EMPLOYMENT TRIBUNALS

Claimant: **Mr G. Bruton**

Respondent: **The British Heart Foundation**

Heard at: **London South (via CVP) On: 5-9 & 12 December inclusive**

Before: **Employment Judge T.R. Smith**

Members: **Ms N. Christofi**
Mr W. Dixon

Representation
Claimant: **In person**

Respondent: **Mr G. Baker (counsel)**

Written reasons suppled pursuant to a request by the respondent under to rule 63 (3) of The Employment Tribunal (Constitution and Rules of procedure) Regulations 2013

JUDGMENT

1.The claimant's complaints of automatic unfair dismissal under both section 100 (health and safety cases) and section 103A (protected disclosures) of The Employment Rights Act 1996 are not well founded and are dismissed.

2.The claimant's complaints of detriment under both section 44 (health and safety cases) and section 47B (protected disclosures) of The Employment Rights Act 1996 are not well founded and are dismissed

The issues

3.At a preliminary hearing held on 22 June 2021 the parties agreed the issues the tribunal would be required to address. Since that date various concessions and clarifications had been made by both parties, and the claimant's complaint that he was a disabled person within the meaning of section 6 of the Equality Act 2010 had been dismissed.

4.The tribunal has set out below what was agreed between the parties at the start of the hearing, as the definitive list of issues it had to determine.

Protected disclosures

5.Did the claimant make one or more qualifying disclosures as defined by section 43B of the Employment Rights Act 1996?

6.The claimant's case was that he made the following disclosures: -

- In a conversation with Mr Wendels on 24 July 2020 the claimant told Mr Wendels of his worries about being exposed to Covid 19 through handling large amounts of donations from the public, particularly as the claimant had COPD. (Disclosure one).
  The respondent did not concede this amounted to a protected disclosure.
- In a conversation with Ms Tiruwa on 27 July 2020 when the claimant told her that none of the quarantine facilities for the warehouse had been prepared, staff and volunteers did not seem to have completed the necessary training, and were not implementing the respondent's new procedures, and Covid 19 needed to be taken seriously as it had a potential serious consequence for staff and public health, and the claimant himself suffered from COPD. (Disclosure two)
  The respondent did not concede this amounted to a protected disclosure.
- In a conversation with Ms Tiruwa on 28 July 2020 when the claimant said the situation in the warehouse remained unchanged and that new procedures had to be brought in to manage a serious risk to staff and public health. The claimant said he was particularly concerned that training had been ineffective or ignored in the case of a volunteer with special needs (JR) and that another volunteer (EH), had diabetes and other underlying health conditions that left him particularly vulnerable to Covid 19. (Disclosure three).
  The respondent did not concede this amounted to a protected disclosure.
- In a meeting with Ms Tiruwa on 29 July 2020 the claimant discussed with her proposed changes that he wished to make to the warehouse to safeguard the health and safety of others but was told it was impossible to institute changes in the absence of the warehouse manager. (Disclosure four).
  The respondent did not concede this amounted to a protected disclosure
- On 03 August 2020 the claimant told Ms Tiruwa, having requested her to accompany him to the warehouse, that the quarantine rules were not being followed and vulnerable volunteers were taking unnecessary risks with their health and safety and that of the public. (Disclosure five).
  The respondent did not concede this amounted to a protected disclosure.

7.Did the claimant disclose information?

8.Did he believe the disclosures of information were made in the public interest?

9.Was that belief reasonable?

10.Did he believe it tended to show that; -

- A person had failed, was failing, or was likely to fail to comply with any legal obligation namely The Health and Safety at Work Act.
- The health or safety of any individual had been, was being or was likely to be endangered.

11.Was that belief reasonable?

Health and safety

12.Did the claimant do anything coming within the definition in section 44 (1A) of the Employment Rights Act 1996, specifically

- Were there circumstances of danger he reasonably believed to be serious and imminent, namely a risk to staff and the public due to a lack of safe Covid 19 working practices?
- Could he reasonably have been expected to avert those circumstances?
- Did he leave his place of work and did he refuse to return?

Detriments.

13.Did the respondent do the following: -

- Fail to pay the claimant's salary from on or about 01 September to 17 November 2020?
  The respondent conceded that this was capable of amounting to a detriment, but was not a detriment in this particular case.
- Uphold the decision to dismiss the claimant's dismissal at appeal?
  The respondent conceded this was capable of amounting to a detriment but was not a detriment in this particular case.
- Offer to redeploy the claimant to another store?
  The respondent made no concession as to whether this was capable of amounting to a detriment.

14.By doing so, did they subject the claimant to a detriment?

15.If so, was it done on the grounds that he made a protected disclosure and/or for a prohibited health and safety reason contrary to section 44(1A) of the Employment Rights Act 1996?

Unfair dismissal.

16.Was the reason or principal reason for the claimant's dismissal a health and safety reason within the meaning of section 100 (1) (d) Employment Rights Act 1996?

17.The claimant clarified that the circumstances he reasonably believed to be serious and imminent were a lack of safe Covid 19 working practices by the respondent.

18.Was the reason or principal reason for the claimant's dismissal that the claimant had made a protected disclosure(s) pursuant to section 103A of the Employment Rights Act 1996?

19.It was agreed at the start of the hearing the tribunal would only address the issue of liability. Remedy, if necessary, would be dealt with on a separate date.

The evidence.

20.The tribunal heard from the claimant himself.

21.The claimant tended statements from two employees of the respondent, Mr N. Rahman and Mr Harris.

22.Neither were called to give evidence and the claimant was advised that, therefore, the weight the tribunal would place on their evidence would be less than from a witness who'd given oral evidence and been cross-examined.

23.For the respondent, the tribunal heard oral evidence from: –

Ms Mary Tiruwa.
Mr John Wendels.
Mr Robin Beaney.
Mr Paul Pritchard.

24.The tribunal also had before it an agreed bundle of documents numbering 756 pages.

25.On 07 December 2022 the respondent produced, voluntarily, following a request from the claimant, two bundles of additional training records, the first as regards the training of staff, which the tribunal marked as R1 and the second as regards the training of volunteers which the tribunal marked R 2.

26.A reference in this judgement to a number is a reference to a page in the main bundle, unless otherwise indicated.

27.The tribunal reminded the parties that it would only look at those documents it was specifically taken to in evidence.

Findings of fact.

28.The tribunal has not sought to resolve each and every dispute as to fact. It has only addressed those matters relevant to determine the issues agreed between the parties.

Background.

29.The respondent is a large national charity that funds research into cardiovascular disease.

30.As part of its fundraising, the respondent operates a network of approximately 700 shops.

31.The shops are broadly divided into two, traditional charity shops and home stores.

32.A home store concentrates upon large items of furniture and electrical appliances.

33.The claimant initially worked for the respondent at its Brixton shop as an unpaid volunteer. The Brixton store was a home store. By all accounts he was hard-working and well-regarded. The manager of that store was Ms Tiruwa.

34.The claimant was subsequently offered a salaried part-time role, working 14 hours per week as a warehouse assistant at Brixton and commenced employment on 13 December 2019. He was issued with written terms and conditions (119/135). Under the provisions of that document the claimant's place of work was stated to be Brixton, or such other place as the respondent should, on giving reasonable notice, determine.

35.Up to the onset of Covid 19 the claimant had no concerns as to the management of health and safety by Ms Tiruwa at the Brixton shop.

Structure.

36.The Brixton store has a mixture of both employed and volunteer staff.

