EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102663/2020

Held in Glasgow on 23-25 & 28-29 November 2022 and by CVP on 14 December 2022

Employment Judge M Sangster
Tribunal Member E Farrell
Tribunal Member G McKay

Mr P Douglas	**Claimant** **Represented by:** **Ms E Matheson - Solicitor**
North Lanarkshire Council	**Respondent** **Represented by:** **Ms S Raza - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

- The Tribunal does not have jurisdiction to consider the claimant's complaint of detriment as a result of making protected disclosures. That complaint is therefore dismissed.

- The claimant's complaints of unfair dismissal (under sections 94-98 and 103A of the Employment Rights Act 1996) do not succeed and are dismissed.

- The respondent failed to make full payment to the claimant, on the termination of his employment, in respect of her accrued but untaken holiday entitlement and is ordered to pay the claimant the gross sum of £386.84 in respect of this.

REASONS

Introduction

1. The claimant presented his claim on 18 May 2020. In his claim he raised complaints of 'ordinary' unfair dismissal under section 94 of the Employment Rights Act 1996 (**ERA**), unauthorised deductions from wages and failure to pay holiday pay.

2. A case management preliminary hearing took place on 18 August 2020. The case was then sisted from 1 December 2020 to 17 November 2021, to allow the parties to address the claimant's internal appeal. At an open preliminary hearing, held on 24 January 2022, the claimant's application to amend his claim form, to include complaints that he was subjected to detriments and automatically unfairly dismissed as a result of making protected disclosures, was granted.

3. The respondent resists the complaints. Their position is that the claimant was fairly dismissed by reason of capability, failing which some other substantial reason. They deny subjecting the claimant to the detriments asserted and that any further sums are due to the claimant.

4. The claimant gave evidence on his own behalf.

5. The respondent led evidence from:

    a. Laura Armstrong (**LA**), Employee Relations Advisor for the respondent;

    b. Lynn O'Neill (**LO**), Service Delivery Manager, Performance and Compliance for the respondent;

    c. Michelle McGuiness (**MM**), Employee Relations Officer for the respondent;

    d. Paul Boyle (**PB**), Operations Manager for the respondent; and

    e. Andrew McPherson (**AM**), Head of Regulatory Services and Waste Solutions for the respondent.

6. The other individuals referenced in this judgment are as follows:

    a. Callum Black (**CB**), manager for the respondent;

    b. Neil Duncan (**ND**), formerly Business Manager for Regulatory Services and Waste Solutions for the respondent;

    c. Stuart Spence (**SS**), latterly the claimant's supervisor; and

    d. Colin Wilson (**CW**), supervisor employed by the respondent.

7. A joint set of productions was lodged, extending to 376 pages. An agreed time line of events was also lodged by the parties.

Issues to be determined

8. The issues to be determined by the Tribunal were discussed, in detail, at the outset of proceedings. It was noted that the claimant no longer sought to advance a complaint of unauthorised deductions from wages in respect of three days' pay, as payment had been made.

9. Following the discussion, the Employment Judge prepared a draft list of issues to be determined. That list was provided to the parties for consideration after lunch on the first day of the hearing. The respondent also indicated at that stage that they were intending to raise the matter of time bar/jurisdiction in their submissions, in relation to the detriments asserted.

10. At the commencement of the second day of the hearing (at which point the claimant was still giving evidence in chief), both representatives confirmed that list of issues prepared accurately reflected the issues to be determined by the Tribunal, subject to the addition of the timebar point.

11. The issues to be determined were accordingly as follows:

Protected disclosure – section 43B ERA

12. Did the claimant make one or more qualifying disclosures, as defined in s43B ERA:

a. The claimant says he made 4 separate disclosures to the respondent in his email to ND dated 9 March 2019.

b. Did he disclose information?

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

d. Was that belief reasonable?

e. Did he believe the disclosures tended to show, as asserted, that

i. A criminal offence has been committed, is being committed or is likely to be committed;

ii. A person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject? or

iii. the health or safety of any individual had been, was being or was likely to be endangered?

f. Was that belief reasonable?

13. If the claimant made a qualifying disclosure, was it also a protected disclosure?

Detriment - section 47B ERA

14. Did the claimant suffer a detriment on the ground that he made a protected disclosure pursuant to s47B ERA. The detriments relied upon are:

a. The respondent leaking sensitive information from the claimant's email dated 9 March 2019 by:

i. CB advising a supervisor (**Supervisor A**) about the allegations the claimant made against him in the claimant's email of 9 March 2019; and

ii. Supervisor A advising one of the claimant's colleagues (**Colleague A**) about the allegations the claimant made in his email of 9 March 2019.

b. Colleague A approaching the claimant after work on 13 March 2019 in an aggressive manner and asking about the claimant's email of 9 March 2019.

c. The claimant being denied annual leave by ND on 13 March 2019.

d. The content of a telephone call the claimant received from Colleague A on the evening of 13 March 2019.

e. Colleague A posting a facebook message on 23 March 2019, mocking the situation.

f. The length of time it took for the respondent to investigate the concerns raised by the claimant on 9 March 2019.

g. The claimant not being given a review period, in accordance with the respondent's absence management processes, at the level 1 meeting on 10 September 2019.

h. The level 2 absence management meeting being called on the day the claimant returned to work, namely 25 February 2020.

i. Not considering the claimant's absences properly during the level 2 absence management meeting, conducted on 25 February 2020.

j. The respondent failing/delaying to pay the claimant his full holiday pay entitlement and pay in respect of the period from 26-28 February 2020.

15. If so, were the claimant's complaints under section 47B ERA presented within the time limits set out in section 48(3) ERA?

Unfair dismissal – section 103A ERA

16. Was the sole or principal reason for the dismissal the fact the claimant made a protected disclosure in terms of s103A ERA?

Unfair dismissal – sections 94-98 ERA

17. What was the principal reason for dismissal and was it a potentially fair one in accordance with s98(1) and (2) ERA? The respondent asserts that it was a

reason relating to the claimant's capability, failing which some other substantial reason.

18. Was the dismissal fair or unfair in accordance with s98(4) ERA?

Failure to pay holiday pay

19. Was the claimant paid less in holiday pay than he was entitled to be paid on the termination of his employment and if so, how much less? The claimant asserts that he ought to have been paid a further 229 hours payment in respect of accrued but untaken holidays.

Remedy

20. If the claimant was unfairly dismissed, should he be reinstated to his role.

21. If any of the complaints are upheld, what financial award should be made.

Findings in Fact

22. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

23. The claimant commenced employment with the respondent on 6 April 1993. He was employed as a Driver 2 (Recycling) and his line manager was CB. He initially worked 37 hours per week on a rota basis and was primarily assigned to driving refuse collection vehicles (**RCV**).

24. In around 2012, the claimant was moved to driving skip lorries, on the advice of occupational health, as a result of the claimant's underlying health condition of arthritis.

25. In around 2018, the claimant's hours of work were changed, at his request, for childcare reasons. From that point onwards the claimant worked a 35.5 hour week, undertaking fixed hours from Tuesday to Friday.

26. The respondent operated a Managing Attendance Policy (**MAP**), which was agreed with the trade unions recognised by the respondent. The MAP stated that it was founded on six principles, including *'irrespective of the genuineness of the absence(s) there may come a point at which the Council has to terminate*

an employee's contract of employment if the length or frequency of the absences becomes unsustainable.'

27. The MAP provided that in cases involving long-term (continuous absence of four working weeks) or substantial intermittent absences, which, on the basis of medical certification or information, are the result of underlying medical conditions, managers must hold regular absence management meetings, at which the following points should be considered:

    a. Pattern of absences (if applicable);

    b. Monitoring periods;

    c. Likelihood and date of return to current position, with adjustments if appropriate; and

    d. Occupational health advice.

28. The MAP set out a formal capability procedure for cases of long term or substantial intermittent absences, involving a level 1 and then a level 2 capability meeting. The MAP stated that where long term or substantial intermittent absence is causing concern and cannot be sustained indefinitely, a level 1 capability meeting will be held. The purpose of a level 1 capability meeting is to discuss:

    a. the improvement required;

    b. any support mechanisms that may be required to achieve the improvement;

    c. the timescale for improvement; and

    d. the consequences of not achieving this.

29. The MAP provided that, *'if the employee is still unable to provide a suitable date to return to work, or fails to maintain an acceptable level of attendance by the end of the review period i.e. if the level of absence can no longer be sustained, then the manager will arrange to meet with the individual at a capability meeting – level 2… If no return to work date is identified or absence*

cannot continue to be sustained, then the employee must be advised that their employment will be terminated and capability grounds with appropriate payment in lieu of notice.'

