EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Skillen	v	Reckitt Benckiser Healthcare (UK) Ltd

Heard at: Hull **On**: 6, 7, 8, 9 and 10 March 2023

Before: Employment Judge A James
Mr D Fields
Mr D Wilks OBE

Representation

For the Claimant: In person

For the Respondent: Mr W Young, counsel

JUDGMENT

(1) The claim for automatically unfair dismissal because of whistle-blowing (s.103A Employment Rights Act 1996) is not upheld and is dismissed.
(2) The claims for detriment because of whistleblowing are not upheld and are dismissed.
(3) The claim for breach of contract (Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994) is not upheld and is dismissed.

REASONS

The issues

1. The agreed issues which the Tribunal had to determine are set out in Annex A.

The proceedings

2. The claimant commenced Acas Early Conciliation on 22 February 2022. The Acas Early Conciliation Certificate was issued on 4 April 2022. The claim form was issued on 26 April 2022. The claim form originally included claims

under the Agency Workers Regulations 2010 and S.44 Employment Rights Act 1996 (detriment for raising health and safety concerns). Those claims were dismissed on withdrawal on 5 July 2022.

3. A preliminary hearing for case management purposes took place on 5 July 2022. The issues were identified, the dates for the final hearing were set and case management orders were made to ensure that the claim was ready to proceed on those dates.

The hearing

4. The hearing took place over five days. Evidence and submissions on liability were dealt with on the first four days. The Tribunal then met in private on the remaining day (having added a fifth day to allow enough time to reach a decision). Judgment was reserved.

5. The Tribunal heard evidence from the claimant; and for the respondent, from Yuanita Fields, Legal Director UK & Ireland Health; Charlotte Baker, HR Business Partner; Charlotte Pattison, Head of Talent Acquisition, Corporate Headquarters, at the relevant time; Christopher Walker, Crew Leader in the Dries section at the respondent's Hull site; Ian Owens, Area Team Leader; Jessica Wilks, Area Team Leader; Naomi Kilner, Area Team Leader; and Richard Carter, Product Supply Leader. A written statement was provided by Joshua Carter, former Crew Leader. Whilst less weight has been placed on Mr Carter's evidence, as a result of his failure to attend the hearing, there are nevertheless parts of his evidence that the Tribunal preferred to the claimant's evidence, due to general concerns about the reliability and credibility of the latter.

6. Examples are set out in the findings of fact below, where the Tribunal has taken the view that the evidence of the claimant was simply not credible or reliable. Further, and with some regret, the Tribunal has concluded that in certain respects, the only conclusion the Tribunal can reasonably reach is that the claimant has not been honest in his evidence before the Tribunal.

7. There was an agreed hearing bundle of 788 pages, including the index. Seven extra pages were added, namely the Talent Acquisition policy, on day 4, with the agreement of the claimant.

8. An email was provided by the respondent regarding the dates of employment of Tracy Bowler. The claimant did not object to that being commented on in evidence in chief by Ms Baker, although the Tribunal notes that he disagrees with the dates of employment provided.

Findings of fact

9. The claimant started work for the respondent as an agency worker, via the recruitment agency KFM Recruitment Limited, in or about October 2019.

10. The Respondent is a manufacturer of a wide range of healthcare products that are supplied globally by the Reckitt group of companies. They include numerous well-known brands including Nurofen, Lemsip, Gaviscon, Senokot, Fybogel and Dettol. The Respondent employs approximately 700 employees in the UK.

11. During the relevant period, there tended to be between 15 and 24 team members working in the 'Dries' area production lines. This is typically made up of a mix of permanent and temporary agency staff.

Relevant policies and procedures

12. The respondent has a whistle-blowing policy. The Tribunal does not consider the contents of that to be material to the issues before us, on the facts of this case and no further reference needs to be made to it.

13. The respondent has a system for dealing with H&S issues, SOPP2856, the relevant parts of which state:

> *Every employee has a legal and moral responsibility to report any safety issues.*
>
> *Issues must be reported to the local manager for the area and the safety champions in the first instance. In addition, dangerous occurrences should be recorded in the local Near hit/Hazard spot books or go safes.*
>
> *Issues must be reported to the local manager for the area in the first instance. In addition, dangerous occurrences should be recorded by filling out on-line Hazard Spot form located in EHS Safety Hub.*
>
> *It is the duty of anyone to whom a safety issue is reported to immediately investigate the degree of risk and take proportionate action as necessary, including the suspension of operations if required.*
>
> *If after a reasonable time local management has not adequately addressed a safety issue, staff must raise the issue through one of the following channels:*
>
> - *Local safety champions*
> - *PSL*
> - *EHS manager and team (in confidence if desired)*
> - *Factory Manager*
>
> *If, during the above processes there remains a real danger of someone being injured, staff must discuss this with their supervisor and not perform the task until suitable controls are in place.*

14. The Tribunal was referred to a detailed log of health and safety issues which had been raised by the respondent's workers. The Tribunal notes that it is recorded that many of those reports resulted in action being taken. That evidence was not challenged by the claimant.

15. The Talent Acquisition Policy states in section 4:

> *Candidates accepting an offer of work with Reckitt will be provided with a written offer of employment. Offer details are to be recorded in myHiring. Offers outside of policy require Reward approval (in the system). Candidates should be provided with a fair & best offer for the role thus limiting negotiations.*

16. There is an induction process for agency workers, which is conducted by the recruitment agency, based on information/documents provided by the respondent. On 8 October 2019, the claimant signed to confirm that he had read and had been provided with the Temporary Worker Induction Pack. He

also confirmed that he had seen the SOPs for the work area he was assigned to work in. He completed a competency quiz which confirmed his understanding that he should not take his mobile phone into the production area.

17. The respondent has a policy on mobile phone use, which confirms that personal phones may only be used when walking to and from the site, in the changing rooms and in the supply office. In addition, there is a policy about taking photographs which states [SOPP3513]:

> *5 Photos*
>
> *5.1 The taking of photographs on site by using personal camera, mobile phone or media device is strictly prohibited by contractors and employees and all photographs must be authorised by a Manager prior to being taken. The use of company devices to take photographs for company purposes is permitted for internal use only.*
>
> *6 Breach of this procedure*
>
> *6.1 Any breach of this policy may lead to disciplinary action being taken up to and including dismissal.*

The Tribunal notes that the claimant argues that this does not apply to him since it does not specifically refer to agency workers. The Tribunal disagrees with the claimant. In the context of the document as a whole, the Tribunal considers that agency workers would be classed as 'contractors'. Further, the Tribunal notes that the claimant's interpretation contradicts what he said in his email to Tracy Bowler of 25 January 2021, referred to below.