37.Volunteers were in the majority and came from a wide range of backgrounds. A number had physical challenges, and at least two had other challenges, one a learning disability and the second, dyslexia.

38.The claimant reported to Ms Tiruwa.

39.Shop managers are paid a flat salary. Their pay and benefits were in no way linked to sales from their shop, although they were given sales targets.

40.The warehouse manager was Mr Marek Broniszewski who reported to Ms Tiruwa. Mr Broniszewski acted as deputy manager in Ms Tiruwa absence.

41.Above Ms Tiruwa was an area manager, Mr John Wendels. The Brixton shop was part of his territory. Amongst his responsibilities was visiting each shop in his locality approximately every 10 days to carry out an inspection to ensure the store was compliant with the respondent's procedures.

42.Mr Robin Beaney was also an area manager but did not have direct responsibility for Brixton.

43.An area manager managed between 6 to 8 stores.

44.Area managers reported to a regional manager, and the relevant regional manager for the purpose of this judgement was Mr Paul Prichard.

45.A regional manager managed five area managers.

The shop and warehouse.

46.It is necessary for the tribunal to describe the Brixton shop in a little more detail.

47.As well as having a shop frontage it also had limited warehousing space at the rear of the premises.

48.Given the size of the majority of stock, whilst some stock was brought in by donors, a large proportion was collected from a donor's home. The respondent also operated a service to deliver larger items of stock to purchasers. This collection and delivery service was subcontracted by the respondents.

Covid 19.

49.On or about Thursday, 19 March 2020 the respondent closed its shops due to the Covid 19 pandemic.

50.In late March 2020 the claimant received a letter from the NHS advising him to shield as he suffered from chronic obstructive pulmonary disease (COPD). The claimant was told to shield until 31 July 2020.

51.From 29 March 2020 the claimant was furloughed.

Training.

52.The claimant was well informed in respect of health and safety, having managed the health and safety issues of various projects in both Pakistan and Afghanistan.

53.Whilst furloughed he was provided by the respondent with electronic training on Covid 19 safe working, which consisted of videos and some electronic question and answer forms, by means to a platform known as Workday.

54.In cross examination, for the first time, the claimant contended that the training had been incomplete as he not been able to access all the information, using his mobile phone. When pressed he had difficulty in stating when he raised this with the respondent. The tribunal considered that if there had really been a failing in his personal health and safety Covid 19 training he would have referred to the same in contemporaneous documentation, his pleadings or his witness statement, especially given his background in health and safety.

55.The tribunal was not persuaded that the respondent had failed to take reasonable steps to train the claimant, prior to his return to the Brixton shop.

56.Ms Tiruwa was required by the respondent to carry out mandatory Covid 19 health and safety training, which took three days to complete.

57.The training material was voluminous (151/489). It appeared to the tribunal to be comprehensive.

58.It was, like the training for the claimant, delivered remotely on the Workday platform.

59.Employees were not allowed to return to work until having undertaken mandatory training on Workday.

60.Ms Tiruwa did not have access to each employee's Workday account so could not check that they had undertaken their training. She sought reassurance from employees that they had completed the training by means of a group WhatsApp.

61.At no stage were Ms Tiruwa or Mr Wendels told by the respondent's human resources department, who could monitor the staff training, that any member of staff had failed to undertake their mandatory Covid 19 induction.

62.Volunteers came from a wide range of backgrounds.

63.Volunteers did not have access to the Workday platform.

64.Their training was by means of accessing a video hub utilising a computer link in the Brixton store. There were significant difficulties, probably due to bandwidth, in the link working, which took time to resolve.

65.Training by video was not suitable or likely to be effective for all volunteers, given some had challenges in maintaining concentration or comprehension. Ms Tiruwa recognised this.

66.Given the two difficulties identified above, Ms Tiruwa trained each volunteer individually on their return to the Brixton's store and documented it. Ms Tiruwa took each volunteer on a walk-through of their work area, completed a support plan (501) which confirmed that they had completed reintroduction training and would adhere to all rules and regulations.

67.Documents were completed for both EH (17 July) and JR (25 July), two staff who the claimant alleged did not fully comply with the respondent's procedures on 03 August 2020.

68.On or about 15 August 2020**,** when it appears the bandwidth problem had been resolved, volunteers were required to sit in a room, one by one to watch the training video. This was to reinforce the oral training.

The warehouse.

69.Relevant to these proceedings was the system in respect of the receipt of goods, post Covid 19 that the respondent sought to operate at its Brixton store.

70.Those working in the warehouse were provided with PPE which included gloves and masks. Sanitation stations were available.

71.New stock was identified by means of a sticker and arrangements are made to ensure that it was then quarantined for 72 hours before being placed on the shop floor for sale. The quarantine period exceeded the then government advice of 48 hours.

72.This procedure required the creation of an isolation area within the warehouse.

73.Three separate bays were to be created. Newly receipted stock was to be duly marked and colour-coded and the plan was that it would spend 24 hours in bay one before being physically moved to bay two for a further 24 hours. Thereafter it was then moved to bay three, and after the expiration of a further 24-hours it was to be taken to the shop floor.

Relevant events up to 24 July 2020.

74.Prior to the store formally opening to the public a number of staff returned to work, one of whom was the claimant.

75.The claimant returned to work on 17 July 2020.

76.The tribunal found that the claimant returned to work before his shielding period had expired. His explanation was that he regarded his COPD symptoms as being mild and was bored at home. Thus the claimant had chosen to disregard government advice as regards his own health and safety and returned prior to the expiration of the recommended shielding.

77.On 24 July 2020 Mr Wendels carried out a store inspection at Brixton, focused on Covid 19 compliance, to ensure the shop was safe for reopening. He was satisfied with the steps Ms Tiruwa had taken to implement the respondent's policies and procedures and determined it was ready to be reopened.

78.Given that Brixton already had a considerable volume of stock, which had arrived pre-lockdown and so had been quarantined for an excess of 72 hours, Mr Wendels decided that no donations would be collected for several days following the formal reopening of the store. This was to allow space to be created in the warehouse.

79.During Mr Wendels visit on 24 July 2020, Ms Tiruwa asked Mr Wendels to speak to the claimant. The claimant explained he had concerns as to his health due to Covid19 and his COPD condition. The claimant was concerned he could contract Covid 19 from stock and suggested the provision of a hazmat suit. Mr Wendels explained that a hazmat suit was not required. He explained the sticker and quarantine system outlined above. The claimant expressed concern that he might have to move stock from one bay to another. Mr Wendels agreed, but explained that the protective equipment provided would ensure his safety. Mr Wendels offered the claimant the opportunity to work on the shop floor rather than in the warehouse if he was still worried, but he declined that offer. The claimant agreed that the respondent's procedures would reduce risks to an acceptable and manageable level.

80.Both Mr Wendels and Ms Tiruwa considered the concern was resolved.

The store reopening and events up to 03 August 2020.

81.The respondents Brixton shop reopened to the public on 25 July 2020.

82.Given uncertainty as regards footfall the sales target was suspended for a period of six weeks.

83.On or about 27 July 2020 the claimant met Ms Tiruwa and expressed concern as regards the bays. Although there was hazard tape on the ground with handwritten signs identifying each bay, he wanted hazard tape on the walls and typed signs. Ms Tiruwa agreed to the claimant suggestions. Whilst the evidence is finally balanced the tribunal was not persuaded that, on this occasion, the claimant made a specific reference to the adequacy of training of volunteers. Ms Tiruwa denied it in her statement and was not challenged on her account.

