EMPLOYMENT TRIBUNALS

Claimant: **Mr M Filipinski**

Respondent: **London Tower Crane Hire and Sales Limited**

Heard at: **East London Hearing Centre**

On: **17, 18 and 19 January 2023**
Reserved decision in Chambers – 22 March 2023

Before: **Employment Judge B Elgot**

Members: **Ms G McLaughlin**
Ms J Isherwood

Representation:

For the Claimant: **Mr P Powlesland, counsel**

For the Respondent: **Ms K Hosking, counsel**

The Tribunal's decision is as follows:-

JUDGMENT

1. The claim of unfair dismissal SUCCEEDS.

2. The remedy to which the Claimant is entitled will be determined at a one day Remedy Hearing by CVP (video) on **16 June 2023** at East London Hearing Centre. An **interpreter in Polish** is required.

3. The claim for unlawful deduction from wages SUCCEEDS and the Claimant is awarded the sum of £400 calculated gross and payable (subject to the appropriate deduction for tax and national insurance) to him by the Respondent within 21 days. This is because we are not satisfied that the Claimant knew of or agreed to a temporary reduction in his hourly rate from £18.50 per hour to £15.73 per hour during the initial covid 19 national lockdown.

4. The claim that the Claimant has been subjected to detriment by any act or failure to act by the Respondent done on the ground that he made protected disclosures DOES NOT SUCCEED and is DISMISSED.

5. The Claimant confirmed that he makes no claim under section 44 Employment Rights Act 1996

REASONS

1. Claims and Issues

The Claimant was employed by the Respondent (LTC) as a tower crane operator from 24 July 2007 until his resignation on 5 August 2020; his last day at work was 12 June 2020 and he was absent from work with stress related symptoms for the period 12 June to 5 August 2020 (just under two months). During the 13 year period of his employment the Claimant had a good record of employment and no disciplinary history. His conduct, competence and capability have never been in question. There is an excellent appraisal of his work in October 2018 at page 470 when he was awarded a pay rise by Mr James Persse who was then the Crane Operator Manager. Mr Persse has since left the Respondent's employment.

2. The letter of resignation jointly addressed to Messrs Harvey (Managing Director) and Carroll (his line manager) is at page 331 of the agreed bundle. It is not just cc'd to Mr Harvey and must therefore have come to his attention for immediate action. The Respondent's reply, if any, is not disclosed.

3. The resignation is said to be for the reason '*that I have to put my health and safety first'.* The Claimant says that, *'I feel that I have no choice but to resign. The way that LTC and their subcontractors have conducted themselves and the business has severely affected my safety, physical and mental health and wellbeing. I have lost all confidence in LTC's ability to protect and support me.'*

4. The Claimant therefore contends that his resignation amounts to a constructive dismissal in the circumstances described in section 95(1) (c) Employment Rights Act 1996 (the 1996 Act). He says that the implied term of mutual confidence and trust which is a crucial part of the employment relationship has been breached by the Respondent, without reasonable and proper cause, and that this is a repudiatory breach entitling him to treat himself as dismissed by reason of the Respondent's conduct.

5. The law of constructive dismissal including reference to the appellate case law is helpfully and thoroughly summarised at paragraphs 4-12 of the Respondent's submission prepared by Ms Hosking. We agree with and adopt her analysis and need not set out the legal principles again. We reiterate that a constructive unfair dismissal case requires us to make findings relating to the obligations contained within the individual contract of employment between the Claimant and the Respondent and

not to set out conclusions as to the general adherence of the Respondent to health and safety principles or to a particular management or workplace style.

6. There is a List of Issues amended and agreed between the parties on 19 January 2023, the third day of the Hearing, to reflect the agreed amendments to the Claim. We have worked from that List which contains fourteen factual allegations numbered 2.1-2.14 which the Claimant says support his complaint of unfair constructive dismissal. It has not been necessary, as we explain below, to make findings of fact and draw conclusions about each separate allegation, for the reasons we give.

