EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Ashley George	AND	Peter Cox Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin ON 19 and 20 December 2022

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In Person, Assisted by his wife Mrs D George**
For the Respondent: **Mr A Williams, Solicitor Advocate**

JUDGMENT

The judgment of the tribunal is that:
1. The claimant's claim that he was unfairly dismissed because he made a protected public interest disclosure is dismissed; and
2. The claimant's claim that he suffered detriment on the grounds of having made a protected public interest disclosure is also dismissed; and
3. By consent the claimant succeeds in his claim for breach of contract in respect of the balance of his notice pay of three weeks, and the respondent is ordered to pay the claimant the agreed sum of £1,500.00 as damages for breach of contract.

RESERVED REASONS

1. In this case the claimant Mr Ashley George claims that he has been unfairly dismissed, and that the principal reason for this was because he had made a protected disclosure, and also that he has suffered detriment on the grounds of that disclosure. He also brings a claim for breach of contract in respect of unpaid notice pay, which has now been agreed. The respondent contends that the reason for the dismissal was redundancy, and it denies the claims.
2. The parties have given their written consent to this matter being determined by an Employment Judge sitting alone in accordance with s4(3)(e) of the Employment Tribunals Act 1996.
3. I have heard from the claimant. For the respondent I have heard from Miss Catherine Hill and Mr Andrew Milburn. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The Facts:
5. The respondent Peter Cox Ltd is part of the Rentokil Initial group of companies and in general terms undertakes property surveys and supervises remedial works. Rentokil purchased the company in 2015 to expand its commercial property and rental property businesses. It divides its business into geographical areas and Miss Hill, from whom I have heard, became Area Operations Manager for the respondent's South region in March 2020. This South area consisted of four branches, with a Peter Cox office and a Rentokil Property Care South West office both based in Bristol, and two similar offices based in Uxbridge. Miss Hill's line manager was the Operations Director Mr Andrew Milburn from whom I have also heard.
6. The respondent has a formal Whistleblowing Policy which is referred to as "Speak Up".
7. The claimant Mr Ashley George commenced employment with the respondent on 15 December 2018 as a qualified surveyor, and he continued in this role until he was dismissed by reason of redundancy with effect from 13 October 2020. He had previously worked for the respondent in the same role between 2014 and 2018. He was assigned to cover the Cornwall and West Devon geographical area, although it was reasonably commonplace for the respondent's surveyors to "cross-cover" work as necessary in different areas.
8. The respondent put in place reasonable adjustments for the claimant during his first period of employment to the effect that he needed to have an automatic car and limit his driving to distances of no more than 200 miles per day. From the start of the second period of his employment the claimant generally worked within his allocated area, and he did not have any issues relating to discomfort or safety in connection with extensive driving. The claimant perceived that this changed from about May 2019 when there was an increased requirement for him to complete surveys in locations that were not within his specified geographical area and required longer driving distances. The claimant raised this on a number of occasions with his line manager Mr Mann, and in particular following a road traffic accident on 6 August 2019.
9. From the end of 2019 into 2020 the claimant continued to raise concerns about health and safety and driving distances to Mr Mann. The claimant also had other concerns about the payment of commission and his perception that the respondent's support office was requiring to drive to surveys which were too far away, and also failed to support him properly by being unavailable or refusing to authorise necessary overnight hotel accommodation where appropriate. The respondent denies this and says that the claimant was responsible for organising his own diary and had never been refused an overnight stay where the distances required it.
10. In any event the claimant raised a formal grievance during early 2020 to address his complaints about the perceived non-payment of commission, and he continued to raise his concerns about what he perceived to be health and safety breaches because of unsafe

driving distances, and risks to his health and safety, and that of others. None of these complaints are relied upon as protected public interest disclosures by the claimant, but it is clear to see from the contemporaneous emails that the claimant did raise a number of complaints during this time which related to commission, driving distances, and health and safety. As it happens the grievance in respect of non-payment of commission was not upheld, and the respondent does not seem to have accepted that the other points raised were well-founded.