84.The tribunal found that, contrary to the claimant's assertion, no donations were accepted up to and including 27 July 2020 as was evidenced by the log (565). What the log did show was that a number of items that had been sold were sent out. However, this was stock that had been in the warehouse prior to lockdown and thus there could not have been an infection risk. The claimant had no reasonable belief that donations were received after lockdown, up to 27 July 2020 or that non quarantined stock was being sold, at this stage.

85.The first delivery of donations, post lockdown to the respondents Brixton shop took place on 28 July 2020 (565).

86.Although goods received started from 28 July 2020 collections were scaled down to allow stock to be cleared from the warehouse.

87.Due to a family hospitalisation, Mr Broniszewski left work early on 28 July 2020 and took time off, followed by compassionate leave.

88.On the same day, there was a short conversation between the claimant and Ms Tiruwa. The tribunal accepted he expressed concerns as to whether two volunteers JR and EH understood the Covid 19 training, as they appeared to be not complying, and he had witnessed it. Whilst Ms Tiruwa disputed this, on this point, the tribunal preferred the claimant's evidence given subsequent events demonstrated further non-compliance.

89.On 29 July 2020 the claimant met Ms Tiruwa and expressed concerns about quarantining of stock. Ms Tiruwa prepared a note of that discussion (569/571) which was not challenged.

90.Balancing both the oral and written evidence, the tribunal concluded the claimant did express concerns that Mr Broniszewski was absent.

91.The claimant expressed concern as to the bays.

92.Both parties then visited the warehouse and a plan was agreed. The claimant was also assured that a large amount of rubbish (including glass) which needed to be removed, would be.

93.There was a discussion and agreement that the stickers that were placed on donations could be made clearer to make identification easier in terms of managing the quarantine arrangement. Ms Tiruwa agreed to discuss these amended arrangements with both the delivery firm owner and the rest of the warehouse staff.

94.The claimant was told that the adjustments would be undertaken on the 30 and 31 of July, two days when he was not working.

95.Given the work required, and the absence of her warehouse manager, Ms Tiruwa spoke to Mr Wendels who agreed to draft in additional support. Pausing at this juncture the tribunal found this was a demonstration that Mr Tiruwa had taken the claimant's suggestions and concerns seriously.

96.Three store manager designates, Simon Markety, Cristina IIco, and Abdul Ahmed attended the Brixton shop to tidy the warehouse on 30 July 2020.

97.Mr Markey and Mr Abdul also attended on the following day, 31 July 2020.

98.By 01 August 2020 the 3 bays were clearly marked with hazard tape, both on the floor and on the walls and typed signs had replaced the handwritten signs. Rubbish had also been removed from the warehouse to create additional space.

99.On Monday 03 August 2020 the claimant returned to work and considered the agreed systems were not being followed. He saw a number of concerns.

100.A recent delivery of a day one donation should have been put in the day one bay but had not been so allocated. The problem apparently was the respondent was short staffed and goods in the bay one bay had not been moved to bay two and thus the new stock that had been delivered had simply been left on the floor. Goods were not being properly quarantined in accordance with the three bay system.

101.A volunteer was moving a newly delivered item wearing a mask but not gloves, although he had been trained by Ms Tiruwa to use gloves.

102.There was no clarity as to whether donations had been sprayed.

103.The claimant was concerned that there was no supervision of volunteers in the warehouse. This was because the warehouse manager remained absent due to compassionate leave.

104.The claimant contacted Ms Tiruwa and she visited the warehouse. Ms Tiruwa accepted that the warehouse was not functioning, in her words *"as it should have been".* She accepted that the newly received goods should have been put in bay one.

105.The claimant left work as he considered there was a health and safety risk and emailed Ms Tiruwa, copied to Mr Wendels (595) expressing his concerns as to the fact that agreed procedures were not being followed, volunteers were not always wearing all their PPE, donations were not being sprayed and the quarantine bays were not being properly used.

106.The claimant asked for the matter to be resolved quickly as it was a matter of public health.

107.This was the last date the claimant attended the respondent's Brixton shop. He was never to return.

108.The respondent continued to pay the claimant for his booked shifts throughout the month of August, even though he was not attending work. The respondent only

stopped making payment to the claimant from about 01 September 2020**,** for reasons that will become clear, later in the tribunal's judgement.

Subsequent events.

109.Mr Wendels contacted the claimant by telephone on 05 August 2022 to discuss his concerns of events on 03 August 2020.

110.It was agreed that a meeting was required, and that the claimant's complaint fell into two categories, firstly the risk from non-quarantined stock and secondly that he believed Ms Tiruwa was taking no adequate steps to protect his health and safety.

111.Although the claimant had previously expressed a fear of catching Covid 19, even when wearing gloves, he suggested he met Mr Wendels at a local public house. Mr Wendels declined because he considered that amounted to a health risk and it was agreed the parties would discuss matters on the telephone on 07 August 2020, further details of which are set out below.

112.Mr Wendels arranged for the new stock at Brixton to be transported to Kingston for quarantining, as there was a possibility that quarantined and non-quarantined stock had been mixed up on 03 August 2020.

113.Mr Wendels spoke to the claimant by telephone on 07 August 2020.The tribunal is satisfied that the note on pages 611/612 is a reasonable summary of the principal matters discussed.

114.The claimant raised serious allegations that Ms Tiruwa had deliberately ignored health and safety procedures and despite agreeing a way forward with her on 29 July 2020, when he came into work on 03 August 2020, none had been actioned. Ms Tiruwa, the claimant contended, had told him that she would move stock without wearing gloves and that her principal concern was the store's takings. He alleged that Ms Tiruwa said she had no intention of following the new health and safety regulations introduced by the respondent.

115.The tribunal did not accept these assertions . The work undertaken by Mr Tiruwa to ensure staff were appropriately trained, coupled with her realisation that video training was not appropriate for at least some of the volunteers to be effective, the documentation of training, her willingness to listen to the proposals put forward by the claimant, and the fact that her salary was not dependent upon sales and she had no sales targets initially, all pointed away from these allegations being credible.

116.The claimant also mentioned that there was no supervision in the warehouse and volunteers were not fully compliant with wearing PPE.

117.Mr Wendels asked the claimant if he would be prepared to work on the sales floor and not move stock, given his concerns as to contamination. He refused the offer.

118.Mr Wendels explored with him stock being quarantined elsewhere and the claimant said if that could be done *"I would come back"*

119.The claimant accepted in cross examination that Mr Wendels was genuinely seeking to facilitate his return to work, although he considered it was because the respondent wanted to meet financial targets and to paper over what he perceived to be the issues. Pausing at this juncture the fact the respondent was seeking to address the claimants concerns to affect a return to work was inconsistent with the claim in his claim form that he was automatically unfairly dismissed for leaving work on 03 August 2020.

120.On 09 August 2020 Mr Wendels instituted a new system whereby donations to Brixton were collected from donors but sent directly to the Kingston store where they were quarantined Only once stock had been quarantined was it then be delivered to the Brixton store for sale, and then on the basis of what Ms Tiruwa wanted in the shop. This was to prevent a surfeit of stock at Brixton.

121.On 11 August 2020 Mr Wendels contacted the claimant (617/618) to confirm that donations were now sent directly to Kingston where quarantine arrangements were undertaken. He explained that he was looking into the claimant's concerns as regards Ms Tiruwa. He considered he had addressed the principal concerns of the claimant and invited the claimant to return to work, given the representation made by the claimant on 07 August 2020 that he would return, if the quarantining issue was addressed.

