EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr K Beacham	**v**	United Kingdom Atomic Energy Authority

Heard at:	Reading (by CVP)	**On:** 30 and 31 January, 1 and 2 February 2023. A further day for tribunal deliberation took place in private on 17 February 2023

Before: Employment Judge Hawksworth
Mr J Appleton
Ms S P Hughes

Appearances
For the Claimant: Mr J Frater (employment lawyer)
For the Respondent: Mr A MacPhail (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. the claimant's complaints of detriment on the ground of having made a protected disclosure under section 47B of the Employment Rights Act 1996 fail and are dismissed;

2. the claimant was not dismissed by reason of having made a protected disclosure and his claim under section 103A of the Employment Rights Act 1996 also fails and is dismissed.

REASONS

Claim and response

1. The claimant was employed by the respondent from 13 March 2019 to 20 September 2020 as a mechanical technician.

2. In a claim form presented on 19 November 2020 after a period of Acas early conciliation from 24 September 2020 to 29 October 2020, the claimant brought complaints of whistleblowing detriment and dismissal.

3. The response was presented on 26 January 2021. The respondent defended the claim.

Hearing and evidence

4. The hearing took place by video.

5. The claimant's representative prepared a helpful opening skeleton argument.

6. At the start of the hearing the claimant's representative made an application to amend the claim to rely on two additional disclosures (disclosures 2 and 3) and three additional detriments (detriments bb, cc and dd)[1]. For reasons given at the hearing, we allowed the application in respect of disclosure 2 and detriment bb. We did not allow the application in respect of disclosure 3 or detriments cc and dd. In short, the reasons for this were that the factual background for disclosure 2 was included in the claim form, and the respondent had been aware of the claimant's application to add detriment bb for some time. The balance of hardship fell in favour of the claimant on these amendments. On the other hand, the facts relied on as disclosure 3 were not in the claim form. There was a lack of clarity about disclosure 3 and detriments cc and dd, and the respondent had only just been made aware of the nature of the amendments sought. A postponement might have been required if these amendments were allowed. The balance of hardship fell in favour of the respondent on these amendments.

7. There was an agreed bundle which had 377 pages. We refer to that bundle by page number. On the last day of the hearing, the respondent produced two additional documents. These were a two page exchange of emails dated 15 October 2020 about a television, and two screenshots with government guidance on face coverings in the context of the pandemic. The claimant did not object to these additional documents being included in the bundle.

8. We heard evidence from the claimant on the afternoon of day one and on day two of the hearing. We heard from the respondent's witness Ms Maclean on the afternoon of day two and the morning of day three. We then heard from the respondent's other witnesses: Dr Stevenson, Mr West and Mr Marshall (day three) and Mr Evans (day four).

9. We also had a witness statement from Tamika Hedges, a People Advisor for the respondent. She was not able to attend the hearing. We told the parties that we would attach such weight to her statement as we thought

[1] An application to include detriment aa was not pursued as it was about dismissal and Mr Frater agreed that it fell within matters to be considered under section 103A rather than section 47B.

appropriate, bearing in mind that she had not attended to be questioned about her evidence. In fact, we made our findings about Ms Hedges' involvement by reference to the contemporaneous documentation and did not rely on her witness statement.

10. The parties' representatives made closing comments on the afternoon of day four. Mr Frater also prepared helpful closing submissions. Some of the complaints of detriment were withdrawn, as explained below.

11. There was insufficient time within the four days for us to make our decision and deliver judgment, and so we reserved judgment. The employment judge apologises for the delay in promulgation of this reserved judgment. This reflects the large number of issues for determination in this case, and current workloads in the employment tribunal.

Issues

12. The parties produced a list of issues which was agreed except for a few points (pages 63 to 66 of the bundle). At the end of the hearing, some complaints of detriment were withdrawn by the claimant and the respondent accepted that one disclosure was a protected disclosure, as explained below. The issues for us to determine are as follows (the original numbering from the list has been retained for ease of reference).

    <u>Protected disclosures</u>

    1 The claimant alleged he made a protected disclosure in his e-mail sent to Ms Maclean on 17 July 2020. [In closing submissions, the respondent agreed that this email amounted to a protected disclosure.]

    2 The claimant also alleges that he made a protected disclosure on 17 September 2020 in an e-mail to the respondent (the 'September Email'). The claimant contends that the September Email contained information which tended to show in the claimant's reasonable belief that a person had failed, was failing or was likely to fail to comply with a legal obligation to which they were subject (section 43(1)(b)). [Reliance on this alleged protected disclosure was allowed as an amendment to the claim.]

    3 Did the claimant's September Email constitute a protected disclosure within the meaning of part IVA of the Employment Rights Act 1996?

    4 In particular:

    (a) Did the claimant's September Email contain a disclosure of information; and
    (b) if so, did the information disclosed tend to show in the claimant's reasonable belief that

(i) a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject (section 43(1)(b)); and/or
(ii) the health and safety of any individual had been, was being or was likely to be endangered (section 43(1)(d))[2].

5 Did the claimant reasonably believe that the disclosure was in the public interest?

Detriments

6 [The claimant alleged that he was subjected to 27 acts of detriment because of making one or more protected disclosures. We have set out each of these acts (acts (a) to (bb)) in our conclusions below. During closing submissions the claimant withdrew five of the allegations of detriment, leaving 22 allegations. The allegations which were withdrawn were:

(f) Mr Slade of the respondent remained in the vicinity of the claimant not wearing suitable PPE (including specifically a face covering);
(h) Mr Marshall of the respondent remained in the vicinity of the claimant not wearing suitable PPE (including specifically a face covering);
(j) Mr Hollis spied on the claimant during the last two weeks of August 2020;
(m) the respondent permitted Mr Gill and Mr Blunt who ought not [to] have access to the claimant’s medical records to view the same;
(z) Mr West informed the claimant not to tell Mr Evans he was aware of the crypto miners’ presence or he ‘would be down the road too’ on 24 August 2020.]

7 Did the claimant suffer any of the acts? If yes, was any such act or omission a detriment?

8 If yes, was the claimant subjected to any detriment by the respondent on the grounds that he had made a protected disclosure, pursuant to section 47B of the Employment Rights Act 1996?

Automatic constructive unfair dismissal

9 Was the claimant dismissed pursuant to section 95(1)(c) of the Employment Rights Act 1996?

[2] Paragraph 4 was included in the list of issues by the respondent to detail the test for determining protected disclosure. The claimant did not think it was required.

10 In particular:

(a) did the respondent breach an express or implied term of the claimant's employment contract? The claimant contends the conduct of the respondent breached the implied duty of mutual trust and confidence along with the implied duty to protect the health and safety of employees;
(b) if so, was that breach sufficiently serious or fundamental to entitle the claimant to resign with immediate effect?
(c) If so, did the claimant resign in response to the breach of contract and not for some other reason?
(d) Did the claimant unreasonably delay before resigning in response to the breach, if found?
(e) Did the claimant at any point affirm the contract or waive the breach of contract, if found?[3]

11 If the claimant can show that he was dismissed (which is denied), was the reason or the principal reason for the claimant's dismissal that he made a protected disclosure within the meaning set out in Part IVA of the Employment Rights Act 1996?

Remedies

12 If the claimant is successful in his claims, what remedy should be awarded?

13 Is any compensatory award applicable and if so, how much?

14 Is any injury to feelings award applicable in respect of the claimant's detriment allegations and if so, how much?

15 Is any uplift applicable to any award and if so, how much?

16 Is any reduction applicable to any award and if so, how much? In particular, if the Tribunal finds that the claimant made a protected disclosure, was the disclosure made in good faith and, if it was not, is it just and equitable to reduce the claimant's award (if any) in accordance with section 49(6A) of the Employment Rights Act 1996?

17 Is any interest applicable to any award and if so, how much?

Time Limits

18 To the extent that any matter upon which the claimant relies (set out at paragraphs 6(a) - 6(dd) is prima facie out of time, are any of those acts part of a series of similar acts the last of which was in

[3] The Respondent wished to include the contents of paragraph 10 in the list of issues to detail the elements of the test for determining whether the Claimant's resignation amounts to a "dismissal". The Claimant contended the inclusion of paragraph 10 was not required.

time or, if not, was it reasonably practical for the Claimant to have presented the claims in time?

Findings of fact

13. We make the following findings of fact about what happened. We have not included here everything that we heard about during the hearing. Our findings include those aspects of the evidence which we found most helpful in determining the issues we have to decide. Where there is a dispute about what happened, we decide what we think is most likely to have happened, on the basis of the evidence we have heard and the documents we have read.

14. On 13 March 2019 the claimant began employment with the respondent as a mechanical technician based at the Culham site (page 69). It is a large site with many separate buildings and stores. The claimant had worked on the site as a contractor for about 10 years prior to this. He was good at his job and had good technical skills.

<u>The miners</u>

15. In December 2019 Alan West, the group leader of the claimant's team, was told by a section leader that the claimant had set up some computer equipment called cryptocurrency miners in a part of the building in which the claimant worked called the mezzanine. Cryptocurrency miners are also known as bitcoin miners, bit miners, bit-mining machines or miners. We have referred to this equipment as 'bit-mining machines' or 'miners'. The miners were plugged into the respondent's electricity system. They were the claimant's personal equipment and were nothing to do with his work.

