# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr K Haji**

**Respondents:** **(1) SGS Sentinel Group Limited**
**(2) Morad El-Shoubaky**

**Heard at:** **East London Hearing Centre**

**On:** **18 and 19 November 2021**

**Before:** **EJ Jones**

**Members** **Ms S Harwood**
**Dr J Ukemenam**

**Representation:**

Claimant: Mr S Martins (solicitor)
Respondent: Mr P Collyer (Advocate)

# RESERVED JUDGMENT

**The unanimous judgment of the Employment Tribunal is that:-**

**(1) The claimant made protected public interest disclosures.**

**(2) The claimant was not subjected to detriments on the ground that he had made protected disclosures.**

**(3) The claimant was not dismissed on the ground that he had made protected disclosures.**

**(4) The claimant resigned his employment.**

**(5) The claim fails and is dismissed.**

## REASONS

1. This was a case in which the claimant complained of detriment and constructive unfair dismissal for having made protected disclosures; against both respondents. Although a complaint of constructive unfair dismissal relying on

section 100 of the Employment Rights Act 1996 was outlined in the agreed list of issues dated 6 September 2021, the claimant did not proceed with that complaint at the hearing.

## Evidence

2. We had an agreed bundle of documents. We also had a witness statement from the claimant. From the respondent, we had witness statements from Morad El-Shoubaky, the Regional Account Manager; Mr Zahid Chaudhry, the respondent's Director of Compliance and Mr Zeeshan Ali, the Client Manager. All witnesses gave live evidence in the hearing.

3. The Tribunal apologises to the parties for the delay in the promulgation of this judgment and reasons. This was due to the pressure of work created by the pandemic.

4. From the evidence the Tribunal made the following findings of fact. The Tribunal has only made findings on those matters relevant to the issues we had to determine.

## Findings of fact

5. We find that the Claimant worked as a relief security officer for the first respondent from 19 March 2020. Initially, he worked at the Highgate Hospital and then at the O2 when it was converted to a Covid testing facility. The claimant was employed on a zero hours contract, which stated that there was no obligation on the first respondent to provide him with work and none on him to accept work offered. The claimant would only be paid for the hours he worked. The contract also stated that the company was required to pay statutory sick pay for certain periods of sickness absence. Payment would be made to eligible employees for periods of absence of four days or more.

6. The first respondent provides security to a variety of clients based in the UK. The company employs approximately 200 members of staff. The second respondent was employed by the first respondent as a regional account manager. At some point during the claimant's employment, he was line managed by Mr El-Shoubaky. The claimant's contract stated that there was a maximum period of 28 weeks payment in any one period of incapacity for work.

7. On 5 August the claimant received a call from the control room. He was offered a job which was to work four nightshifts at a school, beginning on 10 August. The first shift he was scheduled to work, was from 17.30 on Monday 10 August – 7.30am on Tuesday 11 August. The premises that he was asked to work at was part of the Pinnacle Regeneration Group, which was one of the respondent's clients. Pinnacle Regeneration Group run schools and the first respondent provides overnight security at those schools on an ad hoc basis, when required.

8. We find it likely that when the first respondent secures a contract, an assessment is conducted of the premises that need to be guarded. That assessment includes checking that there are appropriate facilities for the security officer who would be asked to work there. Appropriate facilities would usually

include toilet facilities, a cubicle, kitchen facilities or facilities for warming food, electricity and washing/bathroom facilities. Mr Choudhry's evidence was that the first respondent also has a framework agreement with Pinnacle Regeneration Group that the respondent would provide security whenever they are in the process of refurbishing one of their properties. His evidence was that there had never been any issue with security staff attending this school before the evening of 10 August and there was no issue with the security staff who attended that site after that date. Although the first respondent had this contract with Pinnacle for a few years, this was the first time that the claimant had been sent to work there.

9. It is unlikely that the first respondent made a check on the premises that night. It relied on the checks made at the time of the assessment conducted when the contract to guard Pinnacle sites was first made. Mr Chaudhry, the first respondent's director of compliance, told us that the respondent had a framework agreement with the client which required it to provide facilities to the security officers sent to guard the site. The usual practice was that if the client was unable to provide the guard with any of the required, usual facilities, it would send an email notification to the respondent and that it should make other arrangements for whatever facility could not be provided. The only indication the first respondent had that night that there would be any change to the usual provision was the email notification received during the day that there was likely to be some electrical disruption as the refurbishment included electrical works. It is likely that before he went to the job, the claimant was told that there was likely to be electrical disruption during his shift.

10. When the claimant arrived on site just before 5pm, he was told that the caretaker was in the process of closing up the building. The claimant noticed that there were also two construction workers on site. The claimant called the respondent's control room to book on and was told to call back as the shift was not due to start until 5.30pm. It is part of normal procedures for the security officer to call the control room to confirm that all is in order and that he is in place and starting the shift. While waiting to book on with the control room, the claimant spoke to the caretaker and told him that he was the night security officer. He asked the caretaker to show him where he would be carrying out his duties. The caretaker told him that he could use one of the chairs that were available and pointed to a chair. He also informed the claimant that there was no electricity and no toilet or rest room/cubicle on site that he could use. We find that the claimant did not inform the first respondent of this when he called to book on at the start of his shift at 5.30pm.

11. The caretaker told the claimant that if he wanted to use the toilet he should do so now as he was about to lock up the school, as his shift was ending. The claimant used the toilet and grabbed a chair. He took one of the chairs outside to the front of the main gate. The caretaker locked the building.