122.On 12 August 2020 the claimant replied (619)

123.He raised new specific queries namely

- Were volunteers now adequately trained and did they understand the new rules?
- Was the warehouse now being managed by the warehouse manager?
- Had the scrap glass in the warehouse been removed?

124.The claimant said that if he received a positive response that might convince him that problems were being taken seriously.

125.He also stated his concerns as regards Ms Tiruwa related to her *"systematic, wilful and reckless flouting of health and safety rules"*

126.He considered the respondent was unwilling or unable to recognise the depth of the problem and was concerned the problem was institutional and national rather than local and that he could not consider the warehouse or the shop as safe places of work.

127.By 14 August 2020 an unannounced audit by the respondent's internal auditing team was arranged for Brixton (621/623). The purpose of the visit was to evaluate the implementation of the respondent's Covid 19 operating processes and precautions given the claimant considered Ms Tiruwa was engaged in a "*systematic wilful and reckless flouting of health and safety rules" should this be said using the quote again?*

128.The audit was carried out by Mr Harris. Ms Tiruwa was not present as it was her day off and Mr Markey was providing cover, but it was not his shop so he was not familiar with the steps she had taken in respect of training volunteers.

129.Mr Harris spoke to members of staff and inspected the premises.

130.Those spoken to by Mr Harris considered they were safe and Mr Harris was of the opinion that the measures put in place were well understood.

131.Mr Harris checked the online systems and established that all employees had completed the online Covid 19 training. Surprisingly, as Mr Harris was a witness for the claimant, the claimant asserted that Mr Harris was wrong on this point. In fact, in cross examination the claimant went further and said the audit by Mr Harris was *"demonstratively not fit for purpose".* He also described it as a *"sham"*. Other than saying he had heard that health and safety was not being complied with from colleagues who remained working for the respondent, he did not provide any reliable evidence to justify his assertion.

132.The tribunal considered that as Mr Harris had access to the records his audit report could be relied upon in this regard. His opinion also accorded with the documentation produced to the tribunal in R1.

133.Mr Markey told Mr Harris that the volunteers had not viewed the training video. Mr Harris therefore found that volunteers had not completed the relevant training. On this latter conclusion the tribunal considered Mr Harris was wrong although, understandably so, as he did not have access to any permanent managerial staff at the Brixton shop to raise the issue. Had he done so he would have found that volunteers had been trained, albeit verbally, and it had been documented. The records were not accessible to Mr Harris as they were locked away. Mr Markey, as it was not his shop, was unaware of the system that Ms Tiruwa had utilised.

134.On 17 August 2020 Mr Wendels emailed the claimant (625/626) to address the new issues raised by the claimant in his email of the 12 August 2020.

135.He confirmed the warehouse manager had returned following compassionate leave and, on his day off, cover would be provided by Mr Markey. In other words, there would always be supervision available in the warehouse.

136.He stated that records showed that employees had been appropriately trained via e-learning and that any health and safety failings were taken seriously and could potentially lead to disciplinary action.

137.Risk assessments had been carried out in respect of volunteers. Digressing from Mr Wendels's response, on 13 August 2020 Mr Wendels visited Brixton and became aware that Mr Markey had sent a volunteer home when they said they had not reviewed the training video. As a result, Mr Wendels discussed the matter with Ms Tiruwa and was informed of the problems with the videos and was satisfied adequate training to volunteers had already been provided.

138.Returning to Mr Wendels reply he told the claimant that on his recent visit to Brixton he found no evidence of any scrap glass.

139.In order to satisfy himself of the claimant's concern that there was an institutional problem he had checked with all his store managers to ensure they understood the new Covid 19 procedures and were satisfied that they did.

140.He explained the quarantining of goods at Kingston was not a temporary solution, but a new way of working

141.He could not discuss details as regards the investigation into Ms Tiruwa due to the need to respect employee confidentiality.

142.He informed the claimant of the audit and enclosed a copy of Mr Harris's report.

143.He considered he had now addressed all outstanding issues and pressed the claimant as to when he would return to work.

144.The claimant in cross examination agreed that Mr Wendels was not trying to push him out but did not accept his concerns had been taken seriously. The tribunal disagreed with the claimant's latter comment. It concluded that Mr Wendels had taken the concerns seriously and had undertaken a number of steps, some quite significant, to address the claimant's concerns.

145.On 18 August 2020 the claimant responded (629), and disputed Mr Harris's report. He also said that there was glass in the warehouse despite the fact he not been present since 03 August.

146.The claimant now described his *"fundamental concern"* as being that Ms Tiruwa had "*admitted that she has deliberately, systematically and persistently exposed me and the public to unnecessary risks in pursuit of financial goals, and that she intended to continue doing so, demonstrating a complete failure of health and safety management and culture"*

147.The claimant was not prepared to consider Brixton a safe workplace and wanted to know what action had been taken against Ms Tiruwa

148.The tribunal noted the claimant had moved from specific allegations, which could be investigated, towards more general assertions in respect of health and safety. The thrust of his concerns now centred on a lack of trust in his manager.

149.On 21 August 2020 Mr Wendels offered to redeploy the claimant to the respondent's Old Kent Road store, working under a different manager, (631) having considered he had adequately addressed the claimant's concerns.

150.The tribunal would stress this was an option being put forward to the claimant to facilitate a return to work so that he was not working for a manager in whom he had no trust and confidence, whilst his concern was being investigated. The claimant declined, because he would need to travel by public transport, which would entail additional health risks. However, the tribunal found that the claimant had travelled to Eastbourne by train in August to collect an item secured at auction. The tribunal considered the claimant's reason for refusing temporary relocation lacked credibility.

151.Mr Wendels told the claimant that whilst he accepted that some volunteers had not viewed the training videos this had now been rectified. Thus, the claimant was reassured that the issue raised by Mr Harris had been addressed.

152.The claimant was told that he was expected to return to work for his next shift day on 29 August 2020 and that if he did not return the situation would be managed which would include a probationary review meeting.

153.The claimant responded by email dated 25 August 2020 (633/634). He complained the respondent did not accept there was a fundamental problem or the seriousness of his concerns and that he could not consider Brixton to be a safe or healthy place to work and redeployment was not an acceptable option.

154.The claimant in evidence stated he would not have returned under any circumstances as he did not believe anything Mr Wendels had said. The tribunal did not consider that to be a reasonable position to take, given the concrete steps Mr Wendell's had already taken seek to address the concerns raised by the claimant.

155.Thus, whatever Mr Wendels had offered, it would not have persuaded the claimant to return to work. This is relevant as it gives an insight into the claimant's belief and whether it was reasonable as regards his refusal to return to work and whether serious and imminent danger still persisted.

156.Mr Wendels wrote to the claimant on 26 August 2020 (639) and asked for specifics of what was the *"fundamental concern was a failure of health and safety management"*. The fact that Mr Wendels was pursuing the point was a factor that persuaded the tribunal that he was not seeking, as the claimant asserted to fob him off. If there was some specific health and safety impediment to the claimant's return to work, he remained willing to address it.

157.The claimant responded by email on 27 August 2020 (641) but did not provide specifics other than to say that as he not been informed how his concerns regarding Ms Tiruwa were progressing and that demonstrated a lack of transparency and that he believed that offering to redeploy him into another store was punishment for whistleblowing.

158.By the end of August Mr Wendels had completed his investigations. In fact, he started to look at the concerns the claimant had raised in his email of 03 August 2020 even before the claimant gave further details of his formal complaint on 07 August 2020.