7. The List of Issues says nothing about any fair reason for dismissal alleged by the Respondent upon which the onus of proof lies. By reference to section 98(2) of the 1996 Act the Respondent has not identified any potentially fair reason for the Claimant's dismissal as described in section 98(2) (a-d). In the Response at paragraph 87 of the amended Grounds of Resistance the Respondent relies on sub-paragraph (b) in section 98(1) and contends that there was some other substantial reason (SOSR) of a kind such as to justify the dismissal [of the Claimant] holding the position which he held. However no such SOSR has been identified in any document we have seen or been put forward in evidence or submissions.

8. In this case we have determined that the Claimant was dismissed. The Respondent has not fulfilled the requirements of section 98(1) and it has shown no fair reason for dismissal including any SOSR and therefore the dismissal is unfair under s98(4). It is not necessary for our decision for us to find an 'automatically' unfair reason under section 100 (health and safety concerns) or section 103A (whistleblowing) of the 1996 Act. Paragraphs 8,17,18 and 19 of the List of Issues need not therefore be considered.

9. Whistleblowing. We are assisted by the accurate summary of the law relating to qualifying protected disclosures in the public interest which is set out in paragraphs 13-23 of Ms Hosking's closing submissions and with which we concur. The three protected disclosures as defined by section 43 of the 1996 Act are listed at paragraphs 11.1-11.3 of the List of Issues and can be described in shorthand as water in the crane base, switching off the anti-collision system on the crane, and rain coming into the crane cabin from a broken door seal. These are the three alleged disclosures we have considered.

10. The alleged detriments arising from acts or failures to act by the Respondent done, contrary to section 47 B of the 1996 Act, on the ground of the making of all or any one of these three disclosures *'to the employer'* are set out in paragraph 16 of the List of Issues. The Claimant relies on the factual allegations at 2.3 (being forced to stay in the crane cab all day without breaks) 2.7 (a reduction in holiday entitlement) 2.8 (being left on furlough) 2.10 (a reduction in salary) 2.14 (being bullied and removed from site on 12 June 2020) and the content of a text message dated 10 May 2020 regarding return from furlough. These are the six detriments we have considered.

11. We have asked ourselves the question whether there is the requisite causal link between the making of the disclosures and the acts amounting to detriment. We conclude for the reasons given below that this link is not established and the claim under section 47B of the 1996 Act fails.

12. Documents and witnesses The Claimant gave evidence on his own behalf and was assisted by an interpreter in Polish. There is a Polish translation of his witness statement. His spoken English and his understanding of the English language is sufficiently good that he did not require interpretation of the entire proceedings. It was agreed with the Tribunal that he would only need a word for word interpretation of the questions and answers which were put to him during his own cross examination. He was able to fully understand, for example, the content of the cross examination of the Respondent's witness. The Claimant's wife Mrs Justyna Filipinska gave evidence on his behalf via a video link from Poland, she did not require the interpreter's assistance. The necessary authorisation for evidence to be given from Poland to an English tribunal was duly obtained and remains extant for the purposes of the next Remedy Hearing.

13. The Respondent's only witness was Mr Martin Harvey, Managing Director. His witness statement dated 13 December 2022, as slightly amended by agreement during his evidence, is notable for the fact that it does not deal with the Claimant's dismissal. The Claimant's line manager at the time relevant to these claims was Mr Ian Carroll then the Operators' Manager. He is still employed by the Respondent but has been unable as a result of what Mr Harvey describes as '*ill health in the last couple of years'* to give oral evidence or prepare a written statement. Mr Carroll is no longer the Operators' Manager but works as a Crane Operator presumably without supervisory or managerial responsibilities.

14. There is an agreed bundle which, following additional agreed disclosure during the hearing, has 471 pages. There is an agreed chronology which is helpful in showing the dates when the Claimant moved from one site to another and it gives the names and locations of the sites.