12. The claimant had not been provided with a torch. Mr Chaudhry's evidence was that the claimant may have locked himself out of the school when he went to the shop to charge his phone. He said this because the first respondent had been told that the facilities were available to him. It was his evidence that the respondent received a complaint from the client about the service provided by the claimant that night as at times he left the site unguarded. Mr Chaudhry did not understand how the claimant came to be outside the property as he was

supposed to be inside the school guarding it. The job was to stay inside the school and make the building secure. The expectation was that he would be working inside the school. The respondent did not understand how the claimant came to be outside, locked out and using facilities at the chicken shop and the filling station instead of in the school.

13. We find that over the next four hours the claimant patrolled the site and sat on the chair outside the locked school. The first respondent's evidence was that there were construction workers working through the night on the school site. The claimant's evidence was that he was alone and did not see anyone else on the site. The claimant found an open chicken takeaway shop on the high street nearby where he was allowed to charge his phone.

14. Later in the evening, the claimant realised that as the door was locked, he would have to continue his shift outside and without washing, toilet or kitchen facilities. He became concerned about this. However, he did not call the office to ask them about this or to report it. He went to a nearby filling station to ask whether he could use the toilet. He was not allowed to do so. He was however, allowed to use the toilet at the takeaway.

15. The claimant telephoned the control room between 8 – 9pm to report that there were no facilities at the school that he could use. It is likely that the staff at the control room were surprised to hear this and told the claimant that they would see what they could do for him and would get back to him.

16. The control room called Mr Ali and informed him of the situation that the claimant had reported. Sometime between 9 – 9.30pm, while waiting for someone to return his call, the claimant called the second respondent, Mr Morad El-Shoubaky, as this was a manager he knew. Mr El-Shoubaky was not on duty that night and Pinnacle was not his account. He was off duty that night.

17. Mr El-Shoubaky answered his mobile and took the claimant's call. The claimant informed him about the situation. He complained that he did not have access to electricity, water, toilet and kitchen facilities. Mr El-Shoubaky told the claimant that his welfare was important to the company and that if what he was saying was true, the claimant would be allowed to leave the site. In cross-examination the second respondent explained that what he meant was that he would need to check the situation but if what the claimant was saying was true, no-one should cover the site and he would be able to leave. Mr El-Shoubaky told the claimant that he would call him back in 30 minutes.

18. Mr El-Shoubaky did not return the claimant's call but instead, Mr Ali called the claimant just after 9pm. The claimant told him that there were no facilities at the school available for him to use. He told him about his conversation with the caretaker. The claimant told him that he was scared because it was dark and that he had to go to the chicken takeaway shop or the petrol filling station to use their toilet and charge his phone. It is possible that he also told Mr Ali that he had seen foxes nearby, although Mr Ali did not recall that part of the conversation.

19. We had photographs of the school gates, front door and grass verge outside the school, where the claimant said that he placed his chair to work. The photographs show that there were some streetlights and some greenery visible

around the school. From the claimant's description of being able to go to the filling station and the chicken takeaway shop to use the toilet and charge his phone, we find that he did have some interaction with others but not on the site. It was the claimant's case that as there was no electricity on the site, he had to sit on the chair on the grass verge outside the school and use the streetlights or lights from the filling station to be able to see to use his phone.

20. During the night the claimant had pain in his groin area which he stated was related to the fact that there were no toilet facilities on site and because he had to hold his urine during the shift. He also said that at some point during the night and before he was relieved by Mr Shabbeer, he used an empty water bottle to urinate.

21. After he spoke to the claimant, Mr Ali instructed the control room to find another officer to take over the shift from the claimant. While they were trying to find a replacement, Mr Ali tried to call the claimant to let him know what was happening. However, the claimant did not respond to the calls. Mr Ali sent the claimant a text message at 10.28pm and asked him to respond to his calls. He also texted the claimant Mr Shabbeer's telephone number and name as he was the security officer who was coming to the site to relieve him. He asked the claimant to wait to be released and told him that he should not leave the site until the officer who was going to replace him arrived. It is also likely that during their conversations Mr Ali told the claimant that he should not tell Mr Shabbeer about his experience that night.

22. Around 10.29pm, around the same time as Mr Ali was sending him text messages, the claimant sent a text message to Mr El-Shoubaky. The part of the message that we had in the bundle of documents read as follows:

> '*Mr Marood Evening to you I called you about an hour ago and u said you will get back to me in half hour you didn't back to me its against health and safety for me to stay on the site theirs Foxess on this site and no electricity my phone is about to die and the control they telling me they would….'*

23. Mr El-Shoubaky did not return the claimant's call. He considered that the matter was in hand as he had spoken to Mr Ali and to the control room and they told him what they were doing to resolve the situation. Once he had passed the issue on to Mr Ali and the control room, he had no further involvement.

24. Between 10.30pm and 11.30pm, the claimant and Mr Ali exchanged text messages. The claimant was told that the helpdesk was coordinating everything. He was also messaged by the Helpdesk. The claimant had been given Mr Shabbeer's telephone number so that he could contact him to see where he was. This would enable him to track Mr Shabbeer's travel to the site. He would be able to assess how much longer he would have to wait to be relieved. In one of his texts to Mr Ali the claimant referred to a shop that was about to close. It was not clear whether that was the takeaway or the filling station but from the texts we find that the claimant was becoming anxious that the shops on the high street were closing and that it was likely to get darker and he would be on his own. In his text to Mr El-Shoubaky which we quoted above, he referred to foxes being around. In his evidence the claimant confirmed that he was afraid of the

dark and had a fear of foxes which related to experiences during his childhood in Somalia.

25. Once the claimant responded to Mr Ali's text messages, around 10.30pm, he continued to converse with him via text messages, the last of which was sent at around 23.47pm. Mr Shabbeer arrived at the site around midnight and took over from the claimant. The claimant left the site and took night buses home. We find from text messages the claimant sent to the second respondent that he arrived home at around 2.30am. He told him that he had to take three buses to get home as there were no tube trains running. He also sent a text to Mr Shabbeer to tell him that he should not go to the back of the school buildings as that was where the foxes were, that he might need to urinate in a bottle if he needs to, and that it was *'a very hard situation'*.