30. The MAP further provided that *'where an absence is attributable to stress, irrespective of the duration, or likely duration of the absence, the manager must meet with the employee in the first instance to gather more information on the nature of the stress. Where it is not possible to meet, contact must otherwise be made with the employee, with a follow-up face-to-face meeting arranged as soon as possible thereafter. Where stress is identified as being work-related, the Council's stress tool must be used to identify the potential stressors. The stress risk assessment tools provides an introductory risk assessment of potential organisational stressors and can be used to provide a focus for manager led discussions with an employee who is reporting work related stress.'*

31. The claimant was absent from work on the following dates:

    a. From 21 March 2016 to 27 April 2017 due to an industrial injury;

    b. From 6 December 2017 to 8 March 2018 due to work related stress; and

    c. From 13 September to 8 November 2018 due to back pain.

32. The claimant attended a meeting with CW and LA on 5 March 2019. At that meeting it was suggested that the claimant may be required to move back to driving RCVs, and his working pattern changed. The claimant highlighted that his duties were previously changed as a reasonable adjustment and suggested that he would require to be assessed again by occupational health, before any such move was implemented. It was agreed that the claimant's working arrangements would remain unchanged until the claimant was assessed by occupational health and the content of their report considered and discussed.

33. On Sunday 10 March 2019, at 19.05, the claimant sent an email to ND, in the following terms

'9th March 2019

PAUL DOUGLAS

CLASS 2 DRIVER

I refer to the above. There are a couple of issues that I would like to raise with the council and would be obliged if you could address these points and thereafter, if necessary to clarify any points, hold a meeting with myself and any other relevant person.

Firstly, I would like to address the issues that I have with myself. At the moment I work under two supervisors – Billy Kennedy and Stuart Spence. I have had no issues whatsoever with Stuart Spence, however, Billy Kennedy appears to have an issue with my working on his shift and on the amended hours that I now do.

The days that I work just now are Tuesday through to Friday. I reduced my hours due to childcare issues.

I hold a Class 1 licence, but have been employed as a Driver 2 with the Council for approximately 25 years. I have a couple of health issues, not least of all arthritis. About 7 years ago I was having a problem with my health and was advised, on doctor's recommendation, to move from driving a bin lorry to something that would not exacerbate my arthritis. This ended with me driving the skip lorries.

I was advised by Billy Kennedy a couple of months ago that I was "no good to him" due to the shifts that I worked.

Billy Kennedy advised me, prior to finishing up for Christmas, that I would be starting to drive the bin lorries when I returned after the New Year. This was done on the day I finished for annual leave and was done at such a time that there was no time for me to respond to him, except to advise him that I would obviously need to see the company doctor for him to advise whether I was medically fit to drive the bin lorries.

When I returned after New Year, nothing else was said about me driving bin lorries. I carried on doing the skip lorries as usual. I did, however,

request to see the work's doctor in January, fully anticipating that I would be requested to drive the bin lorries.

I understand that I am now being put onto bin lorries, this is following a conversation recently. I have still not seen the work's doctor to clarify the health position. [The sections in bold italics are the **First Asserted Disclosure**]

Two CA Site Attendants, who hold a Class 2 licence, have now been asked to do my job. They have been asked to do it on their normal shifts and also as overtime. Drivers from Land Services were asked, and did, overtime on the skip lorries on 2nd and 3rd March.

On 5th March, I left two voicemails and Colin Wilson's phone requesting a meeting with yourself, to try and sort out the above issue, together with another couple of issues, that I feel need dealt with urgently.

I feel it is unfair to take me off the job that I am currently doing and replacing me with workers who do not hold the sufficient licence to do the job. [The sections in bold italics are the **Second Asserted Disclosure**].

Colin Wilson text me on 7th March to advise that the first available time for you to have a meeting would be on 10th April. As this is five weeks from my request, I find this unacceptable, hence the email to request an urgent meeting with yourself.

My second issue is, if I am moved onto the bins, it is a known fact that the distribution of both the workload and the overtime opportunities are unfair. At the moment there are teams of men who finish their runs at 1.00pm and there are teams who do not finish until 5.00pm and who get no help from the teams who finish their runs four hours earlier. Also, the distribution of overtime is not carried out in a fair and reasonable manner. By this I mean that certain workers are taking chocolates and treats into [Supervisor A], and in return they are getting first pick at all available overtime. [Supervisor A] has his "favourite" employees and does not even try to hide the fact they get the best runs and overtime opportunities. If I am moved to the bins, all I ask

is that distribution of the workload and overtime opportunities, should they arise, be carried out fairly and not because of any "bribes" that may be given to any supervisors.

Another issue with the bin drivers that has been noticed by the men is that [Named], Stand in Supervisor, has been doing overtime, driving, with presumably double time, before asking some of the other Driver 2s if they would be available for overtime. Again, this is unfair distribution of the overtime and is taking advantage of his position. [The sections in bold italics are the **Third Asserted Disclosure**]

I take health and safety very seriously. The supervisors on the bin runs only want the runs completed every day. They don't appear to take health and safety regulations seriously. It is a widely accepted practice that certain drivers leave the lorry running to help load the bins on, which leaves the driver vulnerable for theft and, in the worst case scenario, manslaughter, should someone steel the lorry have have a fatal accident. It is also acceptable to the supervisors to have drivers and loaders work through their lunch, without the legal breaks, to have the work completed quicker. Loaders have also been seen running collecting the bins and following the lorries, again to have the work completed quicker. If I am put back on the bins, I would like it formally known that I will not be prepared to break health and safety rules and regulations to get the work completed. The work will be carried out in line with all health and safety regulation and legislation. [The sections in bold italics are the **Fourth Asserted Disclosure**]

I would be obliged if you could consider the above and schedule an informal chat as soon as is convenient for you. I have also got a couple of things I do not want to put officially in writing but would like to speak to you about as a matter of urgency.

I look forward to hearing from you and thank you in anticipation of your assistance.

Yours sincerely'

34. ND responded to the claimant's email 15 minutes later. In the email exchange which followed he indicated that he would ask a senior manager to investigate the allegations made by the claimant in this email, but stated that the claimant should also raise matters with his duty supervisor, to ensure policy and procedures are followed.

35. On the morning of 12 March 2019, the claimant raised his concerns with his supervisor, SS, as ND had indicated he should do.

36. The claimant attended a meeting with CB on 12 March 2019 in relation to the concerns raised in his email. This was stated by CB to be an 'informal chat'. The claimant made a covert audio recording of the meeting. CB sought, during the meeting, to obtain further detail of the allegations being made by the claimant, including names, dates etc. The claimant indicated that he would collate this and provide this to CB. The claimant was advised that, on receipt of that further detail, his complaint would be considered to ascertain whether a formal investigation should be undertaken, in which case the claimant would be invited to a formal meeting with his trade union representative, and a witness statement would be prepared following that.

37. While ND had indicated that he would meet with the claimant on 21 March 2019, to discuss the claimant's concerns, ND cancelled that meeting following the claimant's meeting with CB, due to work commitments. He indicated that this would however allow the claimant to provide more information to CB, and allow CB to investigate/decide the best way forward.

38. The claimant did not provide any further detail to CB, following their meeting on 12 March 2019.

39. On 13 March 2019, as the claimant was leaving work, Colleague A approached him at his car in an aggressive manner. He came very close to the claimant and aggressively said to him *'did you put a fucking letter in saying I'm giving chocolates for overtime?'.* The claimant indicated that he did not name anyone in the letter and asked Colleague A how he knew about it. Colleague A stated that CB had told Supervisor A, who had told him. The claimant reiterated that

he had not named anyone in his letter and drove off. The claimant was very upset by the encounter, particularly as he had considered Colleague A to be a friend. He required to pull over, after he had left the workplace, as he was shaking. He felt anxious and intimidated, which later turned to anger at the situation.

40. When he returned home the claimant sent a further email to ND, raising concerns that his colleagues appeared to be aware of the allegations he had made, and about the incident which had taken place after work that day. He asked if he could take annual leave until he could see his GP, which he was unable to do until 25 March 2019. ND responded that he could not authorise annual leave for the claimant: the claimant would require to follow the respondent's procedures to request this. ND stated that he would now be instructing a formal investigation into all of the claimant's allegations, including those in the email sent by the claimant that day.

41. That evening, at around 22.30, the claimant received a telephone call on his mobile from Colleague A. The claimant answered and said hello. Colleague A, who was at this point calm, stated *'it's just to see about the letter you put in'*, at which point the claimant hung up.

42. The claimant did not attend for work on 14 March 2019, indicating that he was unfit to do so due to work related stress. He was subsequently certified as unfit to work for this reason by his GP.

43. On 14 March 2019, the claimant attended for an assessment with the respondent's occupational health providers. They noted that it would be beneficial for the claimant to continue driving skip lorries, rather than reverting to driving RCVs. They noted however that the claimant was currently unfit to work due to perceived workplace stressors. They recommended that a workplace stress risk assessment be undertaken. A stress risk assessment was subsequently posted to the claimant, but not received by him, so not completed.

