and Mr Ralley were both at the same level in the company.

By contrast, in August 2018, after he received his draft contract, the claimant texted Mr Mullaney and stated that he was totally disappointed that the respondent had sent it to him. The claimant referred to it in disparaging terms. He called it a '*slavery contract'* and refused to consider or even discuss it. Mr Mullaney told him that it was a standard contract used by companies in the construction industry and that the claimant should let him know what clauses he wanted taken out or added to it. He made it clear that he himself had not read it yet, that it was up for discussion and the respondent was willing to discuss and agree the terms with the claimant.

The text messages about the draft contract continued until March 2019, at which time the claimant had still not agreed to the terms or suggested any additional terms that he wanted added. When asked in the hearing to identify the issues that he had with this draft contract, the claimant stated that it did not contain the agreement that he felt that he had with Mr Mullaney for taking over the business. The claimant wanted Mr Mullaney's vision for the future of business set out in the 8 January WhatsApp message, to be the basis for his employment contract. The respondent did not consider it to be appropriate for that discussion to be inserted into a contract of employment. If the parties had agreed to a binding agreement related to the claimant taking over the business, this could have been part of a separate contract or agreement. A contract of employment is meant to reflect the situation at the present time and not an expression of what might happen in the

future.

In their text messages about the contract, we find that Mr Mullaney tried to reassure the claimant that this was not the final version of the document, that he himself had not read it yet as it was simply a draft that he asked Mentor to send to the claimant and to Mr Ralley. He told the claimant that the intention was that if he came back to him with comments, suggestions or requests, those would be considered and if agreed, would be incorporated into the contract. The claimant totally refused to engage with the respondent over the draft contract.

The respondent tried again to discuss this with the claimant in June 2020. The claimant continued to be dismissive of the draft contract and the respondent's attempts to agree written terms with him. He stated that he *'wouldn't sign that illegal prison statement'* and told Mr Mullaney *'don't insult me even talking about it'.* Mr Mullaney made it clear that he would agree to stop talking about it, if this was what the claimant wanted but the claimant should be aware that his refusal to discuss and agree the contract was the reason why he had not got one. He was reminded again that he was supposed to come back to the respondent with any changes that he wished to make to the draft and as he failed to do so, the process stopped.

The draft contract sent to the claimant was in the bundle of documents at page 37 and the claimant confirmed that he received it. Details of the claimant's name, pay, start date and job title were left blank to be completed by the parties. However, it did contain clauses which covered the details of the claimant's holiday entitlement, pay allowance, deductions that the respondent could make from his pay, his pension entitlement, hours of work, statutory sick pay entitlement, notice entitlement, disciplinary and grievance procedures, post-termination restrictions, confidentiality and his entitlement to a fuel card, vehicle and mobile phone. The claimant never signed the draft contract but he had the benefit of these clauses during his employment with the respondent.

Although the claimant's evidence was that this contract was different to that given to Mr Ralley and other colleagues and he hinted that the those were more favourable than the one given to him. The Tribunal was not told in what way they were more favourable and we did not see copies of the contract allegedly given to Mr Ralley at the time, or any contract given to any other of the respondent's employees.

Employment of the claimant's wife

In April 2019, the claimant asked the respondent by text message if his wife, Ahn, could be employed to assist him with administrative duties. The claimant's wife had done work occasionally for the respondent as a subcontractor. The claimant proposed that the respondent split his annual salary into two paying him a salary of £41,000 and paying the balance of £14,000 to his wife. This idea was put to the respondent on more than one occasion in the bundle and the amounts varied across the emails but the idea was the same. This suggestion was to reduce the claimant's tax liability.

On 27 April, Mr Mullaley emailed the claimant in response and stated that he would have to see what the respondent's accountant, Price Bailey's advice would be on splitting the claimant's wage as the claimant requested. He indicated that he was concerned that the HMRC would consider that this was just a tax

reduction strategy and made it clear that if agreed, the claimant's wife would have to do the admin work that she was being paid to do. He was happy to do it if the accountant agreed. The claimant repeated the request on the following day.

On 11 July 2019, Mr Mullaney informed the claimant that following taking advice from his chartered accountant, the respondent decided that it could not do this as the HMRC could consider it to be fraud. Instead, the respondent told the claimant that his wife could submit invoices to the respondent for the work she did assisting the claimant and those would be paid with the same amount of money. The respondent reduced his salary to enable that to happen, as he requested. There were copies of emails in the bundle that had been attached to some of those invoices. The respondent paid those invoices.

The respondent had employed Mr Ralley's wife as a buyer. We were not told the circumstances of her employment. The claimant agreed with respondent's counsel that it was up to the respondent to employ who it wants to, to further its business interests.

The claimant was paid a bonus at Christmas and another at summertime, on an informal basis, for every year that he worked with the respondent. In 2019, he received a summer bonus of £1,500 and a Christmas bonus of £3,000.

Company car

The paragraphs related to the provision of company vehicles in the draft contract stated as follows:

"8. Vehicle Allowance:
As long as you hold a valid driving licence, you will be provided with a suitable vehicle to assist you in performing your duties. It is your responsibility to keep the vehicle in clean and well-maintained condition.

9. Mileage Allowance:
The Company will reimburse the cost of business mileage incurred as part of your role."

Once he became a full-time employee the claimant was provided with a company car. The respondent did not have a company fleet of cars but negotiated deals with a car dealership, whenever a car was required. The first vehicle the claimant was given, was a company van in 2016. At some point in his employment, the claimant had what was described in the hearing as '*a new, high spec BMW*' during that time. The claimant later told respondent that the car had developed a 'rattling' noise which he found unacceptable. The respondent agreed to change the car and the claimant was given e-class Mercedes Benz, at a cost to the business of £470 per month.

The respondent's vehicles were leased on 4 year deals, whenever one was needed. Mr Ralley negotiated with a car dealership and in 2018, the respondent got a deal on Jaguar cars which were for the use of Mr Mullaney and Mr Kelly, the company directors; and Ash Ralley, who had just been promoted to the post of senior operations manager and Mr Holstead. They cost £950 per month to the business and each person was responsible for paying their own company car tax payments.

In 2019, the claimant asked the respondent to allow him to change his company vehicle. His vehicle was still under a lease agreement expiring in June/July 2020. The Tribunal saw text messages from the claimant on 12 May 2019 in which he told the respondent to give his car to someone called Gavin as he wanted the company sell big van and buy a different vehicle that would cost him less in tax. He complained that the car that he was using was costing him £9,500 a year in tax. It was in response to this that the claimant was given a different vehicle - a utility truck - to use for work and for his personal use. This caused the company money as it had to break the lease on the car but the respondent agreed to the claimant's request. The claimant made no complaint about this and used it until termination of this contract.

Quality of life at work

I find that the respondent was supportive of the claimant with his personal financial difficulties. When the claimant told Mr Mullaney that his monthly outgoings were greater than his income, the respondent decided to do what it could to help the claimant. In 2017 he asked the respondent for a loan of £3,000, which he offered to 'pay back' in bonuses. The respondent agreed. There were other messages in the bundle where the claimant was in financial difficulty and asked the respondent for an advance of salary and Mr Mullaney agreed.

The claimant made regular threats to leave the respondent's employment, whenever he did not get something that he had asked for or when he was unhappy with the directors' decisions.

The respondent allowed the claimant to use company vehicles to drive his family to Poland on holiday. In May 2019, when the claimant's father died in Poland, the respondent told him to use the company credit card to make arrangements to take his family there for the funeral.

The claimant believed that the respondent should pay his tax liability on his company car because he felt that as his agreement with the respondent was that he should be paid £2,900 per month net of tax, he should have to pay anything out of it for use of the company car. If he did so, this would reduce his net pay. The claimant did not appreciate that this was how the company car scheme worked. The claimant was not happy to pay the P11D charge, which was what he complained about in his email to Mr Mullaney dated 12 May 2019. This was why the respondent gave the claimant a different vehicle and he gave back the Mercedes-Benz. There was no complaint from the claimant about it at the time.

The Tribunal finds that the claimant had a team of workers who worked for him on jobs for the respondent. We find that most of the workers were Polish nationals but the respondent had not given him these workers. The claimant was responsible for recruiting workers to his team. The workers were subcontractors/self-employed. The rates at which they were paid was determined by the price of the job. When Mr Kelly quoted for a job, he would give the manager of the team, in this case the claimant, the rates for the job where the price was set. Those rates would be within the schedule of rates that the respondent applied across the board. All managers had the same schedule of rates. There were also allowances/variations within the job that was down to the judgment of the contracts manager and could be added to make up the subcontractor's wage. Mr Kelly would explain the allowances in each contract to

the contracts' manager. The claimant was autonomous in how he managed and ran his jobs.

However, the respondent was responsible for the costs associated with each contract. At one point during his employment the respondent conducted an audit which revealed that the claimant was paying more to his sub-contractors that he should have. The respondent asked him to revisit the payments and reduce them, where it was possible to do so.