26. The claimant called in sick on the following day. He called 111 and was advised to go to the Royal Free Urgent Care Centre. The only document we had from that visit was on page 129 of the bundle which was a note headed *'to whom it may concern*'. It confirmed that the claimant attended the Urgent Care Centre on 12 August. It did not include a diagnosis or period of ill-health, details of medication prescribed or even the complaint that the claimant presented with, or anything else.

27. On 11 August, Mr Ali called the client, Pinnacle Regeneration to find out what had happened the previous evening. We found the evidence unclear. The first respondent was told that there were facilities for the claimant and that his account had been untrue. We find it likely that it was on that basis that the first respondent was able to cover the balance of the shifts for that week.

28. The first respondent's evidence was also that Mr Shabbeer did not report any issues at the site that night and that he completed the shift with no problems. Other officers employed by the first respondent covered the remaining shifts at the school that week. There were no complaints or issues with the other officers. We did not hear from Mr Shabbeer or any of the other officers.

29. On 19 August, the first respondent's Helpdesk emailed the claimant to ask if he was interested in three shifts at Gatwick, between 22 – 24 August. The claimant refused the shifts.

30. On 24 August the claimant was assessed by his GP and signed off sick for 7 days from 24 August to 30 August. The condition was described as Epididymitis. We find it likely that this was a bladder condition as the claimant's evidence was that he developed a urinary tract infection from having to hold in his urine during the time that he was at the site on the evening of 10 August. We did not have any medical evidence before us that linked the diagnosis on 24 August to the night of 10 August, some two weeks earlier.

31. The claimant was paid for the whole shift on 10 August and was paid statutory sick pay (SSP) for the periods covered by the sick certificate.

32. On 3 September the claimant wrote to the respondent to complain about what happened on 10 August. He titled the email '*health and safety at work'*. The contents could be described as a grievance. In it the claimant confirmed that

the second respondent told him that if the client did not open the facilities, he would instruct him to leave. He complained that the second respondent never got back to him. He referred to having suffered pain in his groin area that night, as well as experiencing headaches and fear. He stated that he had to wait for about an hour before his replacement arrived. He complained that the whole experience reminded him of the trauma he experienced as a child. He also stated that after the night of 10 August, he felt harassed by the first respondent whenever he was offered shifts. He had been referred by the call-handlers at 111 to the urgent care centre at Middlesex Hospital where he was diagnosed as developing a urine infection due to holding in his urine for so long. He was given medication for seven days and advised to rest, drink lots of water and to refrain from lifting heavy objects. He complained that even though he had emailed the control room to say that he was not able to work as he was sick; he was still being offered work. He confirmed that he had since received an apology from the first respondent and a promise that there would be no contact to offer work unless he first contacted them to say that he was available for work. The claimant indicated that he was currently going through depression and was on medication.

33. He wanted the grievance investigated to see whether the first respondent had breached its duty of care to him. He stated that he was disgusted with the standard of care that the respondent offered to him that night. He complained that the first respondent's treatment of him had been unacceptable and that an animal should not be treated in the way that he had been. He referred to the Human Rights Act and stated that he felt that the company had not shown any remorse or awareness of the situation and that there had been a clear breach of '*ethics of work'*, negligence and breach of health and safety law.

34. On 4 September, the first respondent's Helpdesk contacted the claimant to offer him shifts on 5, 6 and 7 September. The claimant replied to say that he was not available.

35. On 9 September, the claimant attended the Royal Free Hospital and was diagnosed with a urinary tract infection. On 11 September, the claimant visited his GP and was given a certificate for two weeks because of Epidymitis and being on antibiotics. The certificate was sent to the first respondent on 13 September, which was after the first respondent had written to offer him work on 4 September. This certificate was to cover the period 31 August–13 September. The previous certificate had expired on 30 August.

36. On 14 September the first respondent's regional account manager, Edward Stevens, wrote to the claimant to invite him to a grievance meeting to be held on 17 September at Sentinel House. Mr Stevens was not based in the control room and was not the manager involved with the school or that contract. He worked in a different department and had not been involved in these issues prior to being asked to conduct the claimant's grievance.

37. In the invitation letter, the claimant was advised of his right to be accompanied and that Mr Stevens would chair the meeting and be supported by a notetaker. There were three points that Mr Stevens intended to discuss with the claimant, at the grievance hearing: 1) that the claimant had been left without basic facilities such as toilet or clean water when he attended a site on 10 August

for work, 2) that the first respondent had been negligent by not checking the site facilities available to officers, and 3) that the claimant had been expected to work in an unsafe environment.

38. On 17 September, the claimant attended the grievance meeting. He was unaccompanied. In the meeting, the claimant had the opportunity to outline his concerns and to explain what happened that night. He was particularly aggrieved that Mr Ali told him not to scare the officer who was coming to relieve him. The claimant thought that it was outrageous that the respondent considered that it was important that the other officer should not be scared off or told that there were no toilet facilities available that night. He stated that when Mr Shabbeer arrived on site, he had already been told that there were no toilets available but he did not know that there was no canteen or facilities to warm food.

39. The claimant complained in the grievance meeting that he had become ill and lost income because of what happened that night. He also complained that the first respondent kept offering him work while he was under a sick certificate, which he considered to be harassment. The claimant was sent another email offering him work during the evening of 30 September. It was an offer to work shifts on 1 and 2 October. He responded to the Helpdesk on 1 October to refuse the work. The claimant's last sick certificate expired on 13 September and the claimant had not sent in another one.