11. Meanwhile the Covid-19 pandemic had resulted in the national lockdown from March 2020, and the claimant and the majority of his colleagues were put on furlough leave from early April 2020 when the Government introduced that scheme. There was a significant reduction in the respondent's business as a result of the pandemic, and Miss Hill commenced a redundancy process in the South region, and two office workers and two surveyors were made redundant following this process in July 2020. This process is discussed in more detail below. The claimant was aware of these redundancies, and on being informed in a general email to a number of staff from Miss Hill dated 7 August 2020 that the redundancy process had "now finished", he took that to mean that there would be no further redundancies. Ms Hill's evidence is that she was merely confirming that that particular redundancy process had come to an end and was by no means guaranteeing that further redundancies would never be implemented.
12. The claimant was then absent on sick leave with a dental infection during July and August 2020, but he remained concerned about a number of matters. The claimant wrote a letter to Mr Mann on 15 August 2020. This is the letter which is conceded by the respondent to have been a protected public interest disclosure, and it is referred to in this Judgment as "the Disclosure Letter". This Disclosure Letter runs to just over two pages and it has five main subjects, and which raised a number of complaints under the following headings: Contract and Employer; Area of Work; Working Day; Driving and Safety; and Health and Well-being.
13. The fourth main subject heading was "Driving and Safety". The claimant made the following comments: "We have spoken about this on several occasions … You have said you will "look into this" but I received no response, and it is getting worse not better. I am regularly driving over 1,000 miles each week … If you refer to the company's driving policy and requirements (together with the HSE regulations in this area) as a travelling worker my time in the car is included in my working day. This is in place under the Working Time Directive and HSE guidance as a safety measure … No allowance is made for the distance to be travelled to or between appointments … No allowance is made for statutory rest breaks that are required in law for safety measures … No allowance is made for breaks … The company places undue pressure on me then to break driving rules and certainly not take the breaks I should be taking under our own policy for driver safety … The company is therefore not acting in line with their own driving policies and duty of care for me as a driving employee."
14. The claimant had been absent for more than four weeks, and in these circumstances the respondent put in place a prospective meeting under its attendance policy, and the claimant was invited to a Welfare Meeting. Mr Mann agreed to address the issues raised by the claimant in his Disclosure Letter at that meeting.
15. Meanwhile the respondent's business was continuing to face severe financial difficulties as a result of the Covid pandemic, and Mr Milburn and Miss Hill had a discussion about the need to implement further redundancies.
16. The Welfare Meeting was scheduled for 9 September 2020 and it took place remotely by video. Miss Hill, who was Mr Mann's line manager, took the meeting because Mr Mann was away. There was some discussion about the claimant's health and how his medication might affect his driving. The claimant's Disclosure Letter to Mr Mann was also discussed and in particular with regard to travelling time and driving distances. The meeting then suddenly changed to discussions about the business needs and the respondent's reduced capacity, and Miss Hill informed the claimant that the respondent was considering the viability of the claimant's position in his geographical area. The claimant complained that he felt hijacked and that if there was to be any discussion or consultation with regard to

prospective redundancy then a meeting should be arranged for that purpose, and it should then be dealt with in its proper context.