The claimant was able to procure his own team members and often recruited Polish workers to join his team. That was his choice as there were no restraints put on him or restrictions on who could be in his team. The claimant also would not allow any of '*his'* men to work on other jobs for other managers, when they needed help. The respondent considered that they were all Fire Integrity subcontractors but the claimant behaved as though they were his personal team.

The respondent had Eastern European contractors working in other teams, with other managers. It was not only the claimant who had Polish workers in his team. The respondent confirmed that the person who replaced the claimant is also Eastern European. The respondent also confirmed that all invoices are paid. Across the business there would be around 150 subcontractors/workers sending in their invoices on a fortnightly basis and the respondent would pay them all. There would no consideration as to the nationality or ethnicity of the person who submitted the invoice before they were paid.

The scheduled rates of pay differed according to the jobs that the contractor did and not according to where the contractor lived. As the claimant only wanted to do firestopping work, it is likely that some contractors in different parts of the country, working for other managers doing a broader range of work may have been paid at a different or higher rate that then contractors on the claimant's team. That would have been because of the rate for the work they did rather than their location or their nationality.

The claimant and his colleague, Ash Ralley were both senior contracts managers. They were both paid the same wage. Although the claimant lived in the SouthEast of the country and Mr Ralley lived in a rural area. The claimant had a number of additional perks associated with his job. He was allowed to use the company credit card for personal use. He used company vehicles for personal use, including driving it abroad.

Mr Mullaney guaranteed to the claimant that he would get a net payment every month of £2,900, regardless of the gross wages. We find that the claimant was the only person that he did this for and that he did it to assist the claimant in solidifying his personal financial situation.

The claimant complained of a reduction in wages in June 2019. Although the respondent had promised the claimant that he would get a net payment of £2,900 per month, the respondent was not in charge of tax codes. Those are set by HMRC and based on an employee's total personal financial circumstances. The claimant claimed Child Benefit as he had dependent children. The rules on Child Benefit changed from January 2013. From that date, if an employee earned more than £50,000, they could still claim Child Benefit but HMRC would deduct

part of it from their income at the end of the tax year. If an employee earned more than £60,000, the full amount of Child Benefit claimed would need to be repaid to the government at the end of the tax year. These were rules brought in by the government of the day and was not in the respondent's control. The claimant's tax code changed, which meant that by law, as the claimant's employer, the respondent had to deduct the appropriate amount and send it to HMRC.

On 27 June 2019, in a WhatsApp message to Mr Mullaney the claimant complained that the payslips in January were for a net sum of £2,880 but his recent payslip showed a reduced figure of £2,740. He refused to accept that this was related to Child Benefit. The Tribunal finds that the change in the claimant's net pay was caused by HMRC's decision to reclaim from him a percentage of the Child Benefit that he claimed in the previous tax year. This was another reason why he wanted the respondent to split his wages between him and his wife so that his wages would be below the £50,000 threshold, allowing him to claim and retain all of the Child Benefit.

Although the reduction in pay was not caused by anything that the respondent had done, after the claimant complained about it, the respondent decided to make up the net wage to £2,880. The drop in salary caused by the change in the tax code happened for about three months. After that, the respondent effectively increased the claimant's wages by paying him the same amount as the Child Benefit that had been reclaimed by HMRC. The claimant's net wage was restored to £2,900. The respondent did this to assist the claimant.

At the time he resigned, the claimant was a senior contracts manager for the respondent. This was a senior position in the company. In his position, the claimant's work was frontloaded so that most of his input was at the start of the contract. Once the contract was up and running and his team were working on it, there would usually be less for him to do. He would then move on to the next contract and keep a supervising eye on those contracts that were up and running.

Because of this and his ambition to become a partner in the business, the claimant was happy to take on a lot of work. We find it extremely unlikely that he complained about his workload while he worked for the respondent. However, as the claimant was quite vocal about his finances and other aspects of his job, we find that he would have raised it with the respondent if he considered that he was overworked or that the workload was unfairly shared. In the hearing, the claimant was asked about the spreadsheet at pages 212 – 216 which showed that other managers had managed more projects that he had. He queried whether one or two of his projects had been presented as being done by others, but he agreed that overall, it showed that he had not managed more projects than his colleagues. Mr Kelly's evidence was that in July 2019 the claimant's work contributed £130,000 to the total value of the respondent's turnover while Mr Mullaney's work contributed £282,000 and Mr Holstead's work represented £121,000. In October 2019, the value he added to the respondent's profit was £221,000, whereas that contributed by Mr Holstead was £209,000 and that by Mr Mullaney was £195,000. The claimant restricted himself to firestopping work which were usually short contracts that did not always bring in a lot of value. He may have been busy with these short contracts but they did not always the more valuable contracts.

The respondent's evidence was that Mr Ralley who at the time was also a senior contracts manager, was more willing to assist with other jobs apart from firestopping and was more flexible in his approach to work. This meant that he was able to assist on more projects and made him more suitable to be promoted when the respondent came to consider who would be best suited for the position of Managing Director.

Events leading to the end of the claimant's employment

The respondent had worked with Kier Group Plc for approximately 16 years at the time the claimant was asked to do some work for them, on the respondent's behalf, in the roof space of a hospital. Kier was the main contractor on site.

On 3 July 2020, the claimant was instructed to carry out repairs to the fire protection to existing steelwork. Kier sent the claimant an email with photos of the existing work and told him that there was scaffolding already up to assist his team with doing the work.

The claimant responded to say that he would visit the site on the following Tuesday to assess it. On 7 July, following the visit, the claimant emailed Kier, Mr Ralley, Mr Kelly and Mr Mullaney to say:

'Fire Integrity would require proof of what was originally used to protect the steel beam is in order to carry out repairs. Unfortunately without materials data back up, we only have one option which is to replace the fire protection in its entirety'.

Mr Mullaney confirmed in his evidence that this was an appropriate question for the claimant to ask.

Between 15 July and 23 July, the claimant and his managers and colleagues communicated by email, WhatsApp and telephone about this Kier job. We had all the communications in the trial bundle and were able to piece together the sequence of communication between them to determine what happened.

On 15 July, a Kier representative wrote to Barry Kelly to instruct the respondent to attend the site and carry out repairs to the existing fire protection, where Kier had had to cut away to make the steelwork connections. He clarified that Kier was happy that the respondent would not be able to certify any of the existing fire protection or the detail of the connection or the repair to it. He stressed that Kier wanted the work done as soon as possible and that any further delay would be holding up other critical work that needed to be done within the following few days. Having had that reassurance, Mr Kelly responded to the Kier representative to say that he was happy for the respondent to undertake the work on that basis. He forwarded the email chain to the claimant and asked him to pull together a price for Kier and book the labour in '*asap'*. That evening, in an email to his managers, the claimant stated that he did not think that the respondent, as a fire stopping company, was what was required for the job. He was essentially complaining that the job was at a lower level than the work that the respondent would usually undertake and about the amount of manpower that would be taken up to do the job. It is likely that this email was sent after he had visited the site and assessed the job.

Later in the evening of 15 July, the claimant sent a WhatsApp message to Mr Mullaney to ask about his bonus for the new tax year or summer as he needed it for the upcoming summer holidays. He also stated that he was not going to ask Mr Ralley for any money as he was not working for him. Mr Mullaney stated that he would sort something for the claimant if he promised not to attack him ever again.

On 16 July, the claimant was copied into the formal work order from Kier to the claimant. It asked the respondent to proceed with the repairs to the fire protection to existing steelwork that had been cut away to allow for the new steelwork connections. It stated clearly, *'we appreciate that you are unable to certify any of the existing fire protection or the connection detail between the existing and new fire protection and therefore clarify out these requirements from the instruction.'* The claimant would have been clear when he received this that the respondent was not being asked to certify the work that existed or the work that the respondent was being asked to do.

Also on 16 July, Barry Kelly responded to the claimant to ask why he thought that the respondent as a firestopping company was not the right company for this job. He asked '*why? Is it not steel and do we not do steel protection*?'

Also party to this chain of emails was Ash Ralley, who wrote on 16 July, *'they've accepted they don't want us to sign it off though? So we repair it. Bill it. Init?'*. Barry Kelly confirmed that this was also his understanding of this situation as he emailed the claimant and Mr Mullaney to say '*Exactly, Don't know that we are in a position to turn away anything at the moment'.*

The claimant responded as follows:

'Existing protection is not installed correctly. Just taped to the wall. If we don't certify it and repair to the same standard as what is there now. No need for fire stopping company.'

We find that the claimant is here telling the respondent that having inspected the work, he felt that the existing protection had not been installed correctly. In his response, Mr Kelly said to the claimant '*we are certifying our own work'*. The claimant responded much later that day to say *'surely we can't do that?'* Mr Kelly's response was that the respondent would be able to identify its element of the works and could also stipulate to Kier that it was not offering any certification on the existing installation nor the junction. The claimant responded as follows:

'Thought we can't crossover two different products? What you saying, we install section of fire protection and join it to unknown materials. That will not be as per manufacturers detail. Our work will not be compliant'

In response, Mr Ralley stated *'Kier already stipulated that 12 messages ago…*'

Mr Kelly's evidence was that he did not mean that the respondent was being asked to certify anything and that he was simply using the claimant's language in his quick response.

