EMPLOYMENT TRIBUNALS

Claimant: Mr E Piperdy

Respondents: Shepherds Bush Housing Association Ltd (1)
Paul Weston (2)

Heard at: London Central (by video using Cloud Video Platform)

On: 6, 7, 8, 9, 12, 13 & 14 September 2022

In chambers: 28 September 2022

Before: Employment Judge Khan
Ms T Breslin
Mr S Godecharle

Representation
Claimant: In person
Respondent: Mr S Crawford, counsel

JUDGMENT

The unanimous judgment of the tribunal is that the claims are dismissed.

REASONS

1. By an ET1 presented on 19 September 2021 the claimant brought claims for a breach of the Working Time Regulations 1998, detriment for having made a protected disclosure and breach of contract.

2. By a judgment dated 9 March 2022 the claim for breach of contract was dismissed upon the claimant's withdrawal.

The issues

3. We were required to determine the issues listed below which were based on the tribunal's Order dated 9 March 2022 and refined following discussion with the parties during the hearing.

1. Breach of the Working Time Regulations 1998 ("WTR")

1.1 Did the first respondent, in breach of regulation 4(1) WTR, require the claimant to work in excess of 48 hours a week? The claimant alleges that this breach was ongoing from 1 March to 26 July 2021. The respondent disputes this.

1.2 Did the first respondent take all reasonable steps, under regulation 4(2), to ensure that the claimant's working time did not exceed an average of 48 hours for each seven days, namely:

a. The claimant was invested with management powers over his team who share and distribute the team's workload.
b. Recruitment of additional support and resources was within the remit of the claimant's management responsibility.
c. The application of the time off in lieu policy.

2. Protected disclosures (sections 43A – C & 47B of the Employment Act 1996 ("ERA))

2.1 Did the claimant make the following disclosures?[1]

a. PD1: On 26 February 2021 by email forwarded to Mr Weston.
b. PD2: On 11 March 2021 by email sent to Mr Weston.
c. PD3: On 9 April 2021 by email sent to Mr Weston.
d. PD4: On 23 April 2021 by email sent to Mr Weston.
e. PD5: On 28 May 2021 by email sent to Mr Weston.
f. PD6: On 25 June 2021 by email sent to other colleagues and forwarded to Mr Weston.

2.2 It is accepted that each of these statements amounted to a disclosure of information for the purposes of section 43B(1).

2.3 Did the claimant reasonably believe that these disclosures tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject (section 43B(1)(b)? The claimant relies on the following:

a. PDs 1 & 2: section 22 of the Landlord and Tenant Act 1985 ("LTA")
b. PD3: section 19 LTA
c. PD4: section 20 LTA
d. PDs 5 & 6: formula rent under the Rent Standard (para 4.5 Setting rents for social housing March 2020)

2.4 Did the claimant reasonably believe that these disclosures were made in the public interest?

[1] During closing submissions, the claimant withdrew three alleged protected disclosures, which were identified as PDs 7, 8 and 9 in the Order dated 9 March 2022.

2.5 If the disclosures are found to qualify for protection, the respondents concede that they were made to the claimant's employer (for the purposes of section 43C(1)).

2.6 If the claimant made any protected disclosures, did the first and/or second respondent subject the claimant to any of the following alleged detriments on the ground that he made those protected disclosures or any of them?

a. Mr Weston, requiring the claimant to work in excess of 48 hours each week from 1 March to 26 July 2021.
b. Mr Reynolds and Mr Warner, not properly investigating the claimant's grievance that the proper process during his probationary period was not being followed as set out in the claimant's contract of employment.
c. Mr Weston, extending the claimant's probationary period (which meant that the claimant was prevented from applying for another job in month 6 of his employment).
d. Mr Weston, recruiting Mr Hodgson in order to replace the claimant.

3. Limitation

3.1 Has the claimant brought the claim in respect of detriments under section 47B ERA within time?

a. In particular, were the detriments part of a series of similar acts or failures to act, and was the claim brought within three months of the end of that series?
b. If not, was it reasonably practicable to do so, and if not, was the claim brought within such further period as the tribunal considers reasonable?

Relevant legal principles

Maximum weekly working week

4. Regulation 4 WTR provides, materially:

> *(1) [Unless his employer has first obtained the worker's agreement in writing to perform such work], a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days.*
>
> *(2) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each worker employed by him in relation to whom it applies…*
> *(3) …the reference periods which apply in the case of a worker are—*
>
> *(a) where a relevant agreement provides for the application of this regulation in relation to successive periods of 17 weeks, each such period, or*
> *(b) in any other case, any period of 17 weeks in the course of his employment*

…

(6) For the purposes of this regulation, a worker's average working time for each seven days during a reference period shall be determined according to the formula—

$$A + B / C$$

w*here—*

A is the aggregate number of hours comprised in the worker's working time during the course of the reference period;
B is the aggregate number of hours comprised in his working time during the course of the period beginning immediately after the end of the reference period and ending when the number of days in that subsequent period on which he has worked equals the number of excluded days during the reference period; and
C is the number of weeks in the reference period.

(7) In paragraph (6), "excluded days" means days comprised in—

(a) any period of annual leave taken by the worker in exercise of his entitlement under regulation 13;
(b) any period of sick leave taken by the worker;
…

5. Regulation 4(1) WTR is not directly enforceable but is underpinned by the duty set out in regulation 4(2). Regulation 28 provides that responsibility for enforcing that duty lies with the Health and Safety Executive (or other relevant authority enumerated in regulation 28(2)).

Protected disclosure

6. For there to be a protected disclosure, a worker must make a qualifying disclosure, as defined by section 43B ERA, and do so in accordance with sections 43C – 43H, where relevant.

7. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following six prescribed categories of wrongdoing:

(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 and 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.

8. Section 43L(3) provides that where the information is already known to the recipient, the reference to the disclosure of information shall be treated as a reference to bringing the information to the attention of the recipient.

9. As has been restated in Williams v Michelle Brown UKEAT/0044/19/OO, a qualifying disclosure must have the following elements:

   (1) It is a disclosure of information (taking account of section 43L(3), if relevant). This requires the communication to be of sufficient factual content or specificity to be capable of tending to show a relevant failure; whether this standard is met is a matter of evaluative judgment for a tribunal in light of all the facts of the case (see Kilraine v Wandsworth LBC [2018] ICR 1850, CA).
   (2) The worker has a reasonable belief that this information tends to show a relevant failure. This has both a subjective and objective element so that the worker must hold this belief and this belief must be reasonably held (see Kilraine). In considering this the tribunal must take account of the individual characteristics of the worker (see Korashi v Abertawe Bro Morgannwg Local Health Board [2012] IRLR 4, EAT) as well as the context in which the information has been conveyed. In making an assessment as to the reasonableness of the worker's belief that a legal obligation has not been complied with a tribunal must firstly identify the source of the legal obligation that the worker believes has been breached (see Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT).
   (3) The worker also has a reasonable belief that the disclosure is made in the public interest. A tribunal must first ask whether the worker believed that the disclosure was in the public interest, at the time that it was made, and if so, whether that belief was reasonably held (see Chesterton Global Ltd v Nurmohamed [2017] IRLR 837, CA). There is no legal definition of "public interest" in this context. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case. Relevant factors could include: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer (see Chesterton at para 34). Public interest need not be the only motivation for making the disclosure. Further guidance has more recently been given by the EAT in Dobbie v Paula Felton t/a Feltons Solicitors UKEAT/0130/20/OO (at paras 27 and 28).