Recruitment process

18. Permanent vacancies with the respondent are advertised on an online recruitment portal. To apply for a permanent vacancy, agency worker applicants need to upload their CV to the vacancy's requisition number. The applicants' CVs are then made available to the Talent Acquisition Team and to Area Team Leaders. Talent Acquisition Team members can reject a CV if the applicant does not have the appropriate experience. Area Team Leaders (ATLs) who need to recruit for a particular position can also access the system at the same time, review the uploaded CVs next to a requisition number and decide whether to move to reject an applicant or invite them to interview. If an application is rejected by an Area Team Leader, it is the responsibility of the Talent Acquisition Team to remove the application from the process. If an offer is to be made, that will be processed by the Talent Acquisition Team, not the relevant ATL.

19. In November 2020, Ian Owens interviewed the claimant for a role in the processing section of the Dries area of the Respondent's business. He was not appointed, but Mr Owens subsequently recommended the claimant to a colleague for another role.

Photographs of colleagues

20. In January 2021, an issue arose regarding the claimant allegedly taking photographs of a female member of staff, Nikki Silk. This was reported by Mr Josh Carter to Naomi Kilner because he wanted advice about how to deal with it. Ms Kilner subsequently sent a WhatsApp message to Mr J Carter on 18 January 2021 in which she stated:

Realised I didn't send an email with the stuff re Tony, I would sit him down and say it's been brought to our attention that he has been taking and sharing photos of people on the shop floor. We would prefer if he sees something that he is concerned about that he speaks directly to the CL who can deal with it in real time. That he is not authorised to have his phone or take photos in the production facility but if he would like to share the photos he has currently taken I would be happy to deal with any issues observed.

Alleged raising of health and safety issues by the claimant

21. Mr Josh Carter subsequently spoke to the claimant. The claimant told him he had some photographs about alleged health and safety breaches. The claimant offered to show the photographs to Mr J Carter but he refused to look at them. The Tribunal accepts the explanation given by Mr Carter in his written statement that this was because he had asked the claimant to send the photographs to Ms Kilner, and the claimant had declined to do so. So Mr Carter decided not to look at the photographs himself. His priority was to keep the line running and he wanted to deal with any health and safety or other matters in real time, not on the basis of photographs of past incidents. This evidence is consistent with what Mr Carter had been advised to do by Ms Kilner in her message to him; and in line with the respondent's general approach to Health and Safety issues. The Tribunal also finds that the allegation by the claimant that Mr Carter ate some of the sweets, which the claimant brought to his attention, saying he preferred the green ones; and that he apologised to the claimant - are inherently improbable and did not take place as alleged.

22. The claimant asserts that on 19 January 2021 he discussed his health and safety concerns with Mr Chris Walker and showed to him the photographs showing alleged breaches of health and safety. The claimant also asserts that Mr Walker called him into his office. The Tribunal rejects that evidence and finds as a fact that the claimant went to see Mr Walker. Further, the claimant did not share the photographs regarding alleged health and safety concerns with Mr Walker, nor did he raise any other health and safety concerns with him. The Tribunal finds the evidence of Mr Walker more reliable than that of the claimant. When giving his evidence, Mr Walker was matter-of-fact, and answered without hesitation. He was prepared to make concessions where appropriate. Further, as already noted, the respondent has a clear health and safety policy, and positively encourages the reporting of any health and safety issues. The claimant could have raised the issues at daily meetings but notably failed to do so. The Tribunal also accepts that Mr Josh Carter did not discuss any health and safety issues raised by the claimant with Mr Walker during handovers. This is most likely because such conversations did not take place between Josh Carter and the claimant, save to the limited extent set out above. Further, the Tribunal notes that in his email to Ms Bowler, which was sent around that time, he does not mention raising any health and safety issues with Mr Walker, or, for that matter, with Ms Kilner. The Tribunal accepts Mr Walker's evidence that only the issue of the claimant taking photographs of colleagues was discussed on 19 January 2021.

23. It is not in dispute that the claimant did not subsequently share the photographs of alleged health and safety breaches with Ms Kilner. The

claimant alleges in his witness statement that the following interaction took place with Ms Kilner on or about 13 January 2021)

Claimant to NK - "have you been off with covid"

NK - "no I just had cold and blocked sinuses"

Claimant - "its not the only thing you have blocked the fire doors in Bosch are blocked with pallets".

24. The Tribunal notes that the claimant did not mention such a conversation in the email sent to Ms Bowler on 24/25 January 2021 - there is just reference to her allegedly breaching health and safety law. Nor is it mentioned in the Scott schedule he prepared. Further, in the details of claim, it is alleged that he said to Ms Kilner: “You have [a] duty and an obligation not to have blocked fire doors under section 2(d)". The Tribunal finds that had the alleged words been used as reported above, and given the memorable nature of them, they would have been set out in the subsequent documents referred to. Bearing in mind all of that, the evidence of Ms Kilner on these matters is very much preferred.

25. The Tribunal also notes that in his email to Tracy Bowler sent on 24 and 25 January 2021, referred to below, the claimant states:

Fire exits opposite the Bosch line are continually blocked with pallets. If there is a fire there is a risk of people being trapped inside the building.

I reported this to Sue on Bosch who is a team member and I was informed use the other door it is nearer again my concerns have fallen on stoney ground.

The Tribunal notes that although he specifically mentions his colleague Sue, he does not assert that he mentioned this issue to Ms Kilner or Mr Walker.

Further issues raised by Bosch line team members

26. The Tribunal accepts Ms Kilner’s evidence that an issue was raised by other members of her team, Ms Silk and Mr Carmichael, about the claimant having a conviction for a firearms offence. Ms Kilner was shown the contents of a Google search showing that a Mr Tony Skillen from Cockermouth had been convicted of a firearms offence in 2010. **The Tribunal notes that whilst the name is the same and Mr Skillen went to school in the Cockermouth area, he is not the same person referred to in the article**. **Mr Skillen has a clean CRB check and has never been convicted of a firearms offence**.