In frustration at the claimant's queries and delay in carrying out the work, Barry Kelly emailed the claimant at 14.36 and asked whether he should just get Pat to do it. We find it likely that he did not want Pat to do it as Pat was busy with other work but he was hoping that this message would highlight to the claimant that the respondent needed the job to be done and that he was being unreasonable in continuing to query it as opposed to doing it. This did not work and the claimant responded immediately with a thumbs up and the word '*yeah'*.

At 14.39 Mr Kelly emailed him in response to say '*Rad, you will do as your bosses are asking you to do. Are we clear – sort out the labour – sort out the RAMS. In other words do your job. We have all got better things to do – stop going over the same old ground – the client has already agreed it will be exceptional and knows what he is instructing – your direct line Director have (sic) told you its fine. What more do you want'.*

At 14.41 the claimant responded to Mr Kelly to say *'Barry, I quit, get pat to sort this or whoever, I will not certify anything'.*

At 14.44 Barry Kelly, who by now was extremely frustrated by the claimant's constant queries about the job, responded quickly to the claimant and said *'resignation accepted. Please bring your stuff to the office this afternoon'.*

At 14. 49 Mr Kelly, having calmed down, sent the claimant a WhatsApp message to ask whether that was the way he wanted to go. We find that he meant whether the claimant was sure that this was how he wanted to leave the respondent. He stated that if that was the claimant's wish, he was prepared to meet him at the office and drive him home. At 14.51 the claimant responded to say *'send men to collect would you'.* He also sent a WhatsApp message to Mr Mullaney which said that

'*It's illegal to install this and I have every right to refuse'.* Mr Mullaney confirmed that he did have that right but that if he refused to carry out an instruction from his bosses then he ought to resign, as was also his right. He reiterated that there was nothing illegal going on. The claimant responded to dispute Mr Mullaney's version of his conversation with Mr Kelly and stated that he would do what was sensible and did not want to be threatened by his boss.

Mr Mullaney responded to reiterate the respondent's position on the job. The respondent was clear that it would not be able to certify the detail of the job. It could only certify its portion of the work, in an ad hoc way. there was to be no certification other than the products the respondent installed – products that conform. The claimant felt that it was not whether he did the job or not but whether he should do it in this way. He was upset with Mr Kelly's threat of using someone else.

Mr Mullaney responded at 15.14 '*just get on with your job and stop being a dick'*. In the claimant's response he stated that the respondent should go ahead and get Pat to do it and that he wanted to be free from headaches and stress.

Mr Mullaney tried to persuade him to do the job. He sent the claimant the following WhatsApp message at 15.40:

'Mate please don't make it harder than it needs to be. If you are leaving quitting

cos you are that unhappy then just do it, otherwise just do what you have to do for the business. You aren't a director and you've had confirmation from one to do the work. Nobody wants you to leave but at the same time nobody is begging you constantly to do the work, we're all busy and mostly it's just childish and not helpful.

Mate I might as well tell you now that as of next month Ash is going to be Managing Director – I'm pretty much going to be doing the same thing I've been doing but more focus on client relationships and will chip in.

Reason being Ash knows all about the jobs so if there's any problems that clients come to me I don't immediately know and that looks bad on the business. Also, it's a wasted resource me being in that chain because you boys sort the solutions anyways.

So he'll be responsible for everything and that means he only reports to me and Barry.

I really hope you can support him and improve the business between you.

Talk later anyway'

The claimant's response was that he was happy to work with Mr Ralley but not for him. The claimant was advised that both Mr Kelly and Mr Mullaney would be in the office on the following day if he wanted to come and talk. The claimant confirmed that he would be there.

On his return home evening the claimant sent Mr Mullaney a WhatsApp message to say that he would come to the office at midday on the following day, 17 July, to talk and clear the air.

Unfortunately, having set the time for midday, the claimant did not go to the office to meet with Mr Kelly and Mr Mullaney as arranged. At 13.33, the claimant sent Mr Mullaney a text message to ask whether they were still in the office. Mr Mullaney responded to say that they had conducted a meeting in his absence and that they both left the office about 30 minutes earlier.

There was then a series of WhatsApp messages between Mr Mullaney and the claimant in which the claimant complained about his desire to book some annual leave and his workload. He complained about the respondent making Mr Ralley managing director as he felt that he was better than him that he would not be able to do all that the claimant can do. He referred to the respondent's directors as fake friends. Mr Mullaney asked him to look at it as another step forward. We find that the 'it' referred to was Mr Ralley's promotion to the post of managing director.

Although Mr Kelly was not aware of it, we find it likely that the claimant continued working for the respondent on 17 and 18 July.

On 19 July, the claimant stated that all he was after was to be on '*equal terms'* with Mr Ralley. He told Mr Mullaney '*Thought you'd acknowledged this already*!' We find that this was a reference to the message that Mr Mullaney sent him in January 2018. Mr Mullaney repeated that Mr Ralley was going to be in charge of running the whole company and that the claimant needed to help him with that.

He told the claimant that this need not be upsetting to him but that he needed to get used to the fact that Mr Ralley was going to be his boss.

The claimant then stated that he had been loyal for too long and that he would wait for the new boss to dismiss him.

Later that day Mr Mullaney sent the claimant a WhatsApp message about something else but the claimant's response showed that he was unable to move past the idea of Mr Ralley being his boss. He responded to Mr Mullaney that he should get Mr Ralley to answer any questions. Mr Mullaney reminded him that he had been asked by Mr Kelly to sort this particular issue and that it was not something that Mr Ralley had been asked to do. He responded that Mr Mullaney should ask Mr Kelly. Mr Mullaney pointed out that that would mean asking the person who had delegated the task to him. The claimant replied *'new boss will tell you keep safe'.*

In response, Mr Mullaney said as follows:

'Ok mate I think that's it. Can you bring the car, lap top, phone and anything else you have back to the office tomorrow please. Had enough of this.'

In response, the claimant asked the respondent how much notice was required and whether he should dismantle the desk provided to him or would the respondent want it back all in one piece.

The claimant returned the items as requested. He made no query about work. His only query was that he wanted the PAC code to the mobile phone so that he could have access to the information stored on it. He stated that he wanted to be able to get on with his personal life. The phone number was his and he had used the handset for banking and other personal matters. The handset had been purchased by the respondent for his use as part of his job.

On 20 July, the respondent replied to tell the claimant that it needed to keep the phone number as it had company information attached to it. The claimant told the Tribunal that he had contact numbers for family members abroad in the phone as well as other personal information. The respondent eventually stopped paying the phone bill which meant that the claimant needed to a new phone service provider and possibly a new number. The respondent was concerned about the claimant contacting its clients as there were client contact details on the phone.

On 21 July, the claimant sent Mr Mullaney a WhatsApp message requesting that the respondent provide him with a redundancy letter so that he could register at the job centre. In his response, Mr Mullaney told the claimant that he had not been made redundant. He said that he could send the claimant a letter of termination if he wanted but that he had not been made redundant as that is when the company lays someone off because of lack of work. He distinguished that from termination which is when a company ends a contract of employment.

Mr Kelly sent a WhatsApp message to the claimant offering to meet with the claimant to discuss how they could resolve their differences. Mr Mullaney also confirmed with him that he could meet with the respondent to raise his concerns. The claimant agreed to meet on 22 July. It is likely that the claimant believed that

Mr Mullaney would be at this meeting.

Before he went to meet the claimant, Mr Kelly had a discussion with Mr Mullaney about the claimant and whether they would be prepared to sort things out with him so that he continued to work for them. They did not want the claimant to leave as they were very busy. If he left, it would mean that the other contract managers and the Directors would have to share the claimant's workload. The respondent was very busy at this time as in addition to its existing work and managing projects during the coronavirus lockdown, it had been asked to take on a big job for the MOD in Birmingham, working on one of the first Nightingale Hospitals that the government set up to care for people during the height of the Covid-19 Coronovirus pandemic. The respondent could not afford to lose a contracts manager at that time. Mr Kelly therefore went to the meeting hoping that it would be possible to reconcile differences with the claimant but aware that the claimant was finding it difficult to get past the respondent's decision to make Mr Ralley a Managing Director.

They met on 22 July. We find it likely that the notes presented by Mr Kelly at page 104.29 are a contemporaneous note and therefore the most accurate a summary of what was said in the meeting, that it is possible to get. They met at a café. Mr Kelly took brief notes in the meeting, which he did not show the claimant as he did not expect to need there to be any dispute about what was said. He took notes for himself and possibly because he wanted to report back accurately to Mr Mullaney and Mr Ralley on what had been said.