10. A qualifying disclosure is protected if it is made to the employer (section 43C).

Detriment

11. Section 47B ERA provides that a worker has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker made a protected disclosure.

12. Once it is established that a worker has made a protected disclosure and that he was subjected to a detriment, it is for the employer to show the

ground on which any act, or deliberate failure to act, was done (section 48(2)).

13. The correct approach on causation is for the tribunal to consider whether the making of the detriment materially influenced, in the sense of being a more than trivial influence, the employer's treatment of the worker (see NHS Manchester v Fecitt [2012] IRLR 64, CA).

The evidence and the procedure

14. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal.

15. We heard evidence from the claimant and also from Shalah Goolamally, his partner.

16. For the respondent, we heard evidence from:

    (1) Paul Weston, former Chief Finance Officer, and the second respondent.
    (2) Darren Reynolds, Director for Customer Experience.
    (3) Anna Keast, Head of Governance, Risk and Compliance.
    (4) Andrew Warner, Acting CEO and Chief Strategy Officer, formerly Deputy CEO.
    (5) Elizabeth Cave, Consultant Learning and Performance Business Partner.

17. There was a hearing bundle of 1197 pages, to which a one-page email was added by consent. We read the pages to which we were referred.

18. We considered the written and oral submissions made by both parties.

19. References in square brackets below to [25] and [X/25] are to the bundle and witness statements, respectively.

20. On the first day of the hearing, the claimant intimated but did not proceed with an application to admit new (video) evidence, the tribunal having indicated that our preliminary view was that this was unlikely to be sufficiently relevant to the issues in dispute whilst emphasising that the claimant remained at liberty to make this application at a later stage of the hearing. The claimant did not go on to make such an application. During the same day of the hearing, when the parties were taken through the list of issues, the claimant confirmed that his claim did not include one for constructive dismissal. At the start of the third day of hearing, the claimant identified the documents in the bundle on which he relied to illustrate or infer the actual hours that he worked, as he was directed to do by the tribunal (at the end of day two). Later on the same day, we explained to the claimant, whilst he was still being cross-examined, of the requirement to make an application if he wished to rely on new material. On day four, having completed his evidence, the claimant applied to add to his evidence-in-chief

by way of a schedule of the hours he claimed to have worked in the relevant period, to which the respondents objected, before he withdrew this application. As noted above, when making closing submissions, the claimant withdrew three of the nine alleged protected disclosures hitherto relied on.

The facts

21. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

22. The first respondent is a Housing Association.

23. The second respondent was the Chief Finance Officer and the claimant's line manager at all relevant times.

24. The claimant was employed on a full-time basis i.e. 37.5 hours per week by the first respondent as an Income and Data Manager for five months, from 11 February until 26 July 2021. Throughout this period, save for two days, he worked remotely from home owing to Covid-related restrictions / working practices.

25. The claimant was subject to a six-month probationary period. Materially, clause 12 of his contract provided [86]:

> "Confirmation of your employment is subject to satisfactory completion of a 6-month Probationary Period. Further details of the Probationary Period review process are contained in the Staff Handbook."

There was a requirement for regular 1-2-1 supervisory meetings and formal reviews during the probationary period, as the Staff Handbook provided [69]:

> "Monitoring should be continuous throughout the probationary period by the use of formal documented 1-2-1 supervisory meetings with the new employee at least every 4 weeks or more often as necessary. If there are any concerns about a new employee's performance the 1-2-1 supervisory meetings should be documented weekly in order to give the employee every chance to improve. The written record of each 1-2-1 supervisory meeting should be agreed by both the line manager and the employee. Formal reviews of the probationary period should be carried out as detailed above through a meeting between the employee and their line manager."
>
> A formal written record should be made of each review on the Probationary Period Report and a copy given to the employee…"

The Staff Handbook also confirmed that at the end of the six-month probationary period an employee could be confirmed in their employment, be dismissed or have their probationary period extended. In relation to the latter option, it was emphasised that [70]:

> "Probationary periods should rarely be extended, and must be agreed by Human Resources ["HR"]…Extensions will only be allowed in exceptional circumstances: where the line manager can demonstrate they have taken

> every reasonable step to assess the employee and that there is a reasonable expectation that the employee will improve performance to the required standards…"

(There was a dispute between the parties, which it is unnecessary for us to determine, as to whether the terms of this policy were incorporated into the claimant's contract.)

26. The claimant was responsible for managing a team which dealt with, amongst other matters: revenues, service charges and regulatory submissions. When the claimant took up his role, his team consisted of two income accountants, Victoria Nalukenge and Damyanti Bhudia, and a finance apprentice, Edward Alaja. A third accountant role, with a focus on service charges, remained vacant until 7 June, save for two days when the candidate initially recruited by the claimant was in post.

27. The claimant and his team were also supported by Stephen Wood, who agreed to stay on after his retirement, pending the recruitment of a substantive income accountant, as an interim Rent Accounting Officer, until he left in April 2021 [230].

28. Samuel Crabbe, H&S Project Accountant, who had undertaken the claimant's role before his immediate predecessor, was on hand to provide the claimant with a handover and to field any queries the claimant had about his role and team, until Mr Crabbe left the organisation in April 2021. We find that the extent of this handover was limited and there was a lack of documented systems / procedures in place because this was acknowledged by Mr Weston in correspondence with the claimant [287] (see paragraph 51). As will be seen, Mr Crabbe also provided some assistance in relation to the work resolving historical service charge issues.

29. The claimant was not initially appointed when he applied for the role but was brought in to fill this post suddenly, when the candidate selected in preference to him left the role after one month. We accept the claimant's unchallenged evidence that he was immediately faced with an urgent deadline to correct rent and service charges to tenants which he met by working an 18-hour day ending at 4am [C/14]. Later that month, in February, the claimant emailed Mr Weston to say that he had "worked day and night" to resolve a mail merge issue [786] and he also emailed Shubneet Kaur, Head of Financial Accounting and Compliance, around the same time, in relation to the same issue, when he referred to working through the night [783] and having worked 70 hours that week [787].

30. When the claimant joined the first respondent there were multiple issues with its financial governance and controls which included data quality. In June 2022, its governance rating was downgraded (from G2 to G3) by the Regulator of Social Housing ("the Regulator") [1126].