17. Miss Hill then wrote to the claimant by letter dated 9 September 2020 providing details of the "unprecedented drop in enquiries, sales and revenue in our Property Services businesses" and the need to discuss the ongoing role of a surveyor in the claimant's area. A consultation meeting was arranged for 11 September 2020. The claimant requested a postponement of this meeting to enable a trade union representative to attend with him, and the respondent agreed to that postponement. The hearing then took place on 28 September 2020, although in the event the claimant did not have a trade union representative to support him, and he agreed to continue with the meeting unaccompanied. Miss Hill's letter of 9 September 2020 had given detail of the level of discussions which would take place at the consultation meeting and provided a Briefing Pack explaining the consultation process and what would need to be discussed.
18. The claimant objected to the redundancy consultation process which he did not consider to be fair. He calculated that he had done approximately 70 surveys during July and the start of August 2020, when the normal average would have been about 50. In particular another surveyor, Mr Naylor, who was a Rentokil employee based in Plymouth, cross-covered the same postcode areas. He was not as well-qualified as the claimant, and unlike the claimant his reports had to be signed off by a supervisor. He had also undertaken some work in the claimant's area. Mr Naylor had not been placed at risk of redundancy. The claimant objected that he had not been put in a pool for selection for redundancy with Mr Naylor. The claimant also complained that the respondent had not considered "bumping" Mr Naylor out of his position so that the claimant, who was more qualified, could then be retained in Mr Naylor's position.
19. On 27 September 2020 the claimant wrote a detailed letter running to seven pages which he sent to a number of the respondent's senior managers including the Operations Director Mr Milburn. The letter was headed "Formal complaint (made under Whistle Blower Policy) which was subdivided into Health and Safety at Work (Driving Expectations); and Stress at Work Policy and Breaches. The letter also complained of "Harassment and Victimisation" and referred to his grievance which was still active under that procedure. The claimant does not rely upon this letter as a protected public interest disclosure, but it does refer to the claimant's discussions with Mr Mann in August 2020, and repeats the allegations made in the claimant's Disclosure Letter relating to excessive driving and the consequential health and safety risks.
20. There was subsequently a second consultation meeting which took place on 6 October 2020. Miss Hill also chaired this meeting with the HR adviser present. The claimant agreed to proceed without a companion or representative. This meeting also discussed the respondent's perceived need for a redundancy in the claimant's region and there were discussions about the amount of work available and which surveyors could cover which areas.
21. There was then a third consultation meeting which took place on 8 October 2020, again chaired by Miss Hill with assistance from an HR adviser. The claimant agreed to proceed without a representative or companion. They discussed the issues which had been raised with regard to the workload, and what surveyors were available to cover which areas. There was also a discussion about the correct notice period which might be applicable. At the end of that meeting the claimant was informed that he was to be dismissed by reason of redundancy.
22. The claimant asserts that at each of these consultation meetings Miss Hill, and the HR representative who was also present, were "forceful" and refused to accept the claimant's points on health and safety because they were not there to discuss those issues. Miss Hill's evidence is that she was not unnecessarily forceful, but it is correct to say that she made it clear to the claimant that the purpose of the meetings was to consult on and to discuss the prospective redundancy, and not to discuss the claimant's issues which he had raised about health and safety. Ms Hill made it clear that there was a separate procedure in place for dealing with these grievances and concerns and that they had been referred to be dealt with under that procedure. On balance I find that the claimant and the HR representative

were not unduly forceful to the claimant, and although he might have been disappointed that his health and safety issues were not discussed further at those meetings, the purpose of the meeting was for redundancy consultation only, and Miss Hill was entitled to seek to concentrate on those issues to the exclusion of the others.

23. By letter dated 13 October 2020 Miss Hill wrote the claimant to confirm that following the consultation meetings the respondent had decided to make the claimant redundant. She explained that: "Throughout the briefing and consultation process I explained that due to the Covid-19 pandemic we have seen an unprecedented drop in enquiries, sales and revenue in our Property Services businesses. Initially we had to furlough 75% of colleagues and have worked hard to recover sales and production to 70% of expected levels. As result of this downturn we initiated a UK wide branch by branch review of how many colleagues we need to deliver the revenue we now expect to have. I also explained that it now appears that we have reached a plateau and we do not forecast achieving production of more than 80% of capacity. This therefore affects the profitability of the business in your area … The level of enquiries and the travel required means it is not economical for us to sustain a Peter Cox surveyor in Cornwall. As you are the only Peter Cox surveyor in Cornwall, we propose that it would be your role which would be made redundant. Together we have explored ways in which redundancy could be avoided. Unfortunately, we have not been able to identify any suitable alternative employment for you or any way in which redundancy could be avoided. As a result, I have no alternative but to confirm the termination of your employment by reason of redundancy with effect from 12 October 2020."
24. The claimant was paid one week's notice pay in lieu of his contractual notice. The respondent has since conceded that the correct notice period should have been one month, and the claimant succeeds in his claim for breach of contract. The parties have agreed that the respondent will pay the claimant the sum of £1,500.00 as damages for breach of contract in this respect.
25. By letter dated 17 October 2020 the claimant then appealed against his dismissal by reason of redundancy. This letter was in two parts. The claimant appealed against the decision to make him redundant, and he also raised a formal grievance about the process which he asserted had been a sham from the outset. The grounds of appeal against redundancy were in short that the claimant was informed of his redundancy at the end of the third consultation meeting; that he had never been informed before that meeting it might result in his dismissal; that despite the consultation process there was a predetermined outcome because of his grievance about commission and having raised the health and safety and driving related issues; and that Mr Naylor should have been placed in a pool for selection of redundancy along with the claimant.
26. Mr Andrew Milburn was then the respondent's Operations Director. At the time of the claimant's redundancy five area managers reported to him, including Miss Hill in respect of the South region. Mr Milburn agreed to hear the claimant's appeal against Miss Hill's decision. The appeal hearing took place on 28 October 2020. Mr Milburn was accompanied by an HR manager. The claimant agreed to proceed without representation. Mr Milburn was aware of the claimant's previous complaints, which included the Disclosure Letter addressed to Mr Mann, and also the claimant's subsequent letter of complaint of 7 September 2020 because Mr Milburn was one of its many addressees.
27. Mr Milburn's view was that the consultation process had been followed correctly and that although the claimant alleged that he had not been informed at any stage he might be made redundant Mr Milburn concluded that the claimant had been informed that this was a possibility at the start of the process. He decided that it was unnecessary to form a pool for selection for redundancy with other employees because the nearest other employee (Mr Naylor) lived 60 miles away in Plymouth and that if the claimant were to take that position, he would be doing even more travelling than the current level of travelling which he had made clear he found to be unacceptable. Mr Milburn clarified that the claimant had raised an issue under the respondent's whistleblowing policy (known as Speak Up) but that this had only commenced after the claimant to been told that he was at risk of redundancy, and he therefore concluded that this could not be the reason for selecting the claimant. Mr Milburn also raised the point that the claimant's earlier complaints and grievance

