EMPLOYMENT TRIBUNALS

Claimant: Mr R Wyrwa

Respondent: Vandemoortele Worcester (a UK establishment of Vamix NV)

Heard at: Midlands West and then remotely (by Cloud Video Platform)

On: 4, 5, 6, 7 and 8 July 2022 and 8, 9 and 10 August 2022

Before: Employment Judge Faulkner
Dr G Hammersley
Mrs D Hill

Representation:

Claimant: Miss D Janusz (Employment Adviser)
Respondent: Mr C Baran (Counsel)

Interpreters (Polish):

Miss A Gleb (on 4 and 5 July) and Ms M Niedziolka

JUDGMENT

1. The Respondent did not make an unauthorised deduction from the Claimant's wages. His complaint to that effect is not well-founded.

2. The Respondent did not subject the Claimant to any detriment on the ground that he had made protected disclosures. His complaints to that effect are also not well-founded.

3. The Claimant was not dismissed by reason of redundancy. Accordingly, he does not have a right to a statutory redundancy payment.

4. The Claimant was unfairly dismissed. His complaint of unfair dismissal is therefore well-founded.

5. The Tribunal will determine the question of remedy at a further Hearing, details of which have been notified to the parties.

REASONS

1. Reasons for the above Judgment were given orally on 10 August 2022, with the written Judgment being dated 11 August 2022. The Claimant initially requested written reasons on 31 August 2022. For reasons unknown to me, that request was not forwarded to me until 13 October 2022. It was necessary to clarify the request, which was confirmed by the Claimant on 8 November 2022. I apologise to the parties for the delay in the Reasons being provided.

Complaints

2. By a Claim Form presented on 7 October 2020, the Claimant complained of an unauthorised deduction from wages, protected disclosure detriments and unfair dismissal. He also claimed a statutory redundancy payment.

Issues

3. The issues to be determined at this Hearing were identified at a Case Management Hearing before Employment Judge Camp on 5 July 2021. The resulting Case Management Summary listed those issues in the form set out in the Appendix to these Reasons, though I have removed from the list those issues relating to remedy, as this Hearing dealt only with those relating to liability.

4. It was agreed at this Hearing that EJ Camp's list should be amended as follows:

4.1. In relation to time limits for the protected disclosure detriment complaints, the Respondent maintained that the first four complaints were out of time but accepted that the last two were in time.

4.2. In relation to unfair dismissal, if the reason for dismissal was found to be related to capability, in determining the reasonableness of the dismissal the Tribunal would need to consider whether the Claimant was provided with reasonable support, a reasonable opportunity to improve and reasonable consultation. The Tribunal would also need to determine whether the Respondent properly considered alternatives to dismissal, otherwise followed a reasonable procedure in dismissing the Claimant, including in relation to any appeal, and determine whether dismissal was in the range of reasonable responses.

4.3. In relation to unfair dismissal, if the reason for dismissal was found to be redundancy, in determining the reasonableness of the dismissal the Tribunal would need to consider whether the Claimant was warned about redundancy, whether there was a reasonable consultation process, whether the Respondent adopted fair selection criteria which were fairly applied, whether it gave consideration to alternatives to dismissal including suitable alternative employment, whether it followed a reasonable procedure, and whether dismissal was in the range of reasonable responses.

4.4. As to whether the Claimant made protected disclosures, the Respondent agreed that the second and third disclosures (on 5 and 13 March 2020 respectively) were protected, but only to the extent that the Claimant made a disclosure about food safety; it said that his disclosures regarding safety procedures for use of a guillotine were not protected. It did not accept that the first alleged disclosure, which the Claimant says was made orally, was protected, initially at least on the basis that it was not accepted that the disclosure was made at all. The Claimant did not seek to establish that his disclosures regarding hygiene at work were protected.

4.5. As to the substance of the protected disclosure detriment complaints, the Respondent accepted that warning the Claimant and not paying him a bonus both constituted a detriment, but did not accept that the remaining alleged detriments were detriments at all. It also disputed that any of the agreed or alleged detriments were because the Claimant had made one or more protected disclosures.

4.6. It was agreed that in relation to the detriment complaints the Claimant had to show a prima facie case and that if he did it would then be for the Respondent to show the reason for the treatment under s.48(2) of the Employment Rights Act 1996 ("ERA").

4.7. The complaint in relation to the bonus was pursued only as a protected disclosure detriment complaint, not as a wages complaint.

4.8. Finally, it was agreed that there were no time limit issues in respect of the complaints of unauthorised deductions from wages.

Hearing

5. It is necessary to briefly summarise some of the difficulties encountered in progressing this Hearing, not least to make clear why the case was not completed in the originally allocated time.

6. An interpreter for the Claimant was booked by the Tribunal to attend in person from day 1 of the Hearing, along with the parties, but did not attend. The Tribunal's administrative staff were able to secure the services of another interpreter, Miss Gleb, though understandably at such short notice, she could only attend by video. Throughout day 1, there were general difficulties hearing Miss Gleb clearly. The Claimant was concerned that he was not hearing her and Miss Janusz (who also speaks Polish) told us that not everything was being accurately interpreted, doubtless because of the technical difficulties. The Claimant applied to attend instead by video so that from day 2, the Hearing was to be held on a hybrid basis with the Claimant, Miss Janusz and Miss Gleb attending remotely, and the Respondent and Tribunal panel in person.

7. On day 2 however, one of the lay members of the Tribunal showed signs of Covid-19 symptoms. Although they provided two negative tests on the day, in line with HMCTS policy, it was decided that they should leave the Tribunal building. There was a considerable delay whilst these arrangements were made and whilst everyone remaining moved to another hearing room. The parties agreed that the remaining lay member and myself could hear the conclusion of the evidence of the Respondent's first witness, Mr O'Neill, consisting of my

questions and re-examination. We undertook to relay that evidence to the absent member, which we did the next morning. From day 3 onwards, it was agreed that both parties, and the Tribunal panel, should attend remotely. The panel member with Covid-19 symptoms subsequently tested positive, but provided assurance that they felt well enough to continue. Ms Niedziolka was the interpreter from this point onwards.

8. Three pages of new documents had been added to the agreed hearing bundle by consent on day 1. On day 3, the Respondent sought to introduce a further document of two pages relating to the bonus which was the subject of one of the detriment complaints. The Respondent said that it became clear this document was relevant when Mr O'Neill was being questioned on day 2, but the Claimant objected to its inclusion. It was agreed that the Tribunal should see the document to determine whether it should be admitted. We acceded to the Respondent's application because whilst it was not entirely clear to us why it had not been disclosed before (the Claimant's denial of knowledge of the conditions for paying the bonus came late in the proceedings, but still several days before the Respondent sought to admit the document):

8.1. We could see its relevance to the bonus issue, and concluded that it was necessary for us to take it into account to ensure the fair disposal of the complaint about it.

8.2. As the Claimant agreed, there was no prejudice to him in it being admitted – it was a short document, there was ample opportunity for him to give instructions to Miss Janusz about it, it was admitted at a point in the Hearing when there was still opportunity to question the relevant witnesses, and the Claimant could give evidence about it as well.

8.3. The points the Claimant raised in objecting to the application, which related to the provenance of the document – when it was prepared and what it does and does not show – could obviously be dealt with in evidence and submissions.

9. On day 5, Mr Baran informed us that he had discovered that there was a paper archive the Respondent had not searched as part of its disclosure obligations. After a lengthy discussion, it was agreed that the search should be made, any resulting documents should be disclosed and then the Tribunal would resolve any dispute about their inclusion in the bundle. There was in the end only one such document, which was the covering letter for the document referred to in paragraph 8 above. We made clear our displeasure at how the Respondent had conducted itself in relation to its disclosure obligations, but agreed this document too should be admitted to the bundle as a clearly relevant document on which Ms Duncombe could be recalled, as its author, for questioning. We did not see why Mr Parton should also be recalled and questioned about it.

10. All of the above meant that we lost not much short of two days of our allocated time, and of course translation (especially via CVP) slowed the proceedings markedly, though we add that Ms Niedziolka was particularly impressive and helpful in carrying out that task. We acceded, with some reluctance, to the Claimant's application to adjourn altogether in the early afternoon of day 5 (the last day of the original listing), rather than commence his evidence without any prospect of it being completed, leaving him in the position – through no fault of his own – of having four weeks during which he would be

unable to speak to Ms Janusz before his evidence resumed. Those issues outweighed the benefit of hearing the first ninety minutes of his evidence.

11. One further document was adduced on day 5, without objection, namely a March 2020 job description.

12. We read statements from and heard oral evidence of four witnesses, namely Gary O' Neill (formerly the Respondent's Manufacturing Manager), Suzie Duncombe (its Country HR Manager), Mark Parton (its Plant Manager) and of course the Claimant. The Claimant's statement was very long. The parties had agreed a bundle of documents for the Hearing of around 350 pages, supplemented as above. We read all of the documents referred to in the witness statements and in an agreed reading list, but made clear that it was for the parties to take us to anything else they wished us to consider. References to page numbers below are references to the bundle; alphanumeric references relate to witness statements, so that for example GON5 would be paragraph 5 of Mr O'Neill's statement and RW12 would be paragraph 12 of the Claimant's statement.

Facts

13. Our findings of fact now follow, made on the balance of probabilities where there was a dispute between the parties. We did not seek to resolve all of those disputes, but focused on those matters that were necessary for us to decide the issues set out in the Appendix, amended as above. We add that this is one of a number of current complaints in the employment tribunal against the Respondent. EJ Camp decided that this case and the others should not be heard together. We make clear therefore that our findings of fact, and indeed our analysis below, are based entirely on the evidence we heard in relation to this case. As it happened, and as was appropriate, neither party sought to lead evidence or make submissions in relation to the other cases in any event.

Background

14. The Respondent is a UK branch of a company based in Belgium. It makes frozen foodstuffs in Worcester for supermarket chains and has around 65 employees in Great Britain.

15. The Respondent employed the Claimant from 12 July 2008. Ms Duncombe says that initially he was employed as an Operator (also known as a "Task Owner") but was promoted to "Area Owner" in March 2018, which the letter to the Claimant dated 7 March 2018 at page 60 seemed to confirm. Ms Duncombe says that in February 2019 the Claimant was returned to the role of Operator, as borne out by the letter in her name and addressed to him dated 12 February 2019 (page 61). She referred in that letter to a recent meeting and said that from 4 February 2019 the Claimant's job title was changed to Operator "initially for 3 months", after which the position would be reviewed. The Claimant was to retain the same pay, on condition that "you develop your teamworking skills and work with your colleagues with a supportive approach. You will also be required to attend English lessons on site to improve your ability to communicate with your colleagues". Ms Duncombe told us that the Claimant's then line manager had held a performance review meeting with him, regarding teamworking and the standard of his English, with this letter being the result.

16. In reply (pages 64 to 67), the Claimant wrote that he was enthusiastic about the English lessons, but he asked questions about the reason for and timing of the job change, suggesting it was because of a complaint he had made against the Production Manager/Coordinator. The relevant context is set out from RW7 onwards, where the Claimant says he had an issue in January 2019 with a Romanian colleague being aggressive. He complained to the then Production Manager/Coordinator and then complained against him for not taking any action. He says he did not get a reply to his communication to Ms Duncombe and so assumed he remained as an Area Owner. There was no reply in the bundle. Ms Duncombe told us that one was sent, but given the absence of the reply itself, we concluded that there was none. The Claimant also says he did not believe he had been demoted because his pay was unchanged.

17. The letter to the Claimant at page 68, again from Ms Duncombe, suggests that in August 2019 the Claimant was asked to temporarily act up to cover a maternity leave. The letter said that the cover would be until 15 September 2020. Ms Duncombe did not recall the letter but did recall the Claimant acting up, whilst the Claimant said he did not receive it and that he did not act up, but performed his absent colleague's role as well as his own. Ms Duncombe cannot think of a situation where someone would cover, at least not more than briefly, two Area Owner roles, and pointed out that the Claimant was on £9.29, whereas an Area Owner, as the letter says, was on £10.16 per hour, and the Claimant had not disputed his pay. The Claimant says (RW15) that he received the same pay before his colleague went on maternity leave and afterwards. We did not deem it necessary to decide whether the letter was sent; what was clear was that the Respondent believed that the Claimant was acting up.