27. Ms Kilner came to the conclusion, on the basis of what had been reported to her, that the claimant was becoming a distraction on the line, due to him taking photographs of members of staff and rumours about the alleged firearms conviction. Between 19 and 21 January 2021, Ms Kilner emailed KFM, to arrange a call regarding the claimant. During the call, which took place on or about 21 January 2021, Ms Kilner asked KFM not to send the claimant back to work on the Bosch line. She asked that instead he be allocated to shifts which did not run on an 24/7 basis, so the claimant could be properly supervised at all times. The Tribunal notes that Richard Carter and Ms Field later understood that Ms Kilner had asked KFM not to send the claimant to the respondent’s Hull site at all. That however was a misunderstanding. The Tribunal is satisfied Ms Kilner was aware that the claimant was still working on the site as she received a list of agency workers

in both Dries and Liquids each week; and saw the claimant on site. The Tribunal rejects the claimant's evidence to the contrary. Had Ms Kilner wanted the claimant removed altogether, she had ample opportunity to make her position clear to KFM.

28. On 24 and 25 January 2021 the claimant sent an email to Tracy Bowler, Interim Talent Acquisition Manager (with the same content). Tracy Bowler was not working there at that point. She left on 11 December 2020. After that point, she had no access to company emails. The claimant disputes the end date. He says that at some point between 24 January and 31 January, he spoke to Ms Bowler who confirmed that she had received his email and forwarded it on to Mr Woods. The Tribunal does not consider that evidence to be credible. The respondent has carried out a search for any emails forwarded to Mr Woods and has not located any. The Tribunal accepts the evidence before the Tribunal, in the email sent by HR, regarding the dates of employment of Ms Bowler. Further, it is clear from his email of 31 January, that the claimant knew that by that time, Ms Bowler was not working for the company. The Tribunal regretfully comes to the conclusion that the claimant has been dishonest in relation to this aspect of his evidence before the Tribunal. Further, the claimant maintained before the Tribunal that relevant documents had not been provided in relation to Ms Bowler, for example her contract of employment, and invoices sent by her. The Tribunal considers that in the circumstances of the case, it was entirely proportionate of the respondent to simply provide an email, confirming Ms Bowler's dates of employment. Her contract of employment would not have set out the end date, unless it was a fixed contract; even then, that would only have been an indication of the potential end date, not the actual end date.

29. The contents of the email did not therefore come to the attention of anyone working for the respondent until December 2021 when it was forwarded to HR (see below). The relevant parts of the email to Ms Bowler read:

> *I am full of optimism for the future of the company and Health and Safety on the whole is of a high standard. However on the other side of the coin I am dismayed at the standard of health and safety on Bosch line and the scant attitude of [Naomi] Kilner. …*
>
> *I offered to show the evidence to Josh Carter my crew leader and for reasons only known to himself he declined to view the evidence. Trying to get someone to listen to me has been insurmountable. …*
>
> *I am sure my concerns and the nature of the matter may trigger an investigation. I now refer you to the following leading case law in investigations number 3 is an important factor.* [The claimant then set out the 3-fold Burchell test] *…*
>
> *If I have breached company policy in terms of providing you with photographs. I can only apologise for that and hope you show some clemency towards me for having the courage coming forward to help you. (sic)*

30. On 31 January 2021, the claimant emailed Mr Owens, saying he had previously been told by Tracy Bowler that he would not need to be interviewed or assessed for any role. Further, he had heard that Michelle Cain was recruiting on B4 and he asked Mr Owens to 'have a word' with Ms

Cain. Mr Owens did so, only to be told by Ms Cain that she was not in fact recruiting at that time. The claimant also stated that he had called Ms Bowler and '*she has now left the company*'.

31. The claimant was asked by the Employment Judge why he did not follow up the email, having said during cross-examination that he accepted that the health and safety issues he was allegedly raising were potentially matters of life-and-death. The claimant said he was worried about his job, everyone was on furlough, and he didn't want to rock the boat any more. In the light of the actual contents of the email to Ms Bowler, the Tribunal does not consider that credible. The claimant was clearly aware that Ms Bowler was no longer there, and that no one had seen the contents of his email. The more likely explanation for the claimant not following up the email, in the Tribunal's judgment, is that the claimant was no longer concerned that his assignment was going to be terminated as a result of him taking photographs of both the production line and people on the line, without prior authorisation.

Access to canteens/rest areas

32. Access to the Liquids canteen was restricted for all agency workers during the Covid-19 pandemic due to its small size. Scott Holmes of the respondent emailed KFM on 27 January 2021 as follows:

> *Can you please instruct KFM temps to only use the Incubator or Dries canteen please for break times.*
>
> *We have limited seating in liquids and we are only keeping this seating for priority lines only, to reduce travel time so these lines don't have to stop for breaks.*
>
> *With COVID restrictions we are trying to keep everyone safe and balance as best as possible.*

33. This was subsequently sent to the temporary agency staff supplied by KFM to the respondent. The covering email stated:

'*Please do not use the Liquids canteen, only use the Incubator or Dries canteen for your break times. If you have any questions please feel free to give me a call'*.

The claimant told the Tribunal that the incubator rest room was too far away to use and that he subsequently used his car. This is despite his car being the same distance as the incubator rest room from his work area. The claimant's conclusion that he could not use the Dries canteen/rest area because he no longer worked on that line was not a reasonable conclusion for him to reach. The reality was he was not excluded. A simple telephone call to KFM could have clarified that.

Applications for permanent roles

34. On 16 February 2021, the claimant emailed Mr Owens to say he understood that Mr Owens was recruiting again. Mr Owens replied to say he was not, but '*your name is at top of the list*' should any vacancies arise in his area.

35. The claimant made a number of applications for various roles with the respondent during his time as an agency worker for them. During 2021, the claimant is noted as having been 'automatically disqualified' for a role on 7 June; his application was rejected because he did not 'match the position' on

13, 20 and 27 September; and he was short-listed for roles on 1 and 26 June, and 5 and 27 August. There was no credible evidence before the Tribunal to suggest that Ms Kilner had any influence over any of those recruitment decisions. The Tribunal accepts Ms Kilner's evidence that she did not.