44. LO was appointed by ND, in March 2019, to conduct a formal investigation into the claimant's complaints. She contacted the claimant's line manager, with a

view to making arrangements to meet with the claimant but was informed that he was currently absent from work due to illness. She requested that the claimant's line manager inform her when he returned to work, so she could arrange to meet with him.

45. On 23 March 2019, Colleague A wrote on Facebook, in response to a comment from another colleague asking if he would see him tomorrow, *'lollol correct…no bribes and I'm still out'*. This was brought to the claimant's attention. He took this to be a mocking reference to the complaints he raised in the letter he had submitted to ND on 10 March 2019.

46. The respondent invited the claimant to a meeting on 25 April 2019, to discuss his ongoing absence from work. The claimant was unable to attend as he had a prearranged medical appointment at that time. The meeting was accordingly rearranged to 23 May 2019. CW conducted the meeting and was accompanied by LA. The claimant was accompanied by a trade union representative. The occupational health report dated 19 March 2019 was discussed and it was agreed that the claimant would not revert to driving RCVs but would instead remain driving skip lorries, on his existing work pattern. It was noted however that the claimant was currently unfit to work due to work-related stress. The respondent sought to discuss this with him. The claimant briefly outlined the nature of his concerns but indicated that he did not wish to provide names of the employees responsible to the respondent. He indicated he did not see how he could return to work. LA highlighted that the issues which he had raised appeared to fall under the respondent's Dignity at Work Policy and asked the claimant if you would like to pursue his concerns under that policy. The claimant stated that he was about to take a pre-arranged holiday and, he had an appointment with an employment lawyer scheduled after that, in order to seek advice on the best way forward. He indicated that he would prefer to obtain advice from that employment lawyer, before discussing matters further. LA accordingly requested that the claimant call her on 11 June 2019, to provide an update, following the meeting with the employment lawyer. A letter summarising what was discussed at the meeting was sent to the claimant on 7 June 2019.

47. The claimant did not contact LA on 11 June 2019.

48. In June 2019, LO ascertained that the claimant remained absent from work and was not scheduled to return to work in the foreseeable future. She contacted HR to obtain advice as to how to proceed with her investigation. They advised her to progress the investigation, notwithstanding the claimant's absence. LO then wrote to the claimant inviting him to an investigation interview on 8 July 2019, advising that the meeting would be formally recorded and that the claimant was entitled to be accompanied at the meeting. The claimant declined to attend the meeting, indicating that he was unfit to participate, as he was absent from work due to work related stress. LO sought to progress her investigation notwithstanding this. She reviewed relevant documentation, for example the overtime list, and interviewed three other individuals in relation to the complaints made by the claimant, on 8 and 9 July 2019. While she found nothing to substantiate the allegations made by the claimant, she felt it unfair to conclude her investigation until she had had the opportunity to discuss matters in detail with the claimant. She accordingly put the investigation on hold pending the claimant's return to work, or some indication from him that he was now fit to participate in a meeting with her.

49. The respondent sought to hold further absence management meetings with the claimant on 26 July, 29 August and 3 September 2019. The claimant could not however attend these meetings, for reasons which were provided to the respondent.

50. By email dated 4 September 2019, the claimant raised concerns with AM relating to the lack of progress of any investigation into the concerns he raised and the process being followed in respect of the management of his absence. AM responded on 6 September 2019, addressing the concern raised by the claimant. In his email he stated '*I note that you mention that you have not heard anything further regarding the investigation, however I can confirm that as you have advised that you would not be attending the scheduled investigation meeting due to being absent from work due to work-related stress and as you remain absent from work, the investigation is on hold until such times that you return to work or confirm that you are fit to attend a meeting to discuss this.'*

51. The claimant did not subsequently confirm that he was fit to attend a meeting to discuss the concerns he had raised.

52. On 19 October 2019 the claimant wrote to ND summarising the position to date and requesting that consideration be given to entering into a settlement agreement whereby he would be offered a financial package in return for the termination of his employment. AM responded to that letter on 24 October 2019 indicating *'I can advise that the Council is not in a position to offer you a settlement agreement. I understand that the absence management process continues and would encourage you to participate in the process with a view to returning to work in the near future.'*

53. The claimant attended a level 1 capability meeting on 10 September 2019. PB conducted the meeting and was accompanied by LA. The claimant was accompanied by a trade union representative. The claimant made a covert audio recording of the meeting. At the meeting PB explained that the meeting was to discuss the claimant's attendance levels, which were a cause for concern. LA highlighted that the claimant had not yet raised any concerns under the Dignity at Work Policy, despite previous discussions in relation to this. The claimant's trade union representative indicated that the claimant was keen to return to work and suggested that an individual stress risk assessment be undertaken before he did so, with his workplace concerns being addressed following his return to work. LA highlighted that the stress risk assessment process would involve the claimant providing specifics of the concerns which he had in relation to the workplace which were causing him stress, which to date the claimant had indicated he did not wish to do. She stated that it may be beneficial for the claimant's concerns to be addressed before he returned to work. The claimant indicated that he would discuss the potential of raising his concerns under the respondent's Dignity at Work Policy with his trade union representative, following the meeting, and let PB know how he wished to proceed in relation to that. A discussion also took place in relation to adjustments or supports which would assist the claimant to return to work. The claimant indicated that he would consider what else would assist him to do so and call PB when he had done so. It was also agreed that the claimant would be referred again to occupational health for their input on this matter. At the

meeting, parties were envisaging a potential return to work when the claimant's current fit note expired, around 3 October 2019. PB confirmed that, if the claimant did not return to work in the foreseeable future, or returned and maintained poor attendance levels, the respondent would look at progressing to a level 2 capability meeting, which could lead to the termination of the claimant's employment. A letter summarising what was discussed at the meeting was sent to the claimant on 8 October 2019.

54. The claimant did not contact PB following the meeting in relation to progressing a complaint under the respondent's Dignity at Work Policy or in relation to any proposed workplace adjustments, as discussed during the meeting.

55. The claimant attended a further assessment with the respondent's occupational health advisors on 1 October 2019. They subsequently provided a report to the respondent, dated 4 October 2019, stating that the claimant remained unfit for work, principally due to work-related stress. They indicated that a return to work was not likely until the claimant believed that the workplace issues he had experienced had been resolved to his satisfaction. They stated that it might be helpful to ask the claimant to complete a workplace stress risk assessment.

56. The claimant was invited to a further absence management meeting on 7 November 2019, to discuss the terms of that report. That meeting required to be cancelled by the respondent due to bereavement. The claimant was then unavailable on the next dates suggested, namely 5 December 2019 and 3 January 2020, for reasons provided to the respondent.

57. The claimant ultimately attended a further absence management meeting with the respondent on 23 January 2020. PB conducted that meeting and was accompanied by LA. The claimant was accompanied by a trade union representative. The occupational health report, dated 4 October 2019, and the claimant's current medical condition were discussed at the meeting. It was noted that the occupational health report indicated that the claimant was unlikely to be able to return to work until the workplace issues were resolved. PB advised that the claimant was asked to take part in a meeting to investigate the complaints he raised, but he did not want to take part in that process. The

claimant stated that he was off sick and therefore did not feel he could take part. LA highlighted that the claimant had repeatedly been asked to raise his concerns and the Dignity at Work Policy, in order that they could be investigated under that policy and resolved, but he had not yet done so. His trade union representative indicated that it may have been helpful for the claimant to participate in the investigation prior to him starting back at work, as it could be a stressor upon his return if this has still to take place. It was noted that the claimant's current fit note covered him until 28 January 2020. Given that he had been absent since 14 March 2019, he was informed that a level 2 capability meeting would be arranged, at which his contract of employment may be terminated. The claimant indicated in response that he expected his GP to issue a further fit note certifying him as unfit to work for a further period beyond 28 January 2020, but he intended to return to work on the expiry of that next fit note. A letter summarising what was discussed at the meeting was sent to the claimant following the meeting. A further stress risk assessment was also sent to him for completion.

58. On 28 January 2020, the claimant's GP issued a further fit note, indicating that the claimant would remain unfit to work until 24 February 2020. On 28 January 2020, the claimant sent a text to PB stating that he would be returning to work on 25 February 2020.

59. The claimant attended a further occupational health assessment on 4 February 2020. A report, dated 7 February 2020, was subsequently provided to the respondent. The report noted that the claimant hoped to be able to return to work on 25 February 2020. It provided details of the claimant's current medical condition and set out a number of adjustments which would assist him to return to work. In response to the question *'is the employee likely to render reliable service and attendance into the future?'* the report stated *'The most relevant predictor of what the future holds is what has happened in the past unless a significant intervention takes place in the future. I would expect that, if Mr Douglas is able to come to terms with his problems, then he is likely to maintain a satisfactory attendance.'*

60. On 11 February 2020, the claimant sent a further text to PB. This again referenced that he intended to return to work on 25 February 2020 and requested that appropriate PPE be provided.

