Case Number: 1806657/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Aylmer	v	Premier Farnell UK Limited

Heard at: Leeds

On: 26, 27, 30, 21 January and 1, 2 February 2023

Before: Employment Judge A James
Mrs D Winter
Mr G Corbett

Representation

For the Claimant: In person

For the Respondent: Mr N Bidnell-Edwards, counsel

JUDGMENT

(1) The claim for automatically unfair constructive dismissal (s.103A Employment Rights Act 1996) does not succeed and is dismissed.

(2) The claims for detriment because of protected disclosures ('whistleblowing') (S.47B Employment Rights Act 1996) do not succeed and are dismissed.

(3) The claims for victimisation because of protected acts (s.27 Equality Act 2010) do not succeed and are dismissed.

(4) The claimant is ordered to pay the sum of £4,000 towards the respondent's costs.

(5) In addition, the deposit of £45 which was paid by the claimant should be paid to the respondent.

REASONS

The issues

1. The agreed issues which the Tribunal had to determine are set out in Annex A. The claimant withdrew some of the allegations at the final hearing. Those matters which were no longer pursued have been crossed out in Annex A.

The proceedings

2. Acas Early Conciliation commenced on 4 December 2021 and concluded on 8 December. The claim form was issued on 9 December 2021.

3. A preliminary hearing for case management purposes took place on 16 February 2022 before Employment Judge Armstrong. The hearing was adjourned to 21 April 2022 to consider the claimant's application to amend his claims to include allegations of automatically unfair constructive dismissal, sex discrimination and disability discrimination and thereafter to identify the issues and related orders. Case management orders were made to ensure those matters could be dealt with on 21 April.

4. The hearing took place on 21 April 2022 before Employment Judge Lancaster, who made Deposit Orders of £15 each in relation to the claims of automatically unfair constructive dismissal, some of the detriments due to whistleblowing (issues 4.1.2 to 4.1.4), and some of the detriments due to a protected act (issues 5.2.5 to 5.2.7) and the claims of harassment related to race. The note accompanying the Deposit Order states:

> *If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.*

5. The claimant was permitted to amend his claim in part. The second version of the further and better particulars provided was accepted as the particulars of claim. A further preliminary hearing was listed for 12 July 2022. Case management orders were made and the issues were identified.

6. On 13 June 2022, two claims were dismissed - the disability discrimination following withdrawal by the claimant; and the complaint of harassment related to race (due to the deposit not being paid and the claimant confirming that he was not pursuing that claim). The other three deposits were paid.

7. On 12 July 2022 a further preliminary hearing took place before Employment Judge Wade. The final hearing dates were set for a six day hearing. Case management orders were made to ensure that the case was ready for this hearing. An application to amend the claim was made but was refused for the reasons set out in the record of the hearing. The issues were further refined.

The hearing

8. The hearing took place over six days. Evidence and submissions on liability only were dealt with on the first four days. The Tribunal reached its decision in private on the fifth day. It was arranged that on the sixth day, the Tribunal would give its decision and reasons.

9. The Tribunal heard evidence from the claimant; and for the respondent, from Mr T Wojtowicz, Outbound Shift Supervisor and the claimant's supervisor throughout his employment; Ms K Willegems, Associate General Counsel EMEA (Europe, Middle East, Africa) for Avnet Europe BV, part of the Avnet

Group; Danny Carling, Shift Manager; Scott Stacey, Outbound Supervisor; and Urszula Armitage, HR Advisor. The Tribunal was provided with a witness statement from Rachel Tighe, HR Advisor. She was not able to attend the hearing for medical reasons. The weight to be given to her witness statement was reduced accordingly, although we also note that much of the content of her statement was not actually disputed by the claimant when it was put to him in cross examination.

10. There was a hearing file (or 'bundle') of 1031 pages. The claimant was not happy with the respondent's bundle and provided his own, consisting of 972 pages. Although it was inconvenient to do so, and there was no good reason why the respondent's bundle could not be used, the claimant was allowed to use his own bundle to cross examine the respondent's witnesses.

11. On 24 January 2023 an application was made by the claimant to postpone the final hearing because of alleged issues about the bundle and the claimant not being happy with his own witness statement. That application was refused by Employment Judge Wade on 25 January 2023. The claimant was asked about the application on the first day of the hearing. The claimant said he was content to proceed, if the respondent was. Counsel for the respondent confirmed that was the case. The Employment Tribunal was satisfied that a fair hearing could take place. There had only been an issue with one paragraph of the claimant's witness statement which he had been able to change since and the amended statement was accepted by the Tribunal.

12. Although the claimant had decided not to pursue his claim for disability discrimination, the Tribunal was mindful of the fact that he told us he has learning difficulties and suffers from anxiety. The Tribunal therefore asked the claimant whether any adjustments were required in relation to the hearing. The claimant confirmed that he did not require any adjustments as such. He did however ask the Tribunal to note that he might be slower to respond to questions than the average person.

13. The Tribunal took time to explain to the claimant at the outset of the hearing, how the hearing would proceed, with the evidence heard first, and then 'submissions'. The Tribunal explained the purpose of 'submissions'; and agreed with counsel for the respondent that he would provide his written submissions to the claimant, prior to giving his verbal submissions, so the claimant had the chance to read them first. The claimant was then given the option of a further break, before giving his own verbal submissions. The claimant was however happy to proceed without a break.

14. On 27 January 2023 the claimant applied to add a further paragraph to his witness statement about the investigation he intended to carry out on 1 December 2021, which is discussed further below. That was objected to by the respondent, and the Tribunal refused the claimant's application. The Tribunal decided that it was not appropriate to allow the addition at this late stage. The Tribunal had adopted a flexible and supportive attitude towards the claimant, as set out above, but a line needed to be drawn somewhere.

15. The claimant also applied to strike out the respondent's case because of issues he identified with the bundle, for example, some of the transcripts being redacted, and some documents allegedly being missing. Having considered his written application, the Tribunal determined that the

application had no reasonable prospect of succeeding and declined to hear it.

16. The claimant made an application to recall Ms Armitage on Day 4, Tuesday 31 January 2023, because he had forgotten to ask her some questions the day before. The claimant had forgotten his laptop on the Monday but had been happy to proceed without it. The Tribunal could see that the claimant had placed post-it notes on the witness statements in relation to the questions he wanted to ask. The Tribunal decided that it was not proportionate to recall Ms Armitage. The Tribunal was due to hear from four witnesses and hear verbal submissions from both parties on Day 4, with a clear day for deliberations on Wednesday 1 February, and a verbal judgment being given on the final day, Thursday 2 February. The Tribunal noted that that the claimant is representing himself; but the Tribunal had already made various other adjustments/allowances for the claimant as set out at paragraph 13 above. The overriding objective requires justice to be done to both parties, and in light of the adjustments/allowances that had already been made for the claimant, the Tribunal decided that it was not proportionate to recall Ms Armitage. The claimant confirmed that he would refer to the further matters he wanted to put to Ms Armitage in his verbal submissions, although he did not actually do so.

17. Before turning to our findings of fact, the Tribunal believes it would be helpful to make some general comments about the credibility and reliability of the witness evidence before us. On occasions, it was apparent that the claimant was being untruthful in his evidence before the Tribunal. For example, on Friday 27 January, the claimant stated that he had not recorded the meeting on 12 November 2021, before contradicting himself a few minutes later. He did the same on Monday 30 January.

18. Further, as noted in the findings of fact below, the claimant denied that the transcripts of the conversations he had with the security guards on 1 and 2 December 2021 were produced by him. Those must however be his transcripts. The respondent does not make audio recordings of conversations, and did not provide those transcripts. The assertion by the claimant to the contrary was untrue.