Historic rent and service charge issues

31. On 24 February 2021, Mr Crabbe emailed Mark Field, Chief Customer Officer, Daniel Wood, Head of Leasehold, and two others including the claimant, in which he tabulated a list of items overspent relating to the 2019/20 service charge for one of the first respondent's housing schemes,

Issigonis House, when he advised "Invoices available…do not give detailed explanations and reasons why the works were done" [181]. Mr Crabbe asked Mr (D) Wood to liaise with the relevant teams to obtain the missing explanations / commentaries. This was, or became, part of a wider review process commissioned by Mr Field. Notably, Mr Wood replied to explain that he lacked the capacity and resources to provide the commentaries [180] to which Mr Crabbe responded the next day that he too had limited capacity as:

> "I am currently in a new role and only stepped in to assist with background knowledge and not necessarily take ownership of the function. I am afraid that you will have to liaise with Ebrahim to complete. I am happy to give any history [sic] explanations or gaps if necessary…"

PD1: 26 February 2021

32. The claimant replied to Mr Crabbe and Mr Wood on the same date, 25 February which he forwarded to Mr Weston the next day. He relies on the following information from this email [which we have underlined] as being a protected disclosure [178-9]:

> "For me we are in a no win situation with these key scheme disputes at present. There need to be a clear process with timeframes in which when costs are identified for service charges then explanations need to be provided. I am happy to change the process so commentaries are from service charges team when final notices are provided BUT this needs to be a joint approach and I can see we are making steps towards this. The resident's meetings at present are inevitably going to not provide enough information not just to satisfy them but if taken to First Tier Tribunal ["FTT"] cause refunds, this is a risk including a reputational one."

The claimant then went on to identify six steps to remediate this issue. Mr Weston replied "Your proposals look very sensible and what I would expect-hopefully can be implemented asap."

33. The claimant's case is that he believed that this information tended to show that the first respondent had contravened section 22 of the Landlord and Tenant Act 1985 ("LTA") which provides that leaseholders have the right to inspect supporting accounts, receipts and documents related to service charges within six months of the date of receipt of a service charge summary. Although the claimant referred to the risk to the organisation, in relation to revenue and reputation, if a complaint was taken to the FTT, and also to residents' meetings, he made no reference to section 22 LTA nor state that there had been an actual failure to comply with a statutory request made by a leaseholder. It is agreed that the relevant service charge summary was sent out to leaseholders in August or September 2020 when the projected service charge had been reconciled with the actual costs incurred for the scheme. The statutory six-month period was therefore due to end in March 2021, at the latest. Whilst we accept that it is likely that the first respondent would have been unable to comply had a statutory request been made under section 22 LTA, this is not what the information disclosed. On the face of it, the claimant was making the point that the current deficiencies put the organisation at risk of a claim to the FTT, remedial action had now been identified and would be taken. We accept Mr Weston's evidence that he was not concerned by the claimant's email, which is

consistent with his contemporaneous response: he was aware that there were historical issues with the service charge process and that a review was under way to address these issues, which involved the claimant.

34. Mr Field emailed Mr Weston on 10 March 2021 with an outline of the outstanding service charge issues relating to ten housing schemes which the claimant and Mr Crabbe were working on [187]. His objective was for all these historic issues which related to 2019/20 and previous years to be resolved by the end of the month. He suggested weekly updates with the claimant and Mr Crabbe. The focus of the work was to provide a summary and commentary for each outstanding issue. Mr Field concluded by advising:

> "If we end up with areas that we are not able to resolve, we need to understand the root cause as to why and where required take the hit and absorb the cost ourselves".

He was therefore making clear that in any case in which there was an outstanding service charge which could not be accounted for, the organisation would absorb the cost instead of levying this charge on residents.

35. Mr Field underlined that Mr Crabbe was "really the only person who has the background to do this" [187], which acknowledged that Mr Crabbe had been the Income and Data Manager at the relevant time whereas the claimant had only recently taken up his post. This was emphasised by Mr Weston when he forwarded Mr Field's email to the claimant the next day [187]:

> "Mark was / is battling for you to have some help re the past issues his team is currently addressing with you and believes that Sam should take some responsibility re his past knowledge and be allocated some time to help you over the next few weeks…"

However, as Mr Crabbe had made clear, he would not be overseeing this work and we find that this task therefore fell to the claimant to do. In the same email, Mr Weston made a second reference to resources, when he queried the claimant's progress on recruitment, which related to the vacant income accountant role.

PD2: 11 March 2021

36. On 11 March 2021 the claimant emailed Mr Weston [186-8]. He relies on the following information [which we have underlined] as being a protected disclosure:

> "…I believe it to be reasonable and prudent for Samuel to resolve some historical issues. I would emphasise that past processes for service charges have not been up to scratch and if challenged beyond the scope of s22 of Landlord and Tenant Act 1985 i.e. inspection of invoices, accounts and receipts by leaseholders, then it be difficult to justify costs and apportionments.
>
> Please find attached my suggestions in which these schemes would likely have some costs written off, going forward with the relevant teams should prevent this."

37. We accept the claimant's evidence that this related to the work he was doing to reconcile the data with the service charges levied in 2019/20 and earlier financial years. We also accept that the claimant was concerned that there was a lack of data to substantiate the service charges levied and the documents which the first respondent needed to produce in order to meet its obligations under section 22. However, the claimant agreed when giving oral evidence that by the date of his email, the statutory six-month deadline had passed. Once again, he did not state that there had been any statutory request by a leaseholder with which the first respondent had failed to comply. Nor was it clear what the claimant meant by "beyond the scope of s22". Although the claimant's evidence was that he was referring to action taken by an aggrieved leaseholder to the FTT and/or the Housing Ombudsman this was not patent. It is also relevant that, in his oral evidence, the claimant agreed that he understood that the first respondent had agreed to absorb any service charges which it was unable to justify. We therefore find that on the face of it, the claimant was repeating his point about there being a risk to the organisation in relation to cost and, once again, he identified action to be taken to mitigate this risk. We find that this is consistent with what the claimant wrote in a summary update he sent to Mr Weston on 1 April [216-7] under the sub-heading "Risks":

> "No new risks identified. I have provided you with insights into service charges income v costs, the service charge issues, risks and recommendations to improve this going forward and in summary as above the month end processes which my team deals with…Ideally a service charge policy can enable block management accounting to be carried out successfully from the new financial year."

38. We accept the claimant's unchallenged evidence that he worked on the weekend of the 13 and 14 March in relation to an historic leasehold issue, however, we make no finding on how many hours the claimant worked nor the aggregate number of hours the claimant worked that week in the absence of any evidence being adduced by the claimant to quantify this work.

39. The claimant referred to his workload in the same email of 1 April when he explained:

> "Have put a lot of long hours to rectify mistakes for CX uploading, making sure SDR is right, service charge packs, year end accruals, month end issues, overall a lot of processes do need to be improved"

however, he did not specify the additional hours he was working.

40. The new service charge accountant was due to start on 6 April. The claimant had been supported in the recruitment exercise by Elizabeth Cave, Learning & Performance Business Partner. We accept Ms Cave's unchallenged evidence that she disagreed with the claimant's selection decision and that when a reference check raised a further concern, the claimant disregarded her recommendation that the offer was retracted, and that these concerns proved to be well-founded when the claimant agreed within days that the person appointed was unsuitable and his employment had to be terminated. Not only did this result in Ms Cave questioning the claimant's judgement but this vacancy remained unfilled for another two months.

41. On 8 April, Mr Field set up a "Task & Finish" meeting to be held on 12 April to resolve all outstanding service charge issues [226]. Earlier that day, the claimant forwarded a summary update to Mr Field and when the latter asked him to add 'Finance' comments at 18:56 the claimant provided a further updated summary at 21:34 [231] which he forwarded to Mr Weston at 21:40 [225] when he explained that eight of the ten schemes related to Finance and confirmed that Mr Alaja had been spending a lot of time working on this project. We accept Mr Weston's unchallenged evidence that in setting up this meeting, Mr Field was concerned at the apparent lack of progress in completing this exercise.