159.Amongst the steps he took were that he interviewed Ms Tiruwa twice in August 2020.The tribunal had access to the notes of those meetings. He also spoke to other members of staff. Whilst his findings were not identical to Ms Tiruwa's perception they were broadly similar. It was accepted that problems arose on 03 August when the warehouse manager was absent on compassionate leave, a new van crew dropped off stock early and although volunteers had been correctly trained, they were not putting stock in the correct areas. Ms Tiruwa denied that she had ever said she would move stock without wearing gloves and indeed she would avoid heavy items as she was only 4 foot 11 and it wasn't part of the job. She accepted that following the return to work there were occasions when she observed volunteers forgetting to wear full PPE and she had to remind them of their obligations and to wash their hands. Interjecting here the tribunal applied its own industrial knowledge and considered that post COVID 19 life was so different that some people

sometimes did, unwittingly, forget to follow the new procedures through force of habit and not necessarily due to wilfulness or lack of training.

160.Mr Wendels concluded that disciplinary action was not merited.

161.The tribunal found that the investigation was reasonable in the circumstances, and in any event, it was not suggested by the claimant that the conduct of the investigation amounted to a detriment.

162.On 01 September 2020 Mr Wendels responded (645) to the claimant's email of 27 August 2020 setting out the measures he believed were being taken and repeating that investigations involving Ms Tiruwa were confidential and relocation to the Old Kent Road was only temporary. The claimant was told that if he failed to return to Brixton or Old Kent Road when next rostered he would be regarded as being on unpaid leave.

163.On 04 September 2020 claimant was invited to a meeting (649/650) with Mr Beaney, area manager who had become involved at the request of his line manager Mr Paul Prichard.

164.Prior to drafting the invite letter Mr Beaney had read the various correspondence.

165.He noted the discussions between Mr Wendels and Ms Tiruwa.

166.Mr Beaney wanted to meet the claimant to better understand why he would not return to work and then to carry out his own enquiries.

167.The meeting was conducted by phone on 10 September 2020. Notes were taken by a member of HR who was present (653/657)

168.It is appropriate to record that the claimant initially accepted in cross examination that at this time he believed all training, for employees and volunteers had been complied with. Later in his evidence he said he did not, because the report of the auditor Mr Harris was a sham and nothing had happened to Ms Tiruwa.

169.On the first point, the alleged sham, that cannot be right because Mr Wendels had double-checked the issue of the volunteers training and had reassured the claimant that it had been completed.

170.Nor could the claimant have reasonably believed nothing had happened to Ms Tiruwa. He was told repeatedly there was an investigation, as indeed there was, but due to confidentiality the outcome could not be disclosed to him.

171.The tribunal was satisfied that Mr Beaney approached the meeting on the basis of seeing what he could do to get the claimant back to work, only if the claimant would not come back to work would termination be a consideration.

172.Mr Beaney described the steps that already been taken to seek to address the claimant's concerns. The claimant's case was that he didn't trust Ms Tiruwa. Mr Beaney assured him the matter had been followed up and area managers would continue to monitor the situation by means of inspections.

173.Mr Beaney offered the claimant the opportunity of an inspection at the Brixton shop so he could reassure himself that changes had been made and that there was a safe system of work in operation. The claimant declined the offer on the basis he considered that nothing had been done. The claimant had no direct evidence to support that contention.

174.Before the tribunal, the claimant stated he relied upon comments made to him by work colleagues after 03 August 2020 to believe the situation had not changed.

175.Although not called, he drew to the attention of the tribunal the statement of Mr Rahman who suggested even after the claimant left there were still quarantining issues with donations. However, the claimant knew that had been resolved, at the latest by 08 August when all donations had been diverted to Kingston for quarantining so Mr Rahman's account could not be relied upon after that date.

176.The claimant maintained the whole of the respondent was in denial as regards health and safety.

177.The meeting concluded on the basis that Mr Beaney would review matters and carry out any further investigations he considered necessary.

178.On the same day following the meeting with the claimant, unannounced, Mr Beaney visited the Brixton store. He was satisfied from his own inspection that the respondent's policies and procedures in respect of Covid 19 were being followed.

179.On 22 September 2020 the claimant was informed that he was being dismissed for some other substantial reason as in the respondents view all options to facilitate a return to work had been exhausted and the claimant was refusing to attend work. (659 to 661). At the time he reached that decision Mr Beaney's evidence was he could not recall being aware of the conversation between the claimant and Mr Wendels on 24 July 2020 (disclosure one) or the discussions between the claimant and Ms Tiruwa on the 27 and 28 of July (disclosures two and three). Having regard to the documentation Mr Beaney had access to the tribunal considered that was plausible. It was noted Mr Beaney was not challenged on the issue of his knowledge in cross examination.

180.He was however aware of the discussion on 29 July 2020 (disclosure four) as he read Ms Tirana's note and was also aware of what took place on 03 August 2020 (disclosure five)

181.Mr Beaney explained why he considered the respondent had taken all reasonable steps to address the claimant's health and safety concerns in the dismissal letter. The tribunal was satisfied this set out the genuine belief that he held at the time he made the decision.

182.He told the claimant he personally visited Brixton 11 September 2020 and found no broken glass and had been informed it had been removed some four weeks previously. He took photographs.

183.He told the claimant he had checked the stock quarantining arrangements and cleaning schedules and found they were compliant. The warehouse was clean and

organised. Protocols were being followed such as appropriate sanitation stations and shopfloor signage was in place. There were limits on the number of customers. Protective screens had been set up.

184.He told the claimant he had doublechecked the position of the training of volunteers with Mr Wendels on 11 September 2020 who confirmed it had been completed. He knew from Mr Wendels all stock was now quarantined at Kingston from 07 August 2020. It was also apparent to him this was the situation from his own inspection.

185.He noted Mr Harris's audit, and save for an issue as regards volunteer training records, no irregularities were found

186.Mr Beaney made reference to the fact the claimant had been offered, on a temporary basis, redeployment to Old Kent Road whilst his concerns as regards Ms Tiruwa were investigated but he had declined.

187.He informed the claimant that the health and safety standards adopted by the respondent had been benchmarked against the Charity Retail Association. The tribunal would observe that in some respects they exceeded government guidelines, for example government guidelines on quarantining was 48 hours whereas the respondent was operating the 72 hour timeframe.

188.He concluded that he did not regard there were systemic health and safety failures and/or a lack of an appropriate culture.

189.The tribunal found that Mr Beaney genuinely believed there was no alternative to dismissal. He had done all that he could meaningfully do to reassure the claimant, particularly as he would not even visit the Brixton store, and the situation could not continue indefinitely.

190.The dismissal letter gave the claimant a right of appeal.

191.On 27 September 2020 the claimant appealed against his dismissal (663/664). He contended his dismissal was because he raised health and safety concerns. He made no reference to the reason or principal reason for his dismissal being any form of protected disclosure.

192.The claimant contended in his appeal letter, although it was not an argument deployed with Mr Wendels or Mr Beaney, that it was reasonable for him to refuse to return to work because he was clinically vulnerable and suffered from COPD. This was an entirely new matter and not a matter that was pursued before the tribunal. The tribunal therefore discounted the claim.

193.He considered there were fundamental health and safety failings going beyond the events of 03 August 2020; that Ms Tiruwa had demonstrated *"wilful negligence"*; he had no trust or confidence in her or her health and safety management; and it was not unreasonable for him to refuse to return to work.