40. On 5 October the claimant wrote to the respondent to resign. He referred to the situation on the night of 10 August and stated that the first respondent had '*hounded'* him by sending him messages offering him work. He complained that it took 5 hours for his relief to arrive at the site and that he suffered the indignity of having to urinate in a bottle, he had to remove himself from the site to the gas station because there were foxes prowling in close proximity to where he was sitting and that he has since suffered with headaches, sleepless nights and lost income.

41. We did not hear from Mr Stevens in evidence in the hearing but we did have his written response to the grievance which was dated 13 January 2021. There was clearly some delay in him responding to the claimant. In the letter, he stated that the delay was because he wanted to ensure that all the points raised were investigated fully before he concluded his decision. He attached a copy of the notes of the grievance meeting.

42. In the grievance outcome letter, Mr Stevens confirmed that as part of his investigation of the grievance, he had spoken to the team at the control desk and to the client. It was confirmed that there was electricity disruption on the site that night but that as it was a school building, the claimant should have been able to use the facilities. He queried why, if the claimant had been told by site maintenance on his arrival that he would not be allowed to use the facilities, he had not informed the respondent of this until later in the evening, between 8-9pm. The first respondent arranged for a replacement officer to be sent to relieve him as soon as he reported the issue and there was no complaints about the site, from the relief officer or any of the other officers who continued to cover the site for the rest of the week. The client and those other security officers who worked at the site all confirmed that the required facilities had been available to them.

43. Mr Stevens also considered the claimant's complaint about Mr El-Shoubaky, the second respondent. The claimant complained that Mr El-Shoubaky had not called him back during the evening, even though he had promised to do so. Mr Stevens confirmed that in conducting his investigations, he spoke to Mr El-Shoubaky, Mr Ali and the Helpdesk about this. He discovered that the school was Mr Ali's client so once the claimant had contacted Mr El-Shoubaky, he passed the issue over to Mr Ali to address it. Mr El-Shoubaky was advised by the Helpdesk that they were sending a replacement to relieve the claimant. He was further assured that Mr Ali and the Helpdesk were in constant contact with the claimant during the night until the replacement arrived on the site at midnight.

44. To the claimant's point about being harassed by being contacted by the National Operations Centre and offered work, Mr Stevens confirmed that this had happened but that on each occasion, the first respondent was not aware that the claimant was sick as the sick certificate was not received until after the offer was made.

45. He confirmed that the first respondent had not expected the claimant to work in an unsafe environment as there was an expectation that there would be facilities there for his use. He pointed out that the claimant had been aware that this was a night shift, when he accepted the job and so he should have been prepared to work in the dark. The first respondent did not expect him to work without access to clean water and toilet facilities and when it found out that those were the conditions he was working under; it arranged for a replacement officer to attend the site and relieve him. To the claimant's point that the first respondent had been negligent by not checking that the site facilities would be available for its officers that night, Mr Stevens stated that his investigations led him to conclude that the facilities had been available for the claimant to use that night and the only issue was that there had been planned electrical disruption, which the first respondent had been aware of.

46. Mr Stevens concluded that the claimant's grievance was unsubstantiated and the grievance was not upheld. It was at the Tribunal hearing that the claimant first asked for copies of any notes arising from Mr Stevens' discussions with the other managers and the other aspects of his investigation of the claimant's grievance. He did not ask for those at the time.

## *Law*

Protected Disclosures

47. One issue for the respondent is whether the claimant made a protected public interest disclosure during the shift on 10 August 2020 and/or subsequently.

48. The claimant's case is also that he was automatically constructively unfairly dismissed because he raised a protected public interest disclosure. He also complained that he suffered detriment as a result of making protected disclosures.

49. In order to determine whether there has been a protected disclosure, the Tribunal is expected to take a structured approach to assessing the evidence. The Tribunal has to apply a five-fold test. First, there must be a disclosure of

information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in section 43B Employment Rights Act 1996 (ERA), sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.

50. The worker must believe that the disclosure tends to show wrongdoing in one of five specified areas; or deliberate concealment of that wrongdoing. 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).

51. Disclosures can be made verbally, in writing or a combination of both. In this case, the claimant alleges that he made his disclosures both orally and by text message to Mr El-Shoubaky on the evening of 10 August. Although it accepts that the claimant spoke to and texted the second respondent, the respondents do not accept that the claimant made protected disclosures.

52. Out of the 5 statutory categories to which the information must relate if the disclosures are to qualify for protection; the claimant relies on section 43B(1)(b) i.e. that a criminal offence has been committed, is being committed or is likely to be committed; *(although the list of issues says 'a legal' offence, the correct statutory wording is 'criminal' offence)*; or 43B(1)(d), that the health and safety of any individual has been, is being or is likely to be endangered.

53. 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.

54. Section 43(B) places two obligations on the claimant. 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 *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416, EAT. Judge Serota stated that outside of that category (i.e. the perfectly obvious), 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).

*55. Fincham v HM Prison Service* UKEAT/0925/01, was a case in which an employee relied on disclosures related to breach of obligations related to health and safety in section 43(1)(d). In that case it was held that *'there must be some*

*disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the employee is relying'.*

56. The next question for the Tribunal is whether the employee's belief was in the public interest. In the case of *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837 the Court of Appeal held as follows:

> *'In addressing section 43B of the ERA, the tribunal has to ask (a) whether the worker believed, at the time he was making it, that the disclosure was in the public interest, and (b) whether, if so, that belief was reasonable. Element (b) requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; that is particularly so given that that question is of its nature so broad-textured. The necessary belief is simply that the disclosure is in the public interest….*
>
> *The question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people serving that interest. That is the ordinary meaning of "in the public interest". The criterion does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed so to be. Where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that makes it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case. Relevant factors could include: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer.'*

57. If a tribunal concludes that the worker is only motivated by self-interest and 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 does not qualify for protection.