Alleged disclosures

18. The Claimant says that at the end of January 2020, he reported to a shift leader, Joao Sousa, that his team leader was repeatedly failing to do a metal check of products in accordance with the Respondent's procedures. The Claimant says that these checks were vital for food safety.

19. On or around 5 March 2020, the Claimant noted the same issue again, although the team leader had completed documentation saying that the checks had been carried out. The Claimant says that this was a very serious matter which could have resulted in injury to the public. He wrote to Mr O'Neill about it (page 138) and in doing so also reported that Mr Sousa had failed to lock off a guillotine machine, creating a serious risk of injury. He asked for immediate action.

20. The Claimant says that because no action was taken, he reported the same matters to the Respondent's Secretary General in Belgium, Dirk Durez, on 15 March 2020 (page 149). He referred to "disturbing practices" and said he would like to act as a whistle-blower. He told Mr Durez that "some serious health and safety rules are being violated on a regular basis".

21. Mr Parton told us that staff were actively encouraged to speak up about perceived wrongdoing, for example by posters put up in the staff corridor. Minor health and safety issues were raised weekly, though food safety concerns were rare. He says he would not tolerate a culture where wrongdoing was suppressed, whoever was the subject of a concern and however senior they

were; he would not put the business at risk. Two Polish employees were dismissed because it was believed they were not carrying out metal checks. All of that evidence was unchallenged.

Warning and other pre-dismissal matters

22. On 2 February 2020 something called a paddle fell into and damaged a machine in the Claimant's work area, having been placed on top of it by one of his female colleagues. Mr Sousa asked the Claimant to attend a resulting investigation meeting. The Claimant says in RW97 that he was not told that he was suspected of misconduct, just that he needed to attend the meeting as a witness, although at page 154 (part of his appeal against his warning – see below) he accepted he had no issue with how the meeting was convened. The notes of the meeting (pages 103-111) were, Mr O'Neill believes, typed on 5 February 2020, although they were not signed by the Claimant until 17 February 2020. The Claimant says he was pressured to sign them even though he did not understand them. It was not necessary for us to determine whether that was the case.

23. Mr O'Neill was given the notes by Mr Sousa after the latter's meeting with the Claimant, Mr O'Neill thinks within 24 hours. Mr Sousa recommended that both the Claimant and the colleague who had placed the paddle on the machine be given a "letter of concern". The Claimant describes Mr Sousa (RW102) as pushing for a disciplinary hearing.

24. Mr Sousa's report mentioned the colleague saying that she spoke to the Claimant to the effect that he should put the paddle back into the storage area. The Claimant for his part was said by Mr Sousa to be unclear about whether he spoke with the colleague and what was discussed. Mr Sousa added, "CCTV shows [the Claimant] standing directly opposite [the colleague] when she put the paddle on top of the guillotine". Mr Sousa's report was not given to the Claimant.

25. It was Mr O'Neill who decided to escalate the matter to a disciplinary hearing for the Claimant, he says because of inconsistencies in the Claimant's evidence, because the CCTV footage indicated that he was involved and because the Claimant did not take responsibility for what had happened. Whereas a letter of concern would be a file note and no more, a warning is more formal and stays on an employee's record for several months.

26. On 28 February 2020, Mr O'Neill invited the Claimant to a disciplinary hearing (page 114) due to "failure to fulfil your duties as an Area Owner by not paying due care and attention to your work area and failure to ensure equipment was stored correctly, resulting in machine damage. Disciplinary action could be up to dismissal".

27. The Claimant provided an account in writing (page 116). He expressed some concern about what he saw as the late notice of the hearing, but wanted it to proceed. He said it was not him who left the paddle on the machine, and pointed out it was not on his list of tools.

28. The notes of the hearing are at pages 117 to 127. They record Mr O'Neill as saying that it was difficult for him to hold the Claimant "fully accountable" because the tool was not on the Claimant's list, there being no specific place for storing it.

Mr O'Neill told us that nevertheless the tool was stored on the table where the Claimant worked and so the Claimant was still responsible for it.

29. Mr O'Neill is recorded in the notes as saying that the Claimant's statement was "a little bit all over the place", and that this and the CCTV evidence made him feel that the Claimant was not being truthful. The Claimant, through an interpreter, is then recorded as saying he did not really remember what exactly happened and how, which kind of conversation there was, and whether his colleague said something or not. The interpreter then said, "he is saying potentially it did happen" (the conversation with the colleague). The notes then go on to record Mr O'Neill as saying (pages 124 to 125), "What I haven't heard from you today is you taking responsibility as Area Owner … I think you're better than that".

30. The hearing ended with the Claimant being warned. Mr O'Neill's evidence was that it was not clear who was responsible, but it was clear two people were involved, the Claimant and his colleague. He accepts it was the colleague who put the paddle on top of the machine, but she had asked the Claimant to put it away and as Area Owner, he should have done so. The Claimant was thus accountable in Mr O'Neill's view.

31. Mr Sousa's report at page 111 reflects Mr O'Neill's factual conclusions. Whilst the Claimant told Mr Sousa he could not recall speaking to the colleague, Mr O'Neill says that the CCTV footage showed them talking across a conveyor. At the end of the disciplinary hearing, Mr O'Neill is recorded (page125) as saying that he would happily work with the Claimant to try and understand additional workplace issues the Claimant had mentioned.

32. The Claimant's colleague was not given a formal warning. Mr O'Neill says that this was because her statement was to the point and was aligned with the CCTV footage, whereas the Claimant's evidence was meandering and not aligned with the footage, and he did not accept responsibility.

33. Mr O'Neill told us that he was not aware when confirming the warning at the hearing on 3 March 2020 that the Claimant had raised with Mr Sousa that the team leader was not running metal checks. As noted above, the Claimant sent Mr O'Neill an email on 5 March 2020 (page 138) saying that he had complained to Mr Sousa about health and safety violations. We accepted that Mr O'Neill was not aware of the disclosure made to Mr Sousa in January 2020. He told us he was not, denying that he was close friends with Mr Sousa and the team leader, whilst the Claimant could only speculate that Mr O'Neill was aware of it. We preferred Mr O'Neill's direct evidence.

34. The warning was confirmed in writing on 6 March 2020 (page 139). It said:

34.1. The Claimant had acknowledged that his statement did not make a lot of sense. Mr O'Neill told us that the inconsistencies in the Claimant's evidence specifically related to where he said he was at the time of the incident with the paddle, initially saying he was on a break, then in the lab, then on the production line.

34.2. It was disappointing that the Claimant had said he did not really remember what happened, including whether he saw the colleague place the paddle on the machine and whether he spoke to her about it.

34.3. It was necessary for an Area Owner to take responsibility.

35. It went on to say, "After careful consideration of all the facts and your reluctance to admit responsibility for your area despite acting up as an Area Owner, and your unwillingness to disclose what actually happened by saying you can't remember, though in your initial statement you did in fact recall that you spoke to [the colleague] and recited what she has said to you", Mr O'Neill was giving the Claimant a written warning.

36. Mr O'Neill told us he is offended by the suggestion that he was taking revenge for the Claimant having made a protected disclosure. He said he has a reputation for being firm but fair. As for the Claimant's email at page 138 dated 5 March 2020, setting out for Mr O'Neill his health and safety concerns, Mr O'Neill spoke to Mr Sousa about it, who confirmed he had received information from the Claimant, but when Mr Sousa looked into the matter, he had found nothing wrong.

37. The Claimant appealed the warning on 11 March 2020 (pages 146 to 148), supplemented on 19 March 2020 by the further letter at page 154. He said that he had not received 24 hours' written notice for his meeting with Mr Sousa; raised an issue with the content of the minutes of that meeting; said Mr O'Neill had admitted the initial investigation was not carried out correctly; said he had been accused of lying by Mr O'Neill; and said that other possible outcomes had been bypassed, such as an informal warning and a formal verbal warning. In the additional letter at page 154, the Claimant also raised grievances, saying that there was no proper investigation, any investigation report had not been disclosed to him, it was a very vague allegation, and he could not take responsibility for matters outside his control.

38. The Claimant was invited to an appeal hearing with Mr Parton (page 157), but was unable to attend on 31 March because of an accident at work. His case is that the hearing was not rescheduled. Ms Duncombe says however (SD14) that this was because in his further letter on 27 March 2020 (pages 159 to 160) the Claimant said he did not acknowledge the validity of the appeal hearing. He repeated in that letter that he did not have the disciplinary hearing minutes and that the allegation remained wholly vague. Ms Duncombe wrote to the Claimant on 31 March 2020 (page 170) agreeing to postpone the hearing and saying it would be reconvened if the Claimant accepted its validity. The Claimant did not respond. Mr Parton told us he did not provide a written response to the appeal as he prefers face-to-face hearings.

39. The Claimant says Mr O'Neill wrote to him again on 1 April 2020 regarding an accident the Claimant had at work and then separately regarding a delay in the production line being started up on 30 March 2020 which had resulted in substantial downtime. The Claimant says Mr O'Neill wanted to discuss both of these matters with him on 2 April 2020, that he objected to that and so both matters were dealt with by another manager.

40. The Respondent gives a different account. It says that it was the QA Co-Ordinator who wrote two letters to the Claimant on 1 April 2020 (pages 172 and 173) inviting him to discussions on both issues. The letter at page 172 said, "please can you attend a meeting to enable us to complete the necessary paperwork and understand how the accident happened". That at page 173 said, "please could you attend an investigation meeting to help us understand how this [the downtime] happened as part of our investigation into this matter". There are two identical letters at pages 171A and 171B from Mr O'Neill, but he insists that he did not produce them nor did he see them until these proceedings, as he would have conducted any disciplinary hearing that might have resulted, not any investigation.

41. After receiving the letters, the Claimant wrote to someone in HR on 1 April 2020 – see pages 176 to 179 – giving his account of both matters. Mr O'Neill told us that he had no contact with the Claimant about either issue. There is no evidence that he did. Moreover, the Claimant did not raise in his letter of 1 April 2020 anything about Mr O'Neill's involvement; that made it more likely in our view that the duplicate letters from Mr O'Neill were not sent.

42. The Respondent says that it was entitled to question the Claimant about both of these matters, that he suffered no detriment in it doing so and that this was nothing to do with any protected disclosures. Mr O'Neill said that several people were interviewed about the line being stopped. Whilst we were not taken to any records of the same, it can be seen from the notes at pages 163 to 169 that this was the case. It was decided that the Claimant was not at fault in relation to either matter – page 211.

43. On 2 April 2020, Ms Duncombe emailed Mr Sousa about the Claimant raising metal checks issues with him. In reply, Mr Sousa denied that the Claimant had done so (page 191) "[The Claimant] never came to me to complain about any metal detector checks not done by the Line A [Area Owner]". As noted above, Mr O'Neill told us that Mr Sousa had said he had looked into it, and Mr Parton said that checks were carried out and the expected entries on the system were in place, that being the best check the Respondent could do, alongside alerting Quality Control to be vigilant. Ms Duncombe accordingly accepts that what Mr Sousa said in that email is not reliable. We concluded that the Claimant did have a conversation with Mr Sousa in January 2020 on this issue though that is not the same as saying Mr O'Neill was aware of it when he gave the disciplinary warning.

Reorganisation

44. In Autumn 2019, the Respondent decided to undergo a substantial business reorganisation, which in part entailed the complete replacement of its manufacturing machinery in Worcester. It was known as Project Conquest ("the Project"). The machinery installation eventually took place from July to October 2020. The purpose was to provide additional capacity and capability, described by Mr Parton at MP5 as radically altering the control processes for the plant.

45. The Respondent identified that substantial technical retraining would be required both from experts within its wider Group and from those third parties who had supplied the new processes, such training to be relevant to the sections of the production line employees worked in. At pages 73 to 80 is a document from a Project Steering Committee Meeting on 18 October 2019. The

Respondent initially envisaged a headcount reduction – see MP6 and page 75. Page 76 refers to a redundancy matrix and page 77 to enhanced redundancy pay being considered. By January 2020 however, the Respondent identified that a balance had been achieved between existing staff numbers and those required to operate the upgraded plant – see page 80.