15. We have had the benefit of written submissions from both counsel and a reply to Respondent's submissions sent by Ms Hosking.

16. The Respondent is a large plant hire company, Mr Harvey says it is the '*third or fourth biggest crane hire company in the country'* with 260 employees and 220 cranes for hire usually with a crane operator provided to pilot each crane. It is therefore a large employer with significant administrative and other resources from its position as part of a larger group (JRL) of associated construction companies.

17. The Respondent's cranes and hoists are hired to developers and constructors on site and the client on site is referred to as the Principal Contractor (PC) with the crucial responsibility for health and safety at the site. The PC appoints an Appointed Person (AP) to be the senior responsible manager for the lifting operations. The Respondent as the Claimant's employer nonetheless had contractual liability under the contract of employment to ensure his health, wellbeing, and safety.

18. We find that the Claimant's job as a Tower Crane Operator is a highly skilled and physically and mentally arduous job controlling the lifting, moving, and dropping of materials around the construction site from within a small crane cabin, with few facilities and in isolation, at a height of up to 80 metres. Mr Harvey states at paragraph 69 '*life on site can be quite hard'.* The Crane Operator climbs the crane at the beginning of the day and climbs down when work finishes and this takes 20-30 minutes depending on the height of the crane. There is pressure to get the job done

on time which must be balanced with the maintenance of safety standards. It is axiomatic that the Crane Operator also works in all weathers outdoors in an inherently dangerous environment at height and at risk of collisions; the Claimant was involved in an accident in 2018 when two crane arms or horizontal jibs collided. The Respondent surprisingly suggests that this accident did not occur and is not proven by the Claimant.

19. The tough nature of the Crane Operator's role is vividly illustrated by some of the remarks made by Mr Persse in the appraisal document at pages 470-471 where he talks of an ability to '*go anywhere & survived Chelsea Island and Battersea Exchange to mention a few'.* That document emphasises the necessity for crane operators (which he calls pilots) to be reliable, flexible, not to complain and to travel all over and '*get on with it'.*

20. Removal of a Crane Operator from a site. Mr Harvey's witness statement at paragraph 21 makes it clear that crane operators are moved from site to site for operational reasons e.g. when the crane is off-hired and dismantled but also occasionally '*the only way to resolve a personnel issue between an operator and our client is to redeploy an operator from one site to another. This is ultimately what happened to the Claimant in June 2020'.* Mr Harvey could not identify whether there was any contractual obligation upon the Respondent to remove its employees upon demand from the client, as is sometimes the case in many workplaces. However, his evidence does clarify that the Respondent will sometimes and did indeed take this step in relation to the Claimant on Friday 12 June 2020.

21. We find that the Claimant did not '*walk off site'* as Mr Harvey somewhat inconsistently terms it at paragraph 73 of his statement. He left work at 5.30 pm (he started at 7.30 to climb and had a 40 minute break) whereupon the PC/FC Project Manager Bob Winwright refused to sign his timesheet saying there were still lifts to do. At page 302 he complained about this refusal in an email to the inbox called operators@londontowercranes.co.uk which Mr Harvey told us (his paragraph 20) is the means of communication between the crane operators and the Respondent in order to assist with 'real time control' in tracking operator issues. Mr Harvey does not check that inbox and could give no evidence as to whether a reply was sent to the Claimant by Mr Carroll or anyone else. The Claimant was paid but only after an unresolved experience of conflict with Mr Winwright which is recorded in transcript 12 at page 429 and which the Respondent failed to prevent or ameliorate even though the Claimant had informed Mr Winwright that he was unwell and had enough.

22. The Respondent was aware by means of messages between the Claimant and Mr Carroll at 12:49 pm earlier in the day that one of the OHOB supervisors 'Luciano' had queried the length of the Claimant's breaks. The Claimant wrote at page 318 '*has problems with the length of my break…so I'd appreciate it if you could take action and explain to him as this is the break you approved of. I do not need extra stress from him as this place is already stressful. Thanks'.* There is no direct response from Mr Carroll in the bundle.