19. Yet further, in answers to questions put to him in cross-examination, the claimant's answers were often rambling and difficult to follow. By contrast, the respondent's witnesses gave consistently clear answers; and made concessions when appropriate. For example, Mr Wojtowicz confirmed that he may have pointed out to the claimant that his actions could amount to gross misconduct; Mr Carling accepted that he had suspended the claimant; and Ms Armitage readily accepted that her email and letter dated 1 December 2021 as to whether or not the claimant needed to provide proof of identity were contradictory; and that she had made an error, by not noticing at the outset that the claimant had emailed the respondent from a private email address.

20. For all of these reasons, where there is a conflict in the evidence given by the respondent's witnesses, compared to the claimants, the respondent's witness evidence has in general been preferred, particularly where that has been tested in live evidence.

Findings of fact

21. The claimant started work for the respondent on 16 November 2020, in the role of DC Operative. The claimant's role primarily involved picking orders from around the warehouse, mainly in an area known as manual shelving, and packing them up ready to be shipped.

22. Amongst other things, the claimant's contract of employment gave the respondent a right to suspend him on full pay for the purposes of investigating any allegation of misconduct or neglect against him. The contract also obliged the claimant not to use confidential information obtained during the course of his employment, without the respondent's written consent.

23. Avnet Europe BV acquired Premier Farnell UK Limited in or about 2016 and the respondent became part of the Avnet Group of companies. Companies within the group have various shared services functions such as HR, Legal, Finance and IT. HRNow is a generic email address. Emails to that HR portal address from UK-based employees of companies within the Avnet group are allocated centrally to a HR Manager working for UK-based Avnet companies, who then allocate the case depending on the workload and capacity of HR staff at the time the grievance is submitted.

24. Global Information Services (GIS) is part of IT services, which is separate to the shared HR function. The inbox for GIS is ServiceNow. GIS deals with alleged GDPR breaches. Alleged breaches of the GDPR/Whistle-blowing reports are allocated via a third party service provider which provides a global management system. Requests relating to Europe the Middle East and Africa are sent to Ms Willegems.

25. Avnet's Global Data Privacy policy states:

> *Each employee bears a personal responsibility for complying with this Policy in the fulfilment of their responsibilities at Avnet. …*
>
> *3.2 Notice. When collecting Personal Information directly from individuals, Avnet strives to provide clear and appropriate notice about the:*
>
> > *• Purposes for which it collects and uses their Personal Information,*
> >
> > *• Types of non-Agent third parties to which Avnet may disclose that information, and*
> >
> > *• Choices and means, if any, Avnet offers individuals for limiting the use and disclosure of their Personal Information.*

26. On 22 February 2021 there was a disagreement between the claimant and another operative, Anna Kochienawciz (AK) regarding the use of workstations. The claimant raised this with Mr Tomasz Wojtowicz. Mr Wojtowicz was the claimant's supervisor and had line management responsibility for him throughout his employment. (The Tribunal notes that the claimant argued both at the hearing and during his employment that Mr Wojtowicz was not his line manager, he was 'just a supervisor'. Whilst the Tribunal accepts that is the claimant's belief, the Tribunal does not consider that to be a reasonable one).

27. On 26 February 2021 AK raised a formal grievance in relation to the claimant's behaviour. She alleged that the claimant had behaved in a

malicious way towards her, of tampering with her equipment and making rude gestures towards her.

28. A meeting took place on 9 March 2021 between the claimant, Matthew Moon (Quality Manager and Grievance Manager) and AK, in order to try and resolve the disagreement. The claimant and AK agreed that the issue did not need to be taken any further. Both were reminded to be professional and respectful to each other at all times.

29. There was a further clash between AK and the claimant at the beginning of September 2021. An informal grievance was submitted by the claimant by email on 7 September 2021. Attached to the grievance were audio recordings which had been made by the claimant of conversations between him and colleagues, without their knowledge or consent. The recordings were made on a mobile device in the claimant's trouser pocket and as a result, the quality of the audio recordings is poor. The claimant summarised his grievance as follows:

> *My grievance is slander/rumours, hostile workplace, turning into race issue, Harassment, Discrimination (Language), social isolation by her and her friend endless chatter in their own language does not gives a shit about nobody.*

30. Mr Stacey was asked by Emma Sharman, HR Advisor, to speak with the claimant to see if he could informally resolve the issue with AK. Mr Stacey had not met Mr Aylmer before, which is why he was asked to be involved.

31. The informal meeting took place on or about 12 October 2021, between Mr Stacey, Ms Sharman and the claimant. The claimant described the issue as 'just a spat that has got out of hand'. He then told Mr Stacey that he had made the audio recordings. The claimant alleges that at this meeting, Mr Stacey gave him an ultimatum by telling him that Mr Stacey would instigate disciplinary proceedings against him for recording conversations unless he discontinued his grievance. The Tribunal prefers the evidence of Mr Stacey on this point, which it finds to be more reliable.

32. The claimant was actually advised that if this went down a formal route he could be subject to a disciplinary investigation because it was inappropriate and potentially unlawful to record colleagues (who have rights to privacy) without their consent. Additionally, it appeared to Mr Stacey that the claimant had been recording colleagues during work time, when he should have been doing the job the respondent employed him to do. Mr Stacey gave the claimant time to think about how he wanted to proceed, and told him he would discuss the issue further the next day.

33. On 13 October 2021, Mr Stacey duly spoke with the claimant who told Mr Stacey that he wanted to go down the formal route. Mr Stacey informed Ms Sharman.

34. The claimant was asked to come to a grievance meeting on 21 or 22 October 2021 with Mr Stacey. The claimant refused. The claimant was told that the company would carry out the investigation in his absence if he did not come to the meeting. The claimant still did not attend and Mr Stacey decided that since the claimant had admitted to making recordings of colleagues, it was appropriate for that issue to be taken forward under the disciplinary process. Mr Stacey had no further involvement after that date. Ms Tighe and Mr

Carling progressed the disciplinary investigation further (as set out below). Mr Stacey was not aware that the claimant had raised any complaints of race discrimination.

35. On 2 November 2021, AK told Mr Wojtowicz that the claimant had taken one of her orders without her permission. When it is busy, operatives are asked to take three to four orders at a time; but when it is quiet, they are asked just to take one. Mr Wojtowicz asked AK to only take one order at a time as it was quiet.

36. On 3 November 2021 Mr Wojtowicz held an informal meeting with Paul Evans ("PE"), AK and the claimant, to try and resolve the problem without a formal process being followed. It was agreed at this meeting that the claimant and AK would work different shifts in different locations so they did not have to work near each other. Both the claimant and AK agreed to that proposed solution.

37. On 11 November 2021 the claimant was invited to an investigatory meeting with Ms Tighe and Mr Stacey in relation to his grievance and other matters that required investigation.

38. On 12 November 2021, Mr Carling requested Mr Wojtowicz to ask the claimant to come upstairs for a meeting with Mr Carling. The claimant refused to do so until Mr Carling told him what the meeting was about. Mr Carling told him he was going to be suspended for refusing to come to a meeting. The claimant told Mr Carling he had not refused to go into the meeting, he had asked for more time. Mr Carling gave him the benefit of the doubt, on the basis that there might have been a communication breakdown.

39. The claimant was then asked about the voice recording of colleagues. The claimant asked for a copy of the policy saying he could not make covert recordings. He was told that there wasn't such a policy but it was still not appropriate behaviour. The claimant told Mr Carling he had made a recording of a conversation with AK that day, to protect himself from malicious allegations by her against him. Mr Carling was concerned that the claimant would continue to make covert recordings as he did not appear to understand that he had done anything wrong. He therefore decided that the issue should proceed to a formal disciplinary hearing.