194.He did say he would be prepared to return if Ms Tiruwa was individually trained on health and safety management with particular reference to Covid 19; her performance was monitored; that he was offered regular meetings with HR to

discuss any particular concerns; and volunteers were individually assessed for their suitability for working under the new conditions.

195.The claimant's appeal took place on Thursday 08 October 2020. The appeal was conducted by Mr Paul Prichard, regional manager. Notes were taken of the meeting (679/684)

196.Part of the hearing centred on the claimant wanting to know what was happening as regards Ms Tiruwa. Mr Prichard explained that his concerns were being addressed, but matters were confidential although he did say that a formal process had been followed with her. The claimant remained unsatisfied because Ms Tiruwa was still in post. He considered that as she was allowed to continue working there was something wrong with the respondent's health and safety culture

197.The tribunal is satisfied that Mr Prichard conducted a reasonably thorough investigation, looked at relevant documentation and also spoke to Mr Wendels and Mr Beaney. He had before him notes of meetings that had already been taken place with Ms Tiruwa.

198.Mr Prichard accepted there was a dispute as to whether quarantined or non-quarantined stock had been mixed on 03 August 2020 but found that as Mr Wendels had arranged for the entire warehouse to be emptied and quarantined that concern was addressed.

199.He did not find that Ms Tiruwa had deliberately disregarded health and safety but found that it was feasible stock had been put in the wrong place on 03 August 2020 but there were mitigating circumstances.

200.He was satisfied that Ms Tiruwa had taken adequate steps to train volunteers. Whilst it was true that a store manager designate had sent some volunteers home when they said they'd not watched training videos, he was unaware that personal training had been undertaken by Ms Tiruwa.

201.He noted that the claimant had been offered the opportunity to visit Brixton himself to see the improvements but declined.

202.Mr Prichard delayed giving a decision. He spent time investigating which include reviewing photographs of the premises taken by managers, the paperwork regarding return to work procedures for volunteers, the internal audit report, statements taken from various members of staff at the Brixton's store, the discussions between Mr Wendels and Ms Tiruwa, the notes between the claimant and Ms Tiruwa dated 29 July and various other emails and notes from 03 August 2020.

203.When he reached his decision he was only aware of the assertions the claimant made which constituted disclosures four and five

204.On 17 November 2020 the claimant was notified by Mr Prichard (685/688) that his appeal was rejected

205.He found that Ms Tiruwa did not require further training and the incident on 03 August 2020 had been addressed

206.There was no evidence to show a fundamental disregard of health and safety by Ms Tiruwa.

207.Mr Prichard's own investigation, and those of Mr Beaney, Mr Wendels and internal audit did not support the conclusion of fundamental health and safety failings.

208.There was no need for regular one-to-one meetings with the respondent's HR department as there were established procedures for raising concerns

209.There was adequate evidence that volunteers had been trained, evidence by paperwork signed off by each volunteer

210.Attempts had been made to address the claimant's concerns including the retail internal audit team report, the meeting with Mr Beaney on 10 September 2020, Mr Beaney's invitation to the claimant to visit the store and Mr Beaney's own store visit on 11 September to check upon matters.

Discussion and conclusions.

Health and safety.

211.The tribunal started with the health and safety claims because that was where the parties spent almost all of their time in examination in chief, cross examination and submissions.

Automatic unfair dismissal.

212.Section 100 ERA 96 provides

> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that….*
>
> *(a)…*
> *(b)…*
> *(c)…*
> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work…"*

213.Under subparagraph (d) the tribunal is required to first determine whether, as a matter of fact there were circumstances of danger which the employee reasonably believed to be serious and imminent and then that the employee took appropriate steps to protect himself or others from that danger.

214.In looking at the claimant's belief the tribunal is required to focus upon the claimant's mind and determine whether he had reasonable grounds for holding the belief. A claimant might, for example, reasonably believe that his employer was acting in breach of a legislative provision designed to protect health and safety, or possibly government guidelines, even though there was in fact no such breach. **Joao -v- Jury's Hotel Management UK Ltd UKEAT/0210/11/SM.**

215.There were two separate and distinct elements to the claimant's complaint firstly whether he was automatically unfairly dismissed for having left his workplace and secondly if the danger persisted, being dismissed for his refusal to return to work.

216.In both cases, as the claimant did not have two years continuous service the burden of proof fell upon the claimant to show the reason or principal reason for his dismissal was leaving his workplace and/or refusing to return in the circumstances described by the Act.

217.The tribunal will deal with each matter in turn.

218.There was no dispute the claimant left his place of work on 03 August 2020.

219.The tribunal considered it important to remember what was known,, and not known in respect of Covid 19 at that time. It was a virus that could potentially kill. There was no effective vaccine in circulation to the general public. The situation had been deemed by the government to be so serious the country had been locked down for a number of months with grave restrictions on individual liberties not known in peacetime. Government advice was that Covid 19 could remain transmittable on hard surfaces for up to 48 hours.

220.On 03 August 2020 the tribunal is satisfied that a safe system for the quarantining of donations, whilst having been devised, was not effectively functioning on that day. It is also satisfied that the claimant saw two volunteers in the warehouse who were not wearing their full PPE.

221.When Ms Tiruwa was called to the warehouse by the claimant even she accepted the procedures were *"not as they should have been".*

222.The fact the government had set out in its guidelines the need for quarantining and that the claimant observed the respondent's system was not working effectively was sufficient for him to reasonably believe that there was a serious and imminent danger. Covid 19 was believed to be highly contagious. The respondent's own training material emphasised the significant dangers that Covid 19 presented and its transferability.

223.The danger of contracting the virus was not just to the claimant but also fellow workers and the public if stock was insufficiently quarantined.

224.The tribunal is supported in its judgement that the claimant reasonably believed there was a situation of serious and imminent danger by the fact the claimant walked off-site within 15 minutes of seeing the situation, having first notified Ms Tiruwa of his concerns. His email (595) written the same day, to both Ms Tiruwa and Mr Wendels is wholly consistent with what he says was his belief.

225.The fact that there was a confluence of factors, some beyond the respondent's control, that led to the situation claimant faced on 03 August 2020 is no answer. There is no requirement under the legislation that the employer has to have deliberately created the serious and imminent danger.

226.The claimant did take appropriate steps to try protecting himself and others from the danger by leaving the source of the danger and notifying the respondents management. He himself could not avert the danger.

227.However, the tribunal is not satisfied the claimant has discharged the burden of proof to show that the reason or principal reason for dismissal was that he left his place of work.

228.The tribunal can deal with the point briefly given the candid concession made by the claimant in cross examination. He accepted that his employment was not terminated because he left work on 03 August 2020, or the manner in which he made allegations as regards Ms Tiruwa. He accepted that he was dismissed because he failed to return to work, but contended he was entitled to refuse to return because the situation was unsafe.

229.Even without that concession the tribunal would have found for the respondent on this point, given the subsequent actions of the respondent were consistent in seeking to address the claimant's concerns and to get him back to work. The tribunal will summarise the principal steps the respondent took to facilitate a return, later in its judgement. The tribunal also noted that the respondent continued to pay the claimant, even though he was not reporting to work, until the start of September 2020 which was inconsistent with a desire to terminate his employment for walking out on 03 August 2020.

230.Finally, the correspondence was wholly consistent with the respondent terminating his employment because the claimant refused to return to work and not that he left work on 03 August 2020. The fact he left work on 03 August 2020 did not significantly feature in the respondent's contemporaneous documents for termination.