Detriment claim

58. It was the Claimant's case that he suffered detriments as a direct consequence of making protected disclosures about health and safety. 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 Act but 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.

59. If the tribunal decides that there was a protected disclosure, in order to succeed in a complaint that he suffered detriment under section 47(B) of the ERA, the worker needs to show that he was subjected to a detriment; that 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.

60. The Tribunal must analyse the mental processes (conscious or unconscious) which caused the employer so to act. The Tribunal considered the law in *Fecitt v NHS Manchester* [2012] ICR 372 in which the Court of Appeal stated that it is not necessary that the protected disclosure is the sole or principal reason for the treatment. Once the worker 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 act, or any failure to act, was done (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 whistle-blower.

Automatic Unfair Dismissal - because of protected disclosures

61. The Claimant's case was also that he had been automatically unfairly dismissed because he made a protected disclosure. His claim is effectively under section 103A ERA as the claimant did not have sufficient service to bring a complaint of ordinary unfair dismissal. That section states that an employee who is dismissed shall be regarded 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.

62. 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.

63. The reason for the dismissal is the factor or factors operating in the mind of the person making the decision to dismiss or which motivates them to do so.

64. The claimant confirmed in the hearing that he was no longer pursuing a complaint under section 100 ERA.

Applying law to facts

65. The Tribunal will now go through the list of issues on pages 38 – 42 of the hearing bundle and give its decision on each issue.

> *1. The claimant alleged that he made two protected disclosures: in his calls and texts to the 2nd respondent on 10 August.*

66. It is our judgment that in their conversation at around 9.30pm on the evening of 10 August the claimant said to Mr El-Shoubaky that he was at a site,

on duty for the respondent and there was no electricity, no kitchen or toilet facilities available for him to use and no clean water. It was not clear whether the claimant mentioned the presence of foxes in that telephone conversation.

67. About an hour later, at 10.29pm the claimant sent Mr El-Shoubaky a text message to say that it was against health and safety for him to have to remain on site. The message also said that there was no electricity and his phone was about to die. He referred to the presence of foxes on the site.

*2. Are these protected public interest disclosures?*

68. It is our judgment that the claimant gave Mr El-Shoubaky information about the state of the site where he was expected to work that night. He told him that he had no toilet facilities, no clean water, no kitchen facilities and no electricity. The text message added that there were foxes around, there continued to be no electricity and that his phone was about to die.

69. In the text message the claimant says that it was against health and safety for him to be expected to stay on the site.

70. It is our judgment that the claimant disclosed information in these two communications with Mr El-Shoubaky that tended to show that the respondent had breached its duty of care toward him and that the site was an unsafe place to work and had unsafe and unhygienic systems in place. It was personal to him as he was the only person there at the time. However, the state of the site that night was not orchestrated for the claimant. It would have been the same for whoever was the security officer who attended that night. Also, the claimant was asked not to share his experiences with Mr Shabbeer who was coming to relieve him.

71. The claimant complained about the presence of foxes around the school that night and told us of his fear of foxes and of the dark. Those were matters that were personal to him. However, in the text message and in the conversation with Mr El-Shoubaky his complaints were of the lack of electricity which meant that there was limited light for him to see by, a lack of toilet and kitchen facilities and no access to clean water.

72. It was not clear to us how the claimant ended up outside of the building if his job was to stay inside and guard it. However, it is the case that he spent most of his time at the site, sitting outside in the dark. The claimant went to the petrol station and the takeaway shop and persuaded them to allow him to use their toilet and their electricity to charge his phone but those were not arrangements made for him by the respondent.

73. It is our judgment that in the telephone conversation with Mr El-Shoubaky and in the text sent to him at 22.29 on 10 August, the claimant provided information that tended to show that he believed that his health and safety was being endangered and was likely to be endangered if he remained on site. This related to the lack of kitchen facilities, facilities for washing and for drinking clean water as well as electricity to charge his phone and make a hot drink as he was outside the building. He was specific about what was missing and that he believed that this was '*against health and safety'*, thereby identifying what he considered the respondent had breached. It is our judgment that the information

he disclosed in the text message and the telephone conversation with the second respondent satisfies the test in *Fincham*.

74. It is also our judgment that the information the claimant provided did not show that a criminal offence had been committed.

*3. Was it in the public interest?*

75. At the moment the claimant raised these issues with Mr El-Shoubaky, he was clearly concerned with his own comfort and safety. These were matters that were in the claimant's personal interest as he was the person on site at that moment. However, it is also our judgment that they were also in the public interest as it is in the public interest that the claimant and his colleagues are provided with these basic amenities while they work.

76. It is our judgment that the information the claimant provided about the state of the site that night affected the claimant and would have directly affected any security officer sent to the site that night and for as long as the works continued. The respondent did not arrange for there to be disruption to the electricity supply or for the claimant to be locked out of the building with no toilet or kitchen facilities and no clean water; as a special arrangement for the claimant. This would have been the state of the site for whichever of the guards attended the shift that night. The first respondent reported that there were no complaints from any of the guards who worked at the site for the balance of the week but we do not know if that was because the first respondent made different arrangements for them, following the claimant raising these issues or whether they simply ensured that they were let inside the building. These issues would have affected all security guards sent to this site.

77. It is also in the public interest that the first respondent maintains health and safety standards for all its employees. The first respondent agrees with this and that is why it would usually assess the state of a site at the time it takes on a contract and why there was a framework agreement covering the arrangements at this site. It did not do this only for the claimant but for all its security officers.

78. It is therefore our judgment that the issues raised and information provided by the claimant, were in the public interest.