36. The claimant emailed Mr Owens on 26 July 2021 about vacancies in processing in the Liquids department. Mr Owens responded on 2 August 2021 to say:

> *I have no live vacancies at the moment but there are plenty to go at definitely mate. Just follow the normal application route. I think I've got some vacancies coming up soon though*

37. On 28 September 2021, the claimant emailed Mr Owens to say he had been rejected for a permanent role again (numbered 27471). He told Mr Owens: '*I am at a loss*'. Mr Owens suggested that the claimant speak to Scott Holmes on the Friday.

Role 27471

38. On 29 September 2021, the claimant applied for one of the vacant Team Member roles in in Jessica Wilk's team in the Dries department. Ms Pattison short-listed the claimant for the position. The application was then reviewed by Jessica Wilks, the ATL. Ms Wilks rejected the claimant's application because she did not consider that the claimant had sufficient experience in the processing (as opposed to the packaging) side of the business. Ms Wilks was not at the time of her decision aware of the claimant raising any health and safety concerns with any colleagues.

39. On 8 October 2021 the claimant was sent an email by the Talent Acquisition Team about the above role, stating:

> *We have received your application for the position of Team Member.*
>
> *After careful consideration, we regret to inform you that you have not been selected to progress to interview for this position.*
>
> *We will retain your candidate file in our database and may inform you of job openings that match your profile if you've selected this option.*

40. The claimant continued to seek assistance and support from Mr Owens in relation to his attempt to obtain a permanent role. On 14 November 2021, Mr Owens confirmed in an email to the claimant that he would:

> *[H]ave a look at which jobs are on the board now and I'll speak with the guys this week and see what can be progressed. I'll let you know asap*

41. On 16 November 2021, Mr Owens emailed Ms Pattison about another worker, saying why they were not suitable for a particular role. He continued:

> *However there is a guy that's been working as a temp for us that has been interviewed a couple of times. His name is Tony Skillen.*
>
> *He was unsuccessful in the past for a role of mine but it was touch and go with a lot of strong applicants. Have we any team member roles that are still open? If the one under Alex is open he's a strong contender for me – we've hired less experienced/capable people on this current big round of interviews in my opinion.*

42. The claimant alleges that on 17 November 2021 he was made a job offer by Ian Owens. During cross-examination, the claimant said that Mr Owens offered him a role which was the '*same job as before, same place, we discussed the contract, hours of work, pay'.* Bearing in mind the comments already made about the reliability of the claimant's evidence, and the content of the emails referred to below, the Tribunal considers that account to be inherently improbable. The Tribunal finds that an offer was not made by Mr Owens to the claimant. We are reinforced in that conclusion by the fact that the role under discussion was neither a job the claimant had done before, nor was it in a place where the claimant had worked before. It was in a different area, in manufacturing, in a section run by a different ATL, Ms Wilks. Further, the Tribunal notes the claimant's difficulty in answering the question as to when the offer was made. Only after being pressed by the Employment Judge did he suggest it was in the morning of 17 November 2021. The claimant's difficulty in saying when the offer had been made further reinforces the Tribunal's finding that no such offer was made.

43. In any event, the Tribunal accepts the evidence of Mr Owens that he did not have any authority to offer a role. He could interview applicants, and recommend that they be offered a position; but it was the job of the members of the Acquisition Team to make a formal offer. Such offers would in any event be subject to references and proof of the right to work in the UK. Mr Owens has never made a formal offer of employment to any applicant, whilst working to the respondent. The Tribunal regrets that it has come to the conclusion that this is a further example of dishonesty in relation to his evidence, by the claimant. In the Tribunal's judgement, the claimant could not reasonably have interpreted any of his interactions with Mr Owens as amounting to a binding offer of employment which he was entitled to and which he did accept. In none of the subsequent emails with Mr Owens, prior to 20 November 2021, did the claimant suggest otherwise.

Emails regarding Role 27471

44. The content of the relevant emails at this time can be summarised as follows. Mr Owens stated in an email to Ms Pattison on 17 November 2021 at 13:09:

> *I'd take him straight away to be honest. I've sent him that link and told him to apply. Once he confirms done I'll give you a shout.*

45. Mr Owens then emailed the claimant with a link to the said role, saying '*apply for this one mate*'. At 13:35 the claimant emailed Mr Owens to say that he had already applied for the role that Mr Owens had suggested he apply for.

46. On 17 November 2021, Ms Pattison said to Mr Owens, Ms Wilks, Sam Mason (HR) and Mark Duque by email sent at 15:12 [192/279]:

> *I can confirm we can offer Tony against Team Member 27471.*

47. At 16:46 on 17 November 2021, Mr R Carter emailed Sam Mason and Ms Pattison to say:

> *Tony Skillen – he was recommended by Ian to Jess however she hasn't spoken or interviewed him.*
>
> *I know we need to hire quickly however I would have liked my team to have interviewed or reviewed prior to them being offered a role, also I'm*

not sure Alison will be a fit for the processing area and we don't have any other team member roles in packaging available.

48. At 16:56 Mr R Carter added:

I would like for my guys to have a quick conversation with the candidate prior to offer just to ensure we are happy with them as well.

49. Following those exchanges, Mr R Carter instructed Ms Pattison in an email sent at 12:53 on 18 November 2021to make an offer of employment to the claimant.

50. Before that instruction could be formally acted upon however, Mr R Carter attended a regular HR Meeting with other Area Team Leaders including Ms Kilner and Ms Wilks. Ms Kilner attended the meeting by Microsoft Teams as she was isolating for 10 days at that point due to the pandemic. There was a discussion about the recruitment processes for the various vacancies at the time, during which it was mentioned that the claimant was to be offered a position in Ms Wilks' team. Ms Kilner confirmed that she had previously managed the claimant on the Bosch line. She explained that during that time he had taken unsolicited photographs of people and processes on the line; that she had been shown an online news article which referred to a Mr Skillen from Cockermouth having a conviction for possessing a firearm; and that all of this had been a distraction on the line. Ms Kilner therefore suggested to Ms Wilks that she interview the claimant before hiring him. No mention was made during that meeting of the claimant having ever raised any health and safety issues. Since the claimant had not raised any such issues, that is not surprising.

51. Mr R Carter subsequently emailed Ms Pattison and others on 18 November 2021, at 14:09. He said:

Following our people meeting earlier, Tony has previously worked in Dries with Naomi, he was caught taking pictures of the team without their permission, Naomi spoke to the Temp agency and asked him not to attend site again. We have also since found out that he has a criminal record for illegal possession of a firearm.