The claimant was relaxed in the meeting. If he believed that he had been dismissed he did not mention this to Mr Kelly in the meeting. It appeared to Mr Kelly that the claimant was relieved to be leaving the respondent's employment. The claimant told Mr Kelly that he wanted some time to think about his next move. Mr Kelly noted that the claimant said that he wanted to try car valeting as his next job as it was something that he had always enjoyed doing. They talked about the claimant's notice period and the claimant told him that he wanted a payment in lieu of notice instead of him working his n otice. The claimant also wanted to be able to use the truck during his notice period. They discussed a sum of money that the claimant wanted; he mentioned £8,000 as his notice pay, with an ex-gratia payment on top. Mr Kelly's noted that the claimant was asking for '*silly money'*, which we find means that he thought the figure the claimant mentioned was unrealistic. He told the claimant that he would come back to him after he spoke to Mr Mullaney and Mr Ralley about it. They discussed the phone, emails and the company credit card that the claimant had been able to use, which all needed to be or already had been returned. Mr Kelly told the claimant that he could continue to use the company vehicle while he was still employed but that he could not take it overseas. The meeting was amicable and they shook hands at the end. We find that this was an accurate note of what transpired in the meeting. Mr Kelly add that the shook hands once he got back to his car.

On the following day, the respondent was surprised to receive a letter from the claimant, addressed to Mr Mullaney and forwarded to Mr Kelly. In it the claimant alleged that Mr Mullaney had dismissed him by text message on 19 July when he asked him to bring the card, laptop, phone and anything else that belonged to the company, back to the office on the next day. He complained that he was unhappy with his dismissal and the way in which he had been dismissed. He complained about being denied access to the phone and credit card soon after

he received Mr Mullaney's message and that despite asking for the PAC number, he had not been given it. He asked for three months' notice. He also suggested that he should be paid 6 times his monthly net wage as appropriate compensation. He referred to his net wage as £3,500, which was inaccurate as he knew that his net wage was £2,900.

Although he stated that the believed that he had been dismissed on 19 July, the letter then went on to say that he was *'willing to leave the company'* and return all FI possessions upon his return from leave in August, if the respondent would compensate him for the team that he had built up over the years and which was a good team that delivered good service to customers. He asked for 6 months wages, £21,000 and all his pension paperwork in exchange for him leaving the company. He stated that he hoped that he and the respondent could *'resolve this separation peacefully and quietly'.* The claimant ended the letter by threatening to take the respondent to tribunal for unfair dismissal.

The claimant did not refer to any disclosures or to discrimination.

On 26 July Mr Kelly responded to the claimant by letter. He stated that the claimant had given notice on 16 July and so Mr Mullaney's text message on 19 July was received after he ceased to be an employee. Mr Kelly reminded the claimant that Mr Ralley was being promoted to the post of Managing Director and as a result, would be the client's line manager. The claimant had made it clear that he would have been unwilling to take instruction from Ashley and he was reminded of his message on 16 July stating that he quit.

Mr Kelly attempted to set out the claimant's notice entitlement in the letter. He made a mistake as he added the four weeks that the claimant had to give to the respondent, if he was to leave the business; to the four weeks that the respondent has to pay him if he resigns. He therefore stated that the claimant was entitled to 8 weeks' notice. The letter asked the claimant to go on garden leave for the remainder of the notice period, i.e. until 16 September 2020. The claimant was informed that all access to the company systems had been suspended and all company equipment should be returned before the notice period ran out. Mr Kelly included a list of all the company equipment in the claimant's possession. The claimant was told exactly how much money to expect and what it was made up of.

On 10 August Mr Kelly wrote to the claimant to explain the reason why the respondent felt that it could not let him have the PAC code to the phone. The respondent was concerned that the number had become associated with the company and its day-to-day affairs. The respondent could not allow the claimant to use the number while he was on garden leave or have left the company. He reiterated that the claimant had not been dismissed but had resigned. He did not understand why not being able to access the phone was causing the claimant distress as he thought that the claimant had backed up his phone to the Cloud. The respondent needed access to the lock up to retrieve stock and equipment and the respondent asked for the claimant to arrange this. The claimant was reminded that he could only use the car in the UK and only until 17 September as that is the day on which the insurance ended. The claimant emailed and asked again for the PAC code.

On 11 August the claimant made a fuller reply to the respondent. He inserted his responses to Mr Kelly's paragraphs, within the same letter. He attached his copy

of the WhatsApp message Mr Mullaney sent him in January 2018 setting out his vision for the business. The claimant stated that this was the outcome he wanted rather than Ash Ralley being appointed as managing director. The letter stated that the claimant was going to keep the laptop, ipad and phone until the PAC code was released or until they reached an agreement.

On 17 August, Mr Kelly sent the claimant a long letter, responding to all his points. Mr Kelly reminded the claimant that on 16 July, he had asked him in a message if he was sure that this was how he wished to leave the respondent and if so, he was prepared to drive him home. It was the claimant's choice to leave the respondent's employment. Mr Kelly went through every paragraph in the claimant's letter and respondent to each point. He told the claimant that if he had dismissed the claimant, he would not have then tried to convince the claimant to stay or made any goodwill gestures to him. Mr Kelly noted that the claimant had asked for £8,000 at their discussion on 23 July but now, as of 11 August this potential settlement figure had increased £20,000. He confirmed that the claimant was still employed by the respondent.

Mr Kelly confirmed that the claimant worked hard for the business and was well paid for his work. He mentioned all the other perks that the claimant got from the business during his employment, including the use of the company vehicle which he used to take his family on holiday to Poland - saving him the airfare for him and his family. Mr Kelly pointed out that the respondent did not have to explain its decisions on promotion or recruitment to him and that any event, his performance was nowhere near as good as that of Mr Ralley. He stated that he could list many jobs that the claimant had failed to secure final accounts on. He had also failed to supervise the workers that he had recruited, which caused the respondent to incur additional costs and damage. We find that Mr Kelly was making it clear that the clamant and Mr Ralley were not on the same level in terms of performance and that the respondent had legitimate reasons to appoint Mr Ralley to the senior post.

Mr Kelly confirmed that following the meeting with the claimant, the claimant was paid 8 weeks' pay. He later realised the error. The respondent was applying the terms of clause 18 of the contract which the claimant had refused to sign, entitled *Notice*. The respondent added the 4 weeks' notice that the claimant had to give, if he were to resign; with the 4 weeks the respondent had to give him if it were terminating his contract. The claimant had been employed since 6 April 2016.

The respondent explained that as it now looked as though the clamant intended to remain in this area of work, it was even more important to its business interests that the claimant did not get access to the information on the phone as the respondent considered that this presented a massive risk to it. Mr Kelly stated that the claimant had confidential information about the respondent's pricing structures, supplier prices and other sensitive information on that phone and so he was not prepared to jeopardise the business by allowing him have access to the phone's memory.

In October 2020 the claimant attended a hospital appointment for assessment as he had been suffering from symptoms of depression. The cause of his depression was noted as '*feelings of worthlessness….Onset - a year ago. Had stress from work. Feels disappointed - that he has sacrificed so much, as a result has been unfairly treated'.* It was also noted that he was worried about the tribunal and what the outcome might be. He was having nightmares about it.

The claimant was added to the list for behavioural activation by the hospital for his depressive symptoms.

The claimant contacted ACAS to start the early conciliation process on 1 September 2020. The early conciliation certificate is dated 22 September. The claimant issued his claim in the employment tribunal on 29 October 2020.

The respondent gave the claimant the PAC code on 30 October 2020.

In his claim the claimant stated that he had been dismissed on 16 September 2020. In its response to the claim, the respondent submitted that the claimant resigned on 16 July 2020.

In December 2020 the claimant stated '*we are called FireMax'* in a WhatsApp message to a prospective client, which suggested that he might have found alternative employment. In the hearing, the claimant denied working for a company called FireMax. It was his case that he was helping a friend to find contractors. The claimant's evidence was that he only started employment in March 2021 and there was a payslip for the claimant from Firemax in the trial bundle which confirmed that he was employed at that time.

Law

The claimant brings claims of (a) Direct race discrimination; (b) public interest disclosure - and automatic unfair dismissal and detriments; ordinary unfair dismissal or constructive unfair dismissal. The claimant also alleges that the respondent failed to provide him with a statement of particulars.

The list of issues was agreed at the preliminary hearing on 9 April 2021.

Race Discrimination

The claimant brought a complaint of direct discrimination on the grounds of race. The claimant alleged that the respondent treated him less favourably than colleagues who were of British and/or Irish nationality/citizenship. The claimant is of Polish descent and has Polish nationality.

Direct discrimination is prohibited by section 13 of the Equality Act 2010 (the Act). Section 9 of the Act defines race as including colour, nationality, ethnic or national origins. The burden of proving the discrimination complaint rests on the employee bringing the complaint.

The claimant compares his treatment to Mr Ralley in relation to at least 3 of his allegations. He bears the burden of proving facts from which the tribunal could conclude, in the absence of any other explanation, that the respondent contravened section 13. This is set out in section 136 of the Equality Act 2010. If the respondent is able to show that it did not contravene the provision then this would not apply.