79. It is our judgment that the claimant genuinely believed the matters he raised with Mr El-Shoubaky that night. He also believed that he was raising those issues for himself and also for his colleagues. We say this because of how upset he became when Mr Ali told him that he should not let Mr Shabbeer know of the issues that he had experienced that night. The claimant defied that instruction and told Mr Shabbeer about the foxes. Mr Shabbeer already knew of the disruption to the electricity supply.

80. Taking all the above into consideration, it is our judgment that the claimant made protected public disclosures to the respondent during the evening of 10 August 2020.

*4. Detriments*

*4.1 - the respondent's failure to assess the site before 10 August 2020.*

81. It is this Tribunal's judgment that Mr Stevens was unable to confirm when the respondent had last assessed the site before the claimant went to work there that night. It is likely that the site was assessed at the time the contract between the respondent and Pinnacle was signed. At the hearing, Mr Chaudhry was unable to give a date when the site had last been assessed before 10 August but he did confirm that the first respondent had a framework agreement with the client for the facilities that should be made available to its guards.

82. In the claimant's grievance outcome, Mr Stevens answer to this point was that the first respondent had been told by the client that the facilities on site had been available for his use and that the only expected disruption was to electricity. This was in accordance with the framework agreement and the minimum that the client could provide.

83. It is our judgment that it is highly likely that the respondent failed to assess the site just before the claimant attended to work on 10 August.

84. However, it is also our judgment that this was not a detriment done on the ground that the claimant made a protected disclosure. The disclosure took place on 10 August which was after the detriment had occurred.

85. It is not possible for the claimant to be subjected to a detriment on the ground that he made a disclosure; before he made the disclosure. This detriment complaint therefore fails.

*4.2 – following the claimant's texts to the second respondent on 10 August, the second respondent failed to return the claimant's calls or respond to his texts.*

86. It is our judgment that the claimant and Mr El-Shoubaky spoke between 9 – 10pm that night when the claimant called him while he was off-duty and on a night out. The Pinnacle account was not his account and he was not the claimant's line manager. The claimant called him because he was the manager with whom the claimant was familiar. Mr El-Shoubaky passed the claimant's message on to the appropriate manager, Mr Ali. He made sure that the matter was being addressed by Mr Ali and by the Helpdesk.

87. The second respondent promised to call the claimant back but did not do so because he reasonably believed that the issue was being addressed by his colleague and by the Helpdesk.

88. It is our judgment that the second respondent did not call the claimant back as promised because he was able to pass the issue on to Mr Ali as the appropriate manager. His decision not to call the claimant back was not done on the grounds that the claimant made protected public interest disclosures.

89. It is this Tribunal's judgment that the second respondent genuinely believed that he had helped the claimant as much as he could that night, that the Helpdesk was organising someone to relieve the claimant and that Mr Ali would speak to the claimant to relay that information back to him.

90. Mr Ali did call the claimant within the half-hour as the second respondent promised but the claimant did not accept the calls because he was waiting for the second respondent to call him. The claimant was promised a call back within 30 minutes and he was called back within 30 minutes.

91. It is therefore our judgment that Mr El-Shoubaky decided not to call the claimant back because of the following reasons: he was off duty, it was not his account, he had passed the matter to another manager who was also a company representative and the claimant's complaint was being addressed and another guard was going to be sent out to relieve the claimant of his duties so that he could go home. The second respondent's decision not to call the claimant back was unrelated to the fact that the claimant had made a protected disclosure.

92. This detriment complaint fails.

*4.3 - The expectation that the claimant would carry out his duties on a site that fell short of the respondent's legal obligations on health and safety requirements.*

93. It is our judgment, as already stated above, that it is highly likely that the respondent had not assessed the site just before the night of 10 August. We were not told of a recent check that had been made. However, the respondent had a framework agreement with the client on what facilities would be made available to security officers that it supplied and had an expectation that it would be complied with.

94. The respondent assumed that the facilities it saw at the time that it made agreement with Pinnacle were still available for the claimant when it offered him the shifts that week. The respondent knew that there would be problems with the electricity supply that night. It was not aware that the building would be locked and the claimant unable to use the toilets or the kitchen or have access to clean water. There is a dispute between the parties as to how the door came to be locked and whether this was because the claimant left the site to go elsewhere to charge his phone as there was no electricity on site or whether, as the claimant reported, the caretaker locked it on his arrival. We did not have to make a judgment on what actually happened that night as the claimant withdrew his complaint under section 100 of the ERA.

95. It is our judgment that the respondent did not expect the claimant to carry out his duties on a site that fell short of the respondent's legal obligations on health and safety. The first respondent did not know of the lack of facilities before the claimant attended the site. Once the claimant informed the respondent, between 8 - 9pm, of the shortcomings of the site, the respondent changed its requirements. As far as the second respondent was concerned, if what he reported was true, the claimant could leave the site. In those circumstances, the second respondent did not expect the claimant to stay there and complete the shift.

96. When the matter was passed to Mr Ali and the Helpdesk, the first respondent no longer required the claimant to complete his shift. The claimant was asked to stay until his relief, Mr Shabbeer arrived to take over from him. He was told about this at 11pm and Mr Shabbeer arrived around midnight. He therefore waited one hour to be relieved. If the claimant had informed the respondent at 5 or 5.30pm about what he said the caretaker told him, it is likely that he would have been relieved a lot sooner. The claimant waited until approximately 9.30pm before he told the respondent about the lack of basic facilities on site; which is likely to have contributed to the length of time that it took for someone to relieve him of the duty. That was the reason why Mr Shabbeer was not asked to go to the site to relieve the claimant until late in the evening, which contributed to him not getting there until midnight. This did not happen because the claimant made protected disclosures.