16. By the time Mr West was told about them, the miners were no longer in the mezzanine and he thought they had been removed from the respondent's site. In fact, the claimant had moved the miners from the mezzanine and set them up in another part of the building called the J1A satellite store. The satellite store was an area divided off from the main part of the building where the claimant worked, by mesh dividing walls. Its contents could be seen from outside. In early 2020, Mr West saw the miners in the satellite store. He asked the claimant to remove them immediately.

17. In March 2020 the first national lockdown in response to the covid-19 pandemic began. The claimant and most of the respondent's staff who worked at the Culham site began working from home. The claimant left the miners in the satellite store. We find (based on the text sent on 2 June 2020 referred to below) that the miners were plugged in and working to some extent (because they were making noise) over the first lockdown period while the claimant was not at work.

18. From May 2020 some staff who had been working at home began to return to work on site at Culham.

19. The claimant was due to return to site on 2 June 2020. On 1 June 2020 he texted Mr West to ask whether he could book a week's holiday (page 74). Mr West refused, saying he needed the claimant in work on 2 June 2020. Later that evening the claimant texted Mr West again to say he would not be able to come in at all the following day. He had concerns that his attending the site might expose a vulnerable family member to covid-19. The claimant and Mr West spoke on the telephone. The claimant explained his concerns and he was allowed to take two weeks holiday.

20. Also on 2 June 2020, the claimant's colleague texted him about the miners. He said that the claimant would need to collect them. He said they had had to switch off the miners as someone wondered what the noise was when passing by (page 75).

21. On 15 June 2020 the claimant returned to work on the site. He boxed up the miners and stored them in some racking in the satellite store.

<u>The anonymous email</u>

22. Also on 15 June 2020, at 9.55pm, a person using a gmail account sent an e-mail to Lyanne Maclean who was at the time the respondent's chief operating officer (page 77). Neither party knows who the person who sent this email was. It is assumed that it was someone who worked at the respondent's site who set up a gmail account using a made-up name ('Bob'). We refer to this email as we did in the hearing as the anonymous email. It said:

> "Sorry for the anonymous e-mail as I found a bit-mining machine working in J1A sub store next to vac group store.
>
> regards
>
> Bob"

23. The email attached a photo of an untidy workspace in which the miners were shown wired up and apparently working.

24. Ms Maclean did not know what bit-mining machines are or what the email or the photo were about. She sent a reply to 'Bob', copied to one of the respondent's HR officers, Kelly Stallard (page 80), saying:

> "I am unclear on what you are reporting. Can you contact Kelly to discuss please."

25. On 26 June 2020 Ms Maclean forwarded the anonymous email to a number of managers (page 113). She said

> "I cannot track down who sent this or actually what we are looking at – any clarity please?"

26. Not having had a response, Ms Maclean sent a further email on 16 July 2020 (page 92), asking managers Roy Marshall and Sam Jackson whether there had been any progress on working out what the email was about. Mr Marshall had responsibility for the J1A area and Mr Jackson was a manager with responsibility for site safety.

The claimant's protected disclosure

27. On Friday 17 July 2020 at 8.09 pm the claimant sent an email which the respondent has accepted was a protected disclosure (page 89). The email was sent to Ms Maclean. It was a response to one of Ms Maclean's Culham Broadcast Messages emails. Ms Maclean had been sending these emails almost daily since the start of the first national lockdown, to keep staff updated with changing government guidance and the respondent's covid-19 procedures.

28. The email (copied as written) said:

> "Hi Lyanne.
>
> I just wanted to respond to this email with some feedback of how I'm finding things on site.
>
> If I had to summarise the general feeling of everyone I've come into "contact" with I'd say that no one really cares about covid and the measures in place. Sure their are a small few who seem to be taking it seriously but definitely a minority.
>
> I won't go in J20 (where my office is) as I've witnessed 3 people going the wrong way around the one way system. One even laughed and said to a colleague "who's going to stop me, the police". I seem to be one of maybe 4 people that wear a mask at all times on site. Everyone gets too close. I've witnessed multiple pairs of people looking over the same A4/A3 sheet of paper practically cuddling, no mask. People walking side by side between buildings, no mask. People have approached me and I've had to step back again not wearing masks.
>
> A colleague was wearing a mask, was approached by someone not wearing a mask and told he can't wear his cloth mask. If they'd of done the same to me I wouldn't of been as polite.
>
> My personal feeling on increasing the number of people on site is everyone needs to wear masks at all times as people just don't care. And their needs to be some visible "punishment", other no one will bother.
>
> It's sad because those that do wish to take it seriously are being placed at an increased risk because of others.

> I'd like to remain anonymous as I know how people can get on site and don't have the energy to deal with the bitchiness. But today felt I had to at least say something as I only see it getting worse with more people.
>
> Sorry to be a Debbie downer before the weekend.
>
> Stay safe and here if you need anything
>
> Enjoy your weekend."

29. After he sent this, the claimant told Mr West that he had emailed Ms Maclean about people not following covid procedures, and he hoped that he had not got him into trouble.

<u>Initial enquiries into the anonymous email</u>

30. On 20 July 2020 at 9.06pm Ms Maclean was sent another anonymous email by 'Bob' (page 83). It was copied to Ms Stallard. It enclosed details from the specifications for a bit-mining machine. It said that the main costs of miners are power and internet connection, and that Ms Maclean should ask her IT department.

31. The following morning Ms Stallard replied to Bob to say she would look into it, and Ms Maclean forwarded the email to the respondent's head of computing to ask if he could help (page 76).

32. At about this time, Mr Jackson asked two employees to try to identify the location in the photo which had been sent by Bob. One was Ben Slade, area supervisor for the J1A area. Those two employees thought they were investigating a housekeeping issue. They were not aware of the claimant's unrelated email sent on 17 July 2020. The reason these enquiries took place when they did was because Ms Maclean had sent an email to Mr Marshall on 16 July 2020 chasing up her request about the first anonymous email. It was not because of the claimant's 17 July 2020 email about covid concerns.

<u>Response to the claimant's protected disclosure</u>

33. At 8.03am on Wednesday 22 July 2020, Ms Maclean replied to Mr Beacham's protected disclosure email about her Broadcast Message (page 88). She received 2 to 3 replies to almost of all her Broadcast Messages, that is about 10 to 15 emails a week, and she had committed to replying to them all personally. The claimant's email did not stand out to Ms Maclean or play on her mind particularly.

34. Ms Maclean did not think the claimant was raising a grievance. In her email to the claimant Ms Maclean said:

> "Thank you for getting in touch. I am sorry you feel that your colleagues are not taking the covid secure measures seriously

enough. I hope that you have reported the incidents that you state here on UNORs with as much information as possible so that I can chase down those involved and make sure we are correcting behaviours. If not I would ask that you raise a UNOR with all the details including names if you know them. I will broadcast messages re-compliance again and those copied in will, I know look into your reports and reiterate the messages again. However without fuller details we will not be able to track down the individuals.

On face masks. We have closely looked at the guidance and continue to do so. Our primary protection measure is the 2m rule and enhanced hygiene. We have mandated face coverings in control rooms and at certain times and events. We do not see that a face covering needs to be worn at all times but we will review this constantly. We have stated that personal face coverings can be worn providing that this is done in line with Government guidance on their type and wearing of.

Please get in touch again if this doesn't answer your issues and I urge you to provide details of the instances you describe."

35. A UNOR is an Unusual Occurrence Report. Unusual occurrences are defined in the respondent's incident reporting policy as "any occurrence or situation which adversely affects (or has the potential to affect) the environment, the health and safety of personnel or the continuation of normal operations (including near misses)" (page 312). The UNOR system allows a user to submit a UNOR with their name if they would like a response or anonymously (although UNORs are submitted using the respondent's email system and so the sender could be identified). Because of the nature of the respondent's work, the respondent encourages people to report concerns through the UNOR system, to help identify and investigate any potential safety issues so that appropriate action can be taken.

36. When she replied to the claimant, Ms Maclean copied her email to the claimant to Mr Marshall, Mr Jackson and two other managers. She did so to make them aware of the concerns that had been raised, because she was concerned to ensure compliance with covid safety arrangements. She also thought these managers could help the claimant, either to raise a UNOR or by offering him reassurance if he was feeling nervous about covid arrangements. They were all managers with some responsibility for covid procedures around the site.

37. The claimant felt that in copying other managers to her reply, Ms Maclean breached the request for anonymity which he had made in his email. The claimant did not reply to Ms Maclean's email as he had lost confidence in his concerns being treated anonymously. He did not provide Ms Maclean with any more details about his concerns. He did not raise a UNOR about the issues mentioned in his protected disclosure.

Further investigations into the anonymous emails

38. After Mr Slade and his colleague took initial steps to identify and investigate the location which was in the photo sent with the first anonymous email, Mr Marshall emailed Ms Maclean at 3.26pm on 22 July 2020 with an update (page 91). He reported that they had identified the location in the photo, and explained where it was. He said the area was tidier than in the photo: ‘housekeeping was much improved’. They had found out the names of the supervisor of the area, the most frequent user and two occasional users. The most frequent user was the claimant. Mr Marshall ended his email to Ms Maclean saying, ‘Do you want me to take a closer look or do anything else at this stage?’.

39. Replying to Mr Marshall on 22 July 2020 Ms Maclean said there needed to be a formal investigation (page 91). She asked Mr Marshall to get HR and the safety team involved.