concerning commission could not have been the reason for selection of redundancy, because otherwise it would have happened during the first round of redundancies in July 2020.

28. Mr Milburn then decided to reject the claimant's appeal against dismissal. The respondent continued to investigate the claimant's other complaints under the relevant procedure, and these were subsequently dismissed in February 2021.
29. This is the individual position as seen from the context of the claimant and the termination of his employment. On the other hand, Miss Hill and Mr Milburn both described the "bigger picture" with regard to the redundancy process, which was as follows.
30. Before the Covid-19 pandemic took hold Rentokil and Peter Cox Ltd had seven employed surveyors in the western half of the South region, which includes Wales and the South West. In the first round of redundancies in July 2020 four employees were made redundant. Two of these were administrators from the Peter Cox Ltd office, together with two surveyors. These two surveyors were Mr Rees who was an employee of Peter Cox Ltd covering the area between Exeter and Salisbury. The other was Mr Hughes who was a Rentokil employee based in South Wales. After that process there were five remaining surveyors namely the claimant; Mr Naylor who was a Rentokil employee based in Plymouth who covered the area between Plymouth and Bristol; Mr Thornton who was based in South Wales; Mr Elphick who lived in Okehampton in Devon but was a service support manager for other branches; and Mr Tyrrell who lived in Swansea. During the second redundancy process the claimant and Mr Tyrrell were both made redundant. Within about six months of the pandemic taking hold Rentokil and the respondent therefore had a reduced need for employed surveyors, commencing with seven in number, and finishing with three.
31. This was consistent with the approach adopted by the respondent within its group of companies throughout the United Kingdom. In particular redundancies fell in the more rural areas including Norfolk, Northumberland, and Cumbria, as well as the claimant's area of Cornwall and West Devon. Mr Milburn explained that the respondent had lost millions of pounds and moving towards the second national lockdown towards the end of 2020 it was not clear whether the business would be able to survive.
32. Furthermore, the respondent was careful and thoughtful about which employees to dismiss and which to retain, based on the available work in their areas, as is shown by the dismissal of Mr Rees and Mr Hughes during the first round of redundancies. These two surveyors each had more than two years' continuous service, but the respondent decided to proceed with their redundancies, rather than any other surveyor without statutory protection, because the respondent was anxious to retain the right surveyors in the most efficient geographical locations.
33. Miss Hill also explained why the claimant was selected for redundancy rather than Mr Naylor given that the claimant was better qualified. This was because of the reduced need for surveyors in rural areas, and the claimant covered a rural area. Mr Naylor was based in Plymouth, which is the biggest city south-west of Bristol, and he covered the area between Plymouth and Bristol. It simply did not make sense to retain the claimant (who lived 60 miles further to the south-west of Mr Naylor) at the expense of Mr Naylor because that would have left the claimant having to cover a much larger area with increased travelling time and expense.
34. Miss Hill was also adamant that against this background the claimant's Disclosure Letter had absently no impact on her decision to dismiss the claimant. Mr Milburn was also adamant that the claimant's Disclosure Letter had no impact on his decision to reject the claimant's appeal against his dismissal. Miss Hill and Mr Milburn were both fully aware that the claimant had raised concerns and complaints about commission, working hours, and driving safety even before the first round of redundancies, and if they had been in any way motivated to select the claimant for redundancy because of any of his complaints, then they would have done it at that stage, which proves against the backdrop of the pandemic difficulties that it was not a factor in eventually determining which of three surveyors of the original seven in the South region were best to retain.