61. By letter dated 13 February 2020, the claimant was invited to a level 2 capability meeting. On 17 February 2020 the claimant sent a further text to PB questioning why the level 2 capability meeting was proceeding, when he had indicated that he would be returning to work.

62. PB and MM met in advance of the level 2 capability meeting, to review matters. During that pre-meeting they reviewed and discussed each of the claimant's absences and all of the previous occupational health reports.

63. The claimant returned to work and attended a level 2 capability meeting on 25 February 2020. PB conducted the meeting was accompanied by MM. The claimant was accompanied by a trade union representative. The claimant made a covert audio recording of the meeting. He brought with him the completed stress risk assessment form. The claimant's absence record over the previous four years was discussed at the meeting. It was noted that he had been absent for 474 days in that period, the most recent absence lasting 198 days. It was noted that occupational health had indicated that the most relevant predictor of what the future holds in relation to attendance is what has happened in the past, unless significant intervention takes place.

64. The meeting was adjourned to allow PB to consider his decision. The claimant's attendance record was the worst that PB had ever encountered in the 31 years he had worked for the respondent. He discussed matters with MM and took into account all of the occupational health reports. He noted that the claimant had had substantial long term intermittent absences. Those absences were causing concern and could not be sustained going forward. The respondent had required to implement significant budget cuts and found it very difficult to meet the additional costs when an employee was on long term absence repeatedly: it involved paying full salary for 6 months, followed by half pay for 6 months, in each period of absence, as well as enhanced overtime rates to ensure that the work the individual would otherwise have done was undertaken by another employee. Whilst the claimant had returned to work,

there was no guarantee that he would maintain satisfactory attendance in the future. Indeed the most recent occupational health report suggested that the previous attendance pattern was likely to simply continue. PB accordingly had no confidence that the claimant's attendance would be satisfactory going forward.

65. Following the adjournment, PB indicated that the claimant's level of absence could not be sustained indefinitely and had now reached a point which required a decision to be made on his continued employment. He stated that the respondent had provided support and assistance throughout the claimant's years of employment, yet these efforts have not made the difference anticipated to improve the claimant's attendance. Taking this and the respondent's policies into account, he had reached the conclusion that the claimant's employment should be terminated on the grounds of capability with effect from 25 February 2020. He said that the claimant would be paid until Friday 28 February 2020 and would receive 12 weeks' pay in lieu of notice. The claimant asked about his holiday entitlement from the previous year. MM informed him that he would receive his statutory entitlement only, in accordance with the respondent's policies. The claimant was informed he had the right to appeal the decision. A letter summarising what was discussed at the meeting was sent to the claimant on 25 February 2020.

66. The claimant's employment accordingly terminated on 25 February 2020. The claimant's salary at the time his employment terminated was £25,740. He was paid 12 weeks' salary in lieu of his notice entitlement.

67. The claimant was not initially paid from 25-28 February 2020, in addition to his payment in lieu of notice, in accordance with what PB indicated during the meeting. MM did not recall PB stating this during the meeting, so did not instruct payroll to make this additional payment to the claimant.

68. On 19 March 2020, the claimant received a payment in respect of his accrued but untaken 2020 holiday entitlement.

69. On 16 April 2020, the claimant received a further payment in respect of his accrued but untaken 2019 holiday entitlement. That sum represented a

payment for 35.5 hours. The claimant had taken 78.75 hours holiday in 2019 and, as he was unable to take holidays while on long term sickness absence, had carried forward 265.35 hours of holiday entitlement from 2019 to 2020. The respondent considered no further sums were due to the claimant in respect of his 2019 holiday entitlement however, as the hours carried over were either lost (as the carried over holidays were not taken by 31 January 2020) or 'abated', in accordance with the respondent's policies.

70. By letter dated 6 March 2020 the claimant appealed against the decision to terminate his employment. His grounds of appeal were, in summary that

a. No risk assessments were carried out in relation to the first three periods of absence, namely 22 March 2016 to 27 April 2017, 6 December 2017 to 8 March 2018 and 13 September to 8 November 2018;

b. In relation to the final period of absence, namely from 14 March 2019 to 21 February 2020:

i. the claimant had to wait 6.5 months to see the respondent's occupational health advisor;

ii. there was a further delay in receiving the report from the first appointment which amounted to 3 months;

iii. the claimant was not referred to the respondent's employee counselling service; and

iv. the capability 2 meeting was not necessary as the claimant has provided a return to work date.

71. An appeal hearing, chaired by AM, took place on 31 August 2020. The delay was due to the Covid-19 pandemic. The claimant was informed, by letter dated 3 September 2020, that his appeal was unsuccessful.

72. By letter dated 16 September 2020, the claimant appealed to the Policy & Resources (Human Resources Appeals) Sub Committee. They heard the claimant's appeal on 2 September 2021 and did not uphold the claimant's appeal.

73. In the course of the Employment Tribunal proceedings, the claimant disclosed to the respondent that he had covertly audio recorded a number of the meetings he had attended with the respondent and wished to rely on the terms of the recordings. It was agreed that transcripts of the recordings would be prepared. In preparation for the Employment Tribunal hearing, the respondent listened to the recordings which were provided to them by the claimant, to check that the transcripts prepared by the claimant were correct. MM heard when doing so that PB had stated that the claimant would be paid until 28 February 2020. She then arranged for an additional payment to be made to the claimant in respect of this period. This was paid on 15 September 2022.

74. When listening to the recording of the meeting held on 25 February 2020, MM noticed that the noticed recording continued beyond the conclusion of the meeting. She continued to listen to the recording provided by the claimant and heard the following exchange between the claimant and his trade union representative

Claimant: *I've been humming n hawing a bit… I've got my ain wee business that I do really well fae I make more money doing what I do there than what I do here, I've been humming and hawing because of my length of service here, 28 years I didn't want to walk away with nothing, I asked for a deal, I asked Neil Duncan about six months or four months ago so I kind of milked it, I kind of milked it, know what I mean with the sickness staying on the sick for so long*

TU Rep: *you took too long though, took it too far*

Claimant: *I know because I wasn't really wanting to come back in the first place and then I also didn't want to walk away with fuck all that was the thing*

Claimant [following a discussion about whether to proceed with an appeal, employment tribunal claim or both]: *well what's best? I don't want my job back, they've made my decision for me, I don't want it back, but I want something, what's best?*

Claimant's submissions

75. Ms Matheson, for the claimant, lodged a written skeleton submission extending to 11 pages, which she supplemented with an oral submission lasting nearly 3 hours. The relevant statutory provisions and case law were referred to and summarised in the written skeleton submission, which also provided proposed findings in fact.

76. In her oral submission, Ms Matheson addressed each asserted disclosure in turn, setting out the basis upon which each should be found to be a qualifying disclosure. She submitted that the claimant believed that the information disclosed on each occasion tended to show one of the relevant failures set out in section 43B ERA, and his belief was objectively reasonable. The claimant had a reasonable belief that the information disclosed on each occasion was in the public interest.

77. In relation to the claimant's dismissal, she submitted, in summary, that the claimant was dismissed as a result of his absence. His absence was caused as a result of a chain of events, all of which were prompted by his protected disclosures. Whilst PB was not aware of the detail of the allegations made, he was aware that there was a mention of chocolates being given and unfair allocation of overtime. He had a clear lack of understanding of whistleblowing and maintained throughout that absence management and whistleblowing complaints should be dealt with separately. Doing so meant proper consideration was not given to the reason for the claimant's absence. The claimant has demonstrated a link between his most recent absence and the disclosure. Given that link, and the fact that he was dismissed for his absence, the disclosures were the real reason for dismissal, not capability or any other reason asserted by the respondent.

78. In the alternative, the claimant's dismissal was unfair. The respondent has not demonstrated that they had a reasonable belief that the claimant was incapable of carrying out his role, or that this was based on reasonable grounds. The respondent relied solely on the most recent occupational health report and failed to take into account previous reports, as well as the fact that two of the claimant's previous absences were for unrelated reasons, so ought to have been

discounted. The respondent ought to have sought alternative ways to progress the investigation into the claimant's concerns - for example by asking occupational health if he would be able to participate in the investigation in any other way, such as by all answering written questions. In addition, proper procedures were not followed.

79. In relation to holiday pay, in the absence of any evidence disputing the claimant's assertion that he is owed a further 229 hours in relation to holiday pay, the claimant invites the Tribunal to infer that it is more likely than not that the respondent failed to pay the correct sum to the claimant.

80. In relation to remedy, the claimant's primary position is that he should be reinstated. It is reasonably practicable for the respondent to do so. Failing which, if a compensatory award is being considered, the claimant asks the Tribunal to find that he has made reasonable attempts to find alternative employment, but has been curtailed in his ability to do so as a result of his childcare responsibilities. A mid band Vento award is sought in relation to injury to feelings.

Respondent's submissions

81. Ms Raza lodged a written submission, extending to 23 pages, which she was content for the Tribunal to read. The Tribunal took time to do so, before asking some explanatory questions in relation to the submission. Ms Raza also briefly supplemented the written submission with comments in response to the claimant's submission.