42. By around this date, the first respondent decided to bring in an external consultant to conduct an end-to-end service charge review.

PD3: 9 April 2021

43. On 9 April 2021 the claimant emailed Mr Weston [242-5] and relies on the following information as a protected disclosure:

> "Approached Mat Campion [CEO] directly with regards to systematic failure if identified by the Ombudsman would result in a formal investigation. Felt service charges with many residents if they approach the Ombudsman would result in a public finding in why SBHG has this problem and they'd put recommendations for improvements. Matt provided reassurances and stated that it is being taken as a serious matter and felt kind of good that he acknowledged that I have not just the finance angle but also from a customer service and leasehold angle."

The claimant's case is that he believed that this information tended to show that the first respondent had contravened section 19 LTA which provides that service charges shall be payable for relevant costs reasonably incurred. He claims that he was conveying that if the Housing Ombudsman became involved it would make a finding of maladministration which would include a finding about the reasonableness of the service charges levied. Whilst we accept the claimant's evidence that he believed that there had been a breach of section 19 LTA because he knew and was concerned about the lack of data to explain some of the historic service charges levied this is not what the information being relied on conveyed. We find that once again, the claimant was identifying a potential risk to the organisation. If his intention was to flag any legal breaches he did not specify what these were. In fact, within the information being relied on, the claimant acknowledged that Mr Campion had provided him with reassurances.

Meeting on 12 April

44. At a meeting on 12 April, which was in month 2 of the claimant's probationary period, Mr Weston proposed 12 key objectives which he forwarded to the claimant by email [247-8] when he explained that

> "They probably form the basis of expectations for your probationary period but accepting that they are a journey which will take time."

They agreed on six of these objectives which the claimant selected [246]. We find that the claimant was not given any feedback against the agreed

objectives until month 4, in the absence of any documentary evidence to the contrary.

45. On 19 April Ms Bhudia responded to a message the claimant had sent her when he had referred to being at "full capacity" which we infer to be a reference to renewed income accountant vacancy, when she wrote [806]:

> "Full capacity .. you do work for SBHG right?? Short staffed, long hours for little pay..SBHG need to start thinking private sector mentality to retain staff and have work life balance!!"

Three days later, the claimant sent a message to Mr Weston [1088] in which he referred to Ms Nalukenge's workload in the following terms:

> "The volume of work that Vic is having to deal with, the long hours she has to do…"

He made no reference to his own working hours.

46. The claimant applied for another role on 21 April which was not progressed because he was in his probationary period. The claimant agreed that this was a rule which was applied by the first respondent to all employees on probation. He does not complain about this.

PD4: 23 April 2021

47. On 23 April 2021 emailed Mr Weston [265-7] and relies on the following information as being a protected disclosure:

> "Section 20 invoices have been requested by Income Collections team to be sent out by Dee. Will work to improve process as it is borderline compliant as if challenged by FTT (Property Tribunal Chamber), then panel most likely to advise only just can be charged. Will keep a look out for any change in the case law."

Although the claimant's case is that this information disclosed a breach of section 20 LTA which provides for consultation with tenants in relation to proposed costs exceeding a specified sum, we find that this information conveyed the claimant's view that the current process was compliant, albeit "borderline", it was "most likely" it would not be challenged by the FTT, he had not identified any case law to the contrary and, in the meantime, was working to improve the process and its compliance.

48. Ms Cave contacted the claimant on 10 May about a monthly catch-up which she explained she was doing with all managers and would involve a general discussion "about you and your team" [281]. They met later that day.

49. It is agreed that May was a busy time for the claimant and his team. One of their key tasks, headed by the claimant, was to collate data for the statistical data return ("SDR") which had to be approved by the Executive Team and submitted to the Regulator by the end of the month.

50. On 10 May, Mr Weston emailed the claimant [282] to arrange a call to discuss "key deliverables…SDR, year end reconciliations, internal audit, external audit, month end." He emailed the claimant again on 13 May [284]

in which he itemised the claimant's workload following this discussion. In relation to the SDR, he noted that the draft for the internal review was now due with the deadline for the regulatory submission two weeks away and queried whether the claimant had asked Christian Robinson, a Data Analyst in Mr Field's team, for support with this work. Noting that there was "plenty" of work, he wrote:

> "its key that you have agreed / managed key stakeholder expectations and can deliver to them to avoid causing issues in other areas and also for your own wellbeing as there is only limited time in the day. As I mentioned to you if you need a temp that's your call but sometimes they can be more time consuming than beneficial. Your new start [the third income accountant] is beginning of June?"

Mr Weston was evidently mindful of the team's workload and underlined the need to manage the time available as well as stakeholder expectations. The claimant was supported by Mr Robinson to complete the SDR by the May deadline.

51. Later that day, at 23:10, the claimant emailed Mr Weston [292] to explain that because of an oversight by Ms Nalukenge as well as the pressure of her workload, he would need to work overnight notwithstanding that he was now on leave. The claimant subsequently emailed Ms Nalukenge at 06:38 the next morning with a bank reconciliation spreadsheet which he told her he had worked through the night to rectify [288]. He forwarded this to Mr Weston at 07:00 when he explained [287]:

> "Given the above and other matters identified may I take back one day's annual leave. I will work over the weekend for other matters e.g. service charges, SDR etc which aren't just for current year but historical going back as you have seen at least 2 years hence I am committed to using my own time to tackle things and getting these right once and for all."

Mr Weston replied to thank the claimant when he wrote [287]:

> "…Hopefully once we get through the next few months, we will be in a better position re standard processes…It's a shame that Sam didn't fully brief you in the handover of all the tasks for the Income and Services charge team…and didn't have these clearly documented…Once not in fire fighting mode – and I think its on your objective list – its essential one has clear procedures within the team…"

He was therefore acknowledging that because the claimant and his team were "fire-fighting" the claimant had not had time to work on one of his objectives.

52. Weekly senior finance management meetings took place usually every Friday afternoon, which the claimant attended together with Mr Weston. The claimant stopped attending these meetings from 15 May for reasons which he did not state were related to his workload [296].

53. Ms Nalukenge submitted a formal grievance to Ms Cave on 18 May [306-9] in which she complained about her workload and made several complaints about Ms Kaur including being expected to work on Bank Holidays. We accept Ms Cave's oral evidence that she was concerned by its contents and

specifically the issue of Ms Nalukenge's hours.

54. Ms Cave met with the claimant and Mr Weston on the same date following which she emailed her action points from this "departmental review" [299] which included a two-month secondment of Ali Tabia, who was in Ms Kaur's team, to support the arrival of the new income accountant, and for the claimant to continue to conduct a daily welfare and workload check with Ms Nalukenge, and Ms Cave also referred to the historical work which Mr Field had instigated and remained ongoing, and the need to standardise rent queries to manage workload. This was the first documented discussion about hours when some action was taken to support the claimant and his team. Mr Tabia declined to be seconded.

55. On 20 May the claimant emailed his team at 07:25 [871] to advise them that he had cancelled all his meetings in order to focus on the SDR having "worked on this all yesterday evening and most of the night" and emailed Ms Nalukenge later that evening at 23:16 to say "I'm working through the night to get this SDR over the line" [874].