40. Mr Marshall went to visit the area himself later that day and took some photos. He was unable to access the satellite store because it had a combination padlock on it, but he could see through the mesh dividers and could see that there was a bicycle in the store (page 96). He found some waste bins outside the store which contained various parts from multiple bikes including some large parts (page 94). He thought the volume of parts looked too much to be for someone’s personal ad hoc bike maintenance. He also found some packing boxes, three of which were addressed to the claimant. Two boxes were addressed to the claimant at the site address and one to the claimant’s home address. One of the boxes had a delivery note on the outside showing that it had contained cycle parts (page 95).

41. Mr Marshall also liaised with the respondent’s head of computing. The head of computing felt the main issue with the miners was the use of electricity to run machines that were not work related. There was also an issue about whether the respondent’s computer network had been accessed by the devices. Mr Marshall sent an email update and the photos he had taken to Ms Maclean at 6.29pm on 22 July 2020 (page 93).

42. The following day, 23 July 2020, Mr Marshall sent Ms Maclean another email with a further update. He set out options for next steps (page 97).

43. Ms Maclean had asked Mr Marshall to involve HR in the investigation. Mr Marshall and HR officer Ms Stallard arranged to meet on 27 July 2020 (page 100). There was a delay in progressing things after that because Ms Stallard was on holiday for two weeks.

The induction tour

44. On 13 August 2020 Mr Marshall was taking a new colleague on a tour of the respondent’s site as part of an induction tour. The new colleague was taking on a role with responsibility for safety for a number of areas including J1A. While passing near the satellite store at around 2.30pm, Mr

Marshall saw the lights were on. He went to the store and put his head round the door. He saw the claimant working on an electric bike. The style of the bike was the same as those used for a bike rental scheme in Oxford (called 'OBikes'). Mr Marshall briefly said hello to the claimant but did not ask about what he was doing as he was with a new colleague.

45. Mr Marshall updated Ms Maclean by email later that day (page 112). She replied on 17 August 2020. She said that the claimant's line manager should be asked to have a documented conversation with the claimant about why he was carrying out a private activity on site, and that a fact find investigation was required in respect of the miners (page 112).

<u>The fact find and investigation of the store</u>

46. On 19 August 2020 Ms Maclean asked the department manager Paul Stevenson to task the claimant's line manager to arrange for a fact find to be carried out to establish what was going on in J1A (page 108). Dr Stevenson had no knowledge of the claimant's email of 17 July 2020 until after the claimant's resignation.

47. Dr Stevenson spoke to Mr Marshall and looked at the photos he had taken by way of background. Dr Stevenson understood why a fact find was required; he was concerned about bike repairs being carried out on site, and whether any parts had been purchased through the respondent's accounts. He was also concerned about any potential risk to the respondent's network security from the miners. Dr Stevenson did not think that the claimant had set up the miners (or at least not on his own), because they require quite specialist IT knowledge and expertise which Dr Stevenson was not aware the claimant has (the claimant's job does not require very much use of computers).

48. Dr Stevenson asked Glyn Evans to carry out the fact find (page 167). Mr Evans was the unit head for the area that the claimant worked in, and the line manager of Mr West, the group leader for the claimant's team.

49. Dr Stevenson was due to carry out a pre-planned weekly safety tour on the afternoon of 19 August 2020 with a colleague, Sam Hollis (page 125). The purpose of the tour was to check compliance with the respondent's covid-19 procedures. Dr Stevenson decided that they would visit the satellite store as part of the tour. When they arrived, they found the door was padlocked shut. There were lots of boxes outside. While they were looking at the area, the claimant arrived. They exchanged pleasantries and then Dr Stevenson and Mr Hollis left the area.

50. On 24 August 2020 Mr Evans and Mr Marshall went to inspect the satellite store. The door was padlocked and they cut the lock. They found what appeared to be personal property, including boxes addressed to the claimant. The property included bike parts, bike wheels and batteries, the boxed miners and a flat screen television.

51. While they were inspecting the store, the claimant arrived. Mr Evans asked him to leave. Mr Slade also came to the store while Mr Evans and Mr Marshall were there. He told Mr Evans that he thought the claimant's e-bike was in a container in a different part of the site.

52. Mr Evans and Mr Marshall took photos of the property in the store. After the inspection, Mr Evans secured the store with new padlocks. They took the miners to the respondent's computing department to be checked.

53. Mr Marshall updated Ms Maclean by email on the evening of 24 August 2020 (page 128). He said Mr Evans would continue with his investigation. He raised the question whether consideration should be given to excluding the claimant from site in case there was further kit around or in case he might do harm to the respondent's systems.

54. Mr Evans asked Mr West to instruct the claimant to stay at home until further notice. Mr Evans told Mr West that the claimant was not being suspended because the investigation was not part of a formal process (part 134). Mr Evans was intending to speak to the claimant as part of the fact find (page 133).

55. Mr West texted the claimant on the evening of 24 August 2020 and said 'Glyn wants you to stay off work. Tomorrow until further notice'. The claimant asked for clarification that he was not suspended, just working from home for now. Mr West replied 'Yes, think so, all I know is that I was told don't come to work' (page 143). The claimant did not attend work from 25 August 2020, although he did attend team meetings remotely. Mr West told the rest of the group that they should not speak to the claimant.

56. On 25 August 2020 Ms Bishop the respondent's people strategy manager got in touch with Mr Evans (page 135). She said she wanted to check the process. She said that the claimant should be made aware that he had not been formally suspended and that the process was still at informal fact find stage. She said that depending on the outcome of the fact find, a formal disciplinary investigation may then be required. She said that Tamika Hughes would be the HR advisor supporting with the process. Mr Evans replied to say that he had enough evidence to complete his fact find report without interviewing the claimant (page 135).

57. On 25 August 2020 the claimant sent an email to Mr Evans asking 'Am I allowed to know what I'm suspected of'? (page 139). The following day he sent another text to Mr Evans asking if he could have his bike back. He also called Mr Evans, Mr West and Mr Marshall but none of them picked up. The claimant left a message on Mr Marshall's phone asking if he could pick up his bike as he needed it to attend an appointment (pages 140 to 145). None of the respondent's managers replied to this; each of them thought it was more appropriate for someone else to reply and so it fell between them. They did not think the claimant's bike should be returned to him while enquiries were on-going.

<u>The investigation of the container</u>

58. Mr Evans had been told by Mr Slade that the claimant's e-bike was in a container. The container is a lockable metal box the size of a small shipping container, kept outside the buildings as a storage space.

59. Mr Evans asked Mr Slade and Mr West to inspect the container. They visited on 25 or 26 August 2020. There was a padlock on the door which they cut off. They saw an e-bike and large quantities of personal items in the container.

60. Mr Evans visited the container himself on 27 August 2020. He saw that the personal property in the container included a flat-packed kitchen cabinet, bank statements, photos, DVDs and a snowboard, much of it marked with the claimant's name. Some tools and batteries were found insecurely stored.

61. On 28 August 2020 Mr Evans sent Mr Marshall a draft of his fact find report for comment (page 146). Mr Marshall made some suggestions for additions to the report.

62. Mr Evans finished the fact find report and sent it to Dr Stevenson, also on 28 August 2020 (pages 167 and 170 to 185). It was titled 'Fact find into inappropriate use of small store in J1A'. The report included the photos of the property, thought to belong to the claimant, which had been found in the satellite store and the container. Mr Evans recommended a formal investigation and set out some questions to be considered.

63. As part of his fact find, Mr Evans made enquiries about the ownership of the e-bike, as there were bike rental company stickers on it. He found that the company it belonged to had gone out of business and he accepted that it had not been stolen. He did not include this in his report.

64. We do not find that the informal investigation by Mr Marshall or the fact find were an attempt to 'dig up dirt' on the claimant because he had made a protected disclosure, as Mr Frater suggested. We do not find that any of the respondent's staff who were involved in the claimant's case were motivated by a desire to find fault with the claimant in order to exit him from the organisation. Both the informal investigation and the fact find were about the miners and later about the use of the store in general, but it soon became clear that the miners and large quantities of property in the store belonged to the claimant. For that reason, once that was identified, the investigations focused on the claimant.

<u>The formal investigation</u>

65. Dr Stevenson decided to accept Mr Evans' recommendation to start a formal investigation. Ms Maclean agreed with this decision. The formal investigation was one which could lead to disciplinary proceedings under the respondent's disciplinary procedure (page 199).

66. On 9 September 2020 Ms Stallard emailed Mr Evans to let him know that a formal investigation would be carried out and that the investigator would be Ian Jenkins, supported by Tamika Hedges from HR (page 186). Mr Jenkins was a department manager from a different department to the claimant.

67. On 11 September 2020 the claimant emailed Mr West, copying Mr Evans and Dr Stevenson, asking what was going on and why he was being prevented access to his belongings (page 186). Dr Stevenson replied to the claimant on 14 September to say that a disciplinary investigation was being undertaken (page 190). The claimant emailed Ms Hedges to ask for more details about the process. She advised him that he would be sent a letter explaining things (page 192). The claimant chased this up again on 16 September 2020 as he had still not received the letter (page 192).

68. On 17 September 2020 Ms Hedges sent the claimant a letter inviting him to an investigation meeting into allegations relating to the claimant's behaviour in the workplace (page 209 and 196). It said that the alleged misconduct was that the claimant had been 'storing non-UKAEA equipment on site and carrying out non UKAEA work and other activities on UKAEA premises'. The letter said that the investigation meeting would last around 6-8 weeks. It was not a decision to instigate formal disciplinary proceedings, but that could follow.