82. The respondent's submission is summarised as follows:

a. The disclosures relied upon were not qualifying disclosures. They did not disclose information which tend to show that the respondent was in breach of any legal obligation, had committed a criminal offence or that the health and safety of employees was likely to be endangered. The claimant's evidence does not show that he reasonably believed that the disclosures were made in the public interest. Each asserted disclosure was addressed in turn, setting out the basis upon which each should be found not to constitute a qualifying disclosure.

b. In relation to the asserted detriments, these have not been established by the evidence. In the alternative, no evidence has been led to show a connection between each asserted detriment and the disclosures. The Tribunal requires to be satisfied that any protected disclosure established was the real or core reason for the detriment. In any event, the Tribunal has no jurisdiction to determine these complaints, as they are submitted outwith the requisite time limits.

c. The reason or principal reason for the claimant's dismissal was not the disclosures made. PB had limited knowledge of the disclosures when he held the disciplinary hearing. The reason for the claimant's dismissal was capability/some other substantial reason, as a result of unsustainable absence. This was clear from PB's evidence. He was not influenced in any way by the fact the claimant had made disclosures and his knowledge of them was very limited.

d. Capability/some other substantial reason, as a result of unsustainable absence, is a potentially fair reason for dismissal and the respondent acted reasonably in treating this as a sufficient reason to dismiss the claimant. A fair procedure was followed.

e. It would not be reasonably practicable to reinstate the claimant. Any award for unfair dismissal should be reduced as a result of Polkey and the fact that the claimant has failed to take appropriate steps to mitigate his loss. No award for injury to feelings is appropriate, as no detriments, under s47B ERA, have been established.

f. In relation to holiday pay, the respondent accepts that the claimant carried over 265.35 hours of holiday from 2019, which he was unable to take as he was absent from work due to illness. He did not take any holidays in 2020 and received a payment in respect of his 2020 holiday entitlement on 19 March 2020. On 16 April 2020, he was paid for a further 35.5 hours, in respect of his 2019 holiday entitlement. No further sums were due to the claimant in respect of his 2019 holiday entitlement: the hours carried over were either lost (as the carried over holidays were not taken by 31 January 2020) or 'abated' in accordance with the respondent's policies.

Relevant Law

Protected Disclosures

83. Section 43A of the Employment Rights Act 1996 (**ERA**) provides:

"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

84. A qualifying disclosure is defined in section 43B ERA as *"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."*

85. Section 43A ERA states that a protected disclosure is one which is made in accordance with any of sections 43C to 43H ERA.

86. Section 43C ERA states that:

'A qualifying disclosure 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....”

87. In ***Williams v Michelle Brown AM*** UKEAT/0044/19, HHJ Auerbach summarised the position as follows:

“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 sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held. Unless all five conditions are satisfied there will be not be a qualifying disclosure.’

88. In ***Kilraine v London Borough of Wandsworth*** [2018] EWCA Civ 1436, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

“35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a ‘disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f).’ 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).”

"36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters, and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

89. In ***Simpson v Cantor Fitzgerald Europe*** [2020] ICR 236, the EAT confirmed these principles, stating:

'43...As the Court of Appeal in Kilraine v Wandsworth London Borough Council [2018] ICR 1850 made abundantly clear, in order for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show breach of a legal obligation.

69. The tribunal is thus bound to consider the content of the disclosure to see if it meets the threshold level of sufficiency in terms of factual content and specificity before it could conclude that the belief was a reasonable one. That is another way of stating that the belief must be based on reasonable grounds. As already stated above, it is not enough merely for the employee to rely upon an assertion of his subjective belief that the information tends to show a breach.'

Detriment Claim – Protected Disclosures

90. Section 47B ERA states that

'A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.'

91. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 confirms that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An 'unjustified sense of grievance' is not enough.

92. Whether a detriment is 'on the ground' that a worker has made a protected disclosure involves consideration of the mental processes (conscious or unconscious) of the employer acting as it did. It is not sufficient for the Tribunal to simply find that 'but for' the disclosure, the employer's act or omission would not have taken place, or that the detriment is related to the disclosure. Rather, the protected disclosure must materially influence (in the sense of it being more than a trivial influence) the employer's treatment of the whistleblower (***NHS Manchester v Fecitt and others*** [2012] IRLR 64).

93. Helpful guidance on the approach to be taken by a Tribunal when considering claims of this nature is provided in the decision of ***Blackbay Ventures Ltd (t/a Chemistree) v Gahir*** [2014] IRLR 416 at paragraph 98.

Detriment Claim – Time Limits

94. The relevant time limit in relation to the detriment complaint is set out in section 48(3) ERA.

95. These provisions state that a Tribunal shall not consider a complaint unless it is presented to the Tribunal

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

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

96. In considering whether there is jurisdiction to hear such complaints, Tribunals accordingly require to consider the following questions:

a. Were the complaints presented within the primary three month time limit?

b. If not, was it reasonably practicable for the complaints to be presented within that period?

c. If not, were they presented within such further period as the Tribunal considers reasonable?

97. The question of a what is reasonably practical is a question of fact for the Tribunal. The burden of proof falls on the claimant. Whether it is reasonably practicable to submit a claim in time does not mean whether it was reasonable or physically possible to do so. Rather, it is essentially a question of whether it was 'reasonably feasible' to do so (***Palmer and Saunders v Southend-on-Sea Borough Council*** [1984] IRLR 119).

98. Whether the claim was presented within a further reasonable period requires an assessment of the factual circumstances by the Tribunal, to determine whether the claim was submitted within a reasonable time after the original time limit expired (***University Hospitals Bristol NHS Foundation Trust v Williams*** UKEAT/0291/12).

Automatically Unfair Dismissal – Protected Disclosures

99. S103A ERA states that:

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

100. In ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening)*** 2012 ICR 372, the Court of Appeal held that the causation test for unfair dismissal is stricter than that for unlawful detriment under s47B ERA: the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas s103A ERA requires the disclosure to be the primary motivation for a dismissal.

Ordinary Unfair Dismissal

101. S94 ERA provides that an employee has the right not to be unfairly dismissed.

102. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that that it is a potentially fair reason falling within s98(1) or (2) ERA.

103. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):

> *"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

104. In determining whether the employer acted reasonably, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law, as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones [1982] IRLR 439***).

Observations on Evidence

105. The Tribunal felt that each of the witnesses presented their evidence honestly and to the best of their ability. There were very few areas of factual dispute between the parties.

Discussion & Decision

Disclosures

106. The Tribunal firstly considered each of the matters relied upon by the claimant as protected disclosures. The Tribunal was mindful that five elements require to be considered in determining whether each asserted disclosure amounted to a qualifying disclosure (***Williams v Michelle Brown AM***). The Tribunal noted that, unless all five conditions are satisfied, there will not be a qualifying disclosure.

107. The Tribunal's conclusions in relation to whether each asserted disclosure (as set out in paragraph 33 above) amounted to a protected disclosure are set out below.

108. **First Asserted Disclosure.** The Tribunal accepted that this was a disclosure of information. The Tribunal concluded however that the information disclosed did not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered, or that a person had failed, was failing or was likely to fail to comply with a legal obligation, as asserted by the claimant. The information disclosed was simply a statement of what had happened to date. There was no indication that there was any risk to health and safety. The claimant did not state that he was not fit to drive the RCVs, simply that he had not seen the work's doctor for them to assess this. The outcome of that assessment may have been, as the claimant accepted in his evidence, that they considered that he was indeed now fit to do so. In these circumstances, the Tribunal concluded that the claimant did not believe that the information disclosed tended to show that the health or safety of any individual had been, was being or was likely to be endangered. If he did, that belief was not reasonable. Further, the Tribunal did not accept that the claimant believed

that the limited information disclosed was made in the public interest: it related solely to the claimant's personal circumstances, and the fact that he had not been assessed by the work's doctor. The Tribunal accordingly concluded this was not a qualifying disclosure.

109. **Second Asserted Disclosure.** The Tribunal accepted that this was a disclosure of information. The Tribunal concluded that the only part of the Second Asserted Disclosure capable of tending to show one of the relevant failures stated in s43B ERA was the statement that the CA Site Attendants did not hold sufficient licence to do the job. The claimant accepted in his evidence that the CA Site Attendants did have sufficient licences to do the job, and that he was aware of this at the time he made the disclosure of information. On that basis, any belief that the information disclosed tended to show one of the relevant failures set out in s43B ERA was not reasonable. While the claimant asserted in evidence that he in fact meant to state in his disclosure that the individuals had insufficient experience to do the job, that was not the information that he disclosed. For these reasons, the Tribunal concluded that the Second Asserted Disclosure was not a qualifying disclosure.