40. During the meeting, Ms Tighe instructed the claimant not to make recordings. He responded by saying that he was going to carry out his own investigation, at the same time as not participating in the respondent's investigation. Ms Tighe told the claimant that he must not do that and that any investigations should be carried out in accordance with company policy.

41. At the conclusion of the meeting, the claimant was invited to sign the notes. He refused because he said some things were missing; but 'could not remember' what those things were, when Mr Carling asked him to clarify them.

42. On 14 November 2021 the claimant emailed the HRNow email address. Amongst other things, the claimant stated:

> *I request CCTV or check, on 11th Nov, from 7am and onwards someone removes my stuff from Station 5 station (Label on my blue container and other stuff) I suspect its related to poster or from Anna, they think I've*

removed 2 Polish independence day poster on 10th afternoon shift. I know who did remove it but I understand their reasoning for it …

(Anna, Eliza and Patrycja Szabunko chatting behind isle 11 away from CCTV, not getting tote from other area) Anna aggressive behaviour (Racially motivated) grabs one of my totes had 2 on the floor next to my station makes excuses about Tomasz saying one tote per time stil I holding on the tote, I was waiting for her to do her thing before I told her it connected to my RDT, talk to her friend Eliza, told our group about this but didn't know anything about this at all (Eliza always defend her regardless she says …

Its Bullying, no respect for me as a fellow worker, Nonverbal harassment and verbal harassment made worse by Language barrier creates an unfriendly workplace for me to work

43. In line with the agreement reached during the informal meeting on 3 November, at the start of Mr Aylmer's shift on 17 November 2021, Mr Wojtowicz asked the claimant to move to another area. The claimant refused, saying that Mr Wojtowicz was not his manager and he would not follow his instructions. Mr Wojtowicz explained to the claimant that he was his direct report supervisor. The claimant still refused to follow the instruction. The claimant did not tell Mr Wojtowicz at this meeting that he felt he was being discriminated against or that he was being treated differently to his female colleagues. Nor did he tell Mr Wojtowicz that he would be raising this issue with HR. The Tribunal accepts that if the claimant had done so, the claimant would have been advised to speak to the Shift Manager first to explore whether the matter could be resolved to his satisfaction.

44. On the same day, the claimant was asked by Mr Wojtowicz to attend an investigation meeting with him and Paul Evans because he had refused to move when Mr Wojtowicz asked him to. At first, the claimant refused to attend the meeting. However, when Mr Wojtowicz walked away, the claimant followed him and joined the meeting. The claimant claims that he was forced to attend this meeting and that in being asked to attend this meeting, he was being victimised for making allegations of discrimination. The Tribunal accepts the evidence of Mr Wojtowicz that at the time he asked the claimant to attend this meeting, Mr Wojtowicz was not aware of the claimant having made any complaints of discrimination. At the conclusion of the meeting the claimant was advised that if he failed to follow a reasonable management request this could be classed as gross misconduct and he could be subjected to disciplinary action.

45. The claimant raised a grievance in an email to HRNow on 21 November 2021, attaching further audio recordings he had made on 15 and 17 November 2021. Ms Tighe noted that despite the claimant having been told at the meeting on 12 November 2021 not to make any further recordings, he had disregarded this instruction and continued to make recordings of his colleagues, which he attached to his grievance email. The claimant's email, sent at 23.49 on 21 November 2021, states:

I want to talk about the trolley situation i tried one of them on Monday and last week and talk to people about this they say they experience problems with them including the hook catching on High Vis and grazing their

shoulder they complain about it to Tomasz. I didn't know about the trolley situation until recently because I always work in PMAN1

Near-Miss Report sorry most of the picker don't even know about this or other policies relating to this. …

Tomasz is a supervisor he should be speaking in English at all time so that he should be perceived by employee as being fair to all people from different background

Tomasz was directly and indirectly discrimination me when compared with Anna (Personal Relationship and same nationality) and misinformation relating Anna and me before and during the meeting (Misconduct).

46. In an email sent at 03.20 am on 22 November 2021, the claimant said:

Thomas and Paul falsifying document (Notes) to get me dismissed (Gross Misconduct) - include this in my Formal Grievances HRC0103127

Didn't include was health & Safety as part of the reason (Want to talk to Manager and Discrimination) …

I do my own investigation on health & Safety Issue as I told Tomasz about this and pretended about not knowing about this, I will talk to the pickers working in manual shelving won't be interrupt by Paul, Tomasz and any other request this Monday 23/11/21 3pm until 4pm (finish earlier)

47. On an unknown date, the respondent had decided to place a handle on the picking trolleys, to assist employees when sorting orders. The claimant and other employees complained about this, because it caught on other employees hi-vis jackets, might cause minor grazing, caught on shelves and got in the way when they were turning round corners in the warehouse. As a result, having listened to representations from staff, management subsequently decided to remove the handle from the trolleys.

48. On 22 November 2021 the claimant arrived at work early (without authorisation) in a high visibility jacket with an A4 piece of paper taped to it, and with the words 'investigation officer' written on it. The claimant had a clipboard in his hand and he proceeded to go around asking questions of employees and recording them. The claimant did try and argue during his evidence before the Tribunal that this was 'a prank'. The Tribunal does not consider that suggestion to be credible. The Tribunal notes that the claimant's proposed addition to paragraph 178 of his witness statement, confirms that the claimant did carry out his own investigation prior to the shift. That is entirely inconsistent with his suggestion in the hearing, for the first time, that it was simply 'a prank'. Although the proposed amendment to the statement was not formally accepted, the Tribunal considers it to be legitimate to consider its contents when assessing the credibility of this assertion by the claimant that it was just 'a prank'.

49. On the afternoon of 22 November 2021, the claimant was formally suspended by Mr Carling. During the suspension meeting, the claimant was told that he must not attend the site at any point without permission and that he should go home. He was advised that the respondent would be in touch regarding next steps. The reason given for the suspension was:

After attending an investigation meeting on Friday the 12th November 2021 where we discussed your conduct and the use of a recording devise

on site. We gave clear instructions to no longer record people on site and you agreed to this in the meeting which is documented in the notes taken. On the 21st November you submitted two cases to HR Now stating a grievance but also containing three recordings dated the 15P and 17th on this basis we have decided to suspend you pending further investigation into this matter.

The record of the suspension, which set out the above reason, was signed by the claimant.

50. Mr Carling was not aware that the claimant had made any complaints of discrimination or made disclosures about health and safety during his involvement with the matters set out above.

51. On 30 November 2021, the claimant made a subject access request (SAR). Ms Armitage acknowledged this on 1 December 2021 and asked the claimant to set out the parameters of his request, in a standard form which he was sent and asked to complete. In an email to the claimant, the claimant was told by Ms Armitage that he did not need to provide proof of identity. The standard letter and form did however ask the claimant for proof of identity. Ms Armitage was asked about this during the hearing. The Tribunal accepts Ms Armitage's evidence that she had failed to spot that the claimant had emailed the respondent from a Hotmail address. She therefore told him in the email that he didn't need to prove his identity, although the standard documents contradicted that. Having checked the position with her line manager, Suzanne McHale, Ms Armitage confirmed to the claimant that because he had emailed from his personal address, there was no guarantee the email was from him, so the respondent did need him to send the ID documents requested. The claimant did as requested on 6 December.

52. The claimant attended the site on 1 December, in breach of his suspension conditions. He made a recording of his conversation with the security guard. The Tribunal notes that although the claimant denied that, the transcript is in the same format as others produced by the claimant and the respondent does not audio record conversations. The claimant asked Ms Armitage for a copy of the respondent's Whistle-Blowing Policy. On being told by Ms Armitage that the policy was still being drafted the claimant replied on 1 December 2021:

Thank you for that but that your responsibility not mine

Again, why was there whistle blowing policies for Australia in our intranet? and if there was Australia where is the Uk one? why was it place there in the first place emm?