46. In November 2019 there was a presentation to staff across all shifts (MP8 and page 82), at which the Claimant was present. The plan was that this should be followed by regular "town hall" meetings, monthly meetings of the employee forum and meetings with employees individually – see the communications plan at page 102. The Covid-19 pandemic caused issues with the plan. There were one or two town hall meetings from February until staff were furloughed on 3 April 2020, though the Claimant says he was not present at those because he was not invited. One forum meeting took place on 5 March 2020 – see pages 138A to 138C. The Claimant says he did not know about this meeting and he was not a forum member. There was no discussion at this meeting about dismissals. At page 138B it was noted that the forum was told that if employees opted into a new proposed three-shift system, assessments would be required for English, their skill set, mechanical capability and team working. Ms Duncombe is noted as confirming at that meeting that for all current permanent staff a role would be available in the new structure.

47. Mr Parton says (MP12 and 13) that individual managers were to have team talks with their staff and that the Respondent also produced newsletters. The Claimant accepts that the Respondent met with employees to inform them about the new equipment and that it would be introducing changes to how work was performed, but says they were not told that jobs were at risk. He said in oral evidence that he repeatedly asked Mr Sousa about the tests employees were to take, but the answer was that Mr Sousa did not know. The Claimant accepted that he had no evidence for this, and it is not referred to in his very detailed statement, nor in his letter of 19 March 2020 (see below). For those reasons we concluded that he did not make these enquiries.

48. On 9 March 2020, Mr Parton wrote to the Claimant what appears to have been a standard letter sent to all affected staff (pages 141 to 143). He said that the Respondent was recommissioning the line and changing from two to three shifts, to enable 24-hour production. There was to be a four-week consultation. The letter went on to say that there was a need for all employees to be able to write, read and understand English to a good level. It said, "This may be something that you would wish to consider when deciding on whether to accept the shift pattern change or not. Once you have passed the English assessment there will be a selection of different assessments … What happens if I do not pass any of the assessments? … unfortunately, we will need to end your employment with [the Respondent] on 31 July 2020. [If the test was passed], a 1:1 meeting [will be held] to discuss which role you would be suited to … we will be reviewing our terms and conditions for the roles and once the roles have been finalised, we will be reviewing the salary for them to reflect the increased calibre required of the role holder. Once finalised, we will then issue you with a new contract of employment …".

49. At the Steering Committee meeting in October 2019 (page 80) it appears to have been noted that there would be mandatory screening on a certain level of English – written, verbal and reading. Mr Parton could not recall whether staff

were told about this at this point, though he insisted that as soon as decisions were made, staff were told. Ms Duncombe said something rather different. She told us that nothing had been finalised at that point, albeit at Group level it had been made clear that a certain level of English would be needed. She accepted that the letter of 9 March 2020 was the earliest point at which the Respondent can demonstrate that the requirements in relation to English and the consequences of not passing the test were made known to employees. In the letter of 19 March 2020 (pages 154 to 155) written by the Claimant to Ms Duncombe mainly about the written warning (see above), he also said he could not see what changes were being introduced that meant he and colleagues had to take English tests. Ms Duncombe could not tell us whether this point was ever addressed with the Claimant. Accordingly, we found that it was not.

50. The Claimant says that he had been able to do his job adequately before, including speaking sufficiently well in English. He says at RW4 that "it was clearly known to management my English was not perfect, but it was still considered sufficient to carry out my role successfully". The Respondent had previously provided lessons for staff who wanted them, as can be seen from the attendance lists at pages 73A to 73D. The Claimant says at RW54 that he recalls attending some classes but cannot recall how many times he did so. Based on pages 73B and 73D, Ms Duncombe says that the Claimant attended five sessions from March to May 2019, or had opportunity to do so. We saw no reason to doubt that evidence. The Claimant says however that the lessons did not include any reading, listening, writing or grammar tutorials or exercises. Ms Duncombe says that they did, as they were led by TEFL experts, and that after the five sessions staff were given CDs and videos to take away. We preferred Ms Duncombe's more specific account. The Claimant was initially in the lowest ability group, later moving up one group. He also took tests on matters such as health and safety on a regular basis – these were multiple choice tests in English – and passed each time. He says he wanted to attend more English lessons outside of work but could not get the time off.

51. Mr O'Neill told us that from an operational perspective, a particular level of English was a new requirement for the Respondent, because staff would be required to write Standard Operating Procedures ("SOPs"), meaning written English and understanding English was crucial. How employees operated machinery needed to change as well, as both the Area Owner and Task Owner roles were "put up a couple of levels", including in relation to SOPs but also in the use of IT. The Claimant had never dealt with writing instructions before.

52. Mr Parton told us, somewhat in contrast to Mr O'Neill, that SOPs were not high on his list of why a reasonable standard of English was important in the new regime. The improved standard was necessary in his view because the new plant was more complex to operate. Poor English of a number of staff had caused operational problems before. For example, one cause of product waste and line downtime on the old line had been difficulties communicating in English between various nationalities, for example regarding what equipment and preparation was needed ahead of a product (and therefore equipment) being changed over.

53. Mr Parton also said to us that reasonable English was necessary for assimilating the training on the new line, which was to be delivered, often simultaneously, to four different sections. There were various first languages

amongst the workforce and Mr Parton says it would not have been reasonable to provide translation for all of them. He says that the Respondent wanted to retain as many existing employees as possible, which we accept, but that the shift in language ability was imperative. Previously, line adjustments were done manually, but were now to be done via control panels. Whereas a manual adjustment affected only one part of the line, a control panel adjustment could affect the line as a whole. That was a crucial part of the training. Whilst control panels included numbers and symbols as well as words, not only could incorrect input create significant product and equipment issues, employees needed to be able to communicate changes up and down the line so that colleagues could see if changes were required in their areas. Without a reasonable command of English, an employee would be a danger to themselves and to operational efficiency and this was a large investment by the Respondent. New recruits to full-time roles have been required to pass a similar test.

54. Ms Duncombe says (SD17) that the new plant required substantial technical retraining in English and the need to communicate effectively in cross-functional working as part of continuous improvement and for developing work instructions. She referred us to something called Kaizen teams, designed to troubleshoot any issues, and said it was important to be able to contribute in the moment, in such teams, without translation.

55. The Claimant agreed to the shift change on 31 March 2020 – page 143 – but says that there was no individual consultation about the project and its impact on him. Mr Parton on the other hand says it is inexplicable that the Claimant was not helped to understand how he might be impacted by the changes, whilst Ms Duncombe says that all managers were asked to check that team members were present at group consultations and that as a result Mr Parton ensured that he spoke with at least one employee individually who had not been able to attend such consultations. She also says that all employees were given the opportunity for one-to-one meetings, but the Claimant did not request one. We were satisfied that the Claimant had the opportunity for an individual consultation if he desired one. The Claimant also says that he was not told before taking the English test the type of test that would be taken, the level required to pass it, or who would assess it. We accepted that, not least because the Respondent did not say otherwise.

56. Sample tests are at pages 193 to 199. They were designed by a third party, Eileen Kelly, who had previously done some English language training with the Respondent's employees, but with the Respondent's input so that the tests were aligned to its technical jargon and standards. Page 194 was a grammar check, mostly unrelated to work matters. At pages 195 to 196 was a listening test related to a shift handover between Area Owners, asking questions such as "What is the topic of this morning's meeting?", "What was the product number which experienced quality issues?" and "The manager asked when a product was likely to run out. What was the product?". The document at page 197 was a reading test related to manual handling – it asked questions for example about employer and employee responsibilities. The documents at pages 198 to 199 were two writing tests: the Claimant did the first, which required him to write a response to an email from a line manager directing instructions be given to a team regarding workwear shortages. Finally, page 199A was a set of "fluency questions", social and work-related, the latter including questions such as "Tell me what you like about your job", "Do you always work the same shift?". The

fluency questions were tested by Ms Kelly and/or one of her colleagues interviewing each employee (via Skype because of Covid-19) and were said to be testing fluency, vocabulary and accuracy.

57. Mr O'Neill said to us that collectively the tests were to help the Respondent get to the point of its employees being able to write SOPs and any other communications or documents that were required. Mr Parton, less focused on SOPs as set out above, told us that the tests checked ability to share, understand and communicate information. He said that the test at page 194 was about ability to communicate in solid sentences with reasonably accurate grammar, that at pages 195 to 196 was about ability to take in information, and that at pages 197 to 199 about understanding a standard document one would see in the workplace. No such tests had been required of employees before, though some assessments had been undertaken to put staff in appropriate groups for the English lessons.

58. The Claimant took the above tests on 18 May 2020, apart from the fluency test which was taken separately. His test papers are at pages 200 to 204.

59. Ms Kelly marked all employees' tests, according to Ms Duncombe applying the same criteria to each. Ms Duncombe says that using an external assessor was intended to ensure impartiality. The overall pass mark was 70 and the Claimant scored 46 – see page 205. As the Claimant points out, his test papers as they appeared in the bundle are not marked and they do not indicate an overall score; he also disputes that the external assessor was qualified to assess him. He clearly did well on the grammar test (page 200), scoring 22 out of 25; his answers correspond to his score for grammar recorded on page 205. He scored 9 out of 25 for the fluency test. His listening test, for which he scored only two points, is at page 201, with model answers at page 195. We could see, as the Claimant largely admitted, that he got most of the questions wrong. He says that this was because he could not hear the test material, because the sound was unclear and there was machine noise in the room where the test was taken. He does not accept that this replicated a similar level of noise to the factory, says (at RW49) that a native English speaker only got half marks for the same reason, and points out that one can always ask a colleague to repeat something, but neither he nor anyone else raised any concerns at the time, even on getting the results of the test. The Claimant accepts that the written test at page 204 shows how well he could write in English.

60. In summary, as far as we had the evidence in the bundle, and although we did not have much detail on the scoring criteria, we were satisfied that the scores on page 205 essentially reflected the work the Claimant did in completing the tests. All other employees' scores can also be seen on page 205, colour-coded into three groups, against score levels previously determined by the senior management team. Each employee met the target score of 70, came near it or fell significantly short of it. The table was prepared by one of the Respondent's HR team, based on data provided by Ms Kelly on 20 May 2020. Those coded as near the required score all scored more highly than the Claimant.

61. The Claimant does not believe his tests were marked at all, and that his score was made up so that he could fail. For the reasons set out at paragraph 59 above, and given the details referred to in paragraph 60, we did not accept that assertion.

62. The Claimant also told us that other employees who failed were allowed to re-take the tests and that some people with a very poor level of English passed the tests, giving names at RW56 and RW58. As to the latter, Ms Duncombe says that both employees named by the Claimant had a very good level of English. We were not in a position to make a finding of fact either way on that point. As to the former, Mr O'Neill says that those close to passing the English test were allowed to proceed to the other tests, then retook the English test and passed well, but the Claimant's score was far too low to permit that. Mr Parton said that the senior management team, including him, did a gap analysis, which he described as assessing whether, with reasonable support over a reasonable time, a sufficient standard of English could be attained. That evidence was not challenged, although it is not clear whether the Respondent asked Ms Kelly to assist with the analysis. In further unchallenged evidence, Mr Parton said he believes four of the five allowed to retake the test stayed with the business, but he could not recall whether the other failed the retaken English test or one of the other assessments.

63. The Claimant says that he spoke to Mr O'Neill at some point after taking the tests and that Mr O'Neill gave him three different scores (RW55). He says he was initially told he had 68%, then when passing Mr O'Neill later in the day, 56%; he was then given a further score at a subsequent meeting. This is the third alleged protected disclosure detriment, the Claimant saying it deprived him of the right to challenge his scores. Mr O'Neill says (GON19) that he met with the Claimant to give him the results and that there was just one conversation, in the Respondent's training room, in the same way that all other employees were given their results.