PD5: 28 May 2021

56. At 05:19 on 28 May, the claimant forwarded the draft SDR to Mr Weston and others [328] when he wrote

> "…as advised, the formula supported rent not calculated due to no formula rent…"

Mr Weston replied as follows [328]:

> "Re supported rent formula rent – is that therefore last year plus 2.7%? I would be ok with that"

To which the claimant responded [327]:

> "Okay cool, I'll amend the supported to take last year's amounts and multiply by 2.7%. I'll get these added to the SDR."

57. The claimant emailed Mr Weston again that morning which he relies on as being a protected disclosure [327]:

> "Please find attached the data. Ideally there should be valuations and a build up, I'm happy to do this as I am registered RICS surveyor for future as I think the Rent Standard allows this but do correct me if I'm wrong.
>
> I will not amend and in a meeting at moment, happy to discuss in today's SDR catchup or I'll try and get out of this more sooner."

The claimant claims that this information tended to show that the first respondent was in breach of formula rent under the Rent Standard issued by the Regulator. The Rent Standard sets a mandatory limit on the amount by which social rent can be increased annually. The claimant highlighted the lack of valuations and a valuations build-up. He had initially agreed to apply the 2.7% uplift before informing Mr Weston that he would not make these amendments. The claimant's evidence was that he was seeking clarification on how to proceed as this was Mr Weston's decision which

suggests that he was working with Mr Weston to resolve this issue before the data was submitted to the Regulator and was not stating that there was likely to be a breach of any relevant legal obligation at the time of writing his email.

58. On the same date, 28 May, Mr Robinson posted the following comment about the claimant's work on the SDR, on the intranet [332]:

> "having the ultimate can-do attitude and bringing enthusiasm to rather tedious tasks. Thank you for sacrificing evening, nights, and mornings to carry the baton over the line! You've truly supported the entire business with the work that you've been doing."

The recruitment of Mr Hodgson

59. Also on the same date, Mr Weston told the claimant that he was going to recruit Andrew Hodgson, a Rent and Service Charge Consultant, to support his team. In his oral evidence, the claimant agreed that Mr Weston told him that Mr Hodgson would be a resource to assist with the historic rent and service charge issues. We accept Ms Cave's unchallenged evidence that she completed IR35 documentation for Mr Hodgson, who would therefore be engaged as an independent contractor, for three months from 1 June.

60. The claimant wrote to colleagues in his team on the same date [348-9] to explain that Mr Hodgson would be joining the team for three months when he emphasised that support was most needed in relation to Ms Nalukenge's work and having also referred to the new service charge accountant who would be joining the team, he wrote:

> "So overall we have an "oven baked" team so that we are all equipped to deliver without any historical issues, processes in place and we are all upskilled to feel confident in doing what needs to be done."

61. On 3 June Ms Kaur emailed Mr Weston [355] to complain that the claimant and his team were not cooperating with the external auditor. She also complained that:

> "all the hard work me and my team has put in to the stats will be overshadowed by these inefficiencies…"

62. In an email headed "My month 4 probation" which he sent to Mr Weston on 8 June, the claimant requested formal feedback on his performance [367]. A meeting was scheduled for 11 June which was rearranged to take place a week later because the claimant was unwell.

63. The following day, claimant emailed Ms Cave [370-1] about Ms Nalukenge's final probationary review meeting when he sought advice about extending her probationary period. He wrote that "in normal circumstances, I'd be extending her probation" and explained that Ms Nalukenge had failed to complete a core task and that she also lacked the skill and ability to do the work she was required to do. He also explained that he had allocated resources to help Ms Nalukenge, and cited her workload and extended working hours which he said had not been alleviated by Mr Hodgson.

64. For this reason, the claimant now concluded that the team would not be getting the resources he felt they needed. The claimant was on sick leave on 11 June. On or around this date, little more than a week since his upbeat email to the team, he submitted a job application which culminated in his appointment to his current post with Hexagon Housing.

65. On 12 June, the claimant responded to comments made by the internal auditor in relation to "Business Critical Controls". Mr Weston replied two days later to complain [358]:

> "This is not a satisfactory response. The below comments do not make sense to me nor do they give any assurance as to what controls are now in place to ensure that this does not occur again…"

66. Mr Weston emailed the claimant again on 17 June [384] when he alluded to adverse comments made by the external and internal auditors, and implored him to attend the next senior finance meeting:

> "Ebrahim – I think it is key that you attend this meeting and I expect it – as hopefully the three of you can have a frank discussions [sic] around whats [sic] done and then the controls and what needs to be in place/ or made better so as to ensure we have complete, accurate and timely postings.
>
> The internal audit report and external audit comments are all critical that reconciliations and basic controls are not currently working in your area…"

We find that these emails are consistent with Mr Weston's evidence that he was concerned about the issues raised by the auditors and also Ms Kaur's complaint about the claimant, which related to the external audit, and having been prompted by the claimant's request for formal feedback, and applying his mind to the claimant's objectives in preparation for the review meeting, queried whether the claimant was likely to meet them all by the end of his probationary period in August. We find that these concerns were genuinely held.

<u>Month 4 probationary review meeting on 18 June 2021</u>

67. The probationary review meeting took place on 18 June. It was a held remotely. The claimant's partner, Shalah Goolamally, was in the same room as the claimant during this meeting, unbeknownst to Mr Weston.

68. It is agreed that during this meeting Mr Weston told the claimant that he was not meeting his objectives. We do not find that Mr Weston told the claimant that he had decided to extend the claimant's probation, as claimed. We find that Mr Weston told the claimant that if he did not meet his objectives at the end of the probationary period then it was likely that his probationary period would be extended to give him more time to meet these objectives. This is consistent with what Mr Weston wrote in the probationary period review form [1101-4], which the claimant accepted was forwarded by Mr Weston to Ms Cave by email at 06:40 the next morning, in relation to an extension of the probationary period:

> "N/A – but did discuss I am open to extension to ensure one has the best opportunity to meet the key objectives/ requirements of the role"

It is also consistent with what Mr Weston wrote to Ms Cave in his email sent at 10:54 on 18 June [389] (see paragraph 73). As we have noted, the Staff Handbook provided that HR agreement was required for an extension [70] and we accept the first respondent's evidence that HR was also required to confirm such a decision in writing. The claimant did not claim to have received such a letter. Notably, his evidence was that Mr Weston did not specify the duration of the alleged extension. We also find that it would not have made any logical sense for Mr Weston to have decided to extend the claimant's probation in month 4: it would have been premature and unnecessary because any decision to extend the claimant's probation (as an alternative to dismissal) would be made if he was deemed not to have met his objectives *at the end* of his probationary period. We also take into account the fact that the claimant misconstrued part of the outcome to his subsequent grievance as confirmation that his probation had been extended in month 4 (see paragraph 91). For these reasons, we prefer Mr Weston's evidence that he neither decided nor told the claimant that he would be extending his probationary period at this meeting over the evidence of the claimant and Ms Goolamally to the contrary.

69. In relation to dismissal, although we find that Mr Weston told the claimant that he could be dismissed if he failed to meet his objectives at the end of the probationary period, we do not find that he had already made this decision nor that he was actively contemplating or threatening the claimant with dismissal, because he had made clear that, in this event, it was more likely that he would extend the claimant's probationary period.