<u>The claimant's alleged second protected disclosure</u>

69. The claimant replied to Ms Hedges' letter by email on the same day (page 208). He said this was a protected disclosure.

70. In the email the claimant asked some questions about:

    70.1. Whether the investigation was a fact-finding or a disciplinary investigation;
    70.2. Whether there had been any managerial complaint about his behaviour;
    70.3. The detail of what he was being accused of, so that he could fairly represent himself, and whether he could access the site to gather evidence;
    70.4. Whether the failure to provide him with any information for four weeks was fair ('I would like to comment that I don't know how 'fairly' this process has been to date as this was approaching 4 weeks of no information'). He said multiple people had passed on rumours to him and other staff seemed to be more informed than him. He said 'this doesn't seem to have been kept confidential from their point, and has meant other staff have been more informed than I have been';
    70.5. Being told what specifically he was being investigated for was the only way he could adequately prepare for the meeting fairly;
    70.6. Whether he was expected to attend work or not.

71. We find that in this email the claimant disclosed information about the fairness of the ongoing investigation process, in particular about the lack of specific information that had been given to him, and the effect this was having on his ability to prepare for the investigation meeting. We find that this was information which the claimant believed tended to show that the respondent was failing or was likely to fail to comply with a term of his contract of employment, namely an implied term that his employer would undertake a fair disciplinary process. We return in our conclusions to the question of whether the claimant's belief was a reasonable one.

72. We do not find that the claimant believed that in sending this email he was acting in the public interest. The queries raised by the claimant and the points he makes are entirely focused on the investigation in his own case. In this email there is no reference to or suggestion of any concerns about other employees being affected or potentially affected by the respondent's failings which the claimant is highlighting in his email. The only reference to other staff is that other staff are 'more informed' than the claimant about the subject of the investigation into the claimant's conduct which again relates only to the claimant's case. The claimant mentioned his anxiety about the treatment of other whistle-blowers in the context of his 17 July 2020 email, but this was not in his mind at the time of the 17 September 2020 email which was on an entirely different subject. Even considered in the context of the earlier disclosure and concerns around others who made complaints, there is nothing to suggest that the claimant believed the information in his email of 17 September 2020 was disclosed in the public interest. It was about the claimant's personal situation only.

73. On 18 September 2020 Ms Hedges replied to the claimant to say that he would receive more information about the allegations at the meeting.

<u>The claimant's resignation</u>

74. On the evening of 21 September 2020 the claimant sent an email to the Ms Hedges with a letter which said that he was resigning with immediate effect (pages 207, 205). He said he was resigning because of a fundamental breach of contract which followed a whistleblowing disclosure about health and safety breaches in respect of coronavirus. He said the reasons for his dismissal were the lack of communication while he was required to remain at home, the disciplinary process, the failure to deal with his email of 17 July 2020 as a grievance and to keep it confidential, the retention of his personal property.

75. Ms Hedges replied on 22 September 2020 to acknowledge the claimant's resignation (page 212). She said the respondent would pay the claimant a month's notice. She asked him what grievance and whistleblowing he was referring to. We find, based on this email, that Ms Hedges did not know about the claimant's protected disclosure.

76. Ms Hedges also forwarded the email to Ms Stallard, who sent it on to Mr Evans and Dr Stevenson (pages 214 to 216). She asked them to arrange the return of the claimant's property, and to let her know if they were aware

of any grievance or whistleblowing. Mr Evans replied to say he had no knowledge of any grievance or whistleblowing.

77. We accept the evidence of the respondent that if the claimant had not resigned and the investigation and disciplinary procedure had continued, he would not have been likely to have been dismissed. It would have been more likely in the circumstances of the claimant's case that a warning would have been given.

Arrangements regarding the claimant's property

78. There were protracted discussions and arrangements for the return of the claimant's property from the respondent's site.

79. On 24 September 2020 the claimant emailed Ms Hedges to say he wanted to collect his belongings (page 221). Ms Hedges replied on 28 September 2020 to say that he would need to provide an itemised list of his things so these could be located and returned to him (page 229).

80. Also on 28 September 2020 the claimant replied to say that the respondent's suggested approach regarding the return of his property was not acceptable (page 228). He said he had spoken to the police and they had advised him to collected his things, and said they could provide a unit to accompany him if needed. The claimant said he would attend the site at 4.00pm on 30 September 2020 and would like to have someone escort him to his office, the store and the container to retrieve his belongings.

81. The claimant also clarified in this email that the complaint he had referred to in his resignation letter was the email to Ms Maclean of 17 July 2020.

82. On 29 September 2020 Ms Hedges replied to the claimant (page 227). She said he would not be allowed on site on 30 September 2020. She provided a list of the claimant's personal items in the container and in his office space, based on searches carried out by Mr West and two other employees (page 223). The claimant replied to say the lists were not complete. He listed some other items including bike and mobile phone components and batteries, and the miners (page 227). He said he would only be able to give an exhaustive list by attending the site.

83. The respondent's head of security decided that the claimant would not be allowed on site. Ms Stallard told the claimant this on about 30 September 2020 (page 226).

84. On around 29 September 2020 the respondent reported the matter to Thames Valley Police (page 234 is a record of a later update, but refers to an earlier report by a colleague, and the incident happening on 29 September). There were concerns that the flat screen television being stored by the claimant might have been the respondent's property. The serial number was being checked with the respondent's facilities team (page 235) (It was later confirmed that the television was not the respondent's property.) We find that in making this report, the respondent

was seeking advice about the situation generally and used the term 'the former employee'. There was no evidence that the respondent gave the claimant's name to the police.

85. Nigel Furlong, the respondent's business resilience manager, made an update to Thames Valley Police on 1 October 2020 (page 234 and 225). This was to report a concern about the e-bike. He did not know that Mr Evans had also looked at this and was satisfied that it was not stolen. That was not mentioned in the fact find report. Mr Furlong thought that it might be stolen property as it had commercial branding on stickers on the bike. Later on the same day Mr Furlong heard from the owner of the e-bike company who confirmed the company was no longer operating and the e-bike could be scrapped (page 236). We accept the claimant's evidence that he had been given permission to take the e-bike when the company ceased trading.

86. On 5 October 2020 the claimant sent a list of his personal items (page 242). The respondent asked Mr West to locate the claimant's personal items so that they could be returned to him. Mr West asked two colleagues Mr Gill and Mr Blunt to assist him with that. The claimant's property that they identified included the claimant's bank statements which he was storing on site.

87. On 13 October 2020 the claimant attended the main gate of the site to collect a large quantity of his items. He signed a list to confirm receipt, and identified some items which were missing (page 261 and page 263). The claimant accepts that the bulk of his items were returned.

88. There were further communications between the claimant and Ms Hedges about missing items in October and early November (page 271 and page 288). Some items could not be located. Ms Hedges explained the steps that had been taken to find them and said the claimant could raise a grievance if he felt he had been mistreated (page 289).

89. The last items returned to the claimant were sent on 18 December 2020 (page 310).

90. The claimant said that he was treated differently to another employee who was permitted to return to the site to collect his belongings after his employment ended. We did not hear enough evidence about this to make a finding about whether this happened and the circumstances surrounding it.

The claim

91. The claimant presented his claim on 19 November 2020 after a period of Acas early conciliation from 24 September 2020 to 29 October 2020.

The law

Protected disclosure

92. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is:

    92.1. a ‘qualifying disclosure’ as defined by section 43B;

    92.2. which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H.

93. Section 43B sets out what a qualifying disclosure is. Sub-sections 43B(1) and (5) say:

> *“(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*
>
> *…*
>
> *(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).”*

94. In summary, a qualifying disclosure is i) a disclosure of information that ii) in the reasonable belief of the worker making it, is made in the public interest and iii) (again, in the reasonable belief of the worker making it) tends to show that one or more of six ‘relevant failures’ has occurred, is occurring or is likely to occur. Relevant failures include a failure to comply with a legal obligation, or danger to a person’s health and safety.

95. Points ii) and iii) both have two elements: that the claimant has the required belief (as a matter of fact and on a subjective basis) and, if they do, that their belief is a reasonable belief to hold (on an objective basis).

96. In *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979 the Court of Appeal considered the public interest element of the definition. It held that:

> *"where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker."*

97. The court said that the question of whether a disclosure about a personal interest is also made in the public interest is one to be decided by considering all the circumstances of the case, but these might include:

> *"(a) the numbers in the group whose interests the disclosure served;*
>
> *(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
>
> *(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*
>
> *(d) the identity of the alleged wrongdoer…the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest."*

98. A disclosure of information includes a disclosure of information of which the person receiving the information is already aware (section 43L(3)).

99. Section 43C says:

> *"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -*
>
> *(a) to his employer, or*
>
> *(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—*
>
> *(i) the conduct of a person other than his employer, or*
>
> *(ii) any other matter for which a person other than his employer has legal responsibility,*

to that other person."

Protected disclosure detriment

100. Section 47B of the Employment Rights Act says:

> *"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."*

101. 'Detriment' is given a wide interpretation. It means putting under disadvantage, or doing something that a reasonable worker would consider to be to their detriment (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11).

102. The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure is set out in *Fecitt and others v NHS Manchester* [2012] IRLR 64, CA. What needs to be considered is whether the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the worker.