64. There is a transcript at of that meeting at pages 207 to 209, from a recording taken by the Claimant (he says because he sensed something was not right after having already been given two scores) without Mr O'Neill's knowledge. Mr O'Neill had only the scoring grid at page 205 with him at the meeting, not the Claimant's actual test papers. He is noted in the transcript as asking the Claimant, "Do you think you did ok?", to which the Claimant replied, "Probably, I don't know". Mr O'Neill is then recorded as saying that the pass mark was 70% and "unfortunately you had 46". He is then noted as saying that the main issue was the listening test but that the writing test was also quite low. The transcript goes on, "So I have a letter for you to confirm … be clear that your employment will finish in July". The Claimant then said he had twice asked, three years ago, about wanting to start English lessons but had received no response.

65. Mr O'Neill is recorded as saying that he had the Claimant's score breakdown. Page 208 records the Claimant as saying, "I want to see results for test yeah". The exchange was then as follows:

Mr O'Neill: So, you want them write down?
The Claimant: Yeah.
Mr O'Neill: Have you got pen?
The Claimant: No, no, not that, no.
Mr O'Neill: Okay, home and ask me I've got the results here.
The Claimant: Ok".

66. Mr O'Neill says that the Claimant made no such request after the meeting. As there was no evidence that he did, we accepted Mr O'Neill's evidence on this point. The Claimant says it was a protected disclosure detriment to refuse to give him the scores, though he said in evidence that his complaint was not being given his test papers, saying perhaps he did not express himself clearly given the language barrier. Mr O'Neill could not tell us why the actual marking of the papers was not disclosed to the Claimant. He flatly denied however any connection between not giving the Claimant the breakdown of his test results and the Claimant's disclosures.

67. The transcript does not record the Claimant as saying that he had been given the marks before, nor did this appear in his subsequent, detailed, appeal letter. On that basis, on the evidence we had before us, we concluded that it is likely that the Claimant, being the tenacious character he is, asked about his scores outside of the formal meeting, but that Mr O'Neill only gave one score. We reached this conclusion because it is what he did with all other employees, following his standard procedure for doing so and because the Claimant said to Mr O'Neill at the start of their meeting that he did not how he had performed. Further, as just noted, it was not mentioned in his appeal letter.

68. The Claimant was formally told he had not passed the tests by a letter dated 2 June 2020 (page 210), given to him at the end of the meeting. It said that the tests had "now been marked by external language assessors and we are now in receipt of the results. Unfortunately, you have not met the required threshold for us to be able to move you forward to the assessments for the role". The letter confirmed that his employment would end on 17 July 2020 "for reasons of capability". He did not participate in further assessments.

69. The Claimant says it was unfair that the Respondent did not assess everyone against all of the criteria and tests, rather than using the English tests first. He thus says it was an unfair selection process which he also says was not made clear beforehand. At RW61, he says he should have been told at least a year in advance; the test requirement would then have been more understandable, but he had no chance to improve his language skills in the time available, though he said in oral evidence that he spent a lot of time preparing for the tests. He also says that the Respondent avoided making redundancy payments by saying the reason for dismissal was capability. He said in oral evidence however that the job requirements, indeed the machines which colleagues were required to operate in his Area, did not change after the new line was implemented. He described the change in the requirement for English language skills as a pretext to get rid of him.

70. The Respondent says that although a number of staff left its employment because they did not want the new shift pattern and a number because they failed the tests, the same number of staff was required before and after the installation of the new line. The exception was the setters, who were made redundant as their roles were taken over by Area and Task Owners on the line; at least one employee engaged in supply chain work was also made redundant. Mr Parton's evidence was that there were thus some differences between the roles of Area and Task Owner on the old line compared to the new. The Claimant's role had been to add fillings to products and shape them. On the new line, Area Owners and Task Owners have much more responsibility for setting the line when changing products. There are also subtle changes to the main role the

Claimant carried out because the new equipment operates in a different way, but the basic monitoring of the line and the basic responsibilities are, Mr Parton says, "very similar". He thought that about 15 to 20% of an Area Owner's or Task Owner's duties are now taken up with setting. The Claimant's oral evidence was that there was a requirement on him to adapt machinery to production requirements pre-Project as well. He told us the requirements for Task Owners and Area Owners changed post-Project in the sense that they could be required to work in different areas on the production line, whereas before he had worked in many different areas in practice but, in his view, by his consent, whereas after the Project, the work in different areas could be compelled by the Respondent. The six employees who failed the English test were replaced.

71. At RW50 (and RW98 in the context of the disciplinary investigation meeting with Mr Sousa), the Claimant accepts that whilst he understands English fairly well, he has difficulty communicating in it, that is difficultly expressing himself. He accepts that doing so was important for safety reasons within the Respondent's business.

Post-reorganisation detriments

72. The Claimant says that on or around 15 June 2020 he was excluded from an Area Owners' meeting by Mr Sousa and that this was a detriment because of his protected disclosures. His evidence (RW163) was that Mr Sousa said in an abrupt way that the Claimant was not needed as his colleague had returned from maternity leave. This happened in front of all the other Area Owners. There was no evidence before us from Mr Sousa to contradict the Claimant's account of what was said, and we therefore accepted it. Mr O'Neill wrote to the Claimant on 9 July 2020 to inform him he was no longer an Area Owner (page 223) saying, "the agreed temporary changes to your contract ended on 8 June 2020" because the Claimant's colleague had returned from maternity leave. The letter went on to say, "From 9 June 2020 your job title reverted back to Task Owner". The Claimant told us he did not remember the letter but "perhaps Mr O'Neill hand-delivered it". Given that the Claimant essentially conceded the point, we found that the letter was given to him. He says that this too was a protected disclosure detriment. Of course, it cannot have been if the letter was never given to him; the fact that the complaint was not withdrawn was another reason for concluding that the letter was handed over.

73. Mr O'Neill told us his understanding was that the Claimant was employed as a Task Owner, stepped up for maternity cover purposes and was to step down when the colleague returned. The Respondent says that the Claimant did not raise any complaint about either Mr Sousa's comment or Mr O'Neill's letter at the time, which we accepted as there was no evidence that he did.

Appeal

74. The Claimant appealed against his dismissal (pages 246 to 249) on 20 July 2020. In that letter, he also complained about how he said he had been treated in various respects in recent months, including in relation to the investigation of the line downtime and his exclusion from the Area Owner meeting referred to above and the non-payment of a bonus (see below). He wrote separately to HR in Belgium about the bonus and in doing so also raised questions about his final pay (pages 250 to 251).

75. The Claimant says (RW64) that because he was not given his test scores, he could not really challenge his dismissal or how the tests had been carried out. He also says that the Respondent did not consider redeploying him to another role. In his appeal letter he stated, "I think that I have done very well on test, and I do not understand why I would not have passed it. I requested to see my test but I was refused … I have seen that [some] employees whose level of English is low remained in the employment". He referred to his alleged protected disclosures. He did not raise having had any problems with the listening test.

76. Ms Duncombe says that in response to the Claimant's letter she wrote to him convening an appeal hearing on 11 August 2020, but the Claimant did not respond. There is such a letter in Ms Duncombe's name at page 258A, but the Claimant says he did not receive it and asserts that it was created for these proceedings. It was last printed in March 2020, but Ms Duncombe says that it had been uploaded from a V-Drive to the Respondent's Sharepoint. In the letter she referred to the Claimant's grievance and appeal and said, "Your options for progressing both of the above is to attend two concurrent meetings with Mr O'Neill". Ms Duncombe says she sent the Claimant a chasing email on 20 August 2020. This email was referred to in her subsequent letter of 27 August 2020 at pages 263 to 264, dealing with the substance of the Claimant's appeal, but she has not been able to find the email.

77. The Claimant contends that the letter at pages 263 to 264 was also prepared by the Respondent for the purposes of this case. He did not chase up any response to his appeal. In seeking to explain this, he told us that he was informed by Ms Duncombe that any further communication was not welcome. That must be a reference to the letter at pages 263 to 264 where Ms Duncombe said she would not be engaging in any further dialogue with the Claimant.

78. The chronology of the above events was as follows:

78.1. The Claimant presented his appeal on 20 or 21 July 2020.

78.2. On 28 July 2020 (pages 255 to 256), Ms Duncombe sent a substantive response to the Claimant's grievance about his final pay (it had evidently been forwarded to her from Belgium). Although his employment had ended by this point, she invited the Claimant to a hearing in respect of his grievance if that was what he wished.

78.3. The Claimant responded on 3 August 2020 (page 257).

78.4. That is also the day on which the letter at page 258A purported to be sent.

78.5. The letter at page 263 purported to be sent on 27 August 2020.

79. Weighing up the evidence before us, we noted that the Claimant did not in the end agree to attend an appeal against his conduct warning, which might indicate that he did get the letter at page 258A but did not want to attend a hearing. Also, he did not chase the Respondent for a hearing of his appeal, though we took his point that it was the Respondent's responsibility to arrange it.

80. Set against that, we noted the following:

80.1. The Respondent's slightly muddled way of dealing with documents on occasions, evident at various points in this case, which raised the distinct possibility that the letter at page 258A was not in fact sent.

80.2. The fact that the Claimant was clearly engaged in correspondence with the Respondent at this time and – again being the tenacious character he was – was likely to want to pursue his appeal.

80.3. The fact that Ms Duncombe did not refer in the letter at page 258A to her letter of a few days before at pages 255 to 256.

81. For the reasons set out in the preceding paragraph, on balance, and only on balance, we concluded that the letter at page 258A was not sent. This was not to say that it was manufactured for this Hearing; far more likely is that it was prepared as a standard letter and not issued. Page 263 by contrast was not a standard letter, and it is far more likely this was sent, as indeed we found was the email of 20 August 2020 – albeit it we did not see it – referred to in this letter, which enquired whether the Claimant wished to attend a meeting for his appeal and grievance. It is a notable difference between the two letters that that at page 263 referred to earlier correspondence and that at page 258A did not.

82. Mr O'Neill was to hear the appeal, even though he was junior to Mr Parton in whose name the Respondent sent the dismissal letter. Ms Duncombe accepts this was not ideal, but because Mr Parton's name had been used on the dismissal letter template, it was decided he could not hear appeals and Mr O'Neill was the next most senior manager on the site.

83. No appeal hearing took place. As noted, the appeal decision letter was sent to the Claimant on 27 August 2020 (pages 263 to 264). It was in Ms Duncombe's name. She says (SD25) that she discussed it with Mr Parton. The letter said that Ms Duncombe was surprised the Claimant thought he did well on the tests when he had paid for translation of documents sent to him by the Respondent; it also referred to the letter of 12 February 2019 referred to above (page 61) which mentioned the need for the Claimant to improve his English. As to his request to see the test results, the letter said, "I am not aware of any request being made". Results had been given to others who requested them "and we would happily [have] sat down with you similarly to have given you the detail[ed] feedback in person". Ms Duncombe confirmed in the letter that no indication had been given to anyone of how many points were needed to pass the tests. She went on to say, "We have offered several opportunities to increase your English competency at the company's expense". She also confirmed that everyone took the test "once and only once". As to the Claimant's reference in his appeal letter to health and safety breaches, Ms Duncombe said these "have no bearing on your appeal". She also informed the Claimant that he was not redundant because "your role still exists".

84. Mr Parton says that the Respondent prepared a written response to the Claimant's appeal on this occasion, notwithstanding his earlier professed preference for in-person hearings, because of time constraints – the plant was about to close for the new line to be fitted. He did not investigate the alleged protected disclosure detriments the Claimant had raised, saying for example that

the downtime issue in March had been closed without any concern, and that the bonus position was based on clear criteria.

85. On 20 August 2020 (pages 261 to 262), the Respondent's parent company's General Counsel in Belgium sent the Claimant a letter regarding allegedly defamatory posts the Claimant had made on social media. The letter described his outstanding employment issues as having been addressed and "settled", though as just outlined his appeal had not yet been dealt with. Mr Parton says that the letter was sent independently of him and did not affect how the Claimant's appeal was dealt with.