97. The respondent did not agree for the claimant to leave the site before Mr Shabbeer arrived. The text messages between the claimant and Mr Ali show that the claimant did not ask to be allowed to leave the site before Mr Shabbeer arrived. He was anxious about it but was prepared to wait.

98. It is our judgment that the respondent's expectation was that, like all the other sites it covers, this site would have toilet and kitchen facilities and clean water. The only matter that they had prior notice of, from the client, was that the electricity supply may be disrupted. The claimant was given prior notice of that. The respondent did not send the claimant to this site deliberately as a detriment. Also, at the time the claimant was offered the site on 5 August, the claimant had not yet made any disclosures.

99. It is this Tribunal's judgment that the first respondent did not expect the claimant to carry out his duties on a site that fell short of its legal obligations of health and safety because he had made protected disclosures.

100. This detriment fails.

*4.4 - withholding the claimant's sick pay whilst he was off sick.*

101. It is our judgment that the claimant's contractual sick pay was not withheld. Under the claimant's contract he was only entitled to statutory sick pay, if sick and provided he was eligible.

102. The claimant provided sick certificates and was paid statutory sick pay from the 11 August to the end of the month. He had only been offered shifts for that week but the respondent decided to pay him SSP to the end of the month.

103. This was a zero hours contract, which meant that he was only entitled to be paid for work done. The claimant was paid for the whole shift for the night of 10 August and then paid SSP for the whole of the period covered by the first sick note from the GP which was 11 August to 30 August.

104. The claimant refused all offers of work after the shift on 10 August. He was therefore not entitled, under his contract to be paid and as he was sick, he

was not entitled to SSP for the period 1 September to his resignation on 5 October 2020.

105. It is therefore this Tribunal's judgment that the respondent did not withhold the claimant's sick pay. He was paid his entitlement.

106. This detriment fails.

> *4.5 - the expectation that the claimant would return to work despite submitting a sick note expressing his unfitness to work. The claimant sent a sick note to the respondent informing them about his urinary tract infection and he was certified sick. He was still contacted by email on 19 August to cover shifts.*

107. It is this Tribunal's judgment that all offers of work were made after the claimant's sick notes had expired or before the next sick note had been supplied. The claimant's first sick certificate covered the period 11 – 30 August but was not sent to the first respondent until 24 August. The first respondent's Helpdesk wrote to the claimant on 19 August, before it received his sick certificate to offer him work for the 22, 23 and 24 August.

108. As the sick certificate expired on 30 August, the first respondent's Helpdesk wrote to the claimant again on 4 September to offer him shifts on 5, 6 and 7 September. It was not until 13 September that the claimant sent the first respondent a sick certificate covering the period 31 August to 13 September.

109. It is also this Tribunal's judgment that an employer in a zero hours contract is not obliged to offer work and an employee is not obliged to accept work. The claimant was under no pressure to accept the work offered to him. He refused the offer of work and there were no negative consequences for him. Instead, the first respondent continued to offer him work when his sick certificate expired. On 30 September, following the end of the sick certificate on 13 September, the first respondent wrote to the claimant to offer him work on 1 and 2 October. The claimant replied to say that he was unavailable for work. He did not refer to ill-health and did not give a reason why he was unavailable. We were not told of any consequences the claimant suffered because he refused the first respondent's offers of work. In our judgment, he was able to refuse work, as much as he wanted.

110. The claimant resigned a few days later, on 5 October.

111. In our judgment, the letter that confirmed the claimant's visit to the urgent care centre on 12 August was not evidence that the claimant could not work. It did not refer to a condition, or a diagnosis or medication or his ability to work. It simply confirmed that the claimant attended the urgent care centre.

112. It is our judgment that there was no detriment to the claimant when the first respondent offered him work after it received that letter or the sick certificates that he provided. The sick certificates referred to the claimant having a urinary tract infection and being on antibiotics. The recommendation on each sick certificate was that he refrain from work for a period of time. The offers of work

that the Helpdesk sent to the claimant was outside of the period of time stipulated by the sick certificates, as soon as the first respondent was aware of them.

113. Lastly, in our judgment, an offer of work is not a detriment. Especially when the employee is under no obligation to accept the offer. He was not hounded and was not harassed by being offered work, especially when he also told us that he lost income as a result of his experience on 10 August. It was his choice to refuse to work if he felt unwell, unable or not interested in the work offered. He was able to refuse to work and he did so and suffered no adverse consequences for doing so.

114. It is our judgment that this detriment fails.

*4.6 - Failure to adequately investigate the claimant's grievance dated 3 September 2020.*

115. It is this Tribunal's judgment that there was some delay in consideration of the claimant's grievance. He submitted it in September and the result was sent to him in January 2021.

116. It is also this Tribunal's judgment that the grievance was investigated. The claimant was not happy with the result and his grievance was not upheld. Although it may not have been the result he was looking for, the failure to uphold the grievance was not a detriment to him on the ground that he made protected disclosures. The Tribunal's findings accord with the results of the grievance. The first respondent addressed the claimant's concerns. Although it is unlikely that the respondent assessed the site just before the claimant was sent there to work, the client had reassured the respondent that there were facilities there for the claimant, apart from some disruption to the electricity. The first respondent's reasonable expectation was that there would be facilities there for the claimant in accordance with their framework agreement. The first respondent relied on the client's reassurances when it sent the claimant there to work.

117. The claimant may disagree that it was right that the first respondent should have relied on those reassurances. It is this Tribunal's judgment that the decision to rely on those reassurances was not done because the claimant made protected disclosures. Mr Stevens met with the claimant and heard his grievance. He was then very clear in his letter explaining the outcome of the claimant's grievance. He set out clearly the investigation he conducted, who he spoke to in respect of each aspect of the grievance and how he arrived at his conclusion. It is our judgment that he did investigate the grievance thoroughly and that he thought about it and carefully considered it before he decided not to uphold the grievance.