Further guidance on the burden of proof is set out in the cases of *Igen v Wong [2005] IRLR* and *Madarassay v Nomura International Plc [2007] IRLR 246.*

The Court of Appeal of *Igen Ltd v Wong* specifically endorsed the following principles:

> (1) it is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an act of discrimination against the claimant which is unlawful by virtue of the Equality Act 2010. These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination - even to themselves. In some cases, the discrimination will not be their intention but merely based on the assumption that "he/she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.
>
> (5) It is important to note the word "could" in the law. At this stage the Tribunal does not *have* to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact *could* be drawn from them.
>
> (6) In considering what inference is or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.
>
> (7) ….
>
> (8) Likewise, the Tribunal must decide whether any provision in any relevant code of practice is particularly relevant and if so, take it into account in determining such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent had treated the claimant less favourably on the grounds of race, then the burden of proof shifts to the respondent.
>
> (10) It is then for the Respondent to prove that he did not commit, or as the case may be is not to be treated as having committed, that act.

> (11) To discharge that reason, it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires the Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal will normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal would need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

In the case of *Laing v Manchester City Council [2006]* ICR 1519 tribunals were cautioned against taking a mechanistic approach to the proof of discrimination by reference to the Race Relations Act 1976 but which would also apply to the Equality Act, in following the guidance set out above. In essence, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassay v Nomura International Plc [2007] IRLR 246)*.

In every case the tribunal has to determine the reason why the claimant was treated as s/he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572* "this is the crucial question". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reasons. It is sufficient that it is significant in the sense of being more than trivial.

Unfair dismissal

The respondent denies that it dismissed the claimant. The Tribunal will have to decide whether the claimant was dismissed or resigned. If he was dismissed then, the Tribunal must decide whether it was a fair dismissal. If he resigned, the Tribunal has to consider whether this was pursuant to a fundamental breach of contract making it a constructive unfair dismissal contrary to section 95(1(c) ERA 1996.

Constructive unfair dismissal happens when the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

An employee has the right under sub-s (1)(*c*) to treat himself as discharged from his contractual obligations only where his employer is guilty of conduct which goes to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; see *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27.

The claimant's primary case was that he had been automatically unfairly dismissed under sections 103A Employment Rights Act because of protected disclosures.

Protected Disclosures

The claimant's case is that he was dismissed because he raised protected disclosures. He also complained that he suffered detriment as a result of making protected disclosures.

In order for disclosures to be considered as protected in accordance with the Employment Rights Act 1996 (ERA) there needs to be three essential elements. (*Williams v Michelle Brown AM* UKEAT/0044/19/OO). Firstly, there must be a disclosure of information. Secondly, the worker must genuinely and reasonably 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) set out below. Fifthly, the disclosure must have been made either to the worker's employer or to such other persons as set out in sections 43C-43H ERA. Unless all five conditions are satisfied, there will not be a qualifying disclosure.

The disclosure must tend to show wrongdoing in one of five specified areas; or deliberate concealment of that wrongdoing. Those areas are: (as set out in section 43B of the ERA) (a) that a criminal offence has been committed, is being committed or likely to be committed' (b) that a person has failed, is failing or is likely fail to comply with any legal obligation to which he was subject; (c) that a miscarriage of justice has occurred, is occurring or is likely to occur; (d) that the health or safety of any individual has been, is being or is likely to be endangered; (e) that the environment has been, is being or likely to be damaged; (f) that information tending to show any matter falling within any of the preceding paragraphs has been, or is likely to be deliberately concealed. It is not necessary for the information to be true. However, determining whether they are true can assist the tribunal in their assessment of whether the worker held a reasonable belief that the disclosure in question tended to show a relevant failure. (*Darnton v University of Surrey* [2003] IRLR 133.)

Disclosures can be made verbally, in writing or a combination of both.

Out of the five specified areas referred to above, the claimant relies on 43B(1)(b), that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The word '*legal'* must be given its natural meaning. He also believed that he made disclosures that came under subsection 43B(1)(d), that the health and safety of any individual, in this case the occupiers

of hospital, were being endangered or were likely to be so. It was also submitted on his behalf that he reasonably believed that the disclosures tended to show that legal breaches and/or risks to health and safety were likely to be deliberately concealed

What sort of information would satisfy the test? In the case of *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 Sales LJ defined the test that had to be applied to determine whether the worker had provided information that complied with the section as whether the disclosure had sufficient factual content and specificity such as is capable of tending to show the wrongdoing alleged and not just a belief that there is wrongdoing. See also *Soh v Imperial College of Science and Technology and Medicine* EAT0350/14. A belief may be a reasonable belief even if it is wrong. See *Babula v Waltham Forest College* [2007] ICR 1026.

There are two obligations on the employee making disclosures. Firstly, the disclosure of information in question must have identified to the employer the breach of legal obligation concerned; although this does not have to be in strict legal language. Sometimes the breach complained of is perfectly obvious (see *Bolton School v Evans* [2006] IRLR 500 EAT). But as *Harvey* commented, that may be the exception rather than the rule. In B*lackbay Ventures Ltd v Gahir* [2014] IRLR 416, EAT, Judge Serota stated that outside of that category, the source of the obligation should be identified and capable of certification by reference for example to statute or regulation. (See *also Eiger Securities LLP v Korshunova* [2017] IRLR 115 EAT).

The test may have been less onerous in the case of *Fincham v HM Prison Service* UKEAT/0991/01 (3 December 2001, unreported), but that case was of an employee relying on disclosures related to breach of obligations related to health and safety in section 43(1)(d), which is different to the breach of legal obligation at 43(1)(b). However, a similar situation arose in the case of *Western Union Payment Services UK Ltd v Anastasiou* UKEAT/0135/13 (21 February 2014, unreported) as there was no evidence that any particular statute or legal provision applied to the situation. But the EAT, approving both *Fincham* and *Bolton*, held that the legal obligation that was being asserted was clear and well known to both parties as they had a sophisticated understanding of the relevant legal obligations involved. There the obligation was apparent to all involved as a matter of common sense.

Secondly, the employee bears the burden of proof of establishing that there was in fact a legal obligation on the employer and that the information disclosed tends to show that a person has failed, is failing or likely to fail to comply with any legal obligation to which he is subject.

The word '*likely'* requires more than a possibility or a risk that the employer might fail to comply with a legal obligation to which he is subject. *Kraus v Penna* [2004] IRLR 260 EAT.

If a tribunal concludes that the worker was only motivated by self-interest and therefore had no reasonable belief in public interest – even if he could have had such a belief – then it is open to the tribunal to rule that the disclosure/s do not qualify for protection.

Detriment

It was the claimant's case that he suffered detriments as a direct consequence of making protected disclosures. Section 47B(1) of the ERA states that a worker has the right not to be subject 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. The term 'detriment' is not defined in the ERA. Detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had, in all the circumstances, been to their detriment.

In *Blackbay*, the court also made the following comments on dealing with complaints of detriment. Once a protected disclosure has been found to exist it needs to be shown that: - the worker has been subjected to a detriment; the detriment arose from an act or deliberate failure to act by the employer, other worker or agent; and the act or omission was done on the ground that the worker had made a protected disclosure.

The tribunal must analyse the mental processes (conscious or unconscious) which caused the employer so to act. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal stated that it is not necessary that the protected disclosure was the sole or principal reason for the treatment. Once the employee proves that there was a protected disclosure, that there was detriment and that the employer subjected him to that detriment, the burden shifts to the employer to show the ground on which the detrimental treatment was done. it must be shown that the protected disclosure has influenced the act or omission complained of; it is not sufficient to show that the act or omission simply relates to the disclosure. (Section 48(2) ERA). Causation will be established unless the employer can show that the protected disclosure played no part whatsoever in its acts or omissions. What was the reason for the treatment? The employer must prove on the balance of probabilities that the protected act did not materially influence (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

Automatic Unfair Dismissal – because of protected disclosures

1 The claimant's case was also that he had been automatically unfairly dismissed because he made a protected disclosure. He makes a claim under Section 103A ERA. That section states that an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

2 When an employee has over two years' service with the employer at the time of dismissal - if it found that the claimant was dismissed - the burden of proof would then be on the employer to prove the reason for dismissal but the employee will have to produce sufficient evidence to raise the question of whether the dismissal may have been for an automatically unfair reason.

3 In the case of *Salisbury NHS Foundation Trust v Wyeth* [2015] UKEAT/0061/15, it was held that the issue was whether the reason or principal reason for the dismissal was a protected disclosure, thus rendering the dismissal unfair. Judge Eady QC held that in its analysis of the case the employment tribunal must conduct the necessary critical assessment of the employer's reasons for its conduct and properly explain its findings and reasoning in that regard.

4 A colleague can be held liable under section 47B ERA as held in the case of *Timis v Osipov* [2018] EWCA Civ 2321 in which the Court of Appeal held that *"an employee dismissed on whistleblower grounds should be able to pursue distinct causes of action, with significant differences as regards the conditions of liability and (perhaps) compensation, against his or her employer."* This *"eliminates the need to undertake the exercise of drawing a line between those of a co-workers acts which amount to dismissal and those that constitute prior acts".* The judgment in that case means that where a dismissal decision is made by a colleague on whistleblowing grounds, the dismissed employee may bring a detriment claim based upon that dismissal decision, under section 47B(1A) ERA.

5 The reason for the dismissal is whatever was the factor or factors operating in the mind of the person making the decision to dismiss or which motivated them to do so.