70. In the probationary review form Mr Weston set out concerns in relation to four of the claimant's six objectives and in relation to a fifth, noted that it had not been met owing to resourcing issues which had now been addressed, and he acknowledged, more generally, that the claimant's capacity to meet his objectives had been limited by factors outside his control [1102]:

> "…your commitment and time in trying to do the job is commendable and is a credit. The challenges of vacancies now filled has required a significant amount of the time covering for these vacancies. Its now key that with the role filled and the support of a consultant that key/objectives/tasks are now done/met over the next few months to meet probationary objectives. If need be one would consider an extension of the probationary period to try and support the meeting of these objectives."

We accepted Mr Weston's evidence that by "time" he was referring to the additional time the claimant had put in to complete the SDR. Overall, we find that Mr Weston wanted to support the claimant to meet his objectives even if this meant giving him more time by extending his probationary period (something which he conveyed in an email he sent the next day) from which we infer that he did not believe the concerns he had about the claimant's performance were irremediable. We also find Mr Weston's evidence that retaining the claimant was desirable from a practical standpoint to be credible [PW/54] i.e. supporting the claimant to meet his objectives was the best as well as least disruptive option.

71. As the Staff Handbook provided, Mr Weston was required to hold regular 1-2-1s with the claimant to provide him with constructive feedback in relation to his progression towards meeting the agreed objectives, to highlight any

concerns he had and, if necessary, to support the claimant to improve his performance and meet the objectives. We do not accept Mr Weston's evidence that he held undocumented 1-2-1s with the claimant. We were taken to no documents in which Mr Weston outlined any feedback in relation to the agreed objectives apart from the month 4 review meeting. Notably, in his oral evidence, Mr Weston agreed that he had not familiarised himself with the probationary procedure. Although we accept that homeworking was a factor as were workload and resources, these factors underlined the need for regular performance reviews and coaching throughout the probationary period. Accordingly, we find Mr Weston was raising many of these performance issues in the context of the claimant's probationary objectives for the first time on 18 June.

72. After this meeting, the claimant emailed Mr Weston at 11:33 [394-5] when he complained that the six objectives did not reflect the work he was doing, he had not had time to work on them (something which Mr Weston had acknowledged in the review form which the claimant had not seen) and he had been set up to fail and penalised. Although he disputed the number of unmet objectives, he did not disagree that he had failed to complete all of them. He concluded by stating:

> "Not listened to issues advised and overall focus on where I've not had hardly any time to work on. Given the problems within the organization and the detriments that I have now encountered along with me wanting to develop and improve the organization/team I have no other option than to raise formal protected disclosures…"

He did not provide any detail about the disclosures he intended to make.

73. Mr Weston forwarded this email to Ms Cave and Caroline Moore, Director for People and Culture, on the same date [389-90] when he highlighted the claimant's intention to raise protected disclosures and referred to the claimant's reaction to his feedback at their meeting in the following terms:

> "He did not like my assessment that at this 4 month stage that he might not succeed (at this stage) in passing his objectives but our aim with the engagement of the rent and service charge consultant was to provide as much support as we could to try and ensure that he met his objectives and could pass his probation – even if it meant we had to extend it to get the evidence"

74. Later that day the claimant was offered an interview with Hexagon Housing on 29 June [401].

<u>Formal whistleblowing letter</u>

75. The claimant sent a letter to Anna Keast, Head of Governance, by email later the same day [404-11] (which was not copied to Mr Weston) headed "Public Interest Disclosure(s) [sic] Act 1988, Formal Disclosures Made in Good Faith" in which he enumerated the following headings:

> "1. Breach of legal obligation;
> 2. Breach of health and safety (specifically colleagues [sic] hours put into work);
> 3. The deliberate concealment of information relating to any

of the above."

In oral evidence, the claimant said that he referred to the same issues which he had raised in PDs 1 – 4 although in summary format. The claimant did not refer to sections 19, 20 or 22 LTA. Nor did he refer to service charge consultation rights (section 20) or the right to inspect documents (section 22) although he cited three examples where he alleged the respondent had failed to levy reasonable service charges which he said was a breach of section 21, by which we understand he meant section 19 LTA. The claimant also complained about Mr Weston and the decision to extend his probation under the heading "Life Intolerable". He no longer relies on the content of this letter as being a protected disclosure.

76. Mr Weston sent a second email to Ms Cave at 07:17 [412] about the claimant's email the previous day having reviewed it again, in which he commented:

> "…Reading this again now probably reemphasised to me further that there is an issue here – its incoherent and this I think signals/goes through to the bigger issues with his performance and prolonging his involvement with the business despite how much support we give him I fear may be a fruitless exercise despite our real desire to support his success in the role"

He had not seen the claimant's letter to Ms Keast. We find that his focus was not on the claimant's stated intention to make protected disclosures but on the claimant's reaction to the feedback he had been given because we accept his evidence that this reaction led him to question whether the claimant was able and willing to take on board feedback, accept his support and take the steps needed to meet his objectives. Notably, Ms Cave drafted a letter of concern to be sent to the claimant concerning his reaction to the feedback to be discussed at a meeting on 22 June [416]. However, following input from Mr Weston and Ms Moore, the letter was not sent and although Mr Weston intended to meet with the claimant on 22 June to go through the probationary review form with him, this meeting did not take place and this document was not shared with the claimant.

Whistleblowing investigation

77. Ms Keast responded to the claimant's letter on 21 June [423] to confirm that she would investigate the claimant's complaints about leasehold services, data integrity and rent increase processes under the Whistleblowing Policy; the complaints relating to Mr Weston and the probationary process would be investigated separately under the Grievance Policy. We accept her unchallenged evidence that before responding to the claimant, she reviewed and relied on the Whistleblowing Policy which provided [79] that it:

> "should not be used for complaints relating to your own personal circumstances, such as the way you have been treated at work. In those circumstances, you should use the Grievance Procedure…"

78. The claimant's immediate response, on the same date, was to complain that he had not raised a grievance and would now proceed to obtain an early conciliation certificate from ACAS and submit an ET1 and ask for his claim

to be forwarded to the Regulator and the Housing Ombudsman [422-3].

79. They met the next day when the claimant referred to additional material that he wished to rely on. He forwarded over 60 pages to Ms Keast on 25 June [524 & 1131-1192] which included PDs 5 and 6.

80. As part of her investigation, Ms Keast met with Mr Reynolds to discuss some of the technical issues which related to the claimant's complaints. We accepted Ms Keast's evidence that she did not share the emails which are relied on as PDs 5 and 6 with Mr Reynolds. Her focus was on whether there had been deliberate wrongdoing and/or concealment of the same. She was not looking into whether the claimant had made protected disclosures. We also accepted Mr Reynolds' evidence that PDs 5 and 6 were not made known to him and that there was no reason for him to see these emails in the context of his involvement in Ms Keast's investigation.