35. Miss Hill also explained that the respondent did not enjoy sufficient increase in work levels to need to increase the number of employed surveyors for some time, with one new appointment in Bristol in 2021, and a new appointment in Cardiff in 2022.
36. The claimant has made a specific complaint against Mr Milburn that at the appeal hearing he was aggressive and threatening, and when the claimant told him that he had joined a trade union for support, Mr Milburn told the claimant "that he was a liar". The claimant also complains that Mr Milburn told him that he had fabricated his claims and that if he went to a tribunal "he would bankrupt him".
37. I have heard Mr Milburn's evidence today, and I have seen the contemporaneous minutes of the appeal meeting. The claimant challenges the accuracy of those minutes, but they were not expressed to be a verbatim record of that hearing, and the respondent asserts that the gist of the minutes is an accurate record.
38. It is clear that the meeting became bad-tempered and that both the claimant and Mr Milburn became annoyed with each other. Mr Milburn treated the meeting as dealing with two discrete issues. This was the claimant's appeal against dismissal, and then his subsequent grievance, which issues had been explained and sub-divided in the claimant's appeal letter. After Mr Milburn had dealt with the questions arising in connection with the appeal against dismissal Mr Milburn agreed to consider the matter in detail, and then confirm his decision to the claimant, and he then went on to discuss the points raised in the grievance. It was at this stage that the conversation became more heated.
39. The claimant had accused the respondent of engineering a sham redundancy process, and Mr Milburn's response to the grievance was that the claimant himself had treated the process as a sham. He made clear his view that a number of the complaints raised by the claimant were simply untrue, including his grievance about non-payment of commission, whether he had a trade union representative to assist him, and an unfounded complaint about non-payment of full contractual pay over and above sick pay, which had not been promised as the claimant had asserted.
40. The parties then threatened each other in connection with Employment Tribunal proceedings. The claimant threatened to issue tribunal proceedings and to make an application for costs. Mr Milburn stated that the respondent would defend the proceedings "100%" and that the respondent would apply for its costs, as it had recently done in a successful Tribunal claim brought by a former employee who went "as white as a sheet" when a costs order was made against him.
41. In any event the result of that meeting was that Mr Milburn decided to uphold the claimant's dismissal by reason of redundancy and to reject his appeal. The other matters raised in the grievance and the Speak Up procedure were dealt with under a separate procedure and eventually dismissed in February 2021.
42. The claimant commenced the Early Conciliation procedure with ACAS on 7 January 2021 (Day A"), and ACAS issued the Early Conciliation Certificate on the same day namely 7 January 2021 ("Day B"). The claimant then presented these proceedings on the following day namely 8 January 2021. Following an earlier preliminary hearing on disability-related issues, the issues to be determined at this hearing were agreed and set out in my case management order dated 20 April 2022 ("the Order"). This included the issue that any of the detriment claims arising before 8 October 2020 were potentially out of time.
43. Having established the above facts, I now apply the law.
44. <u>The Law:</u>
45. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending

to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

46. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
47. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
48. Under section 47B of the Act, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
49. Under section 48(2) of the Act, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
50. The reason relied upon by the respondent for the dismissal was redundancy. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or 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"
51. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
52. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.
53. I have considered the cases of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; Fecitt and Ors v NHS Manchester [2012] ICR 372 CA; Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ. Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8 Parsons v Airplus International Limited EAT IDS Brief 1087 Feb 2018; Ibrahim v HCA International Ltd [2019] EWCA Civ; Warburton v the Chief Constable of Northamptonshire Police [2022] EAT; Williams & Ors v Compair Maxam Ltd [1982] IRLR 83; Safeway Stores v Burrell [1997] IRLR 200 EAT.
54. Protected Public Interest Disclosures – Whistleblowing:
55. The statutory framework and case law concerning protected disclosures was helpfully summarised by HHJ Eady QC in Parsons v Airplus International Limited UKEAT/0111/17 from paragraph 23: "[23] As to whether or not a disclosure is a protected disclosure, the following points can be made - This is a matter to be determined objectively; see paragraph 80 of Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.
56. In whistleblowing claims the test of whether a disclosure was made "in the public interest" is a two-stage test which must not be elided. The claimant must (a) believe at the time that

he was making it that the disclosure was in the public interest, and (b) that belief must be reasonable. See Ibrahim v HCA International Limited [2019] EWCA Civ 2007.