Time points

The respondent submitted that the discrimination allegations were out of time. The tribunal was mindful of the requirements of section 123 Equality Act 2010 which stated that in order for the tribunal to have jurisdiction to consider complaints of desperation, they may not be brought to the tribunal after the end of the period of 3 months starting with the date of the act to which the complaint relates, or, as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period and a failure to do something is treated as occurring when the person in question decided on it.

The Tribunal had regard to the law in the case of *Hendricks v Metropolitan Comr* [2003] IRLR 96 in which the Court of Appeal stated that where an employer applies a discriminatory or detrimental policy, rule, practice, scheme or regime which continues to apply over a period of time, it is likely to amount to conduct extending over a period. However, those are not exhaustive examples of what might be considered conduct extending over a period and it should not be treated as a complete and constricting statement of the indicia of conduct extending over a period. Rather, what the applicant has to prove in order to establish that the allegations in his case amount to conduct extending over a period, is (a) that the incidents are linked to each other, and (b) that they are evidence of 'an ongoing situation or continuing state of affairs'. The question for the Tribunal is, whether it is a case of an act extending over a period as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

Just and Equitable extension

If there is no continuing act, the tribunal would go on to consider whether it was appropriate to use its discretion as set out in section 123 (1)(b) of the Equality Act to grant an extension of time. The Tribunal is aware that it has been held that time limits are to be strictly imposed in the employment tribunal and there is no presumption that a tribunal should exercise its discretion to extend time. The onus is always on the claimant to convince the tribunal that it is just and equitable

to do so; the exercise of the discretion being the exception rather than the rule.

In determining whether or not this is an appropriate case to apply its discretion, the tribunal had to consider the principles as set out in the case of *British Coal Corporation v Keeble*.

In that case the EAT held that in dealing with the test of whether it is just and equitable to extend time the Tribunal can consider the factors mentioned in section 33 of the Limitation Act 1980 which deals with the exercise of discretion by the courts in personal injury cases. This requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:

(a) the length and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any requests for information
(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and
(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

ACAS Code of Practice

If the claimant was dismissed, the Tribunal had to consider whether the respondent failed to comply with the ACAS code practice.

Statement particulars of employment

The claimant complained that the respondent failed to provide him with a statement of particulars, contrary to section 1 of the ERA. That section sets out details that must be in a written statement of employment particulars. That includes details like the name, employment start date, wages, holidays, pensions and other benefits, notice and probationary period.

A failure to provide a statement of employment particulars is a breach of an employer's legal obligations.

Section 38 of the Employment Act 2002 deals with a failure to give statement of employment particulars, as follows

'(1) This section applies to proceedings before an employment tribunal relating to a claim by [a worker] under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the [worker], but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the [worker] under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change) [(in the case of a claim by an employee)] under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday)], the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the [worker] and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the [worker] in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under sections 41B or 41C of the Employment Rights Act 1996 the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

Applying law to facts

The Tribunal will now consider the list of issues and apply the law set out above to the facts in this case.

Time limits

The significant dates are as follows: early conciliation began on 1 September 2020 and the early conciliation certificate was issued on 22 September, which means that the process took 22 days. The claim was issued on 29 October 2020. The Tribunal agrees with the respondent's submissions that any claim in respect of alleged acts or omissions that occurred prior to 31 May 2020 are ostensibly out of time as that is three months less one day back from the date that ACAS was first notified of the claim.

What are the dates on which the claimant's complaints are alleged to have occurred?

7.1.1 - The claimant complains that he was not provided with a contract of employment from 2016, when he became an employee. The evidence was that he asked for a contract in 2018 and that it was also in that year that he discussed with the respondent, his belief that Mr Ralley had recently been given a contract, while he had not. There were text messages in 2020 in which the claimant described the draft contract that he had been sent as an *'illegal prison statement'* and confirmed that he would not sign it. We referred to the text and WhatsApp messages above. The allegation relates to April 2018.

7.1.2 - The issue related to the company vehicle occurred in 2018/2019.

7.1.3 – We were not told the last time that the claimant authorised wages to be paid to his subcontractors. It was also not clear from the evidence whether his complaint was that this was a decision at some point in the past which continues to have a discriminatory effect as they were paid less every time or whether his allegation was that there was a new decision to pay them less, at the start of each new contract. As the claimant continued working up to 19 July 2020, it is likely that he paid subcontractors in July 2020. The Tribunal will treat this allegation as being in time.

7.1.4 - It was in 2019 that the claimant asked Mr Mullaney to employ his wife to do his admin. The discussions around this continued in 2019.

7.1.5 – it was not clear what time period the claimant was referring to in his complaint that he had more projects to manage that non-Polish Contracts Managers. It is possible that this relates to the work he was doing for the respondent up to the end of his employment. The Tribunal will treat this allegation as being in time.

7.1.6 - It was in 2019 that the claimant complained about what he saw as a reduction in his wages.

7.1.7 – It was in 2016 that the claimant complained that he was paid the same as Mr Ralley even though his costs of living were higher than Mr Ralley. It is likely that this allegation refers to the period 2016 – 2019 because in 2019, Mr Ralley was promoted to the post of Senior Operations Manager and was therefore no longer on the same salary as the claimant.

It is therefore this Tribunal's judgment that apart from allegations 7.1.3 and 7.1.5 in the list of issues, all the claimant's allegations of race discrimination occurred between 2016 – 2019 and therefore, well before the 31 May 2020. Apart from allegations 7.1.3 and 7.1.5, they are all out of time as potential individual acts of discrimination.

The Tribunal then considered whether they were part of a continuing act, applying the principles set out in *Hendricks*.

We did not find any instances of the claimant complaining during his employment or at any time before he brought this claim that he had been treated less favourably than his colleagues because he was Polish. It was the claimant's case that he raised this orally with Mr Mullaney and Mr Kelly but we did not find that he did. We also agree with the respondent's submission that it was never put to the respondent's witnesses that he had made a complaint about this during his employment. He also did not raise any complaints of race discrimination or being treated less favourably because of his race, in his letter dated 23 July, even though at the time he considered that he had already been dismissed.

It is this Tribunal's judgment that if the claimant had raised with the respondent any concern that he was being treated less favourably because he was Polish or because he was not British, those concerns would have been addressed. The claimant and the respondent, especially Mr Mullaney, socialised together and Mr Mullaney considered him to be a friend. The Directors treated the claimant as a colleague and shared with him their vision for the future of the business. They expressed sympathy when his father died and also gave him practical and financial support at that time. It is our judgment that had he raised any of his concerns about being treated differently because of his nationality with Mr Mullaney or with Mr Kelly, they would have been addressed.

The claimant also submitted that if he failed to raise these issues with the respondent, it was because he was worried about his job. The facts we found above demonstrate that this was an employee who felt comfortable arguing with his managers over their instructions. He had no fear in speaking frankly to his employers. In this Tribunal's judgment, the claimant did not raise these issues with his employer during his employment. This was not because of a fear of any retaliation or repercussions from his employers.

We did not find, as submitted by the claimant that these allegations all formed part of an overarching approach by the respondent to make the claimant work harder in return for less benefits that his non-Polish colleagues. There was no evidence to support that conclusion.

It is this Tribunal's judgment that apart from allegations 7.1.3 and 7.1.5, the others are all different and not related to the same topic. They concern terms and conditions of employment, his company vehicle, employing his wife and his salary.

It is this Tribunal's judgment that the remaining allegations are not part of continuing conduct or a continuing act. They are therefore out of time.

The Tribunal considered whether to extend time on a just and equitable basis. In this Tribunal's judgment, we did not have evidence that during his employment, the claimant considered that he was being treated less favourably because of his nationality or his

race. We did not have any evidence, if he did believe this to be the case, why the claims were not brought until September 2020. If the claimant believed in 2018 and 2019 that he was being treated unfavourably because of his nationality/race, we had no evidence of whether or not he sought legal advice, why he did not raise it with the respondent at the time, why he made no complaint about discrimination during his employment and up to and including the letter of 23 July. He did not raise these matters until after he left employment.

It is this Tribunal's judgment that the claimant has failed to convince it that it is appropriate to use its discretion to extend time to enable us to consider these out of time allegations. We were not told why the claimant did not raise these issues with the respondent or the Tribunal at the time, in 2018 or 2019. It is our judgment that he despite having opportunities to do so, he did not raise them orally with the respondent at any point during his employment.

The claimant had all the information he needed to be able to raise the issues at the time that they allegedly occurred.

In the circumstances, the Tribunal's judgment is to maintain the statutory time limit and not to extend time. It would not be just and equitable to do so.

It is therefore this Tribunal's judgment that it has no jurisdiction to consider the complaints of race discrimination at paragraphs 7.1.1, 7.1.2, 7.1.4, 7.1.6 and 7.1.7 are all out of time. Those complaints are dismissed.

Race Discrimination

The Tribunal can consider the allegations are 7.1.3 and 7.1.5.

7.1.3 – An allegation that the claimant was treated less favourably on the grounds of his race by giving the claimant an instruction/undue pressure to pay his subcontractors less in comparison to other managers

The facts found by the Tribunal are that the subcontractors in the claimant's team were paid according to universal rates set for the jobs they did. The claimant would be advised about the rates for the job and any allowances he as the manager had, that he could add to his subcontractors' wages. The claimant had autonomy over how many subcontractors he engaged and what hours they worked.