PD6: 25 June 2021

81. On 25 June the claimant forwarded an email to Mr Weston, which he had sent to other colleagues including Ms Keast, in which he responded to queries made by the Regulator in relation to the SDR, on which he relies as being a protected disclosure [427]:

> "I understand that this will be submitted to the Executive Team so for the avoidance of doubt I will not be completing the Statistical Data Return for the amendments required. As you will see there is a section on the formula rent which I will not complete as there is no supporting data for this; my comments indicate I will leave this to senior management to determine what should be submitted"

The claimant claims that this information tended to show that the first respondent was failing to comply with the formula rent under the Rent Standard. By this date, the Regulator had written to the first respondent on 16 June [382] with some queries about the 2021 SDR, specifically the integrity of data in relation to formula rent changes and net rent being above formula rent. The claimant's oral evidence was that this hardened his position and he decided that he was not prepared to submit the data in the SDR in the absence of formula rent data. On the face of it, the claimant was once again highlighting the absence of data required to complete the formula rent uplift and deferred to senior management to decide what information was submitted to the Regulator He also agreed when giving evidence that the absence of data would need to be disclosed to the Regulator so that there would be no concealment.

82. In the same email, the claimant also referred to the hours he had put into the SDR work, without quantifying them [427]:

> "Finally, the third tab are key events which I encountered in order to demonstrate the considerable amount of hours and time I had put into this because as you are all aware there was inconsistent, inaccurate and no data available."

83. The claimant was on annual leave from 28 June to 9 July. As Mr Weston would be on leave for a week from 12 July he emailed the claimant on 9

July [454-5] to arrange a meeting the next week to discuss "progress towards your key probationary objectives" and set out his key work priorities in the meantime. This included work reviewing formula rent figures and ensuring that the procedure for creating formula rent was documented. There was no further meeting between them.

Whistleblowing investigation outcome

84. Ms Keast sent an outcome letter to the claimant on 14 July 2021 [463-5]. Her conclusion was that there was no evidence of "any willful [sic] wrongdoing or deliberate concealment of evidence" when she acknowledged:

> "In all the above areas the restructuring of many operational departments has hindered the business in establishing robust processes or protocols around key data returns and charges. However, SBHG recognise these gaps and are addressing this by the engagement of the services of a Rents and Service Charge Consultant who is actively reviewing all obligations and making recommendations for improvements.
>
> Therefore it is my conclusion that whilst there are gaps in our data, knowledge of some processes and implementation of legislation, that this is recognised by the business and an action plan is already underway to improve the position. I therefore, am unable to find any willful [sic] wrongdoing or concealment of information."

In his oral evidence, the claimant agreed that Ms Keast had addressed all issues which she had identified as being within her remit. Nor did he dispute that Mr Hodgson was taking the action which Ms Keast had identified, although he reiterated his complaint that Mr Hodgson's work had not alleviated his workload.

85. The claimant responded to Ms Keast's outcome letter on 19 July, when he enumerated the following four alleged detriments which related to the probationary process: Mr Weston had failed to provide any feedback in months 1 and 3, had introduced 12 objectives in month 2 and had given him "adverse feedback" in month 4. He asserted that he was being set up to fail. The claimant said that this was a "serious breach of contract" which was

> "all because I've banged on about wanting to adhere to regulatory compliance and become better with the Housing Ombudsman"

and he stated that he had made protected disclosures on 18 June and "on previous various occasions" which he did not specify. He did not refer to the recruitment of Mr Hodgson.

86. Having received a "pre-offer" on 2 July, the claimant agreed to start his new job with Hexagon Housing, subject to references, on 15 July [448], he received a formal job offer on 12 July which he accepted a week later with a start date of 26 July. On this first day in his new role, the claimant emailed the first respondent at 09:13 to resign with effect at 09:30 [525-6].

Grievance

87. An investigation meeting was scheduled initially on 29 July before the claimant's resignation and a decision was then made by Ms Cave to

proceed with this process notwithstanding this resignation. The claimant's grievance was heard by Mr Reynolds on 11 August. The claimant did not refer Mr Reynolds to PDs 5 or 6; he confirmed that his preferred outcome was to receive compensation; at the end of the hearing he said that Mr Weston had told him that his probation would be extended and that "if he heard anything negative from the team, he would dismiss me" [561].

88. Mr Reynolds wrote to the claimant on 24 August [563-5] to confirm that his grievance had not been upheld, having interviewed Mr Weston on 19 August. In relation to the month 4 probationary review meeting, Mr Reynolds concluded:

> "…it was highlighted to you that objectives were not being met and that they needed to improve by the end of the process, or an extension could be a possibility."

89. By this date, the claimant had submitted his ET1, on 19 August.

Grievance appeal

90. The claimant submitted an appeal to Mr Reynolds on 30 August [567-9] in which he set out the following four headings: (1) the operational issues; (2) breach of contract; (3) Mr Hodgson "brought in to push me out"; and (4) compensation.

91. Notably, in relation to heading (2), the claimant thanked Mr Reynolds for providing written confirmation that his probation had been extended at month 4, which Mr Reynolds had not done. The claimant agreed that he had misconstrued what Mr Reynolds had written, at the grievance appeal hearing.

92. The claimant's appeal was heard by Andrew Warner, then Deputy CEO, on 14 September. At the start of this hearing, the claimant referred to the second part of his letter of 18 June in which he said he had raised the disclosure that he had not had "proper one to ones as per the policy" [578] to which Mr Warner responded "We don't correlate any perceived feedback around our internal HR policies as PID" [579]. However, it was agreed that the claimant's complaints would be dealt with in the context of his grievance and not the Whistleblowing Policy. The claimant referred to his 18 June letter as a formal disclosure and told Mr Warner he had made numerous protected disclosures before that date. Although the claimant referred to emails that he copied to Mr Campion in relation to service charges, "incorrect rents" and "bad data management" and said that he had also raised "operational issues" with Mr Weston [578-9] he neither specified what these were nor provided Mr Warner with copies of this correspondence to substantiate these disclosures. We do not therefore find that the claimant referred Mr Warner to PDs 5 and 6. We accepted Mr Warner's evidence that he did not see these emails.

93. When Mr Warner interviewed Mr Weston the latter confirmed that he had referred to the potential outcome of dismissal if the claimant had not completed his objectives at the end of his probationary period, at the month 4 probationary meeting; which Mr Weston had not disclosed to Mr Reynolds. Mr Warner was therefore able to consider this at the appeal stage

(even if Mr Reynolds had not).

94. In dismissing the claimant's appeal, by letter dated 30 September [586-8], Mr Warner concluded that the claimant's alleged disclosures on 18 June were written in reaction to the meeting earlier that day with Mr Weston. Although Mr Warner misunderstood that the claimant had told him that he had only made verbal disclosures before this date, he noted, as we have found, that the claimant had failed to provide any evidence to corroborate these disclosures. Mr Warner also concluded that there was no evidence to suggest that the aim of the probationary process had been to remove the claimant nor that its application had breached his contract. Nor did he find that Mr Hodgson had been brought in to push the claimant out.

95. In relation to the probationary process, Mr Warner acknowledged that

> "there are some practical application points that could've been better and I'll be picking these points up as learnings from this process"

without specifying what these were. Neither he nor Mr Reynolds made any specific findings in relation to whether Mr Weston had followed the probationary process.