110. **Third Asserted Disclosure**. The Tribunal accepted that this was a disclosure of information. In relation to the majority of the information disclosed, which related to unfair distribution of work and overtime, the Tribunal did not accept that the claimant believed that the disclosure of this information tended to show one of the relevant failures set out in s43B ERA. It was an assertion of unfair treatment only. In relation to the assertion that workers were taking chocolates and treats to the supervisor and 'in return' they were getting first pick at all available overtime, which amounted to 'bribes', the Tribunal found that the claimant did believe that the disclosure tended to show that a criminal offence had been committed and that that was a reasonable belief: the information disclosed had sufficient factual content and specificity capable of tending to show that a criminal offence had been committed, albeit of a relatively minor nature. The Tribunal accepted that the claimant believed the disclosure was made in the public interest and that that belief was reasonable (it being in the public interest to disclose potentially criminal conduct,

particularly where it is asserted to be occurring in a local authority). The Tribunal accordingly concluded this was a qualifying disclosure.

111. **Fourth Asserted Disclosure.** The Tribunal accepted that this was a disclosure of information. The Tribunal found that the claimant believed that the information disclosed tended to show that the health and safety of individuals had been, was being or was likely to be endangered and that that was a reasonable belief: The information disclosed had sufficient factual content and specificity capable of tending to show this. The Tribunal accepted that the claimant believed the disclosure was made in the public interest and that that belief was reasonable, given the potential risks to health and safety of the workers and members of the public. The Tribunal accordingly concluded this was a qualifying disclosure.

112. The Third and Fourth Asserted Disclosures were made by the claimant in an email to ND, an individual employed by the respondent who was significantly more senior than the claimant. The Tribunal found that this amounted to a disclosure to the claimant's employer under s43C(1)(a) ERA, so these qualifying disclosures constituted protected disclosures under s43A ERA.

Detriment Claim – S47B ERA

113. The Tribunal then considered whether the claimant was subjected to any detriment by an act, or a deliberate failure to act, by the respondent on the ground that he made a protected disclosure(s). As indicated above, the Tribunal found that two of the disclosures amounted to protected disclosures. The Tribunal's conclusions in relation to each detriment asserted by the claimant are as follows:

a. **The respondent leaking sensitive information from the claimant's email dated 9 March 2019**. The Tribunal found that this conduct was established. The claimant gave uncontested evidence that Colleague A informed him, on 13 March 2019 that he had been informed of the content of the claimant's letter by Supervisor A, and that Supervisor A had been informed of this by CB. The Tribunal concluded that this conduct amounted to a detriment – the claimant had a reasonable expectation

that the information he disclosed would remain confidential. The disclosure of it to the claimant's colleagues was something which a reasonable worker would or may view as a disadvantage. The Tribunal concluded that the fact that the claimant made protected disclosures in his correspondence was a material factor (in the sense of it being more than trivial) in that information being leaked. The claimant was accordingly subjected to a detriment, contrary to s47B ERA, as a result of making a protected disclosure.

b. **Colleague A approaching the claimant after work on 13 March 2019 in an aggressive manner and asking about the claimant's email of 9 March 2019.** The Tribunal found that this conduct was established. The claimant gave uncontested evidence that Colleague A approached him in this manner 13 March 2019 and asked about the content of his email. The Tribunal concluded that this conduct amounted to a detriment – it was plainly something which a reasonable worker would or may view as a disadvantage. The Tribunal concluded that the fact that the claimant made protected disclosures in his correspondence was a material factor (in the sense of it being more than trivial) in Colleague A approaching him in this manner and asking about the content of his email. The claimant was accordingly subjected to a detriment, contrary to s47B ERA, as a result of making a protected disclosure.

c. **The claimant being denied annual leave by ND on 13 March 2019.** The Tribunal were split as to whether this conduct was established: on the one hand it could be said that ND did not refuse the claimant's annual leave request, he merely said that he was not in a position authorise it and the claimant would require to follow the respondent's procedures to request this. On the other, he did not authorise this, so in effect was denying it. Regardless of that, the Tribunal unanimously concluded that it was not a detriment: it was not something about which a reasonable worker would or might take the view that they have been disadvantaged, given that he had the option of making a holiday request under the respondent's procedures, which he was informed of. Further, there was no evidence to suggest that either of the protected disclosures were a

material factor in ND not authorising the claimant's annual leave. Rather, it was as a result of ND's belief that he was not in a position to authorise annual leave for the claimant.

d. **The content of a telephone call the claimant received from Colleague A on the evening of 13 March 2019.** The Tribunal found that this conduct was established. The claimant gave uncontested evidence that Colleague A telephoned him on 13 March 2019 and stated that he was calling about the content of the claimant's email. The Tribunal concluded that this conduct amounted to a detriment – being called by a colleague about the terms of a confidential disclosure made to an individual's employer is something which a reasonable worker would or may view as a disadvantage. The Tribunal concluded that the fact that the claimant made protected disclosures in his correspondence was a material factor (in the sense of it being more than trivial) in Colleague A telephoning him to discuss the content of his email. The claimant was accordingly subjected to a detriment, contrary to s47B ERA, as a result of making a protected disclosure.

e. **Colleague A posting a Facebook message on 23 March 2019, mocking the situation.** The Tribunal found that this conduct was established. The Facebook post was produced in evidence and the Tribunal accepted that this referred to the Third Asserted Disclosure. The Tribunal concluded that this conduct amounted to a detriment – Colleague A mocking the situation was clearly something which a reasonable worker would or may view as a disadvantage. The Tribunal concluded that the fact that the claimant made protected disclosures in his correspondence was a material factor (in the sense of it being more than trivial) in Colleague A making his Facebook comment. The claimant was accordingly subjected to a detriment, contrary to s47B ERA, as a result of making a protected disclosure.

f. **The length of time it took for the respondent to investigate the concerns raised by the claimant on 9 March 2019.** The Tribunal accepted that the concerns raised by the claimant had still not been

investigated fully by the time the claimant's employment terminated on 25 February 2020. The Tribunal concluded that this amounted to a detriment in that it was something which a reasonable worker would or may view as a disadvantage. The Tribunal concluded however that the reason for the delay was initially that LO was informed that the claimant was absent from work and she wished to wait for a reasonable period to see if he returned. Thereafter, from July 2019 onwards, the delay in the claimant's concerns being investigated was due to the claimant's stated position, namely that he did not wish to participate in any investigation meeting until he returned to work or confirmed that he was fit to participate. There was no evidence to suggest that the protected disclosures made by the claimant were a material factor in the delay.

g. **The claimant not being given a review period, in accordance with the respondent's absence management processes, at the level 1 capability meeting on 10 September 2019.** The Tribunal accepted that the claimant was not given precise dates for a review period at the meeting held on 10 September 2019, as suggested in the respondent's policy. This was not disputed by the respondent. The Tribunal concluded that this could amount to a detriment: it was something which a reasonable worker would or may view as a disadvantage, particularly as it was provided for in the respondent's own procedures. The Tribunal concluded however that this was due to a misunderstanding of the respondent's procedures by PB, which was not picked up by LA, who provided HR advice to him in relation to the meeting and prepared the first draft of the outcome letter. The fact that the claimant made protected disclosures did not, consciously or unconsciously, materially influence his actions in not providing precise dates for a review period.

h. **The level 2 absence management meeting being called on the day the claimant returned to work, namely 25 February 2020.** The Tribunal accepted that the level 2 capability meeting took place on the day the claimant returned to work. This was not disputed by the respondent. The Tribunal did not accept however that this amounted to a detriment. The respondent's policies confirm that an absence management meeting can

be called where there is no anticipated return to work date, or where the levels of absence are unsustainable. The respondent called the absence management meeting for the latter reason. It was in accordance with their procedures, which had been agreed with recognised trade unions, to do so. Given this the Tribunal concluded that calling the level 2 capability meeting on the day the claimant returned to work was not a detriment: it was not something about which a reasonable worker would or might take the view that they have been disadvantaged. Further, there was no evidence to suggest that either of the protected disclosures were a material factor in PB setting the meeting for this date. He determined at the end of the meeting on 23 January 2020 that it was appropriate to proceed to a level 2 capability meeting. This was before the claimant provided a return to work date. Whilst the claimant later provided a date he intended to return, PB was of the view that a level 2 capability meeting remained appropriate, as the claimant's absence levels were unsustainable. He also noted that the claimant had simply provided a proposed return to work date, and there was no guarantee that he would in fact do so. In these circumstances, the Tribunal concluded that PB believed that he was acting in accordance with the respondent's MAP, and the fact that the claimant made protected disclosures did not, consciously or unconsciously, materially influence his actions.

i. **Not considering the claimant's absences properly during the level 2 absence management meeting, conducted on 25 February 2020.** The Tribunal did not find this conduct to be established. The Tribunal accepted the evidence of PB and LA that each of the claimant's absences were considered, along with each of the occupational health reports. While the claimant did not agree with the way they were considered and felt that certain absences ought to have been discounted, there was no basis for this in the respondent's MAP, nor anything to suggest that the way in which the absences were considered was improper in any way. The detriment alleged has accordingly not been established.

j. **The respondent failing/delaying to pay the claimant his full holiday pay entitlement and pay in respect of the period from 26-28 February**

2020. The Tribunal found that this conduct was established. The respondent accepted that there was a delay in paying the claimant in respect of both of these elements. The Tribunal concluded that this amounted to a detriment in that it was something which a reasonable worker would or may view as a disadvantage. The Tribunal concluded however that the failure to pay the claimant for the period from 26-28 February 2020 was due to a misunderstanding, on MM's part, as to what PB had stated during the meeting on 25 February 2020. She did not recall PB saying that the claimant would be paid until Friday (28 February 2020). As soon as she had access to the covert recording made by the claimant however, she realised this was indeed stated and arranged for payment to be made to the claimant. In relation to holiday pay, this was due to a misunderstanding of the claimant's entitlements. There was no evidence to suggest that the fact that the claimant made protected disclosures, consciously or unconsciously, materially influenced these issues.