We did not have evidence that the respondent set different rates for Polish workers. We did not have evidence that the respondent gave the claimant lower rates for his workers. The rates set were universal.

The claimant has failed to prove facts from which the Tribunal could infer that they claimant had been instructed or pressured to pay his subcontractors less in comparison to other managers. The burden of proof does not shift to the respondent and the complaint fails and is dismissed.

7.1.5 – An allegation that the claimant had to manage more projects that non-Polish contracts Managers

The respondent's contract managers during the claimants were Mr Mullaney, Mr Holstead, Mr Ralley and the claimant. Mr Ralley became Managing Director in July 2020. The evidence was that the claimant would be reluctant to do any other work apart from firestopping work. These were short contracts that may not have been as valuable to the respondent but which they wanted to keep doing.

It is our judgment from the evidence that the projects undertaken by the respondent would vary in terms of length, complexity and the amount of revenue that they brought into the business. The evidence provided by Mr Kelly showed that the claimant brought in less revenue on some months and more in others and that they were all busy. The claimant had less projects in the period covered by the schedule on page 212. Even if he managed more projects on other years, the claimant has not proved facts from which the Tribunal could conclude that this was because he was Polish. The evidence was that the claimant chose to do firestopping work which was work of short duration, which meant that he may at times manage more contracts in number but the other contracts managers may have more complex jobs to manage, that may take more time to complete. The claimant was busy as were his colleagues.

It is this Tribunal's judgment that the claimant has failed to prove facts from which the Tribunal could conclude that he had to manage more projects than non Polish contracts managers. The burden of proof does not shift to the respondent and the complaint fails and is dismissed.

Public Interest Disclosures

The Tribunal's first task is to determine whether the alleged disclosures were disclosures within the meaning set out in the Employment Rights Act.

At paragraph 2.1 of the list of issues at page 36.4 of the trial bundle, the claimant referred to two communications, an email of 16 July 2020 and a WhatsApp message on the same day, 16 July as his protected disclosures.

The issues were as follows: -

Item 2.1 – Did the claimant make the following disclosures?

There is no dispute that these messages were sent by the claimant.

Item 2.2 – if so, were any of the disclosures qualifying disclosures of information in accordance with section 43B of the ERA?

The claimant was an experienced Contracts Manager, having worked in this role for the respondent since 2009. Kier had been the respondent's client for over 10 years so it is likely that the clamant had been asked to do work similar to this for Kier in that time.

Not all of the respondent's work has to be certified. The evidence was that there were ad hoc jobs that did not need to be certified and that there were no breaches of any legal or other obligations done by them not being certified. The FIRAS scheme was voluntary. It was an excellent certification scheme for the respondent to belong to and they did aim to put all their jobs through the FIRAS certification process so that it gave that quality mark and no doubt gave prestige to the job and the business. However, it was a voluntary scheme. We did not have evidence that the respondent was legally obliged to put every job through the FIRAS certification process. It was not a legal obligation.

When the claimant first went to the site on 7 July, he assessed the job and asked for details of the materials that had been used, because otherwise in his assessment, the respondent would need to replace the fire protection in its entirety. Once he raised that issue, the respondent checked with Kier who clarified, clearly, and in writing, that the respondent was not required to certify any of the existing fire protection, the detail of the connection or the repair. That was what Mr Ralley was referring to when he stated that Kier had clarified what the respondent was required to do many messages earlier. The respondent was asked to perform a very specific task, to one part of the steelwork connections for Kier. Kier was clear that the respondent was not required to certify any

of the existing fire protection or even its work.

In our judgment, regardless of the words used in the message from Mr Kelly on 16 July, where he mentioned '*certify'*; the Tribunal is clear, as the claimant would have been, that the client did not require the respondent to certify anything. The claimant had the formal work order from Kier in which it stated *'we appreciate that you are unable to certify any of the existing fire protection or the connection detail between the existing and new fire protection and therefore clarify out these requirements from the instruction.'*

The instruction the respondent gave the claimant came straight from Kier. The respondent did not interpret that instruction. Instead, Mr Kelly forwarded the instruction from Kier to the claimant so that he could see what was required and could see that his initial query had been answered.

The claimant then went on to send the emails referred to at 2.1.1.1, 2.1.1.2, 2.1.1.3 and the WhatsApp message to Mr Mullaney at 2.1.2. It was not clear what legal obligation the claimant was referring to in these messages. In considering these messages the Tribunal took into account the context in which they were made. The claimant and the respondent's directors were all experienced in firestopping and the other products that the respondent offered. The claimant confirmed that ad hoc work is never certified by FIRAS and he would have been aware of that when he wrote these emails.

We considered the surrounding circumstances which were that the claimant was unhappy about Ash Ralley's promotion and question whether this was behind the stance that he took in relation to this job. In the beginning, his attitude seemed to be that this was a job which was so simple or low level that he questioned whether a firestopping company was required. By the end, his attitude had changed so that he said to Mr Mullaney that what he had been asked to do was illegal. Even though he claimed that it was illegal, he did not point to any legal obligation that would have been breached if he had done as he had been instructed.

The claimant did not mention any health and safety concerns or raise the issue of risks to occupiers of the hospital as submitted by Counsel. The Tribunal has to consider whether any of the claimant's disclosures had sufficient factual content and specificity such as is capable of tending to show the wrongdoing alleged and not just a belief that there was wrongdoing (*Kilraine*). The Tribunal cannot assume a meaning to the claimant's words. In order to qualify for protection, the claimant's disclosure of information must have identified to the employer the breach of legal obligation concerned; although this does not have to be in strict legal language.

Unless the breach complained of is obvious, the source of the obligation should be identified and capable of certification by reference for example to statute or regulation. Although issue 2.1.1.3 referred to fire safety regulations, the claimant's email on 16 July did not refer to this but only stated that the work would not be compliant as it would not be as per the manufacturers' detail. That in itself would not be a breach of a legal obligation. We did not have any evidence as to who the manufacturer was, what its requirements were or any evidence that not complying with them would be a breach of any legal obligations, was criminal or had health and safety implications.

Although he stated in another message on 16 July, *'if we don't certify it and repair*

it to the same standard to what is there now'. He does not go on to say what he considered would be the consequence of not doing so or whether he thought that not doing so was a breach of legal obligation or as submitted on his behalf, something to do with health and safety. This was not what he said at the time and we cannot assume that it is what he meant.

In these emails and message the claimant was raising concerns about the work that he had been asked to do but it was not clear to the Tribunal whether he was raising these concerns because he was unhappy about what he saw as being passed over for promotion or because he did not want to do the work or because he really believed that on this occasion, this ad hoc piece of work had to be certified through FIRAS, despite the client and his employer telling him that this was not required.

Even so, in this Tribunal's judgment, in none of the 4 messages referred to as item 2.1 in this list of issues, was the claimant providing information that tended to show that a criminal offence had been committed, that the respondent was failing or likely to fail to comply with a legal obligation to which it was subject or that the health and safety of any individual was being or was likely to be endangered. The information that the claimant provided in these messages did not tend to show that any of the above information had been or was likely to be concealed.

We considered whether the claimant was raising concerns about health and safety and whether that meant that he did not need to identify the breaches that he was referring to. We considered the EAT judgment in *Anastasiou* but the legal obligation that the was being asserted was not clear and well known to both parties. They both agreed that there was no legal obligation to certify work with FIRAS. Both the claimant and the respondent had been doing this work for years and therefore they both had a sophisticated understanding of the relevant legal obligations involved. The claimant's complaint in the emails was that the work would not be as per the manufacturer's detail and would not be compliant with that. From that we conclude that there was no legal obligation that was apparent to all involved.

The claimant is entitled as a professional employee to raise concerns with his employer but raising concerns is not the same as making protected disclosures, unless it complies with the legal requirements set out above.

It is also this Tribunal's judgment that even if the claimant believed that the respondent was under a legal obligation to register this repair with FIRAS and certify it and the respondent was likely to fail to comply with that legal obligation, it is our judgment that the claimant did not raise this with the respondent in the public interest. There was no evidence that the claimant was concerned about the public interest when he wrote these emails and sent the WhatsApp message.

Taking all the above into consideration, it is this Tribunal's judgment that the claimant did not make protected disclosures.

The complaint of detriment for making protected disclosures fails and is dismissed.

The complaint that the claimant was automatically dismissed for making

protected disclosures fails and is dismissed.

Unfair Dismissal/Constructive Unfair Dismissal

Item 4.1 of the list of issues: Was the claimant dismissed by the respondent on 16 July 2020?

The Tribunal has the task of determining when the employment contract between the parties came to an end. There was disagreement between them on this. In his ET1 claim form the claimant stated that his contract ended on 16 September 2020. In the narrative he referred to the WhatsApp message he received from Mr Mullaney on 19 July as the moment he was dismissed.