I'm coming again to UK1 outside gates to get that copy of Whistle Blowing Policies for UK Farnell Version tomorrow no excuse this time

I demand it it's my right

53. The claimant duly attended the site again on 2 December, to request the WB policy and grievance policy. Again he made an audio recording of the conversation with the guard.

54. On 2 December 2021 Ms Armitage emailed to the claimant and attached the health & safety policy, the General Information System security policy, and

the code of conduct. The claimant had already been sent the grievance policy and disciplinary policy.

55. On 7 December 2021, the claimant made a complaint regarding an alleged violation of his data protection rights against Ms Armitage; due to him being asked to provide proof of identity. Ms Willegems told the claimant by email on 8 December 2021 that investigators would be contacting him about next steps.

56. Also on 7 December 2021, the claimant was invited to a grievance hearing, to take place on 10 December 2021. The claimant told HR that he wanted a response to his SAR before the grievance hearing took place so the grievance was put on hold for the time being.

57. On 8 December 2021 Ms Willegems sent an email to the claimant which reads:

> *Thank you for bringing this matter to our attention. As you know, Avnet takes such allegations very seriously and we will be looking into this.*
>
> *Our investigators will be contacting you shortly on the next steps.*

58. On 9 December 2021 Ms Armitage listened to the twelve audio recordings that the claimant had provided to see if they contained anything to help his case. She found that there was mostly background noise, a lot of mumbling and nothing of apparent relevance to the case. Once she had listened to them, Ms Armitage prepared a note about the recordings and then deleted them.

59. On 10 December 2021, the claimant was contacted through the Avnet Alert Line. Those making reports of whistle-blowing are provided with a password and username so that they can access the system directly to see what is happening with their report. As the claimant had not responded to the email sent to his Hotmail email address, the message (which was also sent by email) states:

> *As we are not sure you have the correct email address and you received our emails dated 6th December and today, we would also like to reach you through the alertline. Thank you for bringing this matter to our attention. As you know, Avnet takes such allegations very seriously and we will be looking into this.*
>
> *Would it be possible to provide us further details on the allegation and the specific policy or law that is allegedly violated?*

60. On 11 December 2021 the claimant responded by email as follows:

> *Tomasz Wojtowicz (Supervisor) – Race Discrimination (Ajmal and Anna), Dishonesty, Breach of Privacy (Audio Recorder without permission) HR Advisor Urszula delaying the SAR not giving me the evidence for Formal Grievance and Disciplinary Meeting related to Whistle-Blowing Daniel Carling (Shift Manager) not following the Code of Conduct (Formal Grievance) - suspected falsify doc (Notes) Rachel HR- not following the Code of Conduct- suspected falsify doc (Notes) Ricky Berry and Matthew moon - not following the Code of Conduct to Anna and Ajmal situation Waiting for DSAR for this Suspended for Whistle-Blowing (using Audio Recorder in meeting) No Employee Handbook for Contract workers (Control/restricted them) Health and Safety Issue with Trolley (Do that later*

evidence here) workers told supervisor but nothing changed (still using the upgraded trolley) - Iv reported to HR part of Formal Grievance

61. On 28 December 2021 the claimant asked for clarification as to the reason for his suspension. In a reply dated 4 January 2022 Ms Tighe told the claimant:

Just for clarity - Any action that is inconsistent with the relationship of trust required between Premier Farnell and their employees -

You were asked on multiple occasions not to record people without their permission, and on multiple occasions you have chosen to ignore the request to stop. You have since also been to site when it was confirmed with you not to attend site due to suspension, and used your recording devise (sic) again without gaining permission. You agreed in the investigation not to record but have since continued which could be seen as a breach of trust which you will be given ample opportunity to defend/discuss when you attend your hearing.

62. On 30 December 2021, Ms McHale sent to the claimant the documents he had requested in his first SAR.

63. On 5 January 2022 Ms Tighe received an email from the claimant requesting evidence in relation to '*any action that is inconsistent with the relationship of trust required between Premier Farnell and their employees'*. Ms Tighe responded on the same date. She explained to the claimant that he had admitted to recording colleagues and that he had continued to submit recordings to HR, despite having been asked on numerous occasions not to make recordings. Ms Tighe confirmed to the claimant that he had received all information requested in his first DSAR.

64. On 10 January 2022, the claimant resigned with one month's notice. His letter states:

Im resigning giving you 1 month's notice - 10/02/2022 or 11/02/2022 you choose
Reason:
Breach of Contract and breach of trust and confidence
Got the notes (DSAR) for investigation on 1/01/22 (double checked- nearly missed it) just discovered another attempt on falsifying document
(Notes and Letter) from Investigating meeting, Formal Meeting (Suspension) and both used as evidence against me in disciplinary later on
I should have resigns last month but I want to finish my Formal Grievance and Iv trusted the management to have good ethical behaviour and follow code of conduct towards me. It was quite naive of me to trust you on that and I should have known better thank you.
SAR outcome - Unacceptable
No access to Code of Conduct supporting policies (Accept H&S), Legal Deparment, HR NOW, Workday, Policy HUB
Allowing harassment, not applying dignity at work. Equality etc to an employee (Me)
Retaliation for Whistle-Blowing
Bullying
Discrimination

Delaying and attempted to stop my Formal Grievance
Others (sic)

65. On 11 January 2022 the claimant decided to resign with immediate effect. His email states:

Today I found more, Mr Carling misled me about the investigation meeting from informal (Bully me with suspension) to formal quite malicious act from them both (Manipulated me)

Another one Paul and Tomasz with Ricky (Shift Manager) had decided to give me Gross misconduct for rejecting "reasonable request from manager" but it say misconduct on the Disciplinary Policy and even then, it shouldn't be misconduct as my reason was reasonable - just found that today

Ricky (Shift Manager) was in on this and 2 hours 30 after he wanted to see me with HR when Paul came to tell me to go and meet them this is all planned

I can't allow this to go on I'm resigning now effectively with no notice this was organised to rid of me

Acceptance of the repudiation (sic)

66. On 13 January 2022 Ms Tighe replied to the claimant as follows:

I am sorry that you feel that you feel you would like to resign from our organisation and want to remind you that you have an open grievance and we would still like to work with you hear understand these points further and try to gain a resolution. With this in mind I would like to suggest you take 7 days by way of a cooling off period, to consider your resignation and to give us the opportunity to deal with your grievance and the concerns you have raised in your recent emails inclusive of the points you have raised within your resignation. I would like to reiterate that we have not mentioned dismissal at any point and we are really keen to speak with you about your concerns. (sic)

67. The claimant responded to say he would not reconsider his resignation. On 16 January 2022 the claimant submitted a second DSAR request.

68. On 24 January 2022 a letter was sent to the claimant by Ms Armitage acknowledging his appeal against the DSAR response of the same date. He had asked for copies of CCTV evidence and for copies of his audio recordings. An email was sent by Ms Armitage to the claimant on 26 January 2022 confirming that his 16 January 2022 request was being processed, but that she could not open the file 'Amended SAR Request 25.01.22.rar' as it was not recognised on her PC. She asked that it be sent in a different format.

69. On 9 February 2022, there was a meeting between Ms Armitage and Ms Willegems about the contradictory messages sent to the claimant about whether proof of identity was required. Ms Willegems then emailed the claimant on 9 February 2022, asking him to confirm whether other employees had consented to him recording conversations. The claimant responded:

Why are you focused on consent I don't need consent in relation to protecting myself (other reason) from management/employee (Witness

statement which the original ET1 form I've sent shows Harassment/discrimination and others) which you are now part of (Cover up) when I was employed with Farnell.