If you still want to employ him, Craig Marsham currently has team member vacancies showing.

52. Ms Pattison also emailed Mr Duque to check whether an offer had at that stage been made stage to the claimant. At 15:28 Mr Duque confirmed that an offer had not been made to him. Following that confirmation, Richard Carter stated at 18:27:

Please do not offer following what we have learnt today.

53. That evening, Richard Carter and Ian Owens communicated via text messages. Mr R Carter told Mr Owens:

We discussed him on our people meeting and [N]aomi said he worked on her line and was caught taking pictures of the other team members without permission, she then contacted the agency and stated she didn't want him on site again and he also has a record fir illegal possession of a firearm [sic]

54. Mr Owens replied at 19:47 as follows:

Jesus if I'd have known that I wouldn't have been pushing it. He's impressed me past couple months down here but need to pick up with kfm wtf he is doing on site. There's a few we have asked to be kept away that keep reappearing. I'll feed back to him that we are not interested and tell agency to sort their shit out.

55. Between 18 and 23 November 2021, Mr Skillen spoke with Ms Baker. She noted that the claimant was alleging that an offer had been 'withdrawn'. She took his mobile number and subsequently spoke with Sam Mason. Ms Baker was satisfied that Ms Mason was dealing with the matter and had no further involvement until February 2022.

56. Ms Pattison changed the status of the application to 'Withdrawn by Candidate (Recruiter)' on 18 November 2021. This was in order to avoid another rejection letter being sent to the claimant for the same role.

57. On 20 November 2021 the claimant emailed Mr Owens. He asserted:

In my experience of giving contracts out to pro football league players and doing modules on the pro Licence a verbal contract is binding

Mr Owens did not respond.

58. On 23 November 2021, Steve Brasier, from HR, emailed Ms Pattison and Ms Baker as follows:

Tony has been in the office again today and asked why his offer has been withdrawn, could someone give him a call and explain. He is very upset and worried that he is not sure why it has happened.

Termination of the claimant's assignment

59. Sam Mason subsequently emailed Richard Carter and Kathryn Bassett on 23 November as follows:

… [W]e still have Tony Skillen on site through KFM. I am not sure why we are still engaging with him as a worker based on the feedback that was received last week. Please can you either speak with him to explain why we are not proceeding with an offer, or request that he is no longer provided to us through KFM (which would be the preference based on your feedback).

60. On 26 November 2021 KFM was told by email by Mr Owens that the claimant should no longer be assigned to Reckitt's Hull site. Mr Owens told KFM:

With immediate effect please ensure Tony is no longer brought on site at Reckitts Hull. Further to recent feedback from some other departments we've already asked for him to no longer come on to site. From what I've been told by a number of people there have been issues where he has been taking pictures of people and processes without prior authorisation as well as concerns over attitude expressed.

61. KFM responded:

We know that there was issues in Dries a while ago but we had chat with Tony. Just lately we haven't had any complaints and wasn't aware of any issues. [sic]

Alleged unlawful detriment

62. On 29 November 2021, the claimant emailed Mr Owens, Ms Kilner and HR staff to assert that he had suffered a detriment because he had raised health and safety concerns. He also asserted that he had a binding contract of employment with Ian Owens. His email states:

> *Further more I … applied 26 times and was blocked from fulltime employmen[t]. I then was offered a job and excepted the offer on 17th November and this was withdrawn on 18th November 2021 (sic)*
>
> *Consequently the following week I was told not to come back on site and this can only be down to … whistleblowing.*

63. On 30 November 2021, the claimant emailed Ms Kilner as follows:

> *Can you confirm you have seen the photographs and email sent to Tracey Bowler hr and Jeromy Woods MD on 25th January 2021.*
>
> *I understand you contacted KFM about the photos, so you must of seen them*
>
> *Can you kindly give me copies of the investigation.*
>
> *I still have the photos and email. I shall forward further copies to hr and Jeromy by registered post (sic)*

64. On 1 December 2021, the claimant forwarded the email he had sent to Ms Bowler's email address on 24 and 25 January 2021 to the HR department. His covering emails said:

> *[P]lease find enclosed disclosure made to hr and for attention of Jeromy Woods MD*
>
> *Can we kindly arrange a meeting to avoid further escalation of this matter and confirm a start date [sic]*

65. On 10 December 2021 the claimant sent a further email to Ms Kilner, asserting that he had two legal claims, one for breach of contract and one for whistle-blowing; and that the '*the sensible outcome is to give me my start date to resolve the matter*'. The claimant also used the expression '*stop the clock*', which was a reference to Acas Early Conciliation, which he was aware of.

Whistleblowing Investigation by Ms Field

66. In January 2022, Ms Field took over the investigation of the claimant's whistleblowing complaint from Jason Varga, Ethics and Compliance Director. Ms Field spoke to Ms Kilner on 7 February 2022.

67. The claimant emailed Ms Field on 26 January 2022 to say:

> *I need to make you aware that I only have until 18th February 2022 on time limits to lodge a claim against Naomi Kilner.*
>
> *I have 3 months from the last detriment*
>
> *I also still await my start date as the clock is ticking*

68. On 28 January 2022, Jason Varga confirmed to Ms Field that no paperwork was sent to the claimant in relation to the alleged job offer. Ms Field emailed the claimant on 8 February 2022 to confirm that she was reviewing the matters he had raised and asking for any documents from him, evidencing the alleged job offer on November 2021.

69. On 8 February 2022 the claimant again emailed Ms Field referring to time limits '*as the last detriment was 18 November 2021*'. Ms Field replied to say that she aimed to respond by 21 February at the latest. On 18 February 2021, Ms Field emailed the claimant to say that the decision to reject the claimant's application for the role was 'reconsidered' on 18 November 2021 but that the respondent:

> *withdrew its reconsideration of this decision due to concerns relayed to the business in respect of your previous use of a mobile phone on the factory floor, the taking of pictures on the factory floor in contravention of Company policy and health and safety operating procedures, making other staff members feel uncomfortable by your actions and conduct and concerns regarding your previous firearms offence. In turn therefore the Company made a subsequent decision to maintain the rejection of your application*

70. On 19 February 2022 the claimant emailed Ms Field to assert that she had no evidence that he had a previous firearms offence and that he wanted to appeal the findings.