231.Turning to the second limb of the claimant's claim, there is no dispute that the claimant refused to return to his place of work. The key issue is whether he reasonably believed that the serious and imminent danger he had identified still existed.

232.The tribunal is not so satisfied.

233.Firstly, the respondent arranged for the potentially contaminated Brixton stock to be moved elsewhere, and told the claimant of this, and offered, on 07 August, to put the claimant on the shop floor at Brixton where he would not be handling stock.

234.Secondly Mr Wendels devised a system whereby no donations would be received at Brixton, so the question of the adequacy of the quarantining at Brixton did not arise. The tribunal observed that this initially was the claimant's main concern as he had indicated if it was addressed, he would return to work.

235.Thirdly the Brixton shop was independently audited and that audit shared with the claimant. Whilst the auditor did raise the issue of training of volunteers the claimant was assured in writing that following further enquiries they had been properly trained. Mr Wendels made enquiries and there was no reason for the

claimant not to believe him given he had already addressed the quarantining issue. Mr Beaney also made subsequent checks.

236.Fourthly the claimant was offered, on a temporary basis the opportunity to work at Old Kent Road which the respondent was entitled to do in accordance with the claimant's contract and the claimant had raised no health and safety concerns in respect of that venue.

237.Fifthly and significantly the claimant refused Mr Beaney's invitation to revisit Brixton so he could see for himself the changes that have been claimed had been made.

238.Sixthly every time the claimant raised a specific impediment to his return, for example a pile of broken glass, this was addressed.

239.The claimant based his belief that the danger persisted on what he said were comments from people who remained at Brixton, and he made specific reference to Mr Rahman. In his statement, Mr Rahman referred to new donations at Brixton being stored in an unsafe manner. As the tribunal has already pointed out his statement cannot be right, as of September 2020 there was no quarantining whatsoever at the Brixton shop because donations were not being directly received. In any event the claimant could have satisfied himself personally as to the situation given the offer made by Mr Beaney of an inspection. The claimant's belief was not, therefore, reasonable.

240.The claimant had decided that he could no longer trust Ms Tiruwa in relation to health and safety at the Brixton shop. It is true that the claimant was never given a specific outcome as to what action had been taken against Ms Tiruwa. However, the tribunal did not consider, in these particular factual circumstances, that the claimant could reasonably believe that serious and imminent danger persisted given the information he had and his past relationship with Ms Tiruwa. Pre-Covid he had worked under Ms Tiruwa, who was responsible for health and safety without any concerns. Whilst the situation on 03 August was unacceptable the claimant knew that neither Mr Wendels nor Mr Beaney blindly accepted Ms Tiruwa's explanation. A reasonable investigation was carried out by Mr Wendels (and a considerable amount of time spent by the tribunal looking at training records which were supportive of Ms Tiruwa's explanation) and Mr Beaney himself took steps to reassure himself both that the specifics of the claimant's concerns and in general assertion as regards Ms Tiruwa were not well founded.

241.The reality was the claimant would not return to work for the respondent, either at Brixton or Old Kent Road.

242.At the later premises he had no health and safety concerns. For reasons already outlined the tribunal was not impressed by the claimant's concern about using public transport to the Old Kent Road store justified refusal. The respondent had a contractual entitlement to require the claimant to work at Old Kent Road and was not exercising that power capriciously.

243.The claimant accepted that both Mr Wendels and Mr Beaney were seeking to try and persuade him to return to work. This was not a case of an employer seeking to dismiss because of health and safety concerns.

244.By the date of dismissal all the specific concerns of the claimant had been addressed and all that was left was the claimant's perception in respect of the management of Ms Tiruwa.

245.The claimant was dismissed for refusing to return to work and although the claimant may have believed in his own mind that the danger persisted, he did not have any reasonable grounds to sustain that position.

246.It follows therefore the claimant has not demonstrated that his dismissal was automatically unfair under the second limb of section 100 (1) (d) ERA 96

Detriment.

247.Section 44 (1) (A) ERA 96 provides: –

> *"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act by his or her employer done on the ground that-*
>
> *(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work…"*

248.Thus section 44 is in almost identical terms to section 100 (1) (d).

249.However, there are two important qualifications to add.

250.Firstly, the claimant must establish a detriment or detriments.

251.The test for detriment is whether a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to 'detriment', see **Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.**

252.Secondly the position as regards causation and the burden of proof is different from a complaint of automatic unfair dismissal.

253.Section 48 (2) ERA 96 makes it clear that it is "*for the employer to show the ground on which any act, or deliberate failure to act, was done"* The correct test therefore is whether the claimant leaving his workplace and/or of failing to return materially influenced (in the sense of being more than a trivial influence) the respondent's treatment of the claimant.

254.Once the respondent satisfies the tribunal it acted for a particular reason, that discharges the burden of showing that the prescribed reason played no part in it. It is only if the tribunal considers that the reason given was false or the tribunal was

given something less than the whole story that it was legitimate to infer the prohibited conduct.

255.The case of **NHS Manchester -v Fecitt Court of Appeal 2012 ICR 372,** whilst one on protected disclosures is relevant.

256.The tribunal began by examining whether the claimant was subject to any of the acts or omissions which he relied upon and then whether they amounted to detriments.

257.The tribunal looked at each matter in turn.

258.The tribunal is satisfied that the respondent failed to pay the claimant his salary from 01 September to 17 November 2020 and that could, in law, amount to a detriment.

259.However, the respondent has demonstrated it was not on the ground that the claimant left work on 03 August 2020 or failed to return whilst the danger persisted.

260.The claimant was paid by the respondent from 03 August until 01 September 2020 even though he was not reporting to work. The fact that he had left work on 03 August had nothing whatsoever to do with the subsequent failure to make payment to him.

261.Indeed, as the tribunal has outlined in its findings of fact the respondent was keen to try and facilitate a return to work by the claimant.

262.Payment was stopped from 01 September to 17 November 2020. From 1 September until termination the respondent was entitled to refuse to pay the claimant because he was not prepared to attend work. He had no reason, at all, to believe there was any existing serious and imminent danger at the Old Kent Road store and no reasonable reason at that stage, at Brixton.

263.The respondent did not pay the claimant from dismissal until the outcome of his appeal because he was no longer an employee and it had no contractual obligation to do so. This had nothing whatsoever with the claimant leaving work on 03 August 2020 or his failure to return.

264.The tribunal is not satisfied that offering to redeploy the claimant to the Old Kent Road branch can amount to a detriment in the particular circumstances of this case. Firstly, the respondent was entitled as a matter of contract law to move the claimant but more significantly the proposal was to facilitate a return to work by the claimant to an environment where he had raised no concerns in respect of health and safety. When the claimant refused, no action is taken, he was simply told he had to return to his own branch.

265.The third detriment relied upon by the claimant was upholding his dismissal on appeal. The respondent helpfully conceded this was a detriment and therefore the tribunal was not required to look at the difficult distinction between detriments and dismissal.

266.The tribunal was satisfied the respondent has demonstrated that the claimant leaving work on 03 August 2020 had nothing whatsoever to do with his dismissal. Nor was his failure to return to work anything to do with his dismissal because the respondent has demonstrated that the danger no longer persisted.

Protected disclosures.

267.As the claimant is a worker, he must surmount two hurdles.

268.Firstly, the claimant must establish a qualifying disclosure as defined by section 43B of the Employment Rights Act 1996 ("ERA 96").