114. The Tribunal accordingly found that the claimant was subjected to 4 detriments (as stated at paragraph 113 a, b, d & e above) in the period from 10-23 March 2019.

Time limits

115. The Tribunal then considered whether the complaints under s47B ERA were presented within the primary three-month time limit. The Tribunal noted that, given the dates of the established detriments, the relevant time limit expired, at the latest, on 22 June 2019.

116. The claimant commenced early conciliation on 28 February 2020. As this was done after the expiry of the primary time limit, it did not result in the extension of the primary time limit in respect of the complaints under s47B ERA against the respondent.

117. The claim against the respondent was lodged on 18 May 2020. These complaints were accordingly not presented in the primary three month time limit. They were presented almost 11 months after it expired.

118. The Tribunal then considered whether it was reasonably practicable for the complaints to have been presented within the initial three month period. No evidence was led in relation to this, nor any submission made for the claimant. Despite this, the Tribunal considered the position on the basis of the evidence which was presented.

119. The Tribunal noted and accepted that the claimant was absent from work, due to ill health, in the period in question (from 23 March to 22 June 2019). The Tribunal also noted that, notwithstanding this, the claimant was able to attend a meeting with the respondent, in person, on 23 May 2019, to discuss his absence. He was accompanied at that meeting by his trade union representative. At the meeting he indicated that, between 23 May and 11 June 2019, he would be meeting with an employment lawyer in to obtain advice from them, following a planned holiday.

120. Given that the claimant consulted both his trade union and an employment lawyer in the relevant period, it is clear that he could not credibly assert that he was reasonably ignorant of his right to present a claim, or of the relevant time limits.

121. In relation to the claimant's medical condition, the Tribunal noted that the mere existence of a medical condition does not, of itself, demonstrate that it was not reasonably practicable for a claimant to have presented their complaint in time: The claimant must establish that the medical condition rendered it not reasonably practicable to do so. Medical evidence is normally required to do so, but there is no rule of law requiring this in every case. No medical evidence was produced suggesting that the claimant's condition inhibited his ability to present his complaints, or that he was unable to seek advice or conduct research in relation to Employment Tribunal claims generally as a result of his medical condition. Indeed, it is clear that the claimant was able to consult with both his trade union and an employment lawyer in the relevant period. Any assertion that that the claimant's medical condition meant that it was not reasonably practicable for him to present his complaint in time would also, the Tribunal concluded, not be credible.

122. No further reasons were alluded to in evidence. As indicated above, no submissions were made on this point.

123. Given all the circumstances, the Tribunal concluded that the claimant did not discharge the burden on him to demonstrate that it was not reasonable feasible for him to lodge his complaint in the period from 23 March to 22 June 2019.

124. Given this, the Tribunal did not require to consider whether the claim was submitted in a reasonable further period.

125. The Tribunal accordingly concluded that it does not have jurisdiction to consider the complaints of detriment as a result of making protected disclosures under s47B ERA. They are accordingly dismissed on the basis that they were presented out of time.

Automatically Unfair Dismissal Claims

126. The Tribunal then considered whether the claimant had established, on the balance of probabilities, that the reason (or principal reason if more than one) was an automatically unfair reason, namely that he made protected disclosures (s103A ERA).

127. In considering this, the Tribunal was mindful that the principal reason is the reason that operated on the employer's mind at the time of the dismissal (***Abernethy v Mott, Hay and Anderson*** 1974 ICR 323, CA) and that, if the fact that the employee made a protected disclosure influenced but was not the sole or principal reason for dismissal, then the employee's claim under s103A ERA will not be made out (***Fecitt and ors v NHS Manchester (Public Concern at Work intervening)***).

128. The Tribunal considered what the principal reason that operated on the employer's mind at the time of the dismissal was, why the employer reached the decision they did and what, consciously or unconsciously, was their reason or motivation for reaching that conclusion. The Tribunal was mindful that it may be appropriate to draw inferences as to the real reason for the employer's action when doing so (***Kuzel v Roche Products Ltd*** 2008 ICR 799, CA).

129. The Tribunal concluded that the established protected disclosures were not the sole or principal reason that operated on the respondent's mind at the time of the dismissal. While the Tribunal accepted that PB was aware that the claimant had raised concerns in March 2019, he had not seen the claimant's correspondence or been informed of the precise detail of it. He understood that the claimant's concerns were being investigated separately by another manager, and sought to maintain a clear separation in the processes. The established protected disclosures were made in an email dated 9 March 2019, which was sent ND the following day. Following on from that, the respondent paid the claimant his full salary for 6 months, then a period of half pay. They sought to investigate the claimant's concerns, but he did not participate in the investigation. They offered alternative policies under which his complaints could be considered, but the claimant did not wish to proceed in this manner. The claimant was dismissed almost a year after making the protected disclosures, at a time when he had had 474 days absence from work, over a 4 year period, the most recent being 198 days. The Tribunal accepted PB's clear and cogent evidence that, in his 31 years of working for the respondent, this was the worst attendance record he had ever encountered and that the reason he decided to dismiss the claimant was that he had no confidence that the claimant's attendance would be satisfactory going forward. This was the sole reason for the claimant's dismissal. There was no evidence to support any conclusion that PB was motivated, consciously or unconsciously, by any of the established protected disclosures, or even that these influenced his decision in any way.

130. Given these findings, the claimant's complaint under s103A ERA does not succeed and is dismissed.

Ordinary Unfair Dismissal

131. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(1) or (2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal

had to consider whether the respondent had established a potentially fair reason for dismissal.

132. As indicated in paragraph 129 above, the Tribunal concluded that the reason the claimant was dismissed was that PB did not have confidence that he would maintain satisfactory levels of attendance going forward. The Tribunal accepted that PB genuinely believed this and that this was based on reasonable grounds, namely consideration of the claimant's previous attendance record and the terms of the OH report.

133. The respondent asserted that the reason for dismissal was either capability or some other substantial reason. As the claimant had returned to work and the medical reports indicated that the claimant was fit to do so, the Tribunal did not accept that respondent demonstrated that the reason for dismissal was capability. The reason the respondent dismissed the claimant was not related to whether he was capable of carrying out his role. Rather, the reason the claimant was dismissed was that PB did not have confidence that he would maintain satisfactory levels of attendance going forward. That amounts to *'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the employee held.'* In these circumstances, the Tribunal accepted that the respondent had demonstrated that the reason for dismissal was some other substantial reason (**SOSR**) – a potentially fair reason under s98(1)(b) ERA.

134. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason is shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss

the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

135. When considering whether the respondent acted reasonably or unreasonably in treating SOSR as a sufficient reason for dismissal, the Tribunal considered the various points, including the following particular issues raised by the claimant, in respect of which the Tribunal reached the conclusions set out below.

a. **The claimant not being given a review period, in accordance with the respondent's policy, at the level 1 meeting on 10 September 2019.** The Tribunal accepted that the claimant was not given precise dates for a review period at the meeting held on 10 September 2019, as suggested in the respondent's policy. While the Tribunal felt this ought to have been done, it was clear from the transcript of the meeting (prepared from the claimant's covert audio recording), that the parties were discussing a potential return to work in October 2019 during the meeting and that the claimant was made aware, and understood, that if he did not return in the foreseeable future, or returned and did not maintain satisfactory attendance, the respondent would look at progressing to a level 2 capability meeting, which could lead to the termination of the claimant's employment. The claimant did not return to work in October 2019. A further meeting was held with him in January 2020, before progressing to a level 2 capability meeting in February 2020.

b. **The level 2 absence management meeting being called on the day the claimant returned to work, namely 25 February 2020.** The Tribunal accepted PB's evidence that a decision was taken to proceed to a level 2 capability meeting prior to the claimant providing a proposed return to work date. Whilst the claimant subsequently provided a proposed return to work date, there was no guarantee that the claimant would in fact return to work on that date and, by that stage, PB also considered the claimant's levels of absence were unsustainable. The Tribunal also noted that the

respondent was acting in accordance with the MAP, which was agreed with the respondent's recognised trade unions, in doing so.