57. The statutory framework and case law concerning protected disclosures was also summarised by HHJ Tayler in Martin v London Borough of Southwark (1) and the Governing Body of Evelina School UKEAT/0239/20/JOJ. He referred to the dicta of HHJ Auerbach in Williams v Michelle Brown AM UKEAT/0044/19/00 at para 9: "it is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."
58. The Claimant's Disclosure:
59. The claimant relies on one disclosure, which is his letter to Mr Mann of the respondent dated 15 August 2020, the contents of which are set out in the findings of fact above. That letter included a disclosure of information to the effect that the health and safety of individuals, being the respondent's employees and members of the public, was being or was likely to be endangered. The claimant reasonably believed that this was the position. In addition, he reasonably believed that his disclosure was in the public interest because it potentially directly affected other members of the public. The claimant's disclosure was a qualifying disclosure because it met the necessary requirements of section 43B(1)(d) of the Act. It became a protected public interest disclosure when it was disclosed to the claimant's employer, namely Mr Mann of the respondent, by virtue of section 43C(1)(a) of the Act. The respondent concedes that this letter was a protected public interest disclosure, and I so find.
60. The Unfair Dismissal Claim:
61. The claimant's automatically unfair dismissal claim under section 103A of the Act is to the effect that he is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he made his protected disclosure. The claimant did not have two years' continuous employment and the burden is therefore on the claimant to show jurisdiction and to prove that the reason, or if more than one the principal reason, was his protected disclosure. The respondent denies that was the case, and it asserts that the claimant was dismissed by reason of redundancy, and that this was the only reason.
62. The claimant has a number of complaints about the redundancy process which the respondent applied. These include that he was "ambushed" into a redundancy consultation at a welfare meeting which had been called for a separate reason; that his general workload had continued to increase and that there was no reduction in his work; that he was unfairly selected ahead of Mr Naylor who is less qualified and who at the very least should have been put in a pool for selection with the claimant; and that the respondent should have considered "bumping" Mr Naylor out of his position to secure employment for the claimant.
63. Each of these assertions might well have proved relevant in determining whether the claimant's dismissal was fair and reasonable in all the circumstances of the case in the context of a general unfair dismissal claim. The difficulty which the claimant faces is that he did not have two years' continuous employment and the statutory test of what is fair and reasonable in all the circumstances of the case does not apply to the claimant. The statutory test to be applied for the claimant's unfair dismissal claim in this case is simply this, namely was the reason (or if more than one the principal reason) for the claimant's dismissal because he made his protected public interest disclosure in the Disclosure Letter.
64. Given the background to the Covid-19 pandemic, and the havoc which that wreaked with businesses across the country, it seems clear to me that the reason for the claimant's dismissal was redundancy. Within a timeframe of about three months the combined businesses of Rentokil and the respondent in the South West region went through two redundancy procedures and reduced the number of surveyors from seven to three. The respondent's need for employees to carry out the work for which the claimant was employed had clearly ceased or diminished. The statutory definition of redundancy in s139(1)(b) of the Act was clearly met.