86. As indicated in his appeal letter, there were also issues with the Claimant's termination payments. The Respondent eventually agreed to pay them based on his having been an Area Owner, rather than a Task Owner. The Claimant says (RW173) that this shows its acceptance that he had continuously been an Area Owner throughout the relevant period, so that he should not have been excluded from the Area Owner meeting on or around 15 June 2020 nor received Mr O'Neill's letter at page 223. This was dealt with in Ms Duncombe's letter at pages 255 to 256 dated 28 July 2020. She says that because no review of the Claimant's performance had been done after the letter demoting him to Task Owner (Operator), because further if the review had been done, it could have gone either way, and because he had subsequently been asked to act up as Area Owner to cover maternity leave, she thought it appropriate to work on the basis that the review was satisfactory. The Claimant's termination payments were thus recalculated and back pay paid.

Pay and bonus

87. The Claimant says that it was customary to give employees an annual pay rise of 2.5% by 1 May. In May 2020, he was told this would be moved to October. He complains of unauthorised deductions from wages related to his pay from May 2020 to the termination of his employment.

88. The Respondent says there was no contractual right to a pay rise. Its case is that salaries were reviewed annually and pay increased if the financial situation justified it. It moved the 2020 salary review date, it says, with reasonable notice, because of the adverse impact of the Covid-19 pandemic and what Mr Parton told us was a huge loss of business. Whilst the Claimant says he received a pay rise every year for twelve years, either in April or May, Mr Parton says (MP25) that a pay rise was not given every year nor was there any minimum or standard increase, there being only a handful of employees who got such awards in May 2020. He told us that in his four or five years with the Respondent, it had only increased pay for all employees once or twice. We will come back to this conflict of evidence in our analysis. What is clear is that Mr Parton wrote to all employees on 12 May 2020 the letter at page192 saying, "I can confirm that we have undertaken a review of all Worcester salaries and due to the current circumstances, we have deferred the salary review until October 2020 in line with Project Conquest".

89. Employees were offered a bonus for working Sundays prior to the line change. This is referred to at page 97, part of a presentation to all teams, and was mentioned without any conditions. It said, "In return [for Sunday working] we will reward you with up to £450 bonus for doing this, up to £300 bonus for

meeting the tonnage requirements" (the Respondent was building up stock before the old line was taken out). The Claimant says (RW178-9) that production was above 98% and that he worked all Sundays and so should have received £150 and £300 respectively. It is agreed that he was not given any bonus. The Respondent says this was because he had a live disciplinary warning, as set out above. The Claimant says (RW179) that he was not told that if he had a warning, the bonuses would not be paid, and that (RW180) non-payment was revenge for his protected disclosures.

90. The Respondent's case is that the document at pages 97A to 97B (one of the documents admitted during the Hearing), which Ms Duncombe says she created on 12 December 2019, was given to all staff on 19 December 2019 after a presentation, with the covering letter enclosing it being the document at pages 97C to 97D (also a document admitted during the Hearing). The letter had the Claimant's signature at the bottom, with the date 2 January 2020 written in manuscript. Although the Claimant says the date was not in his writing, he accepts the letter was most likely issued in December 2019. Although Ms Duncombe had initially told us that only a template letter was available, written in Mr Parton's name, she then looked in the paper archive at the end of day 4 as set out above and located this document. Pages 97A to B listed three conditions for receiving the bonuses, related to sickness absence, not having a disciplinary warning and being in employment on 31 July 2020. We were satisfied, based on what was effectively a concession that it was issued to him, that the Claimant did sign the letter as recorded at page 97D in early January 2020.

91. Page 243 shows that an employee who left the Respondent's employment on 17 July 2020 still received the bonus, notwithstanding the third condition mentioned above. Ms Duncombe said this was because the date was brought forward as Project Conquest developed, staff being told this when they were informed of an extension of furlough. We did not see that letter, Ms Duncombe again saying that only a template was available, but we accepted that effectively unchallenged explanation.

92. Mr O'Neill told us that three or four other staff did not get the bonus either. He did not decide who was to be paid it and who was not, though he was part of the team who formulated it. Thereafter his role was simply to communicate the outcome to employees. Ms Duncombe told us that four employees in total did not receive the bonus, the Claimant and one other because of disciplinary action and two because of their sickness record. Again, we accepted all of that unchallenged evidence.

93. At page 259 there is an email from the HR Systems Administrator to the Claimant dated 5 August 2020 (after his employment had terminated) saying that the Respondent's payroll had been processed "before your additional bonus payment had been confirmed" and that it would therefore be paid into his account on 7 August 2020. Ms Duncombe could not explain this; she was concerned that the email referred to a monthly payroll whereas the Claimant was paid fortnightly.

94. ACAS Early Conciliation took place from 12 to 27 August 2020, with the Claim Form being presented on 7 October 2020. The Claimant says (RW192) that all of the alleged detriments were connected to each other and were the responsibility of Mr Sousa and/or Mr O'Neill, so that he did not accept that any of his detriment complaints were out of time.

Law

Protected disclosures

95. Section 43A of the ERA defines a "protected disclosure" as a qualifying disclosure made by a worker in accordance with one of sections 43C to 43H. Section 43B then defines what counts as a "qualifying disclosure". For the purposes of this case, this is "*any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show … – … (d) that the health or safety of any individual has been, is being or is likely to be endangered*". As noted, a "qualifying disclosure" is a protected disclosure if made in accordance with one of sections 43C to 43H. As far as relevant to this case, section 43C applies if a qualifying disclosure is made to the worker's employer.

96. It was of course for the Claimant to satisfy the Tribunal that he made protected disclosures. As the legislation and related case law make clear, there were a number of matters for the Tribunal to consider in this regard.

97. A "qualifying disclosure" requires first of all a disclosure of information by the worker. With the exception of the first alleged (oral) disclosure, it was accepted that there was a disclosure of information in this case.

98. The next question was whether the two remaining requirements of section 43B set out above were satisfied. The first such requirement is whether the Claimant reasonably believed that the disclosure of the information was in the public interest. The second requirement is whether the Claimant reasonably believed that the information he disclosed tended to show that the health and safety of any individual had been, was being or was likely to be endangered.

99. On the first of these requirements, as made clear in **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] IRLR 837**, the test is whether the Claimant reasonably believed that his disclosure(s) were in the public interest, not whether they were in fact (in the Tribunal's view for example) in the public interest. The worker must actually believe that the disclosure is in the public interest and the worker's belief that the disclosure was made in the public interest must have been objectively reasonable. Why the worker makes the disclosure is not of the essence, and the public interest does not have to be the predominant motive in making it. Tribunals might consider the number of people whose interests a disclosure served, the nature of the interests affected, the extent to which they were affected by the wrongdoing disclosed, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer.

100. The second of these requirements is assessed very similarly. It is well-established that in order for the Claimant to demonstrate that he reasonably believed the information he disclosed tended to show that health and safety was endangered, it is not necessary that this actually be true, although of course the factual accuracy of what is disclosed may be relevant and useful in assessing whether he reasonably believed that what he said tended to show that health and safety was endangered. The cases of **Darnton v University of Surrey [2003] IRLR 133** in the Employment Appeal Tribunal ("EAT") and **Babula v Waltham Forest College [2007] ICR 1026** in the Court of Appeal make clear that a disclosure may be a "qualifying disclosure" even if a worker is mistaken in what

they disclose, provided they are reasonably mistaken, in other words that they have the required reasonable belief. This is a question of fact for the Tribunal, looking at the Claimant's state of mind at the time he made the disclosures.

101. Finally, we noted that the Claimant must have the required reasonable beliefs in relation to each alleged disclosure.

Detriment

102. The test the Tribunal had to apply in determining the detriment complaints is whether any protected disclosure had a material influence on any conduct which the Claimant is able to establish amounted to a detriment. The question is not whether the protected disclosure was the reason or principal reason for that conduct.

103. The correct approach seems to be:

103.1. The burden of proof was on the Claimant to show that what happened amounted to a detriment and that a protected disclosure was a ground for (that is, a more than trivial influence upon) the detrimental treatment to which he says he was subjected. In other words, the Claimant had to establish a prima facie case that he was subjected to a detriment and that a protected disclosure had a material influence on the Respondent's conduct which amounted to that detriment.

103.2. If he did establish that, then by virtue of section 48(2) ERA, the Respondent had to show the ground on which the detrimental treatment was done. If it did not do so, inferences may be drawn against it – see the EAT's decision in **London Borough of Harrow v Knight [2003] IRLR 140**.

103.3. As with discrimination cases, inferences drawn by tribunals in protected disclosure cases must be justified by the facts it has found.

Dismissal

104. Section 98 ERA says:

"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) …

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do …

(c) is that the employee was redundant …

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality …

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

105. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers. We return below to the definition of redundancy.

106. If the Respondent shows the reason and establishes that it was one falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including its size and administrative resources, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of the reasonableness of the decision to dismiss. In all respects, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

107. In relation to a capability dismissal, in **Alidair Ltd v Taylor [1978] ICR 445**, the Court of Appeal made the point that "Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent". Put another way, the questions are, "does the employer honestly believe this employee is incompetent or unsuitable for the job [and] are the grounds for that belief reasonable?". The Respondent must lead some evidence of incapability in

proving that this was the reason for dismissal, but under section 98(4) the Tribunal cannot substitute its own view of the Claimant's competence.

108. As to redundancy, it is well known that fairness will require warning, consultation, fair selection criteria fairly applied and consideration of suitable alternative employment, all judged against the range of reasonable responses. We say no more about those matters given our conclusions on the reason for dismissal set out below. Of course, whatever the reason for dismissal, the reasonableness of the procedure followed to effect dismissal is also a highly relevant consideration.

109. The question of consistency can arise in relation to decisions to dismiss, namely whether an employer has treated another employee more leniently. **Post Office v Fennel 1981 IRLR 221** decided that this is part of ensuring tribunals decide cases in accordance with equity (and the substantial merits of the case). The Court of Appeal made clear in that case that it is for the Tribunal to determine if there is sufficient evidence before it to decide whether the cases are genuinely comparable. In **Hadjioannous v Coral Casinos [1981] IRLR 352** it was said that the question is whether the employer had a rational basis for the different treatment. That underlines the importance of the Tribunal not substituting its view for that of the employer.

110. **West Midlands Co-Operative Society Ltd v Tipton [1986] ICR 192** is well-known authority for the principle that unfairness in connection with an appeal against dismissal can of itself render that dismissal unfair. In that case the appeal was provided for contractually, but there is no reason to doubt that the same principle applies where appeal arrangements do not have contractual force as such. Appeals can also correct unfairness at the dismissal stage – **Whitbread & Co plc v Mills [1988] ICR 776**.

111. **Polkey v AE Dayton Services Ltd [1988] ICR 142** is clear authority to the effect that a tribunal cannot say a dismissal is fair because the unfairness would have made no difference to the outcome – except where taking a particular step would have been utterly futile. In summary, what is important is to answer the question posed by section 98(4), as summarised above, and in doing so to make an overall assessment of the facts as we have found them to be. Also of course, the Tribunal must have regard to whether the ACAS Code of Practice on Disciplinary and Grievance Procedures applied, and if it did whether the Respondent complied with it.

Redundancy

112. In a claim for a statutory redundancy payment, there is a presumption that the Claimant was dismissed for redundancy unless the contrary is proved – section 163(2) ERA. It was thus for the Respondent to prove on the balance of probabilities that the reason for dismissal was not redundancy, the Tribunal to have regard to all of the evidence to determine whether the presumption has been rebutted.

113. Section 139 ERA provides:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

114. As far as relevant to this case, the cases of **Safeway Stores plc v Burrell [1997] ICR 523** and **Murray v Foyle Meats Ltd [1999] ICR 827** establish that there are three questions to consider in determining whether the Claimant was dismissed by reason of redundancy. **Safeway** identified three questions. First, was he dismissed? Secondly, had the requirements of the Respondent's business for employees (not necessarily the Claimant) to carry out work of a particular kind ceased or diminished? Thirdly, was the Claimant's dismissal wholly or mainly attributable to that state of affairs? **Murray** identified two questions. First, does one of the various states of affairs in section 139 exist? Secondly, there is a causation question – was the dismissal wholly or mainly attributable to that state of affairs?