96. Following the claimant's resignation, Mr Hodgson covered some of the claimant's previous duties and managed the team. We accept Mr Weston's evidence that because the claimant left with immediate effect, Mr Hodgson was best placed to provide this cover. We also accept his unchallenged evidence that having been initially engaged on a three-month contract, Mr Hodgson was kept on until September 2021 when Ms Kaur took over responsibility for managing the team. A fourth income accountant was recruited into the team after the claimant's departure. Mr Hodgson was involved in the recruitment process. Although Mr Weston's evidence was that the incoming postholder started in July 2021 we prefer Ms Cave's evidence that it was November 2021 as we find that this was more likely given that the claimant's resignation was sudden and took immediate effect on 26 July, that a decision would not have been made to recruit until August, at the earliest, and it was unlikely that the successful applicant would have been able to start immediately. The claimant's post has not been recruited into.

Conclusions

Breach of WTR

97. The complaints brought by reference to paragraphs (1) and (2) of regulation 4 WTR are dismissed because the tribunal does not have jurisdiction to consider them. (For completeness, we find that the claimant has failed to adduce evidence from which we could ascertain 'A' or 'B' as per the formula set out in regulation 4(6) WTR and determine the claimant's average working time during any relevant reference period for the purposes of regulation 4.)

Detriment – Protected disclosures

98. These complaints fail.

The claimant's working hours

97. The claimant agreed in oral evidence that Mr Weston did not ask him to work excessive hours or require him to work in the evenings or weekends, however, he claims that he was required to work excessive hours because of the following additional burdens on his workload: the income accountant vacancy; Ms Nalukenge's sub-optimal performance; the SDR project; the work addressing the historic rent and service charge issues; and poor data, systems and procedures. We do not find that this meant that the claimant was required to carry out three additional posts in addition to his own, as he claims, nor do we find for the reasons set out below that he was required to work excessive hours (i.e. more than 48 hours each week) during the period claimed.

98. As to the amount of the claimant's working time, the claimant conceded in oral evidence that he made no record of the hours he worked and was otherwise unable to quantify his working hours to the tribunal.

99. In respect of the documents we were taken to which are relied on by the claimant and relate to the alleged period of detriment:

    (1) there were no documents in which the claimant stated the number of hours he had worked;
    (2) there were three occasions when he reported that he had worked through the night (without specifying the actual hours he had worked) on 13 May [287, 292], 19 and 20 May [871, 874];
    (3) the claimant complained about working long hours to Mr Weston on 1 April [217] without, again, specifying the number of hours he had worked;
    (4) neither Ms Bhudia's email of 19 April [806] nor Ms Nalukenge's grievance [306-9] referred to their or the claimant's actual working hours;
    (5) the fact that the claimant sent messages to colleagues in the early morning, evening, at night and on weekends does not convey the extent to which he worked on each of these dates (with the exception of the dates above when the claimant stated he had worked through the night);
    (6) we find that it is relevant that he was working from home throughout this period and we were taken to a limited number of documents which illustrated that he exercised a degree of autonomy in relation to his working pattern (and the claimant agreed that he finished work at 4pm once a week and he took a break between 12-2pm every Friday to practise his faith).

    Overall, whilst we find that it is likely that the claimant worked a 70-hour week in late February, and that he worked through the night on 13 (for which he claimed a day's leave back), 19 and 20 May, and more than 48 hours in those weeks, that he often worked during conventionally unsocial hours, because of the lack of cogent evidence as to the number of hours the claimant actually worked, we do not find that he worked (on average) in excess of 48 hours each week from 1 March to 26 July 2021.

100. For completeness, had we found that the claimant routinely worked in

excess of 48 hours each week we would have found that this was because of the factors which the claimant identified (see paragraph 97), and that none of these factors were materially influenced by the communications relied on by the claimant as being protected disclosures, and that the following additional factors were also relevant:

(1) The claimant was a senior manager and agreed in oral evidence that he had the autonomy to set his own work schedule, subject to any demands placed on him to complete urgent work and he did exercise a degree of flexi-working each week.
(2) He was in a relative position of seniority in which if he felt that he was working excessive and/or unsafe hours he was able to bring this to the attention of Mr Weston, Ms Cave or other senior managers which we find that he failed to do. We do not accept the claimant's evidence that he continuously alerted Mr Weston to the excessive hours that he was working. We find however, that the documentary evidence we were taken to is more consistent with Mr Weston's evidence that the claimant only raised the issue of ***his*** hours on a few occasions and Mr Weston had no reason to believe that this was an ongoing issue for the claimant. Nor do we accept the claimant's evidence that he raised the issue of his working hours with Ms Cave from March, something which was not included in the claimant's witness statement, because we accept Ms Cave's evidence that had the claimant raised this issue with her she would have taken steps to support the claimant, which is consistent with the action she took in convening a meeting with the claimant and Mr Weston upon receiving Ms Nalukenge's grievance on 18 May. As the claimant and his colleagues were working remotely his working hours were simply not visible to Mr Weston or Ms Cave.

The claimant felt that he had been set up to fail by Mr Weston in that was required to spend too much time dealing with the historic rent and service charge issues, the SDR submission, and supporting Ms Nalukenge with her work which prevented him from meeting his probationary objectives. We would not have found that this was deliberate but a consequence of the time the claimant spent on the most urgent work and, as Mr Weston had acknowledged in mid-May, in the context in which the claimant and his team were in "fire fighting mode". However, as we have found, Mr Weston remained invested in supporting the claimant to meet his objectives until at least 18 June, when he had acknowledged that resourcing issues had impacted on the claimant's capacity to meet all of his objectives and was prepared to extend the claimant's probationary period, if necessary, instead of terminating his employment. We would not therefore have found that Mr Weston set the claimant up to fail, as he claims.

The grievance

101. We have found that neither Mr Reynolds nor Mr Warner were cognisant of PDs 5 and 6. We have found that Ms Keast did not refer Mr Reynolds to PDs 5 and 6 during her investigation. Nor have we found that the claimant referred Mr Reynolds or Mr Warner to these disclosures. These alleged disclosures were not therefore causative of the defects we have identified in relation to the grievance process.

The extension of the claimant's probationary period

102. We have found that Mr Weston did not extend the claimant's probationary period at the probationary review meeting on 18 June.

The recruitment of Mr Hodgson

103. We do not find that Mr Weston recruited Mr Hodgson in order to replace the claimant because we have found that Mr Hodgson was brought in as an independent contractor on a short-term basis to assist the claimant and his team in addressing some of the systemic / historic issues which the first respondent was working on; and we have also found that Mr Weston did not extend the claimant's probationary period nor threaten him with dismissal on 18 June, but indicated that an extension was likely at which point he wanted to support the claimant to meet his objectives and remain at the organisation. For completeness, the fact that Mr Weston questioned whether such support would be fruitless when he re-read the email which the claimant had sent to him immediately after the probationary review meeting was not a factor which obtained when Mr Hodgson was recruited in late May, nor did this lead to Mr Hodgson being retained by the organisation to replace the claimant following his resignation.

104. It is not therefore necessary for us to determine whether the claimant made any protected disclosures nor whether we had jurisdiction to consider any complaints which were prima facie out of time. We would emphasise that whilst we have set out our findings above as to what information the claimant's alleged disclosures conveyed objectively it has not been necessary for us to make findings on whether the claimant held a subjective belief that this information tended to show that the first respondent had failed, was failing or was likely to fail to comply with a legal obligation or that these disclosures were made in the public interest, at the relevant time, or whether any such beliefs were reasonably held.

Employment Judge Khan

30.01.2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30/01/2023

FOR EMPLOYMENT TRIBUNALS