The transcript is at page 422 and we listened to the original recording. For the sake of completeness and to be fair to the OHOB supervisor there is no harassment by Luciano of the Claimant, rather he attempts to be conciliatory but the Respondent did not know this and did not appropriately intervene.

23. Events of Friday 12 June 2020. The Claimant states at paragraph 50 of his witness statement that this was '*one of the most dramatic and stressful days of my career'.* He was working on site at Towers Court, Stamford Hill (Stamford Hill) for a PC called Countryside where the Framework Contractor (FC) was O'Halloran and O' Brian (OHOB). The Claimant had been at Stamford Hill for three weeks since 20 May 2020. He had been moved back into work from furlough which began for him on 2 April 2020 during the first nationwide 'lockdown' instituted in response to the covid 19 pandemic.

24. The AP at Stamford Hill was Mr Dougie Kilpatrick. It is the Respondent's case that Mr Kilpatrick asked the Respondent to move the Claimant because he was '*considered to be disruptive on site'.* There are no documents in the bundle showing any such communication between Mr Kilpatrick and Mr Carroll who was at that time the Respondent's Operators' Manager and the Claimant's line manager. Mr Carroll did not give evidence to the Tribunal and so was not able to speak about any conversation he had with Mr Kilpatrick who was also not a witness.

25. It is clear from Mr Carroll's WhatsApp messages to the Claimant on pages 318 -319 of the bundle that he communicated the decision to compulsorily remove the Claimant from Stamford Hill without any explanation. Following the Claimant's complaint about his treatment by Luciano from OHOB Mr Carroll abruptly sent a message almost three hours later timed at 15.30pm and it can be seen on page 318 '*Doug* [Kilpatrick] *the AP wants you off to[sic] job after the end of the day. I'll send you the address for Monday as I have another crane that needs covering for the next six weeks. Many thanks'.*

26. The Claimant's reaction is one of extreme concern. He writes (page 319)'*Ian, can you explain why the AP wants me off work? I have been working super hard and gave them 100% of my performance?'*

27. Mr Carroll does not answer the question but simply sent the address for the next Monday's work. The Claimant asked again at 16.11 pm '*sorry Ian but please answer my question about why I am being moved to another site. Is this because I did not want to give up my 40 minute break? Or refused to lift big shuttering panels in a high wind?'*

28. None of those queries are answered on the day or at any time since by Mr Carroll or any other manager of the Respondent. The final message is timed at 17.01pm when Mr Carroll writes '*he wants you off. That's it really'*(our emphasis).

29. There are no documents disclosed by the Respondent which record what Mr Harvey calls previous '*problems with the Claimant's interactions with staff at the Countryside site'* which he says in paragraph 21 of his statement is the reason for the Claimant's removal from Stamford Hill. Mr Harvey did confirm that the Claimant had not been moved between sites for any such reason before.

30. The voice recordings made by the Claimant on his mobile phone are transcribed at pages 420-431 and at the request of both counsel we listened to the short recordings in order to take account of the tone of the interactions. With reference to the working relationships on site at Stamford Hill we heard no evidence of harassment of the

Claimant by the PC or FC employees but neither was there evidence of any unhelpful obduracy or unreasonable obstruction/lack of co-operation by the Claimant.

31. It is thus the Claimant's case that he was distressingly and humiliatingly removed by the Respondent from the Stamford Hill site without explanation save to be told that he was no longer wanted by the client. His questions to the Respondent about his assumption that the removal was as a result of his refusal to lift a load of heavy shuttering in high winds and/or because he insisted on his proper agreed break were not answered. He left Stamford Hill at 5.30pm following the altercation about timesheets with Mr Winwright.

32. He felt that he was harassed and pressured to change his mind about climbing down for breaks outside the cab and he also says at paragraph 50 of his witness statement that he was 'stressed out' by queries from the OHOB supervisor about the length of his breaks.