115. In **Murphy v Epsom College [1985] ICR 80** (CA) the employee was one of two plumbers, and the employer needed one plumber and one employee who would do plumbing and heating engineering work. That was a redundancy situation. In **Shawkat v Nottingham City Hospital NHS Trust (No 2) [2002] ICR 7**, the Court of Appeal said that Tribunals must define the particular kind of work rather than the kind of employee. The employee was a thoracic surgeon. The thoracic and cardiac surgery departments merged: the employee refused to do both types of surgery. This was not a redundancy situation because the employer's requirements for thoracic surgery remained unchanged. A reorganisation of duties, even where the level of work itself remains unchanged overall, can be a redundancy situation where jobs are replaced by something materially different. The same work being done by a different kind of employee is however not a redundancy situation.

Wages

116. Section 13 ERA provides:

(1) "*An employer shall not make a deduction from the wages of a worker employed by him unless –*

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".

117. It was not necessary to refer in any detail to case law on unauthorised deductions from wages. We did note though the decision of the EAT in **Weatherilt v Cathay Pacific Airways Ltd [2017] UKEAT/0333/16**. Declining to follow the earlier EAT decision in **Agarwal v Cardiff University [2017] UKEAT /0210/16**, Richardson J held that a tribunal "is required to determine a dispute on whatever ground as to the amount of wages properly payable as a necessary preliminary to discovering whether there has been an unauthorised deduction. This must include a dispute as to the interpretation of the contract or the existence of an implied term. It would be surprising if the [tribunal] could not construe a provision of the contract to see whether it authorised a deduction when this very question is central to the operation of section 13".

118. As to whether a contract contains a term implied by custom and practice, it is well-established that such a term must be reasonable, notorious and certain. In **Duke v Reliance Systems Ltd 1982 ICR 449, EAT**, the EAT said, "A policy adopted by management unilaterally cannot become a term of the employees' contracts on the grounds that it is an established custom and practice unless it is shown that the policy has been drawn to the attention of the employees or has been followed without exception for a substantial period". Where a benefit is discretionary, however, the fact that it had been granted for a number of years will not necessarily convert it into an implied term.

Time limits for detriment complaints

119. **Luton BC v Haque [2018] ICR 1388** says that sections 207B(3) and (4) of the ERA (dealing with the effects of ACAS Early Conciliation on time limits) apply

sequentially. This means that section 207B(4) applies where a time limit, as extended by section 207B(3) – that is by the number of days in a period of ACAS Early Conciliation – expires during the period beginning with Day A and ending one month after Day B. What section 207B(4) then provides is that the time limit expires one month after Day B.

120. Section 48 ERA provides:

"(3) An [employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer … shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done".

121. In **Arthur v London Eastern Railway Ltd [2007] ICR 193**, the Court of Appeal held that section 48(3)(a) could apply where a claimant alleges a number of detriments by different people where there is a connection between the acts or failures to act so that it can be said that they form part of a 'series' and are 'similar' to one another. It may not be possible to identify a connecting rule, practice, scheme or policy but "there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them". The Tribunal should consider whether the acts were committed by fellow employees or, if not, what connection there was between the alleged perpetrators, or whether the acts were organised in some way. It would also be relevant to enquire why the perpetrators did what was alleged.

Analysis

Wages complaint

122. We dealt first with the Claimant's complaint of unauthorised deductions from wages. This concerned only whether he had been underpaid wages from May 2020, his case being that he was from that point entitled to a pay rise. It did not concern his claim for a bonus payment, as that was in the end pursued as a

protected disclosure detriment complaint only. The question for us to determine was therefore whether the Claimant was on any occasion, in respect of his wages, paid less than was properly payable to him (section 13(3) ERA).

123. There was nothing in writing we were taken to by way of any express term in the Claimant's employment contract entitling him to a pay rise from May 2020. The burden on him to prove his complaint thus included his establishing that such a term should be implied.

124. Our starting point was that it would be unusual, in the absence of an incremental pay scale, for there to be a term committing an employer to an annual pay increase, even if – as is common – it was committed to undertaking an annual pay review. A commitment to a review was of course insufficient to found the Claimant's complaint.

125. Mr Parton's letter to the Claimant on 12 May 2020, at page 192, was somewhat unusual in that it said both that the Respondent had carried out a salary review in May 2020 and that it was deferring the review to October. In all likelihood this was intended to mean that the Respondent had reviewed the salary position, could not apply a salary increase in May 2020 and would look at the matter again in October. Whatever its meaning, the letter committed the Respondent to reviewing salaries in October; either the review had been carried out and would be repeated later in the year, or it had been deferred. Either way, the Respondent did carry out a 2020 salary review.

126. In any event, we should have needed clear and convincing evidence of an established custom and practice to lead us to the conclusion that there was in the Claimant's contract (and, necessarily, that of his colleagues) an implied term that he would receive a pay rise every year. The Claimant's case was that there was such a practice, whilst Mr Parton's evidence was that there was no guaranteed, consistent position, but we were not taken to any other evidence, even of the Claimant's own payslips, or of other employees' pay, let alone communications from the Respondent, to demonstrate the position as it had developed over time.

127. We were therefore unable to determine what the Claimant and his colleagues could reasonably understand from any communications they received from the Respondent about their pay. There was nothing before us that indicated that the Respondent had informed its employees that they would always receive a pay rise, still less that it would always be provided at a particular point in the year come what may. There was thus no basis for the implied term the Claimant contended for. He did not establish that he was paid less than was properly payable to him on any occasion. His complaint of unauthorised deductions from wages was accordingly not well-founded.

Protected disclosures

128. The first matter for us to determine in relation to the protected disclosure detriment complaints was, of course, whether the Claimant had made one or more protected disclosures at all, in accordance with the law summarised above.

129. The Respondent eventually conceded that the Claimant had made protected disclosures in his emails of 5 and 15 March 2020 to Mr O'Neill and Mr Durez respectively (pages 138 and 149), concerning the metal checks, related as they

were to food safety. We could see no basis on which it could be concluded that the oral disclosure which we found had been made in January 2020 to Mr Sousa, concerned with the same subject matter, was not a protected disclosure. We concluded that it was.

130. It was clearly a disclosure of information, to the effect that his team leader was not doing the required checks, it was clearly reasonable to believe that this was in the public interest given the wide potential impact of failing to check food products for metal contamination, and on the same basis it was clearly reasonable to believe that this related to a danger to health and safety. Did the Claimant subjectively have those beliefs? He expressly said in his emails at pages 138 and 149 that what he was raising gave rise to health and safety concerns, which was very much indicative of his belief both on those occasions and in his prior conversation with Mr Sousa. As for whether he subjectively believe that the disclosure was in the public interest, this did not have to be the Claimant's sole or even principal motivation in making the disclosure. Given that the Respondent did not challenge his case that he had this subjective belief when writing his emails (unsurprisingly, when on both occasions the Claimant referred to "many people" potentially being put in danger), we did not see how it, or we, could reach a different conclusion in relation to the oral disclosure. We thus found that what the Claimant said to Mr Sousa in January 2020 was a protected disclosure, as Mr Baran indicated in his submissions that he expected us to conclude.

131. Given that the Claimant did not pursue his case that his disclosures regarding general hygiene were protected disclosures, it remained for us to decide whether his disclosure of concerns about the lock not being applied to a guillotine, referred to in both of his emails in March 2020, was also a protected disclosure.

132. The Claimant clearly disclosed information, namely that on at least one occasion the lock was not being put on a guillotine. It was clearly reasonable for him to conclude that this tended to show that his and/or colleagues' health and safety was being endangered, and we were satisfied that this was what the Claimant subjectively thought, given in particular that he said to Mr O'Neill (page 138) that he reprimanded Mr Sousa out of fear for his safety.

133. The key question therefore was whether the Claimant also believed that the disclosure was made in the public interest and whether that belief was reasonable. As the **Chesterton** case indicates, one might consider in assessing the reasonableness of the belief, the numbers of people affected, the nature of the interest being protected, the extent to which people might be affected by what was disclosed and the nature of the wrongdoing.

134. There is no doubting that what the Claimant raised was a serious issue, in that failure to properly lock a guillotine could cause very serious injury. It might also have been thought to raise issues of contamination of food products, something which would undoubtedly be in the public interest, but we were not given any evidence by either party on that topic, accordingly could not consider the issue on that basis, and in any event that does not seem to be the reason why the Claimant raised the matter: his concern, quite properly, was Mr Sousa's (and others') safety. It appeared to us therefore that the Claimant did not subjectively believe his that his disclosures of this matter were in the public

interest. Even if he did, we further concluded that, whilst the Claimant was clearly committed to observing good health and safety practice, this was not something he could reasonably conclude would be of interest outside the confines of the Respondent's business. We thus concluded that this was not a protected disclosure. In any event, as Mr Baran submitted, this conclusion did not materially affect the determination of the Claimant's complaints, given that he had established that the disclosures about metal checks were protected.

Detriments

135. We then turned to the complaints of detriment, asking in relation to each one the questions set out above in our summary of the relevant law.

Warning

136. The Claimant's complaints in this respect were about the issue of the warning itself and, as he put it, being deprived of an appeal against it. The Claim Form at paragraph 21(a) (page 24) also complained about various aspects of the process the Respondent followed leading up to the warning, but the Claimant accepted in his appeal letter of 19 March 2020 (pages 154 to 155) that he was not pursuing any complaint about not being able to prepare for the investigation meeting, and as we have found, he expressly agreed to go ahead with the disciplinary hearing, even though he says he was given late notice of it. For those reasons, and in any event based on our own assessment of the process the Respondent followed overall, we could see no basis on which the Claimant could say that he was subjected to a detriment in the procedure that led to the warning.

137. Clearly, as the Respondent rightly accepted, the issue of the warning was a detriment for the Claimant. It would similarly have been a detriment had he been deprived of an appeal against it, but we concluded that he was not. He was given the postponement he requested and Ms Duncombe confirmed in her letter of 31 March 2020 (page 170) that it would be reconvened if he accepted its validity. We could not conclude that the Claimant was deprived of the right to appeal when it was offered to him, albeit he had questions about matters he wanted resolved, such as the provision of notes, before he attended it. That is particularly the case where the Respondent offered help with the notes being translated and where we were more than satisfied, contrary to the Claimant's case, that the disciplinary allegation was clear. For these reasons, we concluded that the Claimant had not established the detriment of being deprived of the right to appeal.

138. As for the warning itself, it was clearly given at the disciplinary hearing, albeit later confirmed in writing, before the Claimant made his written protected disclosures. If Mr O'Neill did not know of the oral disclosure when communicating the warning, that is the end of the matter and we found that he did not. He cannot have been influenced by it if he was unaware of it; it is irrelevant that he knew about it when he confirmed the warning in writing.

139. We would in any event have concluded that the giving of the warning was in no sense influenced by the protected disclosures or any of them because:

139.1. Mr Sousa, to whom the first disclosure was made, recommended that both the Claimant and his colleague (who did not make a disclosure) be treated in the same way, namely by being given a letter of concern. That is strong evidence that there was no prima facie case to link the protected disclosure made to him to the Respondent's decision to take disciplinary action.

139.2. There clearly was an incident with the paddle falling on the machine. Mr O'Neill gave clear reasons for escalating the matter to a disciplinary warning for the Claimant, both at the time and in his oral evidence, which evidence was consistent with the content of the warning. These were the inconsistencies in the Claimant's evidence during the internal process, the fact that he did not take responsibility for what had happened and the fact that whilst recognising he was not solely accountable, it still took place in his work area. The Claimant agreed that he spoke with the colleague who placed the paddle on the machine so that Mr O'Neill could reasonably conclude that she had asked him to put it away. He was also more senior than her, as Area Owner.

139.3. Moreover, the Claimant implicitly agreed – though he would not accept it in oral evidence – that some reprimand or action was required. We say this because his case was that other, less severe disciplinary options had been bypassed.