In the hearing it was the claimant's case that he was dismissed by Mr Mullaney's text message on 19 July. it was the respondent's case that it did not dismiss the claimant and that he resigned on 16 July.

In this Tribunal's judgment, Mr Kelly gave the claimant clear instructions by email on 16 July, at 14.39, to do his job and stop quibbling about it. In clear, unequivocal language, Mr Kelly told the claimant to do his job. The claimant responded with an also clear statement that he quit and that the respondent should get someone else to do what was clearly his job. It is our judgment that this was not a statement of something that he would do in the future but was a dismissal in the moment. Mr Kelly told him to get on with the work now. It was already 9 days since the claimant visited the site and he still had not done the preparatory work of sorting out the labour and the RAMS so this was an urgent instruction and the claimant replied to resign rather than carry out the work.

Following that email, the claimant had many opportunities to retract that statement or to explain it and to maintain his employment contract. Mr Kelly emailed him back to say that his resignation was accepted. That was the first opportunity the claimant had to say that he had not intended to resign. He did not. Mr Kelly then texted him to ask if that was the way he wanted to go. The claimant confirmed that this was his decision by responding that the respondent should send men to collect the company property.

Later, when Mr Mullaney told him to get on with his job, he had another opportunity to retract his earlier email and agree to do the job. He refused and said that the respondent should get Pat to do it. The claimant did not have the authority to decide not to do work that the respondent had asked him to do.

Mr Mullaney's response makes it clear that the respondent did not want the claimant to leave and certainly was not terminating his contract. Instead, it is our judgment that they were trying to get him to do his job. They also did not want to hold him in employment if it was his desire to leave. The claimant had threatened to leave the respondent on many occasions before so on this occasion he was told that if he wanted to leave, he should do so but that that was not the respondent's desired outcome.

The respondent was busy with work and needed the claimant to do his job. Each contracts manager had work that they had to do and there was no desire to terminate the claimant's employment. That is why even though the claimant's message on 16 July was clear, the respondent allowed him to work on 19 and 20 July. There was work that needed to be done. The claimant did not show up for the meeting on 17 July, which had been arranged at the time he suggested. This meeting was for him to explain his attitude to the Kier job, explain his message saying that he had quit and show his intention to keep working. He was not interested in maintaining his relationship with the respondent, especially as Mr Ralley's promotion had been confirmed.

It is our judgment that the respondent needed the situation to be resolved. This was why

the respondent made another attempt to arrange a meeting with the claimant. Before the meeting on 22 July, Mr Kelly and Mr Mullaney discussed the situation and decided that despite what had happened, if he wanted to, they would be prepared to let the claimant remain in employment. There was no intention on the respondent's part to terminate the claimant's employment contract.

The claimant showed no desire at the meeting to remain in employment. He discussed his plans for other work. He discussed how much money he would want as part of him leaving the business and he wanted the PAC code to the company mobile phone.

In our judgment, if the claimant really believed that he had been dismissed on 19 July, he would have asked Mr Kelly in the meeting on 22 July, why had he been dismissed and he have complained that it was unfair. He would not have needed to put that in legal language but there was no mention of dismissal at all at that meeting.

If the respondent had dismissed the claimant, it is highly unlikely that Mr Kelly would have met him to discuss resolving issues between them. Mr Mullaney would not have told the claimant in his text message on 16 July that from now on he would have to report to Ash Ralley as the managing director as it would not have been anything to do with him, if he was no longer an employee.

Mr Mullaney did say in his text message to the claimant on 19 July that the claimant should bring all company items back to the office as he had had enough.

It is this Tribunal's judgment that the claimant resigned from the respondent's employment on 16 July in an email to Mr Mullaney, Mr Kelly and Mr Ralley in which he stated that he quit. There was no backtracking from that position in any subsequent communication from the claimant. Instead he was defiant. He asked the respondent on different occasions – in a text to Mr Kelly - to send men to collect company items, in a WhatsApp to Mr Mullaney – how much notice the respondent required, and whether the respondent wanted the desk to be taken dismantled or in one piece. On 22 July, in the meeting with Mr Kelly, the claimant did not query his situation but instead took the opportunity to negotiate an exit package.

By the time Mr Mullaney sent his message on 19 July the claimant had already resigned and this was the respondent accepting his resignation. The respondent had hoped that by allowing the claimant to continue to work, the situation would blow over and could be resolved. Even after Mr Mullaney told him to bring back the company items, the respondent was still open to resolving this with the claimant. In our judgment, had the claimant attended the meeting on 22 July willing to resolve the matter with the respondent, he would have remained in employment.

It is therefore this Tribunal's judgment that the claimant resigned on 16 July. He never retracted that resignation. He never did the Kier job. He stood firm in his decision to leave the respondent rather than do the job or work for Mr Ralley. The claimant resigned and was not dismissed.

The complaint of unfair dismissal fails and is dismissed.

Following the list of issues on page 36.6 of the hearing bundle, we are now at:

Item 4.4 + 4.5 – Alternatively, was the claimant dismissed, pursuant to section 95(1)(c) ERA 1996? Was the respondent responsible for conduct which was without reasonable or proper cause and calculated or likely to destroy and/or undermine the relationship of trust and confidence?

The Tribunal considered whether the claimant had been constructively dismissed.

The question for the Tribunal is whether, by the date of the claimant's resignation on 16 July, had the respondent conducted itself in a way that was calculated or likely to destroy or undermine the employment relationship.

It is our judgment that the claimant had not made any protected disclosures on 16 July. He had raised queries or concerns about the work that the respondent had been asked to do by Kier. He was provided with answers to his queries and had sight of the job order from Kier. He had known about this job from 3 July and visited the site on 7 July. He knew that this was an ad hoc job, that ad hoc jobs were not usually done under the FIRAS scheme and that the scheme was voluntary and not a legal requirement. The respondent discussed the job with him and provided him with all the information requested.

In this Tribunal's judgment, the claimant was not bullied or harassed. The messages sent to him on 16 July from Mr Ralley, Mr Kelly and Mr Mullaney were straight and to the point, which was the way they spoke to each other. In our judgment, they did not breach the claimant's contract. What was clear was that the respondent expected him to carry out their reasonable management instructions to do this job which was well within his skillset and something – firestopping – he did on a regular basis.

The claimant refused to do it. After he resigned, he became even more unhappy with the respondent when he found out that Mr Ralley alone was going to be promoted to managing director. In his messages with Mr Mullaney, he made his unhappiness about that clear and stated that all he wanted was equal terms with Mr Ralley. If he had got that, it is likely that he would have agreed to remain in employment, either then or at the meeting on 22 July. The respondent had the right to make promotions and other recruitment decisions that it felt were necessary to run the business. The claimant cannot tell the respondent how to do so. The text message of 18 January 2018 was not a binding contract. It did not even have the status of an offer of partnership or shares in the company. The claimant did not reply to accept it. It was a statement of hope and vision for the future of the business and in our judgment, did not have any higher status than that.

There was nothing else referred to as a breach of contract by the claimant in his evidence or in his submissions.

It is this Tribunal's judgment that the respondent did not breach the claimant's employment contract on 16 July by instructing him to do this job. The respondent did not act in a way that was calculated to destroy the employment relationship or made it likely that it would have that effect. The claimant was simply being asked to do his job and he did not want to do so.

The claim of constructive dismissal fails and is dismissed.

Item 8.1 of the list of issues states – Was the claimant provided with a statement of particulars? The respondent says that the claimant was provided with one on 26 April 2018 which he refused to sign.

It is our judgment that the respondent provided the claimant with draft statement of employment particulars in April 2018. The claimant refused to discuss it or agree to the terms.

The document did not include the claimant's name, start date, position or details of his wages. The respondent indicated to the claimant that it was willing to discuss this with him and agree terms. The claimant refused to engage in any discussion on the document and in their last text exchange about it, he barred Mr Mullaney from discussing

it any further with him. He referred to it as an '*illegal prison statement'*. The respondent wanted to provide the claimant with a statement of employment particulars.

The document had most of the employment particulars and details in it and the only details that were missing are as set out above. The reason why those details were not completed was due to the claimant's refusal to cooperate and discuss and agree the remaining terms.

It is therefore our judgment that the respondent provided the claimant with a statement of employment particulars that met the requirements of section 1 of the Employment Rights Act 1996.

In addition, if the omission of the claimant's name, wage and job title mean that this document does not comply with the statutory requirements, it is also our judgment that as all the claimant's remaining complaints have all failed, the Tribunal has no jurisdiction to award the claimant a remedy for this issue.

Judgment

The claimant made no protected disclosures.

The claimant was not unfairly or constructively dismissed.

The claimant resigned on 16 July 2020.

The complaints listed at 7.1.1, 7.1.2, 7.1.4, 7.1.6 and 7.1.7 of the list of issues were brought to the Tribunal outside of the time limit set in section 123 of the Equality Act 2010 and the Tribunal has no jurisdiction to hear them.

The complaint of race discrimination at items 7.1.3 and 7.1.5 of the list of issues fails and is dismissed.

The respondent provided the claimant with a statement of employment particulars in accordance with section 1 Employment Rights Act 1996.

Employment Judge JONES

12 October 2022