71. On 22 February 2022, Ms Field emailed the claimant. She told him:

> *I appreciate that you are disappointed and disagree with my response, which I arrived at after careful consideration of the chronology of events and the other available evidence. As you are not an employee of the Company there is no right of appeal against my decision. I have however instructed our external legal advisers to contact you regarding this matter and they should be in touch with you shortly. 315/442*

Relevant law

Protected Disclosure Detriment/Dismissal

72. 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.

73. 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.

74. As to 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."

75. The issues arising in relation to a 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:

*75.1. 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].*

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

75.3. 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].

75.4. 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].

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

76.1. 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.

76.2. 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].

76.3. 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."

76.4. 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].

76.5. '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].

76.6. 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].

77. 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.

78. 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.

79. 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.

80. 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.

81. 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."*

While it would be right to acknowledge that ***Malik*** was decided before ***Royal Mail Group v Jhuti*** [2020] IRLR 129 (see below), it is arguable that ***Jhuti*** was a dismissal case and not a detriment case, the circumstances in which ***Jhuti*** will apply are exceptional. The existence of vicarious liability provisions in relation to detriment claims (but not s.103A dismissal claims) may affect whether the ***Jhuti*** principle should be imported into detriment cases and there is currently no authority that does so import it.

82. 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?

83. 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 person could also have constructed an invented reason for dismissal to conceal a hidden reason: ***Royal Mail Ltd v Jhuti*** [2020] All ER 257. However, the ***Jhuti*** exception to the general rule that the only relevant motivation to consider is that of the decision-maker is likely to be of limited application: ***Kong v Gulf International Bank (UK) Ltd*** [2021] 9WLUK 125; [2022] IRLR 854:

    83.1. The general rule remains that the motivation that can be ascribed to the employer is only that of the decision-maker(s).

    83.2. The ***Jhuti*** exception will be *"a relatively rare occurrence"* and the scenario in ***Jhuti*** was a *"highly unusual variation"* and: *"Instances of decisions to dismiss taken in good faith, not just for a wrong reason but for a reason which the employee's line manager has dishonestly constructed will not be common."*

    83.3. There is no warrant to extend the exceptions beyond those envisaged in ***Jhuti*** itself.

83.4. Two common features of the ***Jhuti*** exception are that (a) the person whose motivation is attributed to the employer sought to procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case.

84. A third essential feature for the ***Jhuti*** exception is that the role or position of the person providing the underlying manipulated information is such that that their motivation could be attributed to the employer.

Breach of contract

85. Article 3 of the *Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994* provides:

> *Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
>
> *(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
>
> *(b) the claim is not one to which article 5 applies; and*
>
> *(c) the claim arises or is outstanding on the termination of the employee's employment.*

86. The provisions of Article 5 are not reproduced here since none of them are relevant to this claim.

Formation of Employment Contract

87. Contracts are formed by the exchange of an offer and an acceptance. Whether any given formulation of words is capable of setting out a legally effective offer will depend on whether that formulation is sufficiently certain and whether the person issuing it has the authority to do so.

88. With respect to what constitutes sufficient certainty, IDS Handbooks, Volume 3, Chapter 1 at 1.4 provides helpful guidance:

> *The offer must be capable of immediate acceptance. In other words, it must be sufficiently clear and unequivocal to enable the person to whom it has been made to accept it without further negotiation.*

89. From the case law, it is apparent that when determining whether the offer was sufficiently certain, the ET will look for the following features, inter alia: a start date, a sum of remuneration and a description of work that would be undertaken. Oftentimes, these features will be found in documentary evidence, such as job advert or letters of appointment.

90. With respect to authority, it is clear that the person making the offer must be authorised by the employer to do so. As such, the employers usual hiring practices are highly relevant to assessment of whether the purported offeree had the requisite authority.

91. In *Puntis v Governing Body of Isambard Brunel Junior School EAT 1001/95*, a Deputy-Head teacher was alleged to have made a permanent offer of

employment to a temporary worker. R argued that the Deputy-Head had no such authority, and therefore could not have made a legally effective offer. In deciding that the Deputy-Head did not have the requisite authority, the ET found it relevant that there was no evidence that the Deputy-Head had awarded temporary promotions in the past.

Time limits

92. The questions to be considered by a Tribunal in a case where time limits are at issue in relation to a whistle-blowing dismissal/detriment claim (section 111/48 Employment Rights Act 1996) are:

    92.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination/act complained of/ was Acas Early Conciliation commenced within three months of the act complained of?

    92.2. If not, (in relation to the detriment claims), was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

    92.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

    92.4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period thereafter?

Conclusions

93. 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.

1. Employment status

1.1 Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

94. The Tribunal has found on the facts that no formal offer of employment was ever made to the claimant in relation to role 27471. There had been a temporary intention to offer a role, without interview, but that decision was revoked. Even if the claimant had seen at any stage that the job had been marked ‘offer’ that could not have been sufficient to amount to a formal offer of employment. Therefore, the claimant was never an employee of the respondent; he remained an agency worker throughout.

1.2 Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

95. The respondent accepts that the claimant was a worker for the purposes of the detriment provisions of the Employment Rights Act 1996.

3. Unfair dismissal

3.1 Was the claimant dismissed?

96. It is not in dispute that the claimant's assignment with the respondent, via KFM, was terminated on 26 November 2021. As stated above however, he was never an employee and therefore could not have been dismissed from employment.

3.2 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

97. Since the Tribunal has concluded that the claimant was not an employee, and was never dismissed from employment, this question does not arise. The Tribunal notes that there is no detriment claim regarding the termination of the claimant's assignment. For the reasons set out below, the Tribunal has in any event concluded that the claimant did not make any protected disclosures prior to the decision being taken not make an offer to him and to terminate his assignment.

5. Wrongful dismissal

5.1 What was the claimant's notice period? R says one week, C says 3 months.

98. Had the claimant been offered employment, his employment would have been subject to a six month probation period, during which the notice due to him would have been one week. However, since the claimant was never an employee, he has no right to bring a claim for wrongful dismissal under the 1994 Order, which only applies to employees.