70. The claimant further responded on 15 March 2022. Amongst other things he stated, in response to the questions raised by Ms Willegems (with the claimant's responses underlined):

Based on our Code of Conduct and any Whistleblowing regulation, reports are handled confidentially.

Whatever is this and [I'm] Ex-employee and its been 4 months so its desperation really

Communication of the existence of an investigation and its related subject matter should be limited to those who need to know to help ensure confidentiality, respect individual privacy rights, and maintain the integrity of the Investigation. May I therefor[e] strongly request you to keep this investigation confidential?

There is no investigation and waste of my time (4 months) …

Again, we take the allegations that you reported serious and will Investigate this matter further. As our Investigation Is based on the information and documentation that is provided to us, we would like to ask you to send us any additional information or documentation that you consider relevant for this case.

False, don't waste my time

71. Ms Willegems decided not to use the recordings since the consent of other employees had not been obtained. On the basis of the above responses, Ms Willegems produced a report concluding that there had been no breach of the GDPR and closed her file.

72. The claimant's second SAR was responded to on 14 February 2022.

Relevant law

Protected Disclosure Detriment/Dismissal

73. 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 types of wrongdoing or failure listed in s.43B(1)(a) to (f) of the ERA 1996.

74. In ***Williams v Michelle Brown AM***, UKEAT/0044/19/00 at paragraphs 9 and 10, HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

"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 not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn its reasoning and conclusions in relation to those which are in dispute."

75. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in ***Kilraine v London Borough of Wandsworth*** [2018] ICR 1850 CA, Sales LJ provided the following guidance:

"30. The concept of 'information' as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Longstaff J made the same point in the Judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between 'information' on the one hand and 'allegations' on the other […]

31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute 'information' and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.

[…]

35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in the ***Cavendish Munro*** *case did not meet that standard.*

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by the Tribunal in the light of all facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s43B(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 Ltd v Nurmohamed*** *[2018] ICR 731, para 8, this has both a subjective element 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."*

[…]

41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it

*is made. If, to adapt the example given in the **Cavendish Munro** case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says 'You are not complying with health and safety requirements', the statement would derive force from the context in which it was made and taking in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of the whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner."*

76. The issues arising in relation to the Claimant's beliefs about the information disclosed were reviewed by Linden J in ***Twist DX v Abbott (UK) Holdings Ltd*** (UKEAT/0030/30/JOJ), from which the following principles emerge:

    *76.1. Whether at the time of the alleged disclosure the Claimant held the belief that the information tended to show one or more of the matters specified in s.43B(1)(a)-(f) ("**the specified matters**") and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs [para.64].*

    76.2. It is important for the ET to identify which of the specified matters are relevant, as this will affect the reasonableness question [para.65].

    76.3. The belief must be as to what the information 'tends to show', which is a lower hurdle than having to believe that it 'does show' one or more of the specified matters. The fact that the whistle-blower may be wrong is not relevant, provided his belief is reasonable [para.66].

    76.4. There is no rule that there must be a reference to a specific legal obligation and/or a statement of the relevant obligations or, alternatively, that the implied reference to legal obligations must be obvious, if the disclosure is to be capable of falling within s.43(B)(1)(b). The cases establish that such a belief may be reasonable despite the fact that it falls so far short of being obvious as to be wrong [para.95].

77. The Court of Appeal considered the 'public interest' test in ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731. The following principles emerge.

    77.1. The Tribunal must ask: did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest? [Para.27]. That is the subjective element.

    77.2. There is then an objective element: was the belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest [para.28].

77.3. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. According to Underhill LJ (at para. 29):

"That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify after the event by reference to specific matters which the Tribunal finds were not in his head at the time, he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential and not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable."

77.4. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it [para. 30].

77.5. 'Public interest' involves a distinction between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest [para. [31].

77.6. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest [para.36].

78. When considering the question of the Claimant's reasonable belief, it is to be remembered that motive is not the same as belief: ***Ibrahim v HCA International Ltd*** [2020] IRLR 224.

79. Section 47B(1) ERA 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. 'Detriment' is not defined in the ERA 1996, but applying discrimination case law, the concept is a broad one and there will be a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment: ***Jesudason v Alder Hay Children's NHS Foundation Trust*** [2020] IRLR 374.

80. The initial burden of proof is on the Claimant to establish that a protected disclosure was made and that the ground or reason (that is more than trivial) for detrimental treatment is the protected disclosure. Thereafter, by virtue of s.48(2) ERA 1996, the Respondent must be prepared to show why the detrimental treatment was done and inferences may be drawn in the event that the Respondent's explanations are unsatisfactory.

81. While the threshold of establishing a qualifying disclosure may be relatively low, it is essential that causation is properly considered. In a detriment case, determining whether a detriment is on the ground that the worker has made a protected disclosure, requires an analysis of the mental processes (conscious or unconscious) of the employer acting as it did: ***Chatterjee v***

Newcastle Upon Tyne Hospitals NHS Trust [2019] 9 WLUK 556. It is not sufficient to demonstrate that 'but for' the disclosure, the employer's act or omission would not have taken place. The protected disclosure must have materially influenced the employer's treatment of the worker: ***NHS Manchester v Fecitt & Ors*** [2012] IRLR 164. It is not enough to consider whether the act was 'related to' the disclosure in some looser sense.

82. Further, in order to establish causation in a detriment case, a Claimant must establish that the person who subjected him/her to a detriment was personally motivated by the protected disclosure. Another person's knowledge and motivation cannot be imputed: ***Malik v Cenkos Securities Plc*** (UKEAT/0100/17):

> *"It is in any event not clear how a decision-maker, who did not have personal knowledge of the protected disclosure, could be said to have been materially influenced by it to make the decision under challenge. If a decision-maker in that position were to be fixed with liability it would have to be as a result of importing the knowledge and motivation of another to that decision-maker. However, it seems to me that such importation is not permissible in considering why the decision-maker acted as he or she did."*

83. In a dismissal case under s.103A of the ERA 1996, there are two questions to be answered: Did the employee make a protected disclosure? If so, was the making of that protected disclosure the reason or principal reason for the dismissal?

84. In a s.103A claim, the 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision: ***Croydon Health Services NHS Trust v Beatt*** [2017] ICR 1420. The net could be cast wider if the facts known to, or beliefs held by, the decision-maker had been manipulated by another person involved in the disciplinary process with an inadmissible motivation, where they held some responsibility for the investigation. That is not the case here.

Constructive dismissal

85. An employee is entitled to terminate the contract with or without notice and treat himself as constructively dismissed, when the employer has committed a repudiatory breach of contract, *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*, namely:

> *a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.*

86. If there is a repudiatory breach the employee must show that she resigned at least partly, in response to the breach, *Nottinghamshire County Council v Meikle [2004] IRLR 703 CA*.

87. The Claimant relies on the implied term existing in all employment contracts, a breach of which is a repudiatory breach:

> '*the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee' Malik v BCCC SA [1998] AC 20*, 34H-35D.