c. **The claimant's submission that his absences were not considered properly during the level 2 capability meeting.** The claimant stated that the absences relied upon by PB were for differing reasons and included absences for an industrial injury (for which the claimant was blameless) and back pain, both of which had now resolved and were unlikely to recur, as well as an absence caused by the claimant's protected disclosures, where again the claimant was blameless. The claimant submitted that each of these absences ought to have been discounted as a result. The Tribunal noted that the MAP, which was agreed with the trade unions recognised by the respondent, did not provide for the reason for the absences should be taken into account, or particular absences discounted. Indeed, one of the founding principles was that *'irrespective of the genuineness of the absence, there may come a point at which the Council has to terminate an employee's contract of employment if the length or frequency of the absences becomes unsustainable.'* The MAP accordingly applied to all absences, irrespective of 'fault'. The respondent was therefore entitled, under the MAP, to consider the claimant's overall pattern of attendance in order to consider whether there was a likelihood of satisfactory attendance in the future.

d. **The delay in providing a stress risk assessment and failure to consider alternative ways for the claimant to participate in the LO's investigation during his absence, for example by exploring with him or occupational health whether he would be fit to participate in a meeting by video, or by answering written questions.** The Tribunal accepted that, from the evidence presented during the course of the hearing, there was an unacceptable delay in the provision of a stress risk assessment to the claimant. The Tribunal concluded that the respondent ought to have been aware, from the discussion at the level 1 capability hearing on 10 September 2019, that the claimant had not received that stress risk assessment and a further template provided to him for completion at that time. This was not however done until the start of

February 2020. The Tribunal also accepted that the respondent had not considered alternative ways for the claimant to participate in LO's investigation: they had simply waited for the claimant to contact them when he felt fit enough to return to work or participate, as he indicated. While these points were raised during the Tribunal hearing, the Tribunal noted that they were not raised by the claimant, or his trade union who represented him throughout, with PB at any stage – whether by directly contacting him to request this, during the course of the various meetings with the claimant or, in particular, in the level 2 capability meeting.

136. In ***Sharkey v Lloyds Bank plc*** *EATS 0005/15* Mr Justice Langstaff, then President of the EAT, observed that it will almost inevitably be the case that in any alleged unfair dismissal a claimant will be able to identify a flaw, small or large, in the employer's process, and that it is therefore for the Tribunal to evaluate whether that defect is so significant as to amount to unfairness. He stated: *'Procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.'* It is important for Tribunals to consider the reasonableness of the whole procedure, including the decision to dismiss, in the round and consider procedural flaws in context when determining the overall reasonableness of the employer's decision to dismiss.

137. The question a Tribunal must decide in cases of unfair dismissal is not whether in all the circumstances the employer acted reasonably, but the narrower question under s98(4) ERA of whether the employer acted reasonably in treating the reason shown as a sufficient reason for dismissing the employee.

138. Considering that question, the Tribunal found that the respondent acted reasonably in treating the fact that they did not have confidence that the claimant would maintain satisfactory attendance levels going forward as a sufficient reason for dismissing the claimant. The claimant was given the opportunity to participate in numerous meetings in relation to his absence, and to be represented by his trade union at these. The claimant was warned that continuing absence may lead to dismissal. Whilst it would have been preferable for precise dates for the review period to have been given, the Tribunal

concluded that the claimant was aware that if his absence continued this could lead to the termination of his employment. The fact that precise dates were not given did not, when considering matters in the round, undermine the reasonableness of the respondent's decision. The claimant was aware, in September 2019, of the next steps if he did not return to work in the foreseeable future. The respondent waited for a reasonable period thereafter (4½ months), before informing the claimant that they would be proceeding to a level 2 capability hearing, which took place a month later. The respondent acted in accordance with their procedures in holding the level 2 capability meeting, notwithstanding the fact the claimant indicated he intended to return to work that day. The respondent took into account the points raised by the claimant and his trade union representative prior to reaching a decision at the level 2 capability hearing. Given that the delay in providing the claimant with a stress risk assessment, and the failure to provide the claimant with alternatives which may have enabled him to participate in LO's investigation, were not raised with PB by the claimant or his trade union representative, the fact that he did not consider these points did not, in the round, undermine the reasonableness of his decision to dismiss the claimant, for the reasons stated. The claimant also had the opportunity of two appeals.

139. Whilst the Tribunal was of the view that PB's decision to dismiss was somewhat harsh, given that the claimant had in fact returned to work on the day of the level 2 capability hearing, the Tribunal did not consider that it was so harsh that no reasonable employer would have dismissed in these circumstances, given the claimant's absence history and all the circumstances. While another employer might have waited to see whether the claimant's attendance improved following his return to work, that is not the test the Tribunal required to apply under s98(4) ERA. It cannot be said that no reasonable employer, faced with these circumstances, would have acted in this manner.

140. The Tribunal accordingly concluded that the respondent's decision to dismiss the claimant was within the range of reasonable responses of a reasonable employer in those circumstances. Given these findings, the claimant's complaint of unfair dismissal does not succeed and is dismissed.

Holiday Pay

141. In his ET1 the claimant set out his claim in respect of holiday pay as follows *'I am claiming in respect of unpaid holiday pay for the period January 2019 to December 2019. My holiday entitlement for this period was 344.1 hours, of which I had taken 78.75 hours, leaving a balance of 265.35 hours. I was paid for 35.5 hours and am therefore due to be paid the remaining 229 hours at a total sum of £2,965.55.'*

142. The claimant stated in evidence, when referred to the schedule of loss produced on his behalf, that he was due 265.35 hours holiday pay. The schedule of loss simply stated *'2019 entitlement was 344.1 hours, taken 78.75 hours, thereby leaving a balance of 265 hours.'* The contractual documentation indicated that the claimant's annual leave entitlement was latterly 255.6 hours per annum. Beyond this no evidence was led by either party in relation to the holidays taken by the claimant, or the sums paid to him on the termination of his employment in relation to accrued but untaken holidays. No wage slips were included in the bundle. The respondent's annual leave policy was not included in the bundle. Each contract of employment indicated that *'further details in relation to annual leave are included in Schedule A'*, which was not included in the bundle.

143. The respondent however, in their submission, agreed with a number of the issues asserted by the claimant in his ET1 and/or schedule of loss, namely that:

    a. The balance of the claimant's 2019 annual leave entitlement, which was carried forward to 2020, was 265.35 hours;

    b. The claimant received a payment in respect of his 2020 annual leave entitlement on 19 March 2020; and

    c. The claimant was paid the equivalent of 35.5 hours pay on 16 April 2020. This was in respect of his 2019 holiday entitlement and was the only sum which the respondent considered was due in respect of 2019.

144. The respondent explained, in their submission, that 170.65 hours of the claimant's annual leave entitlement for 2019 had been 'lost' by the claimant as he had not taken the carried over leave by 31 January 2020. The remaining hours had been lost due to 'abatement' under the respondent's annual leave policy.

145. On the basis that the parties agreed to the points stated in paragraph 142, the Tribunal was able to make limited findings in fact in relation to the holiday pay claim, as set out above.

146. Regulation 13(9)(a) of the Working Time Regulations 1998 prohibit carry over of basic annual leave into a subsequent leave year. It is now settled law however that a public sector worker, such as the claimant, who is unable to unwilling to take their basic (4 week) entitlement to annual leave, due to long term sickness absence, may rely on the direct effect of Article 7 of the Working Time Directive to carry over their unused entitlement into a subsequent leave year and/or receive a payment in lieu of unused entitlement on the termination of their employment.

147. Considering that position, and the findings in fact made, the Tribunal concluded that the claimant is due a further £386.84 (gross) in respect of holiday pay for 2019. That ought to have been paid to the claimant on/following the termination of his employment. The calculation for that is as follows:

    a. The claimant's basic (4 week) statutory entitlement to holidays in 2019 was to 142 hours (4 x 35.5).

    b. He took 78.75 hours holiday in 2019 (as per his ET1 and schedule of loss, a matter which was not disputed by the respondent).

    c. He was paid for 35.5 hours, in respect of holidays accrued in 2019, on 16 April 2020.

    d. This leaves a balance due to the claimant of 27.75 hours.

    e. The claimant's salary was £25,740 at the time his employment terminated and he worked a 35.5 hour week. That provided a salary of £495 per week, or £13.94 per hour.

f. 27.75 x 13.94 = 386.835.

148. The Tribunal did not accept that the claimant had demonstrated a contractual or legal entitlement to any further sums in respect of holiday pay. The Tribunal were not referred to any documentation to demonstrate that the claimant had a contractual right to carry over any entitlement beyond his statutory basic annual leave entitlement.

Employment Judge: Mel Sangster
Date of Judgment: 14 January 2023
Entered in register: 17 January 2023
and copied to parties