5.2 Was the claimant paid for that notice period? Agreed he was not.

99. It is not in dispute that the claimant's assignment was terminated without notice.

5.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

100. The claim must fail because the claimant was never an employee of the respondent. Had we found that he was an employee, the Tribunal would have found that the respondent was not entitled to terminate the claimant's employment, in November 2021, relying on matters which had occurred in January 2021. Even if those matters had amounted to fundamental breaches, which the Tribunal doubts, the passage of time would likely have meant that any such breach had been waived.

6. Protected disclosure

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

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

6.1.1.1 January 2021 – the claimant told Ms Kilner verbally in a face-to-face conversation not to block the fire doors.

101. The Tribunal refers to the findings of fact above – no such conversation took place. This allegation therefore fails on the facts.

6.1.1.2 January 2021 – the claimant took pictures and explained his concerns to Josh Carter (who did not wish to view the photographs) and

Chris Walker (who did view them) which related to the fire doors, people on telephones, pictures of sweets which could contaminate tablets and agency workers plugging their phones into sockets which had not been PAT tested. The claimant's case is that Mr Carter apologised to him for the safety breaches.

102. Again, this allegation fails on the facts.

6.1.1.3 The claimant forwarded the photographs with an explanation of his concerns to Tracey Bowler of HR on 23 and 24 January 2021. [It is noted that the claimant sent hard copies to Mr Jeremy Woods in December 2021 after the detriments to which he says he was subjected]

103. Again, this allegation fails on the facts, insofar as the claimant relies on Ms Bowler having received the email, since the email was never opened by her as she had by then left the respondent's employment. The only alleged detriment which post-dates the email being sent in December 2021, is the decision to refuse the claimant an appeal by Ms Field. Since, for the reasons set out below, the Tribunal has had no hesitation in concluding that this was the real reason for the appeal being refused, and that Ms Field's decision had nothing to do with the content of the email to Ms Bowler, it is not proportionate to reach any further conclusions in relation to this and the remaining issues in relation to the protected disclosures.

6.1.2 Did he disclose information?

104. See the conclusion at 6.1.1.3 above. It is not proportionate to reach any further conclusions on this or the remaining protected disclosure issues.

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

105. See above.

6.1.4 Was that belief reasonable?

106. See above.

6.1.5 Did he believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered;

107. See above.

6.1.6 Was that belief reasonable?

108. See above.

6.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

109. See above.

7. Detriment (Employment Rights Act 1996 section 48)

7.1 Did the respondent do the following things:

7.1.1 January 2021 – Ms Kilner told the employment agency that the claimant was not to be placed in work in her department.

110. This occurred as a matter of fact.

7.1.2 the claimant was blocked from applying and being considered for team member roles on 1 and 13 April, 8 June, 14, 28, 29 and 30 September and 8

October 2021 as well as having an offer of employment made on or about 17 November 2021 withdrawn. The claimant believes that Ms Kilner was responsible for those decisions, but documentation in his possession showing the rejection of his applications have the name of the potential decision maker currently redacted.

111. We refer to our above findings of fact in relation to the actual dates that the claimant was refused employment with the respondent. Subject to that clarification, it is accepted that the claimant was refused employment on a number of occasions after January 2021. Ms Kilner did however have nothing to do with those decisions.

7.1.3 from 27 January 2021 the claimant was refused admission to the liquids canteen and, in circumstances where he couldn't enter the dries canteen as he was no longer working there, was effectively left without any restroom he could use.

112. This claim fails on the facts, in that he could have used the Dries canteen/rest area or the incubator rest area. His belief to the contrary was not reasonable. In any event, these restrictions were applied to all agency workers.

7.1.4 from January 2021 the claimant was accused of being guilty of firearm offences by various members of management in emails which were subsequently circulated between them

113. This allegation is made out on the facts.

7.1.5 Ms Field denied the claimant's appeal against the alleged purported withdrawal of his job offer in November 2021 and failed to make enquiries as to the circumstances behind it.

114. The claimant was indeed denied an appeal.

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

115. The Tribunal is willing to give the claimant the benefit of the doubt in relation to this issue, in relation to the first allegation above. The Tribunal also concludes that detriments 2, 4 and five are also a detriment. Detriment 3 fails on the facts and no conclusion is necessary as to whether that was a detriment.

7.3 If so, was it done on the ground that he made a protected disclosure?

116. The Tribunal has concluded that no protected disclosure were made by the claimant until 1 December 2021 at the earliest. Therefore, none of the alleged detriments which predate that could have been linked to the alleged raising of health and safety issues. In any event, the decision by Ms Kilner to move the claimant from the Bosch line for the good of the team and the business, was because the claimant's presence on that line was becoming a distraction.

117. As for the recruitment decisions, detriment 2, these had nothing to do with Ms Kilner in any event and nothing to do with the raising of health and safety issues.

118. As for detriment 4, the accusation of firearms offences, this was due to a Google search by colleagues and an unfortunate mistake of identity. The claimant accepted during cross examination that the raising by Nikki Silk of

the firearms offence issue was not because of any protected disclosures by him - '*it may have been crossed wires'*, he accepted.

119. Finally, the decision to refuse the claimant an appeal, alleged detriment 5 had nothing to do with Ms Bowler's email, so even if that email was a protected disclosure, once received in December 2021, it had no impact on the decision of Ms Field. Ms Field reasonably concluded, as has this Tribunal, that the claimant was not an employee and for that reason and that reason alone, he was refused an appeal.

120. The Tribunal notes that the claimant relies on the ***Jhuti*** decision, to argue that Ms Kilner somehow manipulated others involved in the decisions leading to the various detriments alleged. That submission cannot succeed, because of the Tribunal's conclusions in relation to the alleged protected disclosures. In any event, it is clear to the Tribunal in relation to, for example, alleged detriment 1, that Ms Kilner came to a reasonable management decision. She reasonably decided that the claimant's presence on the line was becoming a distraction to other staff. Further, the allegation of firearms offences was not something invented by Ms Kilner; it was raised with her by other employees. Finally, the Tribunal notes that Mr Kilner has been upset by the allegations against her and wishes to record that in the Tribunal's judgement, Ms Kilner has acted reasonably at all times.

2. Time limits

2.1 Given the date that early conciliation was commenced, any complaint about something that happened before 23 November may not have been brought in time. The claimant contends, however, that all of his complaints were in time in circumstances where his services only terminated on 26 November 2021.