139.4. Mr O'Neill said at the conclusion of the disciplinary hearing (page 125) that he would be happy to work on other issues the Claimant may have had at work, which demonstrates that he had assessed the disciplinary case on its own merits, in isolation from any unrelated issues.

140. We concluded for all of these reasons that the Claimant had not established a prima facie case that the protected disclosures had any influence on the giving of the warning and that in any event the Respondent had clearly shown the reason for it, which was not the disclosures but its conclusions as to his conduct.

141. For completeness we add that even if the Claimant had been denied an appeal, the reason that happened was clearly not that he made protected disclosures – there was no evidence Ms Duncombe was aware of them at that point – but because he would not accept the validity of the appeal hearing the Respondent had arranged.

Investigations on 1 April 2020

142. The alleged detriments in relation to 1 April 2020 were that the Respondent attempted to accuse the Claimant of failures which were not his fault (related to the accident at work and the line downtime) – see paragraph 21(b) of the Claim Form at page 25.

143. Contrary to what the Claimant says, the Respondent did not level any accusation at him in these respects, nor did it allocate him any blame. In both cases, the Respondent wrote to him saying, "Please can you attend … so we can understand". We could not see how either such letter amounted to a detriment. The Respondent was perfectly entitled to have meetings with the Claimant about two important matters, and it is plain that it simply wanted to hear his account. The Claimant said in submissions that he experienced stress as a result of the letters, but we had to look at whether objectively what the Respondent did could

reasonably be said to have given rise to a detriment and we did not think that it could, given the very neutral and open-ended way in which both letters were expressed. It is also agreed that the Claimant was not found to be at fault in either respect (see page 211 in relation to the downtime). Further, meeting with the Claimant regarding his accident at work could properly be said to have been to his benefit.

144. The complaint in relation to these matters would have failed in any event, because the Respondent was plainly entitled to investigate both matters and they were, as the Respondent submitted, routine business issues. Aside from his assertion that they were, the Claimant did not make out any prima facie case that his protected disclosures had any influence at all on the Respondent's actions in these respects. It is noteworthy in relation to the line closure that the Respondent interviewed several witnesses, and it was not said that any of the others made protected disclosures. Further, we were satisfied that the Respondent had shown the reasons for the investigations and that they were in no way connected to the disclosures. It wanted to know from a number of employees what had happened to cause the line closure and from the Claimant about his accident.

Meeting(s) with Mr O'Neill on 2 June 2020 regarding test scores

145. The alleged detriments under this heading were that the Claimant was given different scores for his English tests and that he was not given his test papers.

146. As set out in our findings of fact, we concluded that Mr O'Neill did not give the Claimant three different scores for his tests and so that particular part of the complaint failed on that basis. In any event, it was not clear to us how giving the Claimant three different scores would have prevented him from challenging them or otherwise have amounted to a detriment.

147. As for not giving the Claimant his test papers, it is clear that he was not given them and we were satisfied that this could legitimately be said, in isolation, to have been a detriment. As set out in our findings of fact however, the transcript of the meeting on 2 June 2020 shows that the Claimant's request to Mr O'Neill was for his test scores and not for the papers. It could not reasonably be said to be a detriment not to provide something the Claimant did not ask for and this element of the complaint failed on this basis.

148. Moreover, Mr O'Neill showed no reluctance to provide the Claimant with his scores. He offered them at the meeting, the Claimant did not make clear what he wanted, and Mr O'Neill invited him to request his results at some point after the meeting. There was no evidence that the Claimant made any such request, whether of Mr O'Neill or otherwise, even with the assistance of his wife – who it is agreed is a highly competent English speaker – once he returned home.

149. Furthermore, there was no evidence before us to suggest the Claimant had established a prima facie case that his protected disclosures played any part in what Mr O'Neill did and did not provide to him. We were satisfied that Mr O'Neill took the same approach with all employees to whom he communicated test results and that the reason for not providing the papers was that the Claimant had not requested them, even if it could be said that the Respondent should have provided them anyway.

Area Owner meeting on 15 June 2020 and Mr O'Neill's letter of 9 July 2020

150. Our findings of fact in relation to the various changes to the Claimant's role can be summarised as follows:

150.1. In March 2018, he was promoted to Area Owner (page 60).

150.2. In February 2019, he returned to being a Task Owner/Operator (page 61).

150.3. He assumed, because he did not receive a reply to his letter of 1 March 2019 at pages 64 to 67, that he remained employed as an Area Owner.

150.4. Whether or not the Claimant received in August 2019 the letter at page 68, it is clear that the Respondent believed he was from this point acting up in the role of Area Owner, covering for a colleague's maternity leave.

151. Mr Sousa did not give evidence, and so as set out in our findings of fact, we concluded that he made the comment, alleged by the Claimant, to the effect that he should not join the Area Owner meeting. We were also satisfied that this was a detriment, given that the Claimant appears to have been genuinely unclear whether he should attend or not and particularly as the comment was said in front of others. As for Mr O'Neill's letter telling the Claimant that he was no longer acting up, we would not have been prepared to conclude that this was a detriment if it had been clear that the Claimant knew he was acting up for a fixed period. There does however seem to have been some lack of clarity on his part as to whether that was the case and therefore, we were just about prepared to accept that he was subjected to a detriment when he got the letter telling him he was no longer an Area Owner, not least given that his reply to the Respondent's letter at page 61 (pages 64 to 67) had not been picked up.

152. That said, whilst we did not hear from Mr Sousa and whilst, clearly, he might have better handled telling the Claimant not to attend the meeting by taking him to one side for a private word, there was no evidence before us that the protected disclosures played any part in his giving the Claimant this message. We have already noted how Mr Sousa treated the Claimant and his colleague involved in the paddle incident in the same way. That is a strong indication that having received a protected disclosure did not appear to have influenced Mr Sousa's actions. The same was true for Mr O'Neill, though there was some delay in him telling the Claimant about the impact of his colleague's return from maternity leave. In any event, the very obvious reason Mr Sousa said what he did and Mr O'Neill wrote as he did was precisely that the colleague had returned from that leave, and the Respondent thus believed that the Claimant's cover period as an Area Owner had ended. If there was any confusion about his position as Area Owner, that confusion was the joint or alternative reason for the Respondent's actions. The Claimant did not establish a prima facie case that the protected disclosures played any part in these events and anyway, the Respondent showed the reasons for its actions which were unrelated to them. These complaints failed accordingly.

Bonus payments

153. It was accepted that the non-payment of the bonuses was a detriment, but the reasons for the Respondent's actions in this respect were abundantly clear,

as Miss Janusz accepted in submissions, namely that the Claimant did not meet the conditions for payment, because of the disciplinary warning.

154. The protected disclosures could have been said to have had a material influence on the non-payment of the bonuses if they had had a similar influence on the decision to give the Claimant the warning, because that is what led to the bonuses not being paid and the influence exerted by the protected disclosures does not have to be direct. We found however, as set out above, that the warning was not influenced by any of the disclosures. We noted also that other employees did not receive bonus payments, for similar reasons, namely that they did not meet one of the conditions. Again therefore, the Claimant did not establish a prima facie case that one or more of the disclosures influenced the Respondent's decisions and, in any event, the Respondent showed the reasons for its decision, which were not the protected disclosures. The communication sent to the Claimant on 5 August 2020 (page 259) was therefore irrelevant to this question and was clearly an error.

General

155. We were confirmed in our decisions in relation to the detriment complaints by the following:

155.1. Mr Parton's evidence to the effect that employees are encouraged to speak up about the sorts of matters raised by the Claimant in his disclosures. Health and safety concerns are raised regularly, and the Respondent deals with them. Food safety concerns are raised more rarely, but it seemed to us highly unlikely that the Respondent would take a different approach to that which it takes in relation to health and safety generally, on something so critical to its business. We were struck by Mr Parton's evidence that he would not tolerate suppression of issues in relation to such matters given the business risk they entail.

155.2. Two employees were dismissed for failing to carry out metal checks, which shows how seriously the Respondent takes them.

155.3. There was little evidence before us about what the Respondent did with the protected disclosures, but the evidence we did have was to the effect that what the Claimant raised was looked into by discussion with Mr Sousa, checking records and asking Quality Control to be more vigilant. Perhaps more could have been done, but what we heard satisfied us that the Claimant's concerns were not buried and that there was nothing to suggest that the Respondent took them in any other way than on face value.

156. For completeness, we add that neither the issues the Respondent had in this case regarding disclosure nor the unreliability of Mr Sousa's email to Ms Duncombe at page 191 when he said that the Claimant had not raised any safety issues was at all sufficient to change our conclusions. The former did not relate to whether the protected disclosures were made and how the Respondent viewed them. As to the latter, whilst Mr Sousa's email was plainly wrong, in light of his recommendation (after the disclosure to him) that both the Claimant and his colleague should get a letter of concern, we were more than satisfied that he was not in some way turned against or adversely influenced in respect of the Claimant as result of that disclosure.

Time limits

157. In summary, we concluded that none of the Claimant's complaints of protected disclosure detriment were well-founded. As a result, it was not necessary for us to go on to consider time limits.

Unfair dismissal/statutory redundancy payment

Reason for dismissal

158. It was the Project which was plainly the impetus for the Claimant's dismissal. The question we had to consider was whether the reason for dismissal, in that context, was redundancy or capability. As set out in our summary of the law, it was for the Respondent to show the reason and that it fell within one of the fair categories, and in relation to the claim for a statutory redundancy payment, there is a statutory presumption that redundancy was the reason, which it was for the Respondent to rebut.

159. By the conclusion of the evidence and submissions on liability, it was conceded by the Claimant that he was not dismissed by reason of redundancy, a concession that was tantamount to accepting that the dismissal was for the reason the Respondent relied upon, namely capability. We nevertheless considered the question of the reason for dismissal based on the evidence put before us.

160. In order to retain a role on the newly installed line, employees were required to undergo substantial retraining. Mr Parton's letter of 9 March 2020 (pages 141 to 143) informed the Claimant that if he passed the English tests the Respondent would discuss which role in the new set-up he was suited to and also told him that he would be issued with a new contract. The Respondent's case was that an increased calibre of performance was required post-Project, Mr O'Neill describing the Task and Area Owner roles as being "put up a couple of levels".

161. All of that might have been thought to suggest that the reason for dismissal was redundancy, but:

161.1. A requirement for an improved standard of English to carry out a role is not sufficient to show that an employer has a reduced need for employees to carry out work of a particular kind and the Claimant did not argue that it was. A situation where the same work is to be done by a different kind of employee – one might say, an employee with better ability in English – does not meet the definition in section 139 ERA.

161.2. It was notable that the Claimant himself said that there was no change at all, to his job at least, whether in relation to the tasks to be carried out or the machinery to be used, except that employees could be compelled to do a greater variety of tasks under the new contract whereas before they could only be requested to do so. He said in evidence that before the Project, he had to adapt machinery to product requirements and work on various parts of the line. All of that was doubtless what led to Miss Janusz conceding that redundancy was not the reason for dismissal.

161.3. There was no headcount reduction amongst Area Owners and Task Owners. This was not determinative but was noteworthy.

161.4. The Respondent said that the Area and Task Owner roles changed by around 15 to 20% post-Project, because of the setting duties they were now required to undertake. We were satisfied however, in terms of what the Claimant had actually done in practice on the line, that there was no material change. As already noted, this was effectively conceded.

161.5. We noted also that the evidence was against the Claimant's suggestion that the Respondent had in some way manipulated the circumstances to avoid redundancy payments altogether. As we have identified, it initially envisaged some redundancies, and in the end made the setters and some other employees redundant and (we assume) paid them statutory redundancy payments.

161.6. We were satisfied that the Respondent wanted more effective communication across functions, continuous improvement and utilisation of work instructions; that post-Project it would be operating a more complex plant; that line changes would be undertaken by use of control panels and that communication up and down the line – a problem before in stopping production – was something it wanted to improve.

162. We will come separately to whether the Respondent acted fairly in dismissing the Claimant, but we were satisfied based on the above analysis that the reason the Claimant was dismissed was not redundancy. It was that he failed the test which the Respondent undertook to establish a minimum level of English it believed would be required in this changed environment.