103. The decision-maker's motivation and knowledge of the protected disclosure are central factors in this assessment. On the face of it, if the decision-maker did not know about the protected disclosure, the disclosure cannot have materially influenced their treatment of the worker. However, the authorities have considered the more complicated situation where detrimental treatment of the worker by someone who does not know about the disclosure has been procured or in some way influenced by a person who does know about and is motivated by the disclosure. In *Ahmed v City of Bradford Metropolitan District Council and ors* EAT 0145/14 the EAT held that treatment could be 'influenced' by a protected disclosure where a person who provided a negative reference was motivated by it, even though the person who acted on the reference to the worker's detriment was not. A different conclusion was reached in *Malik v Cenkos Securities plc* EAT 0100/17 in which the EAT held that it was not permissible to attribute the knowledge and motivation of someone else to the decision-maker in complaints of detriment. This decision of the EAT was handed down between the Court of Appeal and Supreme Court decisions in *Royal Mail Group Ltd v Jhuti* 2020 ICR 731, SC, which considered this question in the context of complaints of whistleblowing dismissal and in respect of which the principles are clearer (see below).

Burden of proof in protected disclosure detriment

104. In a complaint of detriment, section 48(2) provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. This means that the burden shifts to the employer where the other elements of a complaint of detriment are shown by the claimant.

105. Unlike the operation of the burden of proof under the Equality Act 2010, a failure by the employer to show positively the reason for an act or failure to

act does not mean that the complaint of whistleblowing detriment succeeds by default. It is a question of fact for the tribunal as to whether or not the act was done ‘on the ground’ that the claimant made a protected disclosure (*Ibekwe v Sussex Partnership NHS Trust* UKEAT/0072/14/MC).

Automatic unfair dismissal

106. Section 103A of the Employment Rights Act says:

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

107. A dismissal which is contrary to section 103A is ‘automatically’ unfair. The tribunal does not need to consider whether the dismissal was reasonable in the circumstances.

108. Where, as here, the claimant has less than two years’ service, the burden is on the claimant to show, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason (*Smith v Hayle Town Council* 1978 ICR 996, CA).

109. The definition of dismissal which applies to section 103A includes constructive dismissal. Section 95(1)(c) provides that an employee is dismissed where:

> *“the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”*

110. *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27* sets out the elements which must be established by the employee in constructive dismissal cases. The employee must show:

    110.1. that there was a fundamental breach of contract on the part of the employer;
    110.2. that the employer’s breach caused the employee to resign; and
    110.3. that the employee did not affirm the contract, for example by delaying too long before resigning.

111. The claimant in this case relies on breaches of the implied term of trust and confidence and breaches of the implied duty to protect health and safety. The implied term of trust and confidence was explained by the House of Lords in *Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL* as a term to the effect that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

112. The causation question for the tribunal in the complaint of automatic unfair dismissal is different to that in relation to the complaint of detriment. In the automatic unfair dismissal complaint, the tribunal must consider whether the sole or principal reason for dismissal is that the employee made a protected disclosure (*Kuzel v Roche Products Ltd* [2008] ICR 799 and *Fecitt and others v NHS Manchester*).

113. In a complaint of constructive dismissal on the ground of protected disclosures, the question is whether the protected disclosure was the sole or principal reason that the employer committed the fundamental breach of contract which triggered the claimant's resignation.

114. As with complaints of detriment, when considering the reason for dismissal, the starting point is generally the motivation of the decision-maker. This will require consideration of whether they knew about the protected disclosure, to understand whether the protected disclosure was the reason or the principal reason for dismissal. However, in some cases, the tribunal may need to consider the motivation of someone other than the decision-maker, in order to decide the real reason for dismissal. Where, for example, the real reason for dismissal is hidden behind an invented reason by someone other than the decision-maker, their state of mind, rather than the innocent decision-maker's state of mind, can be attributed to the employer (*Royal Mail Group Ltd v Jhuti* 2020 ICR 731, SC).

Conclusions

115. We have applied these legal principles to the facts as we have found them, to reach our decisions on the issues for determination by us. We have approached the issues in the following order: whether the claimant made protected disclosures, complaints of detriment and complaint of dismissal.

Protected disclosure

116. In closing submissions, the respondent accepted that the claimant made a protected disclosure on 17 July 2020 as alleged. The claimant's email of 17 July 2020 was a protected disclosure for the purpose of sections 47B and 103A.

117. We have gone on to consider whether the claimant's email on 17 September 2020 was a protected disclosure, as the respondent did not accept that that email amounted to a protected disclosure.

118. We have found that there was a disclosure of information by the claimant. Section 43B includes information of which the person receiving the disclosure is already aware. We have found that the claimant disclosed information about the process that had been followed in his case, including the facts that he had not had any information for four weeks, that other members of staff seemed to know more than him about his case, and that he did not know what specifically he was being investigated for.

119. We have found that the claimant believed that the information he disclosed tended to show that the respondent was failing or was likely to fail to comply with a term of his contract of employment, namely an implied term that his employer would undertake a fair disciplinary process.

120. We find, in the context of the procedure that was adopted in the claimant's case and the issues highlighted by the claimant, that the claimant's belief about that was a reasonable belief. It was reasonable for him to believe that the process which had been adopted in his case was not a fair process and that he had a legal right under his contract of employment to expect his employer to carry out a disciplinary process fairly.

121. We have not found that the claimant himself had a subjective belief that his disclosure of information about the disciplinary process adopted in his case was a disclosure made in the public interest. There may, as *Chesterton* makes clear, be cases in which a disclosure about failings in a disciplinary procedure in an individual case is made in the public interest, for example where the procedure affects a group of employees or has occurred in a number of cases. However, in the claimant's case, having looked closely at the words used by the claimant and having considered the evidence we have heard about this, we have decided as a matter of fact, that in sending his email of 17 September 2020 the claimant was concerned with his own case only and not with the interest of any section of the public.

122. We have gone on to consider the objective element of this part of the test, that is whether, if we had found that the claimant believed his email of 17 September 2020 to have been sent in the public interest, we would have found this belief to have been reasonable.

123. The circumstances of the claimant's case which he disclosed in his email were very specific to him. Considering the factors set out in *Chesterton* and the particular circumstances of the claimant's case, there are no features which make it reasonable to regard the email of 17 September 2020 as being sent in the public interest as well as the personal interest of the claimant. It was about his individual case, and not about something which impacted other employees. The effect on the claimant was serious, but concerned failings could have been addressed later in the process. There was no suggestion that the failings the claimant identified were deliberate. The respondent is a large public body whose work has important regulatory features, including regarding public safety, which are of very significant public interest. However, the information disclosed by the claimant in his 17 September 2020 email was to do with breaches of obligations in relation to an individual staffing matter and was not information touching in any way on those features.

124. For these reasons, we have decided that if we had found that the claimant had a subjective belief that his email of 17 September 2020 was sent in the public interest, we would not have found this belief to have been objectively reasonable.

125. Therefore we have decided that the claimant's email of 17 September 2020 was not a protected disclosure.

Protected disclosure detriment

126. Having found, based on the respondent's concession, that the claimant made a protected disclosure on 17 July 2020, we go on to consider the complaint of protected disclosure detriment.

127. The claimant alleged that he was subjected to 27 detriments because of his protected disclosures. Five complaints of detriment were withdrawn, as explained above (detriments f, h, j, m and z). We have to consider, in relation to each of the remaining 22 alleged detriments:

127.1. whether the act (or omission) occurred as alleged (that is, what the respondent did or failed to do);
127.2. whether it was a detriment; and
127.3. if it was, whether it was done by the respondent on the ground that the claimant had made a protected disclosure on 17 July 2020.

128. As the claimant has made a protected disclosure, where the claimant shows that he was subject to a detriment by the respondent, the burden will shift to the employer to show the ground on which the act was done. The test for whether any detriment was 'on the ground of' a protected disclosure is whether a protected disclosure materially influenced the respondent's treatment of the claimant.

129. We have considered each of the 22 detriments (considering some together). We have changed the order in which we have considered the detriments, as we have found it easier to consider them in broadly date order.

Detriment (a) The Respondent failed to take his Grievance seriously
Detriment (b) The Respondent failed to undertake the Grievance process

130. These two detriments refer to the way the respondent dealt with the 17 July 2020 email itself.

Findings of facts

131. We have not found that the respondent failed to take the claimant's email seriously as alleged in detriment (a). Ms Maclean's response to the email was an entirely reasonable one and one which treated the concerns raised appropriately seriously:

131.1. She responded within a reasonable timeframe: Ms Maclean had committed to responding to all responses to her covid updates, but because of the numbers she received (and her other work) she could not respond immediately. Nonetheless she replied fairly

promptly, on the Wednesday morning after the email was sent on Friday evening.

131.2. Her response was sympathetic to the claimant's concerns and addressed the points he had raised.

131.3. She made clear that the respondent would take action if it could: she said that if the respondent had sufficient information, it would 'chase down those involved' and 'correct behaviours'.

131.4. She explained that if the claimant did not provide fuller details, the respondent would not be able to 'track down the individuals'.

131.5. She was clear about next steps required from the claimant: She told him how to provide further information, via the UNOR system and 'urged' him to provide details. She invited him to get in touch if the response did not 'answer his issues'.

132. The complaint in relation to detriment (a) fails on the facts.

133. In relation to detriment (b), we have found that this took place as alleged. The respondent did not undertake the grievance process in relation to the concerns raised by the claimant in his email.

Detriment

134. As we have found the facts as alleged in detriment (b) to be proven, we have considered whether the failure to treat the email as a grievance and take action under the grievance procedure was a detriment. We have concluded that it was not.