33. Of course, the treatment by the PC and/or FC and their employees cannot breach the contract of employment between the Claimant and the Respondent and amount to a constructive dismissal. We have examined whether the Respondent 's consequent and subsequent conduct after 12 June 2020 sufficiently undermined the implied term of trust and confidence and whether it amounted overall to repudiatory conduct. We conclude that the actions and omissions of the Respondent on 12 June and during the period up to the Claimant's resignation on 5 August in and of themselves consist of a fundamental breach of the employment contract and a constructive dismissal.

34. This is therefore not in our determination a complex chain of events ending with the 'last straw' on 12 June 2020.

35. However, we have made findings of fact below about the background and context of the Claimant's unexplained and, to his knowledge, un-investigated removal. This is because that context has enabled us to objectively assess the repudiatory intentions of the Respondent during the relevant period 12 June to 5 August 2020 against a background of earlier serious damage to the relationship of trust and confidence. We find that damage to have been caused by the Respondent thus indicating an intention on 12 June and thereafter to 'abandon' the contractual relationship.

36. <u>The period from 12 June 2020 to 5 August 2020</u> Following his removal from site the subsequent breakdown of the Claimant's health and the 'shattering' of his confidence was described credibly and eloquently to us by Mrs Filipinska in paragraphs 13-16 of her witness statement as, '*deeply upset and stressed after the whole event…I was so worried about Maciej and terrified he was going to have a heart attack or collapse from the stress… I advised him to go straight to the hospital… I was scared he was on the verge of a breakdown'.*

37. The certificate of attendance dated the same day at 19:15 pm from the Whittington Hospital on page 299 of the bundle records '*severe stress related problem at work. I have issued medication and advised he cannot operate crane or heavy machinery'.* It was sent to the Respondent on 14 June and receipt acknowledged by Mr Carroll on 15 June 2020 at 8:42 am (page 303).

38. Mr Carroll's acknowledgment expresses no concern, makes no enquiry about the Claimant's wellbeing, and gives no explanation of the events of 12 June 2020.

39. The Claimant was placed on statutory sick pay and produced fit notes for the Respondent's files describing a stress related problem (page 304 for the period 18 June to 5 July 2020) and then *'depression'* for the period up to and including 28 August 2020. He resigned on 5 August 2020 when he decided he could not return to the Respondent's employment.

40. In the relevant period the Respondent demonstrated little or no conscientious support for the Claimant, his health or his expression of concerns that he may have been removed from Stamford Hill for the reason that he had raised issues which were critical of the client and of the health and safety arrangements on site. There is no evidence disclosed by the Respondent of the phone calls which Mr Harvey says were made to the Claimant by him or anyone else and no evidence of an inability to contact him when attempts at communication were made. There is a reference on page 320 in an email from Mr Carroll to Mr Persse dated 25 June 2020 '*I haven't spoken to him since the last time I tried to contact him as per our discussion'*[no dates are given]*he did send in a sick note on Monday signing him off until 5/7/20'.* Mr Persse confirms that he also has had '*no word'* and Mr Carroll says he will send a 'wassup' message. No such message is in the bundle.

41. Mr Harvey is not copied into these messages which casts doubt upon his assurances in his oral evidence that he was personally involved in wanting to find out why the Claimant was sick and to contact him because of the '*key part which was to see if he was ok and get him back to work'.*

42. At page 327 on 3 July 2020 the Respondent's Senior Safety Manager Ms Orla Folan asks, upon receipt of the fit note, '*have we spoken to him recently?'.* Mr Carroll sends a two word reply with no information about what he has done. It says '*NO REPLY'.* There is no evidence of reasonable support, care, or concern by the Respondent. The Claimant says at paragraph 60 of his witness statement '*I just could not comprehend returning to an environment which made me feel so vulnerable and unsafe… and felt compelled to resign in writing on 5 August 2020 in response to LTC's conduct and the environment they had created'.*