163. That was within the capability category set out in sections 98(2)(a) and 98(3)(a) of the ERA. The Respondent dismissed the Claimant because it concluded that he did not have the skill or aptitude which it determined was going to be necessary for performing the work which he was employed to do.

Reasonableness - section 98(4) ERA

164. With the reason established, we turned to consider whether dismissal for that reason was fair within the meaning of section 98(4). We reminded ourselves that the question was whether it was within the range of reasonable responses and that we should not in any respect substitute our view by focusing on what we would have done in the circumstances. Our focus was thus on what the Respondent did and whether that was within the bounds of what a hypothetical reasonable employer could do.

165. We set out below the questions we asked ourselves and our response to each.

Was it reasonable for the Respondent to introduce a requirement for what might be summarised as a certain standard of English?

166. As intimated above in dealing with the reason for dismissal, we concluded that the improvements the Respondent wanted to secure in the ability of its staff to communicate in English were reasonable, principally for the reasons given in Mr Parton's evidence. It would plainly have been substituting our views for those

of the Respondent to say otherwise, and it is not for an employment tribunal to run the Respondent's business or say what it should and should not require. As to whether it was reasonable to conclude that a certain standard of English was required of its employees across the board in order to see those improvements made and come to fruition in the new plant, whilst we may not have reached the same conclusion, we could not say that it was unreasonable of the Respondent to say that it was, again given Mr Parton's evidence in particular.

Did the Respondent adopt a reasonable assessment process?

167. We concluded that it did in respect of the content of the tests, noting the following:

167.1. All affected employees took the same tests, so that there was a fundamental consistency in that sense.

167.2. A third party wrote the tests with the Respondent's input and then assessed them. We had no knowledge of her qualifications and experience, though she had delivered some English training for the Respondent before, and she assessed everyone who took the tests (again therefore there was consistency), and we have found that broadly speaking her assessment of the Claimant's tests was correct. That third party involvement did provide objectivity and, on the face of it, appropriate expertise, avoiding the Respondent being influenced by its own views of employees, whether their language skills or otherwise.

167.3. Some parts of the tests were not work-related, but essentially, as Mr Parton said, they were about testing employees' ability to understand and communicate in English, and that could reasonably be done by a mixture of content that was explicitly work-related and some that was not.

167.4. Specifically in relation to the listening test, the Claimant did not raise at any time prior to these proceedings that his performance had been impaired by noise or poor sound quality, even in his detailed appeal.

167.5. It was not for us to say that other competencies should have been tested – that would have been substituting our view for that of the Respondent.

168. In summary, we concluded that whilst the assessment process was not perfect, for example having a fluency test over Skype, it was reasonable, noting that in that particular respect the problems of the Covid-19 lockdown made it necessary.

Did the Respondent reach reasonable conclusions as to the Claimant's capability based on the assessment process?

169. We did not see a marking matrix or the marking of the Claimant's tests, and neither did the Claimant; in fact, it is possible the Respondent did not see them either. As **Alidair v Taylor** made clear however, it was not for us to mark the Claimant's work and as is evident from our findings of fact, the Respondent could reasonably say that the Claimant did not pass the test overall, based on our consideration of that work.

170. What was required, according to **Alidair**, was an honest belief on reasonable grounds; the Respondent did not have to prove that the Claimant did not have the necessary competencies. We were satisfied that it could reasonably reach the conclusions it did in this respect for the following reasons:

170.1. The assessment of the Claimant's work was carried out by an apparently expert third party.

170.2. As already indicated, we could see ourselves that his scores matched his test papers, certainly essentially and probably exactly and the overall score grid at page 205 properly reflected the Claimant's results.

170.3. The fact that the Claimant had passed earlier multiple-choice questions when carrying out health and safety tests did not show that he was better than he was marked by the external assessor, and anyway, it was his test results in June 2020 that counted; it cannot be said to be unreasonable to discount tests carried out some time before.

170.4. The Claimant says that others who are noted on page 205 as having passed (or who did so on retaking the tests as set out in our findings of fact) did so even though their English was poor, but we had no evidence to that effect, other than his say so and certainly we had nowhere near sufficient evidence to draw parallels, for example with Mr Sousa, in order to assess whether the Claimant was treated consistently with him.

170.5. Other employees also failed the tests. The Claimant was not singled out.

Was the Claimant given reasonable support and a reasonable opportunity to meet the required performance standard?

171. The Claimant's case was that three months was insufficient to prepare for the English tests. The Respondent points to its letter of 4 February 2019 (page 61) alerting him to the need to improve his English, though it must be noted that this was not in the context of the possibility of him losing his job if he did not do so and that this requirement was not reviewed with him at any stage. The Respondent also points to the training provided to the Claimant in 2019, when he attended at least five English classes.

172. It was always open to the Claimant to help himself in this regard, perhaps especially as his wife is a teacher, by taking lessons on his own initiative regardless of whether he could get time off work for a particular course. We have also noted his evidence that he did a lot of preparation for the tests and there was a three-month period in which he sought to do that preparation. There was however no further support from the Respondent after it announced that a particular standard of English was a requirement to continue in employment. We will come back to this point, and answer this question, at the end of our conclusions below.

Did the Respondent embark on a reasonable consultation process and otherwise follow a reasonable procedure in dismissing the Claimant including in relation to his appeal?

173. The Respondent's consultation process was, as we have identified, hampered somewhat by the Covid-19 lockdown. A factor such as that, which was of course beyond its control, has to be taken into account in answering this question.

174. The Claimant attended a general announcement about the Project, had the opportunity to attend a town hall meeting and could also have raised issues via the employee forum. We found it difficult to accept that he did not know about the meetings of the forum, but even if he did not, it was open to him to raise questions by that route – he did not say he was unaware of the forum as such. The forum meeting on 5 March 2020 (pages 138A to 138C) and the letter sent to the Claimant himself on 9 March 2020 (pages 141 to 143) made clear that English tests would be required and what would happen if he did and did not pass them. It is unclear whether the Claimant engaged in any individual consultation after receiving and before signing the letter of 9 March 2020 during the four-week consultation period (which of itself cannot be said to have been unreasonable in length), but there was no evidence that he raised any issues or asked for a meeting, except that he said Mr Sousa was asked about the nature of the tests and could not assist, a point we will come back to. He did in his letter of 19 March 2020 (pages 154 to 155) make a comment about the justification for the English tests, which was not addressed, but by then he had signed up to the process which Mr Parton's letter had outlined.

175. In terms of the scope for consultation therefore, there was a reasonable opportunity for the Claimant to engage with the Respondent both at the collective and individual levels. That said, as we have indicated, it is agreed that he did not know the nature of the tests he would be taking before he did them, nor did he know the score required for an overall pass. Everyone else was in the same position of course, but we accepted that he was therefore required to prepare for the tests in something of a vacuum which was, we concluded, a material shortcoming in the process by which the Respondent went about dismissing the Claimant. It is a fundamental requirement of a fair capability dismissal, which any reasonable employer would recognise and take account of, that an employee know what he or she has to do to meet the employer's expectations. The Claimant plainly did not.

176. Furthermore, and compounding that shortcoming, the Claimant had no opportunity to challenge his scores once they were given to him. There was admittedly some confusion about what he wanted Mr O'Neill to provide, but by then he had already been told that his employment would be terminated.

177. There were, furthermore, two material issues with the appeal. First, the Claimant was not offered an appeal hearing, because the letter on page 258A was not sent to him. Secondly, Mr Parton effectively decided it – though in Ms Duncombe's name – having made the decision to dismiss. It is difficult to see how he could be said to have been in a position to provide a fair assessment of a decision he had already taken.

Conclusions

178. Stepping back and assessing things overall, in answer to the question posed by section 98(4) of whether the Claimant's dismissal was within the range of reasonable responses, we concluded that it was unfair not to provide any

indication to the Claimant of the nature of what would be assessed before he took the English tests. Everyone else was in the same position, but it did mean that the Claimant – although he was able to carry out some preparation – was doing it unsighted and it must be remembered that the context was that his job was at stake. He appears to have assumed, understandably so, that he would be doing the same type of assessment as he had done before when taking health and safety tests, namely multiple-choice questions, but of course he was not. It is perhaps unsurprising therefore that he felt passing the tests would be a formality. An employer who requires particular standards of its employees can reasonably be expected to make clear what those standards are, particularly when they represent a change as to what went before, and it was unreasonable of the Respondent not to do so, as the Claimant argued.

179. It was also unfair not to give the Claimant the opportunity to discuss with the Respondent the outcome of his tests, given that regardless of what he asked for and did not ask for at his meeting with Mr O'Neill or thereafter, he was told he had failed the tests and then immediately told that he was to be dismissed as a result. That was a basic lack of consultation that would be required for any fair dismissal and was not what the hypothetical reasonable employer would have done.

180. In summary, we have accepted that the Respondent was going to be operating in a new environment and reasonably needed its employees to have a particular standard of understanding and communication in English. To that extent, how the Claimant had performed previously was not a particularly relevant question. The fact is however, that he was not told how his competence in English would be assessed and therefore how he could prepare for the assessment and was not given an opportunity to show that he could meet the required standard with that level of transparency and visibility. We make clear that we are not saying that the Claimant should have been given repeated opportunities to pass the tests. Although it would be the normal route in a capability dismissal to set out the required standard, provide an opportunity to meet it, provide a warning if it is not met and then repeat the process with a final warning and eventually dismissal, we do not think that this can be said to be the only route to establishing fairness in that context. The Claimant should nevertheless have been given the opportunity to take the tests when he knew what it was that was being tested, whether first time round or once he had been given his scores and a proper opportunity to challenge them. The appeal certainly did not afford him that opportunity, being unfair of itself for the reasons we have set out.

182. The Claimant did not establish an entitlement to a statutory redundancy payment because he was not dismissed for redundancy, but he was unfairly dismissed for the reasons set out above. His complaint of unfair dismissal was therefore well-founded. As the parties know, there have been other developments in the case since the Liability Hearing concluded, which have delayed conclusion of the remedy stage.

Note: This was in part a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was video.

Employment Judge Faulkner
Date: 17 December 2022

Note

All judgments and written reasons for the judgments (if provided) are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.

Appendix – List of Issues (liability only)

1. **Time limits**

1.1. Were all of the whistleblowing detriment complaints made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1. Was the Claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.1.2. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.1.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.1.4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. **Unfair dismissal and redundancy**

2.1. What was the reason or principal reason for dismissal? The Respondent says the reason was capability (performance), the Claimant that it was redundancy.

2.2. If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.2.1. The Respondent adequately warned the Claimant.

2.2.2. Dismissal was within the range of reasonable responses.

2.3. Was the reason for dismissal redundancy? If so, how much is the redundancy payment the Claimant is entitled to and did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

3. **Remedy for unfair dismissal**

[Omitted]

4. **Protected disclosure**

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

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

4.1.1.1. Around the end of January 2020 – see paragraph 18 of the Claimant's Particulars of

Claim.

4.1.1.2. 5 March 2020, by email – see paragraph 19 of the Particulars of Claim.

4.1.1.3. 13 March 2020, by email – see paragraph 20 of the Particulars of Claim.

4.1.2. Did he disclose information?

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

4.1.4. Was that belief reasonable?

4.1.5. Did he believe it tended to show that:

4.1.5.1. A person had failed, was failing, or was likely to fail to comply with any legal obligation?

4.1.5.2. The health and safety of any individual had been, was being or was likely to be endangered?

4.1.6. Was that belief reasonable?

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

5. Detriment (Employment Rights Act 1996, section 48)

5.1. Did the Respondent do the following things:

5.1.1. See paragraphs 12(a) to (f) of the Particulars of Claim.

5.2. By doing so, did it subject the Claimant to detriment?

5.3. If so, was it done on the ground that he made a protected disclosure?

6. Remedy for protected disclosure detriment

[Omitted].

7. Unauthorised deductions

7.1. Did the Respondent make unauthorised deductions from the Claimant's wages in relation to a pay rise and a bonus payment and if so, how much was deducted?