135. The claimant did not ask for his email to be treated as a grievance, either in the email or in response to Ms Maclean's reply in which she told the claimant what steps to take if he wanted further action to be taken. He said he was providing 'feedback' on Ms Maclean's broadcast message. A grievance does not have to describe itself as a grievance: the Acas Code of Practice describes grievances as 'concerns, problems or complaints that employees raise with their employers', and the claimant was clearly raising a concern about covid health and safety issues. However, it is relevant that at no stage did the claimant suggest that his concerns should be considered as a grievance. If the claimant had felt disadvantaged or subjected to a detriment by the fact that the issues he had raised had not been dealt with as a grievance, he could have replied to Ms Maclean's email to say this.

On the ground of protected disclosure

136. For completeness, we have considered whether Ms Maclean's failure to treat the claimant's 17 July email as a grievance was on the ground that it was a protected disclosure. This is a somewhat circular argument: the claimant is saying that the respondent failed to deal properly with his concerns because he had raised these concerns. We have considered whether the respondent's treatment of the email was materially influenced by the fact that it was a protected disclosure.

137. The claimant's email was one of a large number of emails Ms Maclean received in response to updates about covid in her Broadcast Messages. Ms Maclean treated it in the way she did because she did not think it was a grievance. The claimant had not said it was a grievance, and she had offered what she considered to be the appropriate way to progress the concerns raised. Ms Maclean understandably took the view that the concerns raised by the claimant would be best dealt with under the UNOR procedure, and she told the claimant this.

138. Mr Frater said that the failure to take action in response to the claimant's 17 July email was in stark contrast to the respondent's approach to Bob's anonymous email, where an investigation was undertaken. We are satisfied that this difference was not because one email was a protected disclosure and the other email was not. It was because:

    138.1. Bob provided some information, namely the photograph, which gave a starting point for the respondent's investigation, while the claimant did not provide sufficient information to enable the respondent to start an investigation, as Ms Maclean explained to the claimant. We are satisfied that steps would have been taken if the claimant had provided some information; and

    138.2. The concern raised by Bob was unusual, and was not something Ms Maclean had heard of or knew about. She had to make enquiries to get to the bottom of it, and had to ask others to help. In contrast, the concerns raised by the claimant were matters in respect of which Ms Maclean knew the respondent already had detailed and specific procedures and systems in place, namely its covid safety arrangements.

139. We have concluded that the respondent's treatment of the claimant's 17 July email was not materially or in any way influenced by the fact that it was a protected disclosure. The failure to treat the email as a grievance was not on the ground that it was a protected disclosure. The claimant's email would have been treated in the same way whether or not it had included information which amounted to a protected disclosure.

140. The complaint of detriment (b) fails because it was not a detriment, and in any event, it was not done on the ground that the claimant made a protected disclosure.

Detriment (c) Mrs Maclean of the Respondent emailed his Grievance to Mr Marshall, Mr Jackson and two other managers

141. We have found that this happened as alleged: Ms Maclean copied her reply to the claimant's 17 July 2020 email to these four managers, and it included the claimant's email.

142. As the claimant asked to remain anonymous, it would have been better if Ms Maclean had asked him for permission before copying her reply and

his email to four managers. The claimant reasonably considered this to be a detriment, and we agree that it was a detriment to him.

143. However, we are satisfied that Ms Maclean copied her email to these managers because they had responsibility for covid safety arrangements and she took the claimant's concerns seriously. She felt these managers could help the claimant to raise a UNOR or could offer him reassurance if he was feeling nervous about covid arrangements. Ms Maclean did not copy her reply to these managers because the claimant had made a protected disclosure.

144. This complaint fails because Ms Maclean's action was not done on the ground that the claimant had made a protected disclosure.

Detriment (d) The Respondent spied upon the Claimant
Detriment (e) Mr Slade spied upon the Claimant on 22 July 2020
Detriment (g) Mr Marshall spied on the Claimant on 13 August 2020
Detriment (i) Dr Stevenson spied on the Claimant during the last two weeks of August 2020

[Detriments (f)(h) and (j) have been withdrawn]

Findings of fact

145. Detriment (d) is an umbrella complaint, covering the other three complaints that the claimant was spied on by various employees of the respondent. In general terms, we have not found that the respondent spied on the claimant at any time.

146. Our findings in relation to the specific allegations are:

146.1. Detriment (e) – On a date between 16 and 22 July 2020 Mr Slade visited the J1A area and the satellite store at the request of Mr Jackson to try to identify the location in the photo which had been sent by Bob. Mr Slade was the area supervisor for this area and Mr Jackson was a manager with responsibility for site safety. Mr Slade did not see the claimant during his visit.

146.2. Detriment (g) – On 13 August 2020 Mr Marshall visited the satellite store during an induction tour with a new colleague. Mr Marshall had responsibility for the J1A area and the new colleague was taking on a role with responsibility for safety for a number of areas including J1A. The claimant was at the store when Mr Marshall was passing.

146.3. Detriment (i) – On 19 August 2020 Dr Stevenson visited the satellite store as part of a pre-planned weekly safety tour. Dr Stevenson was the department manager. He decided to visit the store because he had been asked to arrange for a fact-find to be carried out into the use of the store. Dr Stevenson was not going to spy on or observe the claimant. The claimant happened to arrive at the store while Dr Stevenson was there.

147. We have not found that the respondent spied on the claimant on any of these occasions. We have found that a supervisor and two managers visited or inspected the satellite store on these occasions and that on two of them the managers saw and spoke briefly to the claimant.

Detriment

148. We have considered whether the acts as we have found them to have occurred amounted to detriments to the claimant. We have concluded that these three visits to the satellite store were not detriments or disadvantages to the claimant for the following reasons:

    148.1. The satellite store was part of the respondent's site. It was not the claimant's personal area. There was no reason why the respondent's supervisor and managers should not visit the store or the area or why the visits disadvantaged the claimant in any way. Those visiting the area were doing so within the scope of their roles.
    148.2. There was no involvement or interaction at all with the claimant during Mr Slade's visit. No-one within the respondent was aware at the time of this visit that the visit (or Bob's email) was anything to do with the claimant.
    148.3. There were brief and polite discussions with the claimant during the visits by Mr Marshall and Dr Stevenson. The visits were part of an investigation into the use of the satellite store and were not specifically targeted at the claimant.

149. As we have found these three acts not to amount to detriments, these complaints fail. We have, for completeness, gone on to consider whether these visits were done on the ground of the claimant's protected disclosure.

On the ground of the protected disclosure

150. We are satisfied that none of these three visits to the satellite store were done on the ground of the claimant's email sent on 17 July 2020. There are two main reasons for this. First, it is clear from the chronology that the reason Ms Maclean began carrying out enquiries into the satellite store (which led to these visits) was because she had received anonymous information and wanted to know what was going on with the miners and the satellite store. The anonymous email and the steps taken to initiate enquiries into it pre-dated the disclosure: Bob's email was sent to Ms Maclean over a month before the protected disclosure. Ms Maclean followed Bob's email up, and asked a number of managers for information about it on two occasions before the claimant had made his protected disclosure, including chasing it up on the day before the protected disclosure was made. Enquiries were then underway before anyone was aware that the miners were anything to do with the claimant, that is before

anyone could have made any connection between the miners and the person who sent the protected disclosure on 17 July.

151. Secondly, Ms Maclean was not upset or annoyed about the claimant's protected disclosure or the information he passed to her. On the contrary, her response to the claimant's protected disclosure was positive: she urged him to provide more information so that it could be chased up. Ms Maclean was keen to ensure compliance with covid safety arrangements. The respondent encouraged the reporting of any safety matters. There was nothing to suggest that anything the claimant said in the protected disclosure would have led Ms Maclean to want to retaliate or to treat the claimant in a detrimental way.

152. The specific reasons for the acts in alleged detriments (e), (g) and (i) are:

152.1. Detriment (e) – Mr Slade was carrying out a housekeeping visit, to try to identify the location of the photo sent by Bob. He did not know that the claimant had made a protected disclosure.
152.2. Detriment (g) – Mr Marshall was carrying out an induction tour, to show a new colleague round, and he went to the satellite store when he saw a light on. Mr Marshall had been copied into the claimant's email of 17 July 2020 but it played no part at all in Mr Marshall's decision to carry out an induction tour or to include the store.
152.3. Detriment (i) – Dr Stevenson was carrying out a safety tour and decided to include a visit to the satellite store because of the fact find that was going on into the miners and the use of the store. He had no knowledge of the claimant's protected disclosure.

153. Mr Frater submitted that the circumstances here are similar to those in the *Jhuti* case. He said that senior staff who were aware of the claimant's protected act, particularly Ms Maclean but also Mr Marshall, passed down information to innocent decision makers to take steps. There is simply no evidence to suggest that this is the case. As explained above, we have accepted that Ms Maclean herself did not have any unlawful motivation. She copied the claimant's protected disclosure to four managers but she did not do so to manipulate innocent decision makers so that they would subject the claimant to unlawful detrimental treatment.

154. Similarly, we find that the steps Mr Marshall took were because he was investigating the miners and the satellite store, not because of the claimant's email raising concerns about covid. Mr Marshall had no unlawful motivation which could have 'infected' the acts of the other employees who were involved in the enquiries into the satellite store.

155. The complaints of detriment (e) (g) and (i) fail because they were not detriments, and in any event, they were not done on the ground that the claimant made a protected disclosure. They were done because the respondent had been made aware that someone had miners in the satellite store and it was carrying out enquiries into that.