65. Mr Mann and Miss Hill were both aware that the claimant had raised a number of complaints and grievances by the time of the first round of redundancies. They knew that the claimant was an employee who had presented these complaints and grievances which required to be dealt with by the respondent's procedures. That did not result in his selection for redundancy in the first round of redundancies, even though there were others who had statutory protection against unfair dismissal and with redundancy rights who were selected ahead of the claimant. The Disclosure Letter upon which the claimant relies did arise after the first round of redundancies, but the respondent was already aware the claimant's previous grievance and complaints. If the respondent was the type of employer which was likely to set out maliciously to dismiss complaining or whistleblowing employees, then surely they would have done that first time round when they had the opportunity, which they did not.
66. Miss Hill has also given a cogent explanation as to why the claimant was selected for redundancy ahead of Mr Naylor, who covered the nearest geographical area to the claimant. That was simply because Mr Naylor covered an area which was more urban and less rural going geographically northwards from Plymouth. It was the claimant's more rural area where there was reduced work, and it simply did not make sense to ask him to cover an even bigger area with increased travelling time and expense.
67. Bearing in mind all of the above I reject the claimant's assertion that the reason, or if more than one the principal reason, was because of his Disclosure Letter. I find that the claimant was dismissed by reason of redundancy. Accordingly, his claim for automatically unfair dismissal under section 103A of the Act is dismissed.
68. The Detriment Claim:
69. The claimant's claim for detriment is under section 47B of the Act, to the effect that he had the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he had made his protected disclosure. As confirmed by the Court of Appeal in Fecitt and Ors v NHS Manchester, section 47B will be infringed if the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower.
70. Detriment is to be interpreted widely: see Warburton v the Chief Constable of Northamptonshire Police. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.
71. The claimant brings eight claims of detriment which are set out in the Order, and which are now dealt with in turn as follows. The first three relate to the redundancy procedure which was adopted by the respondent. The first is the allegation that the respondent engineered a redundancy process in order to dismiss the claimant. The second allegation is that the respondent failed to include Mr Naylor in the pool for selection for redundancy. The third is the allegation that the respondent failed to consider the possibility of "bumping" during the redundancy process.
72. Bearing in mind the interpretation of detriment set out above, I find that each of these three allegations amounts to a detriment which the claimant suffered. It would be reasonable for an employee of a large employer to assume that a redundancy process would not be a sham process and/or manufactured to engineer a false dismissal, and that the normal standards of reasonableness in a redundancy selection process should be applied. It was the belief of the claimant that this was not happening during his redundancy process. For the record, I do not consider that the respondent did engineer a sham consultancy process, nor that the claimant was necessary wrongly selected for redundancy ahead of Mr Naylor, but that is not the point. The claimant was a reasonable worker who took that view, even if all reasonable workers might not have taken the same view, and in my judgment the test as to whether the claimant suffered detriment is satisfied.

73. The next question to determine is whether the claimant suffered these detriments because of his Disclosure Letter. As noted above, section 47B of the Act will be infringed if the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower. In my judgment it cannot be said that the Disclosure Letter materially influenced the respondent's decision to commence a redundancy process, nor to select the claimant ahead of Mr Naylor. I am satisfied the reasons explained above that there was a genuine redundancy situation and that the respondent had a cogent reason for selecting the claimant for redundancy whilst retaining Mr Naylor. There were good business reasons for the respondent's decision. In my judgment it cannot be said that the Disclosure Letter materially influenced the respondent to create a sham redundancy process and/or deliberately to select the claimant for redundancy when others should have been dismissed ahead of him.
74. I therefore dismiss the first three claims of detriment.
75. The fourth, fifth and sixth allegations are all related. The fourth allegation is that at the consultation meeting on 28 September 2020, Miss Hill and the HR representative were forceful and refused to accept the claimant's points on safety and told him that they were not there to discuss it. The fifth allegation is that at the consultation meeting on 6 October 2020 Miss Hill and the HR representative were forceful and refused to accept the claimant's points on safety and told him that they were not there to discuss it. The sixth allegation is that at the consultation meeting on 12 October 2020 Miss Hill and the HR representative were forceful and refused to accept the claimant's points on safety and told him that they were not there to discuss it.
76. Bearing in mind the interpretation of detriment set out above, I find that in each case the claimant did suffer this detriment. He believed that the first meeting had been called to discuss his workplace-related issues, and that these should also have been discussed in the context of why he was potentially at risk of redundancy during the second and third meetings. That can amount to a detriment, and if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied.
77. However, on the facts of this case the respondent did not ignore the grievance and complaints which the claimant raised. It had in place procedures to deal with complaints of this nature, they were referred to and dealt with under that procedure. It is entirely reasonable for an employer to limit a redundancy consultation exercise to matters which are relevant to that exercise alone. That is what was done in this case. I accept Mr Hill's evidence that she and the HR representative were not unduly forceful in explaining to the claimant that they did not want to discuss his grievances and complaints while they were going through the consultation exercise for redundancy. It cannot be said in these circumstances that the claimant's Disclosure Letter had a material influence on the decision of Miss Hall to limit those conversations to matters of redundancy consultation only.
78. I therefore dismiss the fourth, fifth and sixth allegations of detriment. It is also worth noting that the first five detriment claims predate 8 October 2020 and on the face of it are arguably out of time in any event.
79. The seventh allegation is that the respondent rejected the claimant's appeal against his dismissal.
80. The rejection of an appeal against dismissal can clearly amount to a detriment, and that is what happened in this case. Given the interpretation of detriment above, I find that the claimant did suffer this detriment. The next question which arises is the extent if any to which the Disclosure Letter had a material influence on Mr Milburn's decision to dismiss the appeal.
81. It seems clear from Mr Milburn's evidence that he reviewed the business need for redundancies, and that he reached the same conclusion as that reached by Miss Mills. This was to the effect that the respondent had a reduced need for surveyors, particularly in rural areas, and it made sense to retain Mr Naylor to cover the more urban work between Plymouth and Bristol rather than to retain the claimant in Cornwall and West Devon. In addition, it did not make sense to dismiss Mr Naylor instead of the claimant because this would have increased the time and expense of travelling time from the claimant's home to