121. The Tribunal concludes that the claimant is wrong in relation to the above assertion. As noted above, the claimant has not brought a detriment claim in relation to the termination of his assignment. Even if he was an employee, it is clear that on 18 November, a decision was made to revoke that. In any event, there was no offer and acceptance for the reasons given above.

2.2 Was the unfair dismissal/breach of contract/whistleblowing detriment complaint made within the applicable time limit:

122. No. Acas Early Conciliation should have been commenced within three months of the last of the detriments alleged, i.e. the alleged revocation of the offer on 18 November 2021. It is clear from the correspondence referred to in the fact findings above that the claimant was aware that was the date of the last detriment.

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of?

123. This should refer to the date that Acas Early Conciliation was commenced; as noted above, it was commenced on 22 November, not 17 November. Five days out of time.

2.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

124. Not applicable.

2.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

125. The claimant's primary argument is that the claim was submitted in time. For the reasons set out above, the Tribunal disagrees with that (save for the decision in relation to the refusal of an appeal which fails in any event for other reasons). The claimant does not seek to argue that it would not have been reasonably practicable for him to have submitted the claim in time. Had he sought to do so, the Tribunal would have rejected that argument. This is the third Employment Tribunal claim that the claimant has submitted, and he was clearly aware as early as December 2021, that the last detriment took place on 18 November, meaning that the last date to commence early conciliation in time, would have been 17 February 2022.

2.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

126. Not applicable.

Concluding remarks

127. The Tribunal is not without some sympathy for the position that the claimant found himself in, at the end of November 2021. Complaints had been raised by fellow workers at the end of January 2021, as a result of which the claimant had been removed from the Bosch line. He continued to work for the respondent however, without (as far as we know) any further material complaints being made, for another 10 months. At that stage, due to an apparent misunderstanding between Mr Carter and Mr Kilner (in particular, Mr Carter's misunderstanding that Ms Kilner had asked the claimant to be removed from the workplace entirely in January 2021), the claimant's assignment was terminated. Part of the reason for that was the untrue allegation that the claimant had committed firearms offences. The allegation was however based on an unfortunate mistake of identity, not out of any malice towards the claimant by any member of staff.

128. As an agency worker, the claimant was not entitled to any investigation being carried out by the respondent, prior to his assignment being terminated. That is the unfortunate position that agency workers sometimes find themselves in. Unless the employee can demonstrate that the termination was for a proscribed reason, such as protected characteristic, or whistleblowing, or the raising of health and safety concerns, the agency worker has no recourse in law.

129. It is one thing however for an agency worker to feel a sense of injustice. It is quite another for that worker to maintain a claim before an Employment Tribunal, on the basis of allegations which they could not reasonably have believed to have occurred in fact.

Employment Judge A James
North East Region

Case Number: 1802075/2022

Dated 13 March 2023

Sent to the parties on:

15 March 2023

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For the Tribunals Office

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ANNEX A – AGREED LIST OF ISSUES

1. Employment status

1.1 Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

1.2 Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

2. Time limits

2.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 23 November may not have been brought in time. The claimant contends, however, that all of his complaints were in time in circumstances where his services only terminated on 25 November 2021.

2.2 Was the unfair dismissal/breach of contract/whistleblowing detriment complaint made within the applicable time limit The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of?

2.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

2.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

2.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

3. Unfair dismissal

3.1 Was the claimant dismissed?

3.2 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.

4. Remedy for unfair dismissal

4.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

4.1.1 What financial losses has the dismissal caused the claimant?

4.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

4.1.3 If not, for what period of loss should the claimant be compensated?

4.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

4.1.5 If so, should the claimant's compensation be reduced? By how much?

4.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.1.7 Did the respondent or the claimant unreasonably fail to comply with it?

4.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

4.1.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

4.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

4.2 What basic award is payable to the claimant, if any?

4.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

5. Wrongful dismissal

5.1 What was the claimant's notice period?

5.2 Was the claimant paid for that notice period?

5.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

6. Protected disclosure

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

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

6.1.1.1 January 2021 – the claimant told Ms Kilner verbally in a face-to-face conversation not to block the fire doors 6.1.1.2 January 2021 – the claimant took pictures and explained his concerns to Josh Carter (who did not wish to view the photographs) and Chris Walker (who did view them) which related to the fire doors, people on telephones, pictures of sweets which could contaminate tablets and agency workers plugging their phones into sockets which had not been PAT tested. The claimant's case is that Mr Carter apologised to him for the safety breaches.

6.1.1.3 The claimant forwarded the photographs with an explanation of his concerns to Tracey Bowler of HR on 23 and 24 January 2021. [It is noted that the claimant sent hard copies to Mr Jeremy Woods in December 2021 after the detriments to which he says he was subjected]

6.1.2 Did he disclose information?

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

6.1.4 Was that belief reasonable?

6.1.5 Did he believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered;

6.1.6 Was that belief reasonable?

6.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

7. Detriment (Employment Rights Act 1996 section 48)

7.1 Did the respondent do the following things:

7.1.1 January 2021 – Ms Kilner told the employment agency that the claimant was not to be placed in work in her department

7.1.2 the claimant was blocked from applying and being considered for team member roles on 1 and 13 April, 8 June, 14, 28, 29 and 30 September and 8 October 2021 as well as having an offer of employment made on or about 17 November 2021 withdrawn. The claimant believes that Ms Kilner was responsible for those decisions, but documentation in his possession showing the rejection of his applications have the name of the potential decision maker currently redacted

7.1.3 from 27 January 2021 the claimant was refused admission to the liquids canteen and, in circumstances where he couldn't enter the dries canteen as he was no longer working there, was effectively left without any restroom he could use

7.1.4 from January 2021 the claimant was accused of being guilty of firearm offences by various members of management in emails which were subsequently circulated between them

7.1.5 Ms Field denied the claimant's appeal against the alleged purported withdrawal of his job offer in November 2021 and failed to make enquiries as to the circumstances behind it.

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

7.3 If so, was it done on the ground that he made a protected disclosure?

8. Remedy for Protected Disclosure Detriment

8.1 What financial losses has the detrimental treatment caused the claimant?

8.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

8.3 If not, for what period of loss should the claimant be compensated?

8.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

8.5 Is it just and equitable to award the claimant other compensation?

8.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

8.7 Did the respondent or the claimant unreasonably fail to comply with it?

8.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

8.9 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

8.10 Was the protected disclosure made in good faith?

8.11 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?