Victimisation

88. Section 27 Equality Act 2010 states:

> *(1)A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
>
> *(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

89. In the case of *Nagarajan v London Regional Transport [1999] IRLR 572* Lord Brown Wilkinson addressed the causation test to be applied in relation to victimisation by comparison to direct discrimination claims. At paragraph 41 of his speech he stated:

> *For my part, it is not the logic of symmetry that requires the two provisions to be given parallel interpretations. It is rather a pragmatic consideration. Quite sensibly in s.1(1)(a) cases the Tribunal simply has to pose the question: why did the defendant treat the employee less favourably? They do not have to consider whether a defendant was consciously motivated in his unequal treatment of an employee. That is a straightforward way of carrying out its task in a s.1(1)(a) case. Common sense suggests that the Tribunal should also perform its functions in a s.2(1) case by asking the equally straightforward question: did the defendant treat the employee less favourably because of his knowledge of a protected act? Given that it is unnecessary in s.1(1)(a) cases to distinguish between conscious and subconscious motivation, there is no sensible reason for requiring it in s.2(1) cases.*

90. In the case of *Peninsula Business Services Ltd v Baker [2017] IRLR 394* the EAT addressed the correct legal test to be applied in relation to victimisation claims at paragraph 70 of the Judgment as follows:

> *I accept the respondent's submission that the ET did not apply the right test in deciding that the claimant had been subjected to a detriment because of a protected act. The ET needed to ask why the respondent subjected the claimant to surveillance; what, consciously or subconsciously, was the reason for that (see Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830). There are three points. First, the repeated use of the word 'trigger' suggests that the ET was considering 'but-for' causation. Second, the ET describes different*

triggers with different contents in different passages in the Judgment. The respondent's suspicions that the claimant's allegation was untrue feature in some, but not all. Third, the finding in paragraph 80 suggests very strongly that the ET found that Mrs English's reason for the surveillance was nothing other the suspicion that the claimant was 'not dyslexic, or at least not very dyslexic'. That suggestion is reinforced by the ET's conclusion that the respondent's intention in ordering the surveillance was to catch out the claimant doing private work.

Burden of proof

91. Under s136 Equality Act 2010, if there are facts from which a Tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

92. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The Tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

93. The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

94. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions

95. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. The Tribunal will not repeat every single fact, in order to keep these reasons to a manageable length. The issues are dealt with in turn. The numbering below reflects the numbering in the list of issues in Annex A.

2. Unfair dismissal – s.103A Employment Rights Act 1996

2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:

2.1.1.1 Lack of response/investigation from the Ethics Avert Alert Line by Ms Willegems;

96. The Tribunal has found that there was an investigation by Ms Willegems, so that aspect of the allegation fails on the facts. The Tribunal accepts that there wasn't a response to the claimant between 11 December 2021 and 10 January 2022.

2.1.1.2 The rejection of audio recordings as evidence in Formal Grievance /Disciplinary proceedings – Rachel Tighe;

97. The audio recordings were rejected as evidence.

2.1.1.3 Emails received during his suspension (including one dated 14.01.22- Respondent ET3 claim) – Ms Tighe, Ms Armitage;

98. The email dated 14 January 2022 was received after the claimant's decision to resign had been made and is not relevant to the alleged repudiatory breaches. No other emails were referred to by the claimant in his submissions or put to any of the respondent's witnesses as being in any way inappropriate or unreasonable. This issue therefore fails on the facts.

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;

99. As for the lack of a response from the Avnet alert line of one month between 11 December 2021 and the claimant's resignation on 10 January 2022, the Tribunal concludes that this did not breach the implied term of trust and confidence. That period included the Christmas and New Year holidays. Ms Willegems was dealing with a number of cases at that time, not just the claimant's.

100. The decision not to use the audio recordings as evidence in relation to the claimant's grievance or disciplinary process was a perfectly reasonable stance for the respondent to take. The making of those audio recordings was a potential breach of the privacy rights of other employees. There is no credible evidence to support the claimant's assertion that the respondent made and used audio recordings themselves.

Issues 2.1.2.2 to 2.5

101. Given the conclusion above, it is not necessary or proportionate to reach any conclusions on the remaining automatically unfair constructive dismissal issues.

3. Protected disclosure

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

3.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

3.1.1.1 date 21st November 2021– in an email

102. In the email sent at 23.59, the claimant stated:

> *I want to talk about the trolley situation i tried one of them on Monday and last week and talk to people about this they say they experience problems*

with them including the hook catching on High Vis and grazing their shoulder they complain about it to Tomasz. I didn't know about the trolley situation until recently because I always work in PMAN1.

3.1.1.2 unknown date [11 December 2021] - in a report to the third-party confidential help line [see page 704]

103. The email states:

Tomasz Wojtowicz (Supervisor) – Race Discrimination (Ajmal and Anna), Dishonesty, Breach of Privacy (Audio Recorder without permission) HR Advisor Urszula delaying the SAR not giving me the evidence for Formal Grievance and Disciplinary Meeting related to Whistle-Blowing Daniel Carling (Shift Manager) not following the Code of Conduct (Formal Grievance) - suspected falsify doc (Notes) Rachel HR- not following the Code of Conduct- suspected falsify doc (Notes) Ricky Berry and Matthew moon - not following the Code of Conduct to Anna and Ajmal situation Waiting for DSAR for this Suspended for Whistle-Blowing (using Audio Recorder in meeting) No Employee Handbook for Contract workers (Control/restricted them) Health and Safety Issue with Trolley (Do that later evidence here) workers told supervisor but nothing changed (still using the upgraded trolley) - Iv reported to HR part of Formal Grievance

3.1.2 Did he disclose information?

104. The Tribunal concludes that the claimant did disclose information in the above communications; they were not mere assertions.

3.1.3 Did he believe the disclosure of information was made in the public interest? & 3.1.4 Was that belief reasonable?

105. The Tribunal concludes that insofar as the information relates to health and safety issues, which affected a number of other staff working for the respondent, the disclosure of information was made in the public interest and that the claimant believed that to be so.

106. The Tribunal reaches the same conclusion, to the extent that the information related to potential discrimination against the claimant, it being important that a large organisation does not act in discriminatory manner towards any staff.

3.1.5 Did he believe it tended to show any of the following: & 3.1.6 Was that belief reasonable?

3.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

107. The Tribunal concludes that the claimant did believe that and that such a belief was reasonable.

3.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;

108. As above, at 3.1.5.2.

3.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer, or to a person designated under the employer's policies as a person having appropriate legal authority.

109. No further conclusions are necessary on this issue.

4. Detriment (Employment Rights Act 1996 section 48)

4.1 Did the respondent do the following things:

4.1.1 Claimant suspended from work – Ms Tighe and Mr Carling

110. The claimant was indeed suspended from work on 22 November 2021; that is not in dispute.

4.1.2 HR delaying his SAR

111. This allegation is not made out as both requests were responded to within one month. That does not amount to a delay. The respondent did require the claimant to provide proof of identity but that was a perfectly reasonable stance to take in the circumstances and it was not a detriment in any event since CX was able to comply with the request and it did not delay the response.

4.1.4 The lack of response/investigation from the Ethics Avnet Alert Line

112. See above, at 2.1.1.1. There was an investigation so that fails on the facts; but there was no response between 11 December 2021 and 9 February 2022, just short of two months, when Ms Willegems asked the claimant for further information.

4.2 By doing so, did it subject the claimant to detriment?

113. The Tribunal concludes that the respondent did subject to claimant to a detriment in relation to the suspension. Further, the lack of a response for nearly two months could reasonably be thought by the claimant to be a detriment to him.

4.3 If so, was it done on the ground that he made a protected disclosure (i.e.. the Respondent must have known that a disclosure had been made for this to be the reason why it did what it did)?

114. The Tribunal has no hesitation in concluding that the claimant's suspension had nothing whatsoever to do with the protected disclosures. The claimant was suspended because he had disobeyed a reasonable management instruction by making audio recordings, having been specifically instructed not to; and when there were ongoing disciplinary proceedings about precisely that issue. The tribunal as a result of concerns raised by the claimant and other members of staff, the handle was removed. That further demonstrates that the claimant raising this matter would not have led to any detrimental action against the claimant.