118. It is not customary for the grievance manager to provide the employee with the notes of the investigations he conducted into the issues raised in the grievance. As far as we were told, the claimant did not ask to see those notes until the Tribunal hearing. It cannot be a detriment for the respondent to fail to provide something that had never been requested. There is no complaint about the outcome of the grievance. The claimant's only complaint was that the respondent had failed to adequately investigate it. In our judgment Mr Stevens had adequately investigated the grievance.

119. The claimant's complaint about the grievance is not upheld. The detriment fails.

*4.7 - the claimant's resignation/dismissal arising from the respondent's failures.*

120. Section 47B of the ERA does not apply where the claimant is an employee and the detriment in question amounts to dismissal.

121. It is this Tribunal's judgment that the claimant resigned from the respondent's employment. Whether the claimant was constructively dismissed or simply resigned will be considered below under the heading constructive unfair dismissal.

Second Respondent

122. The claimant says that the second respondent owed a duty of care to him in relation to his health and safety at the workplace. The claimant says that the second respondent should and could have assessed the safety or otherwise of the site not only for the claimant but also for his colleagues.

123. Mr El-Shoubaky had not been the manager to offer the claimant this shift. The first respondent company was not his personal business and he was not directly responsible for this contract. It came within his area but was being managed by Mr Ali.

124. It was not clear to the Tribunal why the claimant felt that the second respondent was personally liable for his experiences that night.

125. It was clear to us that the claimant was upset that the second respondent had not kept his promise and called him back after speaking to Mr Ali. The second respondent considered that he had passed the matter over to Mr Ali. He rightly assumed that the claimant would get a call within half hour and that it did not need to be from him. The claimant was called back around the time that he was promised.

126. The second respondent confirmed that, as Operations Manager, he did owe the guards a duty of care and as far as he knew, this site had the usual facilities. When he was told that the claimant did not have those facilities, he passed the matter to Mr Ali and the Helpdesk and made sure that it was being addressed, that night, as a matter of urgency. It took some time to find an officer who was able to take the claimant's place. Once Mr Shabbeer agreed to do so, the claimant was informed and provided with his number.

127. Mr El-Shoubaky reassured the claimant that his safety was of importance to the first respondent. The claimant was relieved of the balance of the shift and paid for the whole shift.

128. It is our judgment that there is no breach of duty by Mr El-Shoubaky. The claim against the second respondent fails and is dismissed.

Constructive unfair dismissal

129. The claimant did not have two years' service with the respondent as he started his employment in March 2020. His resignation was on 5 October 2020.

130. Why did the claimant resign? The letter of resignation made no reference to the grievance and the delay in the outcome being received.

131. The letter repeated details of the claimant's experience at the school site on 10 August. It was clearly still a live issue for him. At the Tribunal hearing the claimant was still upset about what had happened.

132. Since 10 August, the claimant had invoked the grievance procedure and received pay from the respondent for the shift on 10 August and SSP for the days between 10 August and 30 August. The respondent did not sanction the claimant for leaving the shift early on 10 August even though it was not clear what had happened as Mr Shabbeer made no complaint about the site and all the other security guards who worked at the site for the rest of the week made no complaints about the facilities.

133. The claimant did not work between 10 August and his resignation on 5 October. It is likely that he resigned because he felt unable to work and was unwell. In our judgment, the claimant's decision not to accept any work between 10 August and 5 October was not because he believed that his contract had been breached.

134. On 10 August, once the claimant spoke to Mr Ali, he was required to stay on site just until the relief guard arrived. The first respondent had contractual obligations and a duty of care to the claimant. It also had contractual obligations to its client, Pinnacle. It had a contract to guard the site and if the claimant left before the other guard came, the site would be unguarded and the first respondent potentially in breach of contract. The claimant waited 1.5 hours, between 10.30 – midnight, before Mr Shabbeer arrived to relieve him. During that time, he was in constant text message and telephone contact with the Helpdesk and Mr Ali. The claimant did not resign at that point.

135. In our judgment, when the claimant resigned on 5 October, there was no fundamental breach of contract that would allow the claimant to resign and claim constructive unfair dismissal. Therefore, it is our judgment that the claimant was not dismissed.

136. The claimant has failed to prove that the respondent's response to his protected disclosures caused him to resign some two months later.

137. It is this Tribunal's judgment that the claimant's resignation was not a dismissal.

138. It is unfortunate that the claimant had such an upsetting experience on the night of 10 August, while guarding the school site. The respondent made arrangements for him to guard the site and as far as the respondent was concerned, this was a normal night with some electrical disruption expected. However, it happened, the claimant was locked outside the building and spent

most of his shift outside. It is likely that he felt anxious, scared and isolated. It is our judgment that whether or not it was his fault that he was outside, he rightly reported this to the respondent as a public interest disclosure.

139. The respondent accepted his complaint and made arrangements for someone to take over from him so that he could go home. As it was late at night when he reported this to the respondent, it took some time for a replacement to attend the premises and relieve the claimant. It is our judgment that the respondent responded to the claimant's complaint as fast as it could and that it was taken seriously and accepted.

140. The respondent investigated what had happened that night and although it received a different version of events from the client, it accepted that the claimant had a bad experience and paid him for the shift, paid him sick pay for the rest of the month and continued to offer him shifts. That is not the actions of an employer who did not believe its employee.

141. The claimant was not subjected to detriments because he made protected public interest disclosures. The claimant was not dismissed because he made protected public interest disclosures.

142. Those claims fail and are dismissed.

143. The claimant decided that he could no longer work for the respondent and he resigned but this was not as a result of any breach of contract or breach of a duty of care by the respondents.

144. The claimant's claim fails and is dismissed.

Employment Judge Jones

21 April 2022