> *"…..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) …*
> *(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) …*
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered….*
> *(e)…*
> *(f)…*

269.Secondly in order to be a protected disclosure, a qualifying disclosure must be made only to the category of persons set out in the ERA96. Six different ways are set out, namely in section 43C, 43D 43E, 43F 43G and 43H. It is not disputed the claimant fulfilled the second requirement in the manner of his reporting, complying with 43C.

270.Thus, the central question is whether there was a qualifying disclosure. This concept has been subject to significant judicial guidance.

271.The tribunal noted the decisions in **Chesterton Global Ltd -v- Nurmohamed [2017] EWCA Civ 979**, **Ibrahim -v- HCA International Ltd [2019] EWCA Civ 2007, Babula -v- Waltham Forest College [2007] EWCA Civ 174, and Kilraine -v- London Borough of Wandsworth [2018] EWCA Civ 1436** and considered the following principles were derived from those decisions

272.Firstly, there was not a rigid dichotomy between information on the one hand and an allegation on the other. For a statement to be a qualifying disclosure there had to be sufficient factual context and specificity to show that one of the matters listed in section 43B (1) was engaged

273.Given the possible intertwining of information and allegation the context and the circumstances of the alleged disclosure must be considered carefully by the tribunal having heard all the evidence

> *"…Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to*

> *comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).* (*Para* **35 Kilraine**)

274.The Court of Appeal stressed that the context in which a disclosure was made could be significant. "*It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in para. [24] in the Cavendish Munro case, the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says, "You are not complying with Health and Safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made".*

275.Secondly there is both a subjective and objective element to the belief, the subjective element is the worker must believe that the information disclosed tends to show one of the six matters listed in subsection 43B (1) and objective element is the belief must be reasonable. In looking at the subjective element the personal circumstances of the worker must be examined so the question is whether it was reasonable for him to believe what he alleges.

276.The belief can be reasonable even if wrong as there may be more than one reasonable view as to whether a particular disclosure is in the public interest. The use in the statute of the word *"likely"* does not mean the worker must be right, or that, objectively, the facts must disclose a wrongdoing as set out in section 43 B (1) (a) to (e). That said factual accuracy may be a relevant factor in assessing the reasonableness of the claimant's belief.

277.The worker simply has to show the reasonable belief was in the public interest and that means the disclosure does not cease to qualify for protection simply because the worker refers to matters which the tribunal found was not in the workers head at the time they made the disclosure.

278.Thirdly if the whistle blower has a genuine and reasonable belief that the disclosure is in the public interest that does not have to be the predominant motive for making it.

279.The ERA 96 then sets out the protection offered to a whistle-blower. The protection covers not only being subjected to a detriment but also dismissal.

280.Starting with detriment the relevant statutory provisions are found in section 47B ERA 96 which states as follows: -

"(1) A worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure…

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal within the meaning of Part X. "

281.Next the tribunal examined the position as regards dismissal under section 103A ERA 96 which states: –

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

282.The test is different from that in respect of a detriment. The alleged protected disclosure or disclosures must be on the grounds of the disclosure

283.The tribunal applied the same principles in respect of burden of proof and causation to the above claims as it did to those claims under section 44 (1) (d) and section 100 (1) (d) ERA 96.

284.The tribunal began by seeking to determine whether all or any of the alleged disclosures were protected. In closing submissions Mr Baker made no formal concessions and said it was simply a matter for the tribunal. His primary submission was that given the claimant could not show that he had been subjected to any detriment on the grounds of any proven disclosures or that the reason or principal reason for his dismissal was not because of any such disclosures then the point was irrelevant. Whilst the tribunal saw force in that argument it considered in fairness to both parties it should address this issue, given the parties agreed at the start of the hearing it was an issue the tribunal had to determine.

285.Disclosure one, the conversation between Mr Wendels and the claimant on 24 July 2020.

286.The tribunal is not satisfied that this was a protected disclosure. The claimant was not conveying information which he believed was in the public interest and tended to show breach of a legal obligation or of health and safety. He was simply expressing his particular concerns as regards the Covid 19 pandemic and querying the extent of the safety measures put in place. He was not suggesting the respondent was breaching a legal obligation or that health and safety was likely to be endangered.

287.It is true that the claimant did ask whether he will be provided with a Hazmat suit but when the claimant was told again of the precautions the respondent was taking he was content that they had reduced any risks to an acceptable and manageable level.

288.Disclosure two, the conversation with Ms Tiruwa on 27 July 2020.

289.The tribunal found a conversation did take place between the claimant and Ms Tiruwa. The tribunal is satisfied that the claimant was concerned as to the signage in the warehouse. His suggestion of the need for hazard tape of the wall, so stacked stock did not "creep" from one bay to the other was sensible (although the colour coding on each item would have highlighted any such incident) as was his suggestion of better signage in respect of the bays.

290.The tribunal is persuaded, just, that this was a protected disclosure. The claimant was clearly conveying information which he reasonably believed would improve stock separation arrangements and reduce the risk of Covid 19 transmissibility. If this was not done, he believed that there was an increased risk of transmission of Covid 19 and objectively he was entitled to take that view. The failure to quarantine effectively would breach government guidance and in the circumstances health and safety was likely to be endangered.

291.Disclosure three, his conversation with Ms Tiruwa on 28 July 2020

292.The tribunal is satisfied the claimant made a disclosure of information. He was entitled to reasonably believe that it was both in the public interest and has shown that health and safety was likely to be endangered given the accepted dangers from Covid 19 at the time. A failure of volunteers to properly and fully follow guidance and procedures greatly increased the risk of infection to others.

293.Disclosure four, the meeting with Ms Tiruwa on 29 July 2020

294.The tribunal, whilst accepting there was a meeting on 29 July and also that initially Ms Tiruwa considered there would be difficulties in organising the bays as required, did not say it was impossible to implement the changes either with or without the warehouse manager. Her contemporaneous notes showed that having visited the warehouse an agreement was reached between the parties which satisfied both parties concerns. On the factual matrix as found this was not a protected disclosure.

295.Disclosure five, the discussion with Ms Tiruwa on 03 August 2020.

296.The tribunal was satisfied that the quarantine rules had not been followed and at least one and possibly two volunteers were not wearing PPE.

297.The claimant clearly disclosed information. He reasonably believed on reasonable grounds, namely his own observations that health and safety was likely to be endangered given the risk of cross contamination. Ms Tiruwa accepted on 03 August 2020 that the situation was "*"as it should have been".* Again, given the risk presented to others by Covid 19 the claimant was entitled to reasonably believe that the health and safety of others was likely to be endangered.

298.To summarise the tribunal found that disclosures two, three and five were protected disclosures.

299.That will not suffice for the claimant to succeed. The tribunal must decide whether the detriments were done on the ground of the proven protected disclosures.

300.The tribunal has already examined those detriments and the explanations put forward by the respondent and is wholly satisfied that the proven disclosures played no part in the actions of the respondent. The tribunal would add one further point to its previous reasoning. There was a temporal separation between the last proven disclosure and the stopping of pay. The claimant was paid whilst not attending work

for approximately a month while steps were taken to reassure him and to effect a return to work.

301.The claimant has not persuaded the tribunal that the reason or principal reason for his dismissal was the proven protected disclosures. Of the proven protected disclosures Mr Beaney, the decision-maker, only knew of disclosure five and that was not the reason or principal reason for the claimant's dismissal. The reason why was because the claimant would not return to work.

302.It follows therefore the tribunal must dismiss all the claimant's complaints.

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Employment Judge T Smith
Date: 11 January 2023

Sent to the parties on
Date: 16 January 2023