115. As for the lack of a response for nearly two months, the Tribunal concludes that was reasonable in the circumstances, given Ms Willegems' workload and the Christmas and New Year break. The two month timescale had nothing whatsoever to do with the contents of the email of 11 December 2021.

5. Victimisation (Equality Act 2010 section 27)

5.1 Did the claimant do a protected act in good faith as follows:

5.1.1 Formal grievance on 7th September 2021 [406];

116. The grievance states:

My grievance is slander/rumours, hostile workplace, turning into race issue, Harassment, Discrimination (Language), social isolation by her and her friend endless chatter in their own language does not gives a shit about nobody.

117. The Tribunal concludes that such language did amount to a protected act.

5.1.2 Informal meetings on 13th, 20th September and 12th October 2021 [412-422];

118. There is no credible or reliable evidence before the Tribunal that the claimant raised allegations of race discrimination at those meetings. Whilst the emails referred to do raise an issue of the Polish language being used, the claimant does not assert that his rights under the Equality Act were being breached because of that. No protected act arises in relation to these meetings.

5.1.3 Email dated 14th November 2021 [535-7];

119. The Tribunal refers to our above findings of fact, and concludes that the contents of this email did amount to a protected act.

5.1.4 In a conversation on 17th November 2021

120. On the basis of the above findings of fact, the Tribunal concludes that neither of the two conversations with Mr Wojtowicz on 17 November 2021 amounted to a protected act.

5.1.5 Unknown date in a report to the third-party confidential help line – 11 December 2021

121. The Tribunal refers to the above findings of fact, and concludes that the contents of that email did amount to a protected act.

5.2 Did the respondent do the following things:

5.2.1 Subject the Claimant to disciplinary proceedings [Mr Carling];

122. It is not in dispute that Mr Carling did recommend that the claimant be subjected to disciplinary proceedings, following his investigation.

5.2.2 Force the Claimant into a meeting with a supervisor, accusing him of not complying with a management request;

123. The claimant was requested to attend a meeting; he was not 'forced' to do so. He was 'accused' of not complying with a management request.

5.2.3 Threatening him with allegations of gross misconduct [Scott Stacey and Mr Wojtowicz];

124. The claimant was not threatened with allegations of gross misconduct by Mr Stacey; he was advised that there might be a 'serious investigation' on 12 October if he decided to go down a formal route. That aspect of the allegation fails on the facts. On 17 November the claimant was advised that if he did not follow a reasonable management request, that could be gross misconduct.

5.2.4 Suspending him;

125. The claimant was suspended on 22 November 2021.

5.2.5 HR delaying his SAR;

126. The SAR response was not delayed – this allegation fails on the facts.

5.2.7 The lack of response/investigation from the Ethics Avnet Alert Line?

127. See 4.1.4 above – there was a lack of response for two months.

5.3 By doing so, did it subject the claimant to detriment?

128. The Tribunal concludes that the matters set out at 5..2.1, 5.2.4, and 5.2.7 amount to a detriment. Issue 5.2.5 fails on the facts, so nothing more needs to be said about that allegation.

129. As for 5.2.2 and 5.2.3, the action taken/advice given to the claimant was perfectly reasonable. Had the claimant heeded that advice, this claim may never have been submitted.

5.4 If so, was it because the claimant did a protected act or sufficiently in the case of [5.1.5] that the Respondent being aware of his intention to report believed that he may do a protected act?

130. In relation to the decision to initiate disciplinary proceedings, that decision had nothing to do with the three protected acts we have concluded did occur. Mr Carling was not in any event aware of any of the protected acts; the third of which occurred after the decision to suspend had been made. The claimant was subjected to disciplinary proceedings because he had been recording colleagues without their permission, and he continued to do so despite being told that it was not allowed. Again, had the claimant followed this management advice, this claim may not have been submitted.

131. Allegations 5.2.2 and 5.2.3 would have failed in any event since the Tribunal has found as a fact that neither Mr Stacey nor Mr Wojtowicz were aware that the claimant had done a protected act. Their actions were in any event perfectly reasonable; unlike the claimant's actions.

132. As to 5.2.4 – the claimant's suspension – this was because the claimant was continuing to make audio recordings of colleagues having been specifically instructed not to do so. His suspension had nothing whatsoever to do with the protected acts, which Mr Carling was not in any event aware of (although Ms Tighe would have been aware of the first two protected acts).

133. Finally, as for 5.2.7, the Tribunal adopts the reasoning set out in relation to 4.3 above. The Tribunal is entirely satisfied that Ms Willegems did not deliberately delay her actions on the claimant's GDPR complaint because of the contents of the email of 11 December. It is fanciful to suggest otherwise.

<u>Overview</u>

134. Looking at each incident individually, we have not found any evidence which can shift the burden of proof on the claims of victimisation. We have also looked at the incidents as a whole, to see if they could convey a different impression. On the contrary however, taking an overview only reinforced the Tribunal's conclusions in relation to each incident individually.

<u>Time-limits</u>

135. Given our above conclusions, no conclusions need to be reached in relation to the issue of time limits.

Costs

136. After oral judgment had been delivered, the respondent made an application for costs. The tribunal was provided with a schedule which showed that the total costs incurred by the respondent, including counsels fees and other disbursements, amount to approximately £55,000. The respondent took the view that it would not be proportionate to ask for a detailed assessment of costs, given that the claimant appeared to be a man of relatively modest means. This means that the maximum amount the Tribunal could order the claimant to pay would be £20,000. The respondent therefore restricted the application on costs to two main issues. Before setting those out, together with the issues they give rise to, the relevant law is set out.

Relevant law on costs

137. Rule 39(5) *Employment Tribunal Rules of Procedure 2013* provides:

> *(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order*
>
> > *(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
> >
> > *(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders)*

138. Rule 76 of the *Employment Tribunal Rules of Procedure 2013* ("the 2013 Rules") provides, in so far as relevant here:

> *(1) A Tribunal may make a costs order … and shall consider whether to do so, where it considers that—*
>
> > *(a) a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*

139. Rule 76 requires the Tribunal to adopt a two-stage approach:

> *the tribunal must first consider the threshold question of whether any of the circumstances identified in [what is now Rule 76] applies, and, if so, must then consider separately as a matter of discretion whether to make an award and in what amount."* (*Vaughan v London Borough of Lewisham (No. 2) [2013] IRLR 713* at [5])

140. The relevant parts of Rule 84 provide:

> *In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay*.

The costs issues

141. The respondent pursues costs against the claimant on two main grounds. The first is that the claimant pursued three matters which were the subject of deposit orders, and the claimant has lost on those allegations at the hearing, for the same reasons as set out in the written reasons which relate to those deposit orders. The second is that the claimant withdrew the serious allegations relating to changing/manipulating evidence, on the second day of

the hearing (issues 2.1.1.4, 4.1.3 and 5.2.6). By that stage, the respondent had incurred costs defending itself against allegations which were not in the end pursued by the claimant.

142. The first issue for the Tribunal to determine is whether or not the claimant has persuaded us that his pursuit of the allegations which were the subject of deposit orders was not unreasonable. He has not done so. In responding to the application for costs, the claimant is continuing to argue that if only his amended claim had been allowed to proceed, instead of the second set of further and better particulars; or if only he was better cross-examination; or if only he been allowed to ask further questions of Ms Armitage; or if only he be allowed to cross-examine Ms McHale (who was not called by the respondent because her evidence would not have been relevant); his claim would have succeeded. In light of the findings of fact and the conclusions of this Tribunal in relation to the issues, the Tribunal finds the claimant's assertion in that respect to be wholly unreasonable. The Tribunal hopes that, having had time to consider these written reasons and reflect on his conduct, the claimant will be able to accept and comprehend the unreasonableness of his conduct, both at work and during these proceedings.