cover the remaining work. Mr Milburn was aware of the claimant's previous grievance and complaints, and his Disclosure Letter, but in my judgment, there were sound business reasons for selecting the claimant for redundancy, and it cannot be said that the decision to reject his appeal was materially influenced by his Disclosure Letter.

82. I therefore reject the seventh allegation of detriment.
83. The eighth and final allegation is that on 28 October 2020 Mr Milburn was aggressive and threatening and told the claimant that he was a liar and had fabricated what he had raised that if he went to a tribunal, he would bankrupt him.
84. It is clear from Mr Milburn's frank evidence and the minutes of the appeal meeting that this allegation is largely true. I find that Mr Milburn could have been perceived as threatening and aggressive, but this was in the context of both parties becoming exasperated and ill-tempered with each other. It is true that Mr Milburn expressed his view that some of the claimant's complaints and grievances were untrue and unfounded. There is no evidence that he suggested that he would attempt to bankrupt the claimant, but it is clear that they discussed Employment Tribunal proceedings, and both threatened a costs application against the other in the event of a successful result.
85. To the extent that the allegation of detriment is that Mr Milburn was aggressive, alleged that some of the claimant's grievances were untrue, and that a costs application would follow the successful defence of any tribunal claim, I accept that this did happen. Given the interpretation of detriment set out above I also find that the claimant did suffer this detriment.
86. The one remaining question which therefore falls to be addressed is the extent if any to which the claimant suffered this detriment on the grounds of having made his Disclosure Letter in the sense that it materially influenced Mr Milburn's behaviour.
87. On balance I conclude that this was not the case. Mr Milburn made these comments because he was exasperated with the claimant against the background of the respondent's severe financial problems and his perception that the claimant was simply not seeing the bigger picture. He doubted the veracity of a number of the claimant's complaints, and he thought that the claimant was deliberately causing unnecessary difficulties over and above the straightforward issue of the respondent's need to make surveyors redundant, and whether the respondent could support someone in the claimant's position in rural Cornwall and West Devon.
88. The various complaints and grievances which the claimant had raised did of course include the issues relating to excessive driving and health and safety which the claimant confirmed in his Disclosure Letter. Mr Milburn was aware of this letter, and also aware of the claimant's subsequent grievance letter which included a repeat the same information on 7 September 2020. It does seem clear that Mr Milburn thought that the claimant was something of a troublemaker who had raised a number of unfounded complaints. However, the heated discussion between them was in the context of the second part of the appeal hearing relating to the claimant's ongoing grievances, only after Mr Milburn had considered and noted the claimant's grounds of appeal.
89. The burden of proof is on the claimant to establish that this particular detriment was materially influenced by the Disclosure Letter. In my judgment that was not the case. It is certainly arguable that a combination of the claimant's historical grievances and repeated challenges to the respondent's various procedures, including but not limited to his selection for redundancy and his objection to that procedure, were in Milburn's mind when he spoke to the claimant in the manner which gave rise to this detriment. However, that is not the same as saying that he was materially influenced by the comments relating to driving distances and health and safety in the claimant's Disclosure Letter which then gave rise to his behaviour amounting to the detriment. In my judgment the claimant has not discharged the burden of proof in this respect, and this claim is also dismissed.
90. Accordingly, all of the claimant's claims of detriment are hereby dismissed.
91. <u>The Breach of Contract Claim:</u>
92. Finally, the claimant was paid one week's notice pay in lieu of his contractual notice. The respondent has since conceded that the correct notice period should have been one month, and the claimant succeeds in his claim for breach of contract. The parties have

agreed that the respondent will pay the claimant the sum of £1,500.00 as damages for breach of contract in this respect.

93. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 43; a concise identification of the relevant law is at paragraphs 44 to 53; how that law has been applied to those findings in order to decide the issues is at paragraphs 54 to 92.

Employment Judge N J Roper
Date: 21 December 2022

Judgment sent to Parties: 04 January 2023

FOR THE TRIBUNAL OFFICE