Detriment (o) Mr Evans of the Respondent searched through the Claimant's personal effects absent permission on 24 August 2020;
Detriment (p) Mr Marshall of the Respondent searched through the Claimant's personal effects absent permission 24 August 2020;

156. The allegations in detriments (o) and (p) happened as alleged. We have found that Mr Evans and Mr Marshall visited the satellite store on 24 August 2020 as part of Mr Evans' fact find. During the visit they searched through the claimant's personal effects which were in the store. They took photos of some of the claimant's things. They did not have the claimant's permission to search.

157. For reasons similar to those explained above in relation to the allegations of spying on the claimant, this was not a detriment to the claimant. A reasonable employee would not regard it as a detriment for an employer to search their personal things if they had left them on the employer's site in this way. This was not a search through an employee's personal locker or office drawer. Large amounts of personal property were being stored in a general storage area belonging to the employer. Mr Evans and Mr Marshall did not know who the items in the store belonged to without having a closer look at them, so they could not seek the claimant's permission to search them beforehand. A reasonable employee would not expect an employer to seek their permission before searching a part of their site where they and others work. For these reasons, this search did not amount to a detriment to the claimant.

158. In case we are wrong about that, we have gone on to consider whether the search by Mr Evans and Mr Marshall was on the ground that the claimant made a protected disclosure on 17 July 2020. We are satisfied that it was not. The search was carried out as part of the initial fact find into the allegation of inappropriate use of the satellite store which was prompted by Bob's email. Mr Evans and Mr Marshall on behalf of the respondent needed to check what was being kept in the store and who it belonged to. The decision to carry out the search of the store was nothing to do with the email about covid safety concerns which the claimant sent. It was not action which was targeted at the claimant, because at this stage the respondent did not know who the miners and the other property belonged to.

159. The complaints of detriment (o) and (p) fail because this search was not a detriment, and in any event, it was not done on the ground that the claimant made a protected disclosure. It was carried out because the respondent had been made aware that someone had miners in the satellite store and it was carrying out enquiries into that.

Detriment (s) The Claimant was required to leave work without being given a reason on 24 August 2020;
Detriment (u) Mr West informed the Claimant to not attend work with no reason provided on 24 August 2020;

160. The allegations in detriments (s) and (u) happened as alleged. Mr West asked the claimant to stay off work (the claimant did not return to work after this). The claimant was not given a reason; when the claimant asked whether he was suspended, Mr West said 'all I know is that I was told don't come to work'.

161. Requiring the claimant not to attend work was a detriment. The respondent's managers thought that, because many people were working from home during the pandemic, asking the claimant to stay at home was not a suspension. We do not agree. The claimant was no longer required to work from home because of the pandemic. He had been asked to return to work and had been back at work on site for over two months. He was asked to stay at home because of the fact-find, not for any pandemic-related reason. He could not do his work from home. He had to attend team meetings remotely and the rest of the group was instructed not to speak to him. Requiring him to remain at home in these circumstances was a suspension. Even if it had not been a suspension, requiring the claimant not to attend work when he could not do his work at home was a detriment. Failing to provide the claimant with a reason as why he was being asked to work from home was also a detriment. It made him understandably worried and anxious.

162. However, as to the ground on which the claimant was asked to remain at home, again we are satisfied that it was the fact-find which was prompted by Bob's email and the information the respondent's managers had found having made enquiries into that email. It was nothing to do with the claimant's protected disclosure.

163. These complaints of detriment fail because the treatment was not on the ground of the protected disclosure.

Detriment (w) Mr West, Mr Evans, Mr Marshall repeatedly ignored the Claimant's requests for clarity in relation to any allegations which had been made against him between 25 August 2020 and 14 September 2020;
Detriment (x) Mr West, Mr Evans, Mr Marshall repeatedly ignored the Claimant's requests for access to his property and/or to return his personal property between 25 August 2020 and 14 September 2020;

164. We have found that this happened as alleged, on 25 August 2020. The claimant emailed and texted Mr Evans and asked for if he could have his bike back. He also called Mr Evans, Mr West and Mr Marshall but they did not answer. He left a phone message asking if he could have his bike back. There was a three week period between 25 August 2020 and 14 September 2020 when the claimant was at home but did not know whether he was to be subject to an investigation and if so what it was about.

165. This amounted to a detriment to the claimant. The three week period when the claimant was not aware what he was suspected of doing was unnecessarily long. Not knowing what was going on was worrying and difficult for the claimant. He wanted to understand why he had been asked

to stay at home, and he needed his bike for an appointment. Not having his messages and calls returned made the claimant feel worse. It would have been better if the respondent had got back to the claimant, and been clearer with him about the situation.

166. The context in which this took place was the fact-find. The respondent's managers failed to reply to the claimant and to provide him with an updated because of a lack of understanding about who was the appropriate person to reply, a lack of certainty about what to tell him and delays finalising arrangements for the investigation. This aspect of the fact-find procedure could have been dealt with better, but the reason for this treatment was nothing to do with the claimant's protected disclosure about covid.

167. These complaints of detriment fail because the treatment was not on the ground of the protected disclosure.

Detriment (k) The Respondent fabricated a disciplinary matter;
Detriment (l) The Respondent brought disciplinary proceedings against the Claimant on 14 September 2020;
Detriment (v) Mr Stevenson of the Respondent informed the Claimant "it had been decided to undertake a disciplinary investigation" on the 14 September 2020;

Findings of fact

168. In relation to detriment (k), we have not found that the respondent fabricated a disciplinary matter. We have found that there were genuine grounds for the enquiries the respondent made to investigate the matter raised in the email from Bob, and to investigate the issues about the claimant's personal property and work activities that came to light as a result of those enquiries. The fact find was carried out thoroughly and properly. Mr Evans and Dr Stephenson genuinely and reasonably thought that the matters it revealed required further investigation.

169. This allegation of detriment (k) fails on the facts.

170. We have found, as alleged in detriments (l) and (v), that Dr Stephenson told the claimant on 14 September 2020 that it had been decided to undertake a disciplinary investigation. The claimant was sent a letter on 17 September 2020 inviting him to an investigation meeting and explaining the procedure.

171. There was some confusion about the stage in the process which had been reached, and in the terms used by some of the respondent's managers. We have found that:

171.1. Mr Marshall made initial enquiries to see whether any further enquiries were required.
171.2. Mr Evans was asked by Dr Stephenson to carry out an informal fact-find following which Mr Evans recommended that a formal

investigation should be started and Dr Stephenson accepted that recommendation.

171.3. Mr Jenkins was appointed to carry out an investigation. The investigation would last around 6-8 weeks and was to decide whether a formal disciplinary hearing would be required. The claimant was told by HR that it would be a fact-finding exercise to decide whether the formal disciplinary procedure should be instigated. This investigation did not take place as the claimant resigned.

Detriment

172. Inviting the claimant to an investigation meeting to consider whether a formal disciplinary hearing should take place was a detriment.

173. The difference in understanding about the point in the process which had been reached was not a detriment. That was a matter of labels; the substantive enquiries and investigations which were being carried out were in line with the respondent's procedure.

On the grounds of protected disclosure

174. For the reasons set out above, we are satisfied that the initial stages taken to investigate the use of the satellite store were prompted by Bob's email, not the claimant's protected disclosure, and were not in any way directed at the claimant.

175. The reason the claimant was invited to an investigation meeting to consider whether formal disciplinary hearing should take place was because initial enquiries and an informal fact find established that there were matters regarding the claimant's use of the satellite store and work activities which the respondent's managers considered should be further investigated. The decision to start an investigation was entirely appropriate and reasonable given the information which Mr Evans had discovered in the course of his fact find.

176. The decision to move to an investigation was not influenced in any way by the fact that the claimant had made a protected disclosure about covid health and safety issues on 17 July 2020.

177. The complaints of detriment (I) and (v) fail because they were not done on the ground that the claimant made a protected disclosure. They were done because, having conducted a fact find, the respondent had concluded that an investigation into claimant's behaviour in the workplace was required.

178. Even if we had found that the difference in understanding about the point in the process which had been reached was a detriment to the claimant, we would have concluded that was because of some confusion on the part of the managers. It was not anything to do with the claimant's protected disclosure.

179. These complaints of detriment fail because the treatment was not on the ground of the protected disclosure.

Detriment (r) Ms Hedges of the Respondent refused to provide the Claimant with any and/or sufficient evidence to defend the disciplinary proceedings on 18 September 2020;

180. The way this allegation is put does not reflect our findings on this. We have not found that Ms Hedges refused to provide evidence. We have found that the invitation letter to the investigation meeting gave some outline details of the allegations. When the claimant asked for more information about the allegations Ms Hedges said he would receive this at the investigation meeting.

181. However, the decision not to provide the claimant with more information about the allegations before the meeting was a detriment. Although the claimant could have been expected to understand the allegation about storing property, it was more difficult for him to understand what was meant about non UKAEA activities. He wanted to have further details to enable him to prepare properly for the meeting, and it was a detriment not to provide them.

182. The respondent's treatment of the claimant in respect of the invitation to an investigation was not on the grounds of the claimant's protected disclosure. Ms Hedges did not know about the claimant's protected disclosure. There was no manipulation of the process by any other of the respondent's employees who did know about the claimant's protected disclosure. The respondent was dealing with the matters it had discovered as a result of Bob's email.