143. *The second issue* is whether the claimant, by pursuing allegations which he withdrew on day two of the hearing, has conducted the proceedings unreasonably. The Tribunal is satisfied that he did. The making of allegations that evidence has been manipulated/changed is extremely serious. There was simply no credible basis for the claimant suggesting that. The only evidence before the Tribunal in relation to that allegation was that, when scanning double sided notes of a hearing, the respondent inadvertently only copied one side of the document. Patently, that was an administrative error, not an attempt to manipulate evidence.

144. Third, the Tribunal having determined that a threshold condition (i.e. unreasonable conduct of the proceedings) has been established, whether to make a costs order as a result. The Tribunal has determined that a costs order should be made. Justice is a scarce and valuable resource and Employment Tribunal time should not be taken up with unreasonable allegations. Nor should employers be put to the expense of defending themselves against unreasonable and unsustainable allegations. The Tribunal also regrets that those implicated in the unreasonable allegations have been subjected to the stress and strain of responding to them.

145. In responding to the application for costs, the claimant told the Tribunal that he was 'happy' about the costs that he had caused the respondent to incur, and would consider that as 'compensation'. The Tribunal considers that to be an entirely unreasonable position for the claimant to take. Whilst the Tribunal would have decided to award costs despite that comment, it only reinforces the conclusion that an award of costs is entirely appropriate in this case.

146. In deciding whether to make a costs order, the Tribunal has taken account of the claimant's means. Following his resignation, the claimant obtained agency work. He is had to give that up temporarily, whilst the proceedings are ongoing. The claimant has about £900 credit in his bank account. He receives about £70 per week universal credit, and housing benefit which covers about £360 of his £450 per month rent. He does not have any debts. He doesn't own any property, nor does he own a car. He is not in receipt of a

personal independence payment. He does not have any dependents. Although this clearly demonstrates that the claimant is a person of limited means, the Tribunal does not consider that is sufficient reason in itself not to make a costs order against him, in the circumstances set out above.

147. Having decided to make a costs order, the remaining issue for the Tribunal to determine is the amount of the order. Taking a broad brush approach, the respondent estimates that 25% to 30% of the costs relate to the allegations which were the subject of the deposit orders; and about 10% to the allegations which were withdrawn on the second day of the hearing. That amounts to some 35% to 40% of the total costs, which is close to or just over, the £20,000 limit which a Tribunal can award, without a detailed assessment taking place.

148. Were it not for the claimant being of limited means, an award of that magnitude would have been made. Although the claimant is currently unemployed, the Tribunal is satisfied that just as he has been able to find agency work following his resignation, he should be able to do so again, now that the proceedings have been concluded.

149. In all the circumstances, the Tribunal considers that an award of costs of £4,000 is the appropriate sum to order him to pay. The Tribunal is satisfied that the claimant should be able to pay that amount within a reasonable period.

150. In addition, the deposit of £45 in total should be paid to the respondent as soon as possible.

Employment Judge A James
North East Region

Dated 8 February 2023

ANNEX A – LIST OF ISSUES

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5th September 2021 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal – s.103A Employment Rights Act 1996

2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:

2.1.1.1 Lack of response /investigation from the Ethics Avert Alert Line – Ms Willegems;

2.1.1.2 The rejection of audio recordings as evidence in Formal Grievance /Disciplinary proceedings – Rachel Tighe;

2.1.1.3 Emails received during his suspension (including one dated 14.01.22- Respondent ET3 claim) – Ms Tighe, Ms Armitage;

~~2.1.1.4 Manipulating/changing evidence with a view to removing the Claimant from his employment – Mr Carling and Ms Tighe as the note taker? In particular in the record of the investigatory meeting with Mr Carling on 12th November 2021 supplied upon the SAR request, the change from the partially signed record of that meeting provided to the Claimant at the time (and of which a further copy had also in fact been supplied to him under the SAR procedure) the following are alleged to constitute a "change" and "manipulation" of the evidence:~~

~~2.1.1.4.1 Mr Carling saying he was not interested in the history;~~

~~2.1.1.4.2 the notes not recording that the reason the claimant would not sign all the pages was because of the failure to include matters; and~~

~~2.1.1.4.3 the notes' failure to record that Mr Carling said he would make a decision after the weekend, and then when he heard the claimant had recordings to play, he changed his mind and gave a decision straight away.~~

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 And/or was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.1.4 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.1.5 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?

2.3 Was it a potentially fair reason?

2.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

2.5 Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

If so, the claimant will be regarded as unfairly dismissed but it is for him to prove.

3. Protected disclosure

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

3.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

3.1.1.1 date 21st November 2021– in an email

3.1.1.2 unknown date [8 December 2021] - in a report to the third-party confidential help line [see 704]

3.1.2 Did he disclose information?

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

3.1.4 Was that belief reasonable?

3.1.5 Did he believe it tended to show that:

3.1.5.1 [a criminal offence had been, was being or was likely to be committed;

3.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

3.1.5.3 a miscarriage of justice had occurred, was occurring or was likely to occur;

3.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;

3.1.5.5 the environment had been, was being or was likely to be damaged;

3.1.5.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.]

3.1.6 Was that belief reasonable?

3.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer, or to a person designated under the employer's policies as a person having appropriate legal authority.

4. Detriment (Employment Rights Act 1996 section 48)

4.1 Did the respondent do the following things:

4.1.1 Claimant suspended from work – Ms Tighe and Mr Carling

4.1.2 HR delaying his SAR

4.1.3 ~~Manipulating/changing evidence with a view to removing the Claimant from his employment (as to the details of the allegations about notes – see above 2.1.4)~~

4.1.4 The lack of response/investigation from the Ethics Avnet Alert Line

4.2 By doing so, did it subject the claimant to detriment?

4.2.1 As to 4.1.3

4.2.1.1 They subjected the Claimant to a detriment because:

4.2.1.1.1 They were done to make him look bad;

4.2.1.1.2 The claimant felt betrayed;

4.2.1.1.3 The notes were a snapshot of what happened in the meeting.

4.3 If so, was it done on the ground that he made a protected disclosure (i.e.. The Respondent must have known that a disclosure had been made for this to be the reason why it did what it did)?

5. Victimisation (Equality Act 2010 section 27)

5.1 Did the claimant do a protected act in good faith as follows:

5.1.1 Formal grievance on 7th September 2021 [406];

5.1.2 Informal meetings on 13th, 20th September and 12th October 2021 [412-422];

5.1.3 Email dated 14th November 2021 [535-7];

5.1.4 In a conversation on 17th November 2021 [TWWS9; 680-681].

5.1.5 Unknown date in a report to the third-party confidential help line – 11 December 2021

5.2 Did the respondent do the following things:

5.2.1 Subject the Claimant to disciplinary proceedings [Mr Stacey];

5.2.2 Force the Claimant into a meeting with a supervisor, accusing him of not complying with a management request;

5.2.3 Threatening him with allegations of gross misconduct [Scott Stacey and Mr Wojtowicz];

5.2.4 Suspending him;

5.2.5 HR delaying his SAR;

5.2.6 ~~Manipulating/changing evidence with a view to removing the Claimant from his employment;~~

5.2.7 The lack of response/investigation from the Ethics Avnet Alert Line?

5.3 By doing so, did it subject the claimant to detriment?

5.4 If so, was it because the claimant did a protected act (or sufficiently in the case of [5.1.5] ~~7.15~~ that the Respondent being aware of his intention to report believed that he may do a protected act)?