Detriment (q) The Respondent failed and/or refused to return the Claimant's property to him;

183. We have not found that the respondent refused to return the claimant's property. The complaint is really about the way in which the respondent chose to deal with the large amount of personal property which the claimant had stored on site. The claimant wanted to be permitted to return to site to find his property after he had left the respondent's employment. We have found that the respondent was not willing to allow this, and instead required the claimant to provide a list and asked employees to search the locations where the claimant's personal property was kept.

184. For reasons similar to those explained above in relation to the allegations of spying on the claimant and searches of the store, this was not a detriment to the claimant. A reasonable employee would not regard it as a detriment for an employer not to permit them to return to this employer's site after they had left. There were specific safety and regulatory reasons why it would not be appropriate for a former employee to be permitted to go through parts of the employer's site in these circumstances. For these reasons, this refusal did not amount to a detriment to the claimant.

185. In case we are wrong about that, we have gone on to consider whether the refusal to allow the claimant to return to the site to go through the store and the container to find his property was on the ground that the claimant made a protected disclosure on 17 July 2020. We are entirely satisfied that it was not. It was because the claimant had left the employment of the respondent while under investigation for storing large amounts of personal property on the employer's site.

186. The complaint of detriment (q) fails because this respondent's approach to returning property was not a detriment, and in any event, it was not done on the ground that the claimant made a protected disclosure.

Detriment (n) The Respondent permitted Mr Gill & Mr Blunt who ought not to have access to the Claimant's bank statements to view the same;

187. We have found that Mr Gill and Mr Blunt were asked to assist Mr West with identifying the claimant's personal property which was left on site, and that the property they found included the claimant's bank statements.

188. For reasons similar to those explained above in relation detriment (q), this was not a detriment to the claimant. A reasonable employee would not regard it as a detriment for an employer to search their personal things in order to return them, if they had left them on the employer's site in this way. Mr West was in charge of arrangements, but it was reasonable for him to ask colleagues to help, given the volume of property which the claimant had on site. For these reasons, this search did not amount to a detriment to the claimant.

189. In case we are wrong about that, we have gone on to consider whether allowing two of the claimant's colleagues to see his bank statements was on the ground that the claimant made a protected disclosure on 17 July 2020. Again, we are entirely satisfied that it was not. It was because the claimant had left the employment of the respondent while under investigation for storing large amounts of personal property on the employer's site, and the employer had to make arrangements to return it. The employer would have adopted the same approach whether or not the claimant had made a protected disclosure about covid safety.

190. The complaint of detriment (n) fails because this search was not a detriment, and in any event, it was not done on the ground that the claimant made a protected disclosure. It was done in the course of carrying out arrangements to return the claimant's property. This was unrelated to and uninfluenced by the claimant's disclosure.

Detriment (bb) The Respondent reporting the Claimant to the police

191. We have found that the respondent reported the situation to Thames Valley Police on about 29 September 2020 to seek advice. The concern was that the flat screen television being stored by the claimant might have been the respondent's property. We have found that Mr Furlong made an update to Thames Valley Police on 1 October 2020 to report a concern

about the e-bike. He did not know that Mr Evans had also made enquiries about this. We have found that it was later confirmed that the television was not the respondent's property and that the e-bike could be scrapped. We have not found that the respondent reported the claimant's name to the police.

192. Making a report to the police to seek advice on the situation without naming the claimant did not amount to a detriment to the claimant. The claimant had also sought advice from the police.

193. Even if it had amounted to a detriment, the reason the respondent contacted the police was because of its concerns about the claimant's personal property. It was nothing to do with the protected disclosure the claimant made on 17 July 2020.

194. The complaint of detriment (bb) fails because it was not a detriment, and in any event, it was not done on the ground that the claimant made a protected disclosure.

Detriment (t) Treating the Claimant differently to other staff who undertook private work on site. Another employee was allowed to attend site to recover his personal belongings;

195. We did not have sufficient enough evidence to make findings of fact about whether this occurred and in what circumstances. In any event, the reason the claimant was not allowed to attend the site to recover his belongings was because of the circumstances in which he left the employment of the respondent, that is while under investigation for storing large amounts of personal property on the employer's site. The respondent was concerned about allowing the claimant access to its site after his employment had terminated in these circumstances. It was not because the claimant had made a protected disclosure.

Detriment (y) Members of staff were required not to speak to the Claimant from September 2020; and/or

196. We have found that Mr West asked the group not to speak to the claimant after he was asked to remain at home on 25 August 2020.

197. This was a detriment.

198. Mr West took this step because he thought it was not appropriate for the team to be talking to the claimant while he was under investigation about the miners and the store. It was not in any way because of the claimant's protected disclosure about covid.

The claimant's alleged second disclosure

199. We have found that the claimant's email of 17 September 2020 was not a protected disclosure. If we had found that it was a protected disclosure, it would have only been relevant to alleged detriments (r), (q), (n), (bb) and

(t) (because it was sent after the other alleged acts of detriment took place).

200. The reason for each of those acts was as set out above. The claimant's email of 17 September 2020 which raised concerns about the investigation and disciplinary process was not the reason for any of the treatment relied on in detriments (r), (q), (n), (bb) and (t). Therefore, even if we had found this email to have been a protected disclosure, these complaints would also have failed.

Influence of others on decision-makers

201. We have found on the facts that none of the respondent's managers or officers were motivated by the claimant's email of 17 July 2020. This was not a case in which the detrimental treatment of the claimant by an innocent decision-maker was in some way influenced by another person who was motivated by the protected disclosure. We do not need to consider the conflict of case law about the way in which a situation similar to that which arose in a dismissal context in *Jhuti* is treated in the context of a complaint of detriment, as it does not arise here on the facts.

202. For these reasons, the claimant's complaints of protected disclosure detriment fail and are dismissed.

<u>Protected disclosure dismissal</u>

203. For this claim to succeed we would need to conclude that:

203.1. the claimant was constructively dismissed; and
203.2. the sole or principal reason for the respondent's fundamental breach(es) of the claimant's contract which led to his constructive dismissal was that he had made a protected disclosure.

204. For a constructive dismissal to be made out, the following elements are required:

204.1. the respondent breached the claimant's contract of employment (the claimant relies on breaches of the implied duty of mutual trust and confidence (all breaches of which are fundamental) and fundamental breaches of the implied duty to protect the health and safety of employees);
204.2. the claimant resigned in response to the breach(es) without first affirming the contract (by delay or by other conduct).

205. In his complaint of whistleblowing dismissal, the claimant relied on the conduct alleged to be detriments for the complaint of protected disclosure detriment, particularly the investigation, as the breaches of his contract which entitled him to resign. All of the reasons identified in the claimant's letter of resignation were also allegations of whistleblowing detriment.

206. The respondent's conduct did not breach the implied term of trust and confidence. Although we have found that the respondent could have dealt better with some aspects of the claimant's case, such as not informing him of the details of the reasons he had been asked to remain at home and failing to provide details of the allegations against him, this conduct does not meet the threshold to amount to a fundamental breach of contract. The claimant would have provided this information later in the process, if he had not resigned. The respondent's conduct was, in the circumstances, not conduct which viewed objectively was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It was not a breach of any implied term relating to health and safety.

207. The disparity of treatment between the claimant and Bob did not amount to a fundamental breach of the claimant's contract. For the reasons explained above, the concerns raised in Bob's email were very different to the concerns raised by the claimant in his email of 17 July 2020. It was not a breach of the claimant's contract for the respondent to investigate the matters raised in Bob's email or to consider that an investigation which could lead to a disciplinary hearing was required. The facts the respondent found in its initial enquiries justified further steps being taken to investigate.

208. Therefore the claimant was not constructively dismissed.

209. In any event, even if we had found the claimant to have been constructively dismissed, the sole or principal reason for the respondent's treatment of the claimant was not because of the claimant's email of 17 July 2020. It was because the claimant had run his own bit-mining machines and kept large amounts of property on the respondent's site. The respondent reasonably believed that these matters should be the subject of an investigation. For reasons explained above in the context of the detriment complaints, we are satisfied that the reason the respondent began its investigations into the miners and the store was because of Bob's anonymous email, and the reason the claimant became the focus of the investigation was because he owned the miners and a large quantity of personal property which was kept in the store. The other conduct which the claimant complains of was related to that, not to his protected disclosure. Although there were aspects of the respondent's treatment of the claimant which could have been better dealt with, for reasons explained in the section dealing with detriment complaints, the protected disclosure was not the reason for this treatment.

210. We have not found that any of the respondent's staff who were involved in the claimant's case were motivated by the protected disclosure. This is not a *Jhuti* situation.

211. The claimant said other staff kept property at work or carried out non-work activities in work time. He said he had been unfairly singled out. He highlighted the respondent's policies and procedures as being unclear about the extent to which personal property could be kept on site. The claimant would have had the opportunity to raise these points in the

context of the disciplinary process. We have found that, if the disciplinary procedure had progressed, it is likely that the respondent would have accepted that the claimant's conduct did not justify his dismissal. However, the claimant decided to resign before that point was reached.

212. As we have found that the claimant was not constructively dismissed and that the reason for the treatment which led to the claimant's resignation was not the claimant's protected disclosure, the complaint of unfair dismissal because of making a protected disclosure cannot succeed. That complaint fails and is dismissed.

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Employment Judge Hawksworth

Date: 28 April 2023

Sent to the parties on: 28 April 2023

For the Tribunals Office

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