43. <u>Mr Harvey's evidence at the Hearing</u> The oral evidence given by Mr Harvey was surprising and unsolicited by the Tribunal given that his witness statement does not specifically deal with the constructive dismissal claim. He told us that if a PC refuses to have one of the Respondent's operators on site then the Respondent will investigate and review the situation-' *we would investigate the incident and find out the reasons why and whether there's any truth behind those reasons… address it at site level or with the PC's Health and Safety department, find common ground and then the crane operator would not be moved… or it might be that we have to move him to keep the relationship between LTC and the client and keep the contract going and complete the building. We find the employee other work'.*

44. Under cross examination and in response to questions from the Tribunal Mr Harvey agreed that no specific site investigation was done on 12 June 2020 but that an 'explanation' was given by the client '*which I do not have in front of me and I am not sure of the date'.* No document containing such an explanation is contained in the

bundle; Mr Harvey wished to search for and disclose what he described as emails between Messrs Carroll and Kilpatrick. This application for late discovery and disclosure on day three of the Hearing was refused.

45. Mr Harvey then went further and told us about an internal investigation which he thinks did in fact take place including a conversation with the AP Doug Kilpatrick. He said that such a 'conversation' was important because the Respondent did not understand why the Claimant was off sick. Mr Harvey agreed that the Whats App messages between the Claimant and Mr Carroll which are in the bundle at pages 318-319 do show the nature of the Claimant's worries and concerns but were not seen by anyone at the Respondent apart from Mr Carroll who was later himself on long term sickness absence. Mr Harvey did not see the messages until *'a lot later… when forwarded by the Claimant'* [presumably in these tribunal proceedings]. Mr Harvey cannot remember how or when the conversation with the PC AP took place or what was said; the Whats App messages cannot have been discussed if they were not seen by Mr Kilpatrick or their content described to him. There are no disclosed documentary records of any such conversation, discussions, or investigation and none of these matters are dealt with in Mr Harvey's witness statement.

46. Indeed, the Respondent's internal emails at pages 320 and then at 327-329 make no reference at all to any investigation being initiated or conducted by Messrs Carroll or Persse or by Ms Folan.

47. In apparent contradiction to his initial oral evidence Mr Harvey then said that the questions raised by the Claimant in his WhatsApp message on page 319 timed at 16.12 pm should have triggered a site investigation and did not. '*The system should have kicked in on Monday 15 June 2020 and we should have contacted Countryside and I don't know if it did happen… there's no evidence of an investigation in the pack and if it didn't happen it's a breach of our policy'.*

48. Mr Harvey is quite certain that the Claimant was not told of the existence or conduct of any investigation and was not consulted- '*no… I agree his questions were never answered'.* He agreed in response to cross examination that it was possible that the Claimant could reasonably form the view that he had been removed for failing to agree to move an awkward heavy load in high winds because he was given no information to the contrary. He agreed that the Respondent, in the person of Mr Carroll, did not appear '*on this occasion'* to take steps to ensure that the Claimant's breaks at Stamford Hill were respected despite the expression of the Claimant's concerns in WhatsApp messages about this health and wellbeing issue. Instead,
Mr Carroll's terse response was '*he wants you off'.*

49. Conclusions re constructive dismissal. We conclude therefore that the Respondent's treatment of the Claimant on 12 June 2020 and its lack of reasonable support, failure to communicate, support and reassure in all the circumstances which pertained during the period from 12 June to the Claimant's resignation on 5 August 2020 was a fundamental and repudiatory breach of the implied term of mutual trust and confidence between employer and employee and the Claimant was constructively dismissed. The Respondent conducted itself during this period in a manner calculated or highly likely to destroy or seriously damage the relationship of

confidence and trust and it acted in this way without any pleaded or actual reasonable and proper cause.

50. It is the Respondent's contention that:-

i) The Claimant did not resign in response to the removal from Stamford Hill and/or the lack of investigation, communication, and information thereafter because he does not specifically refer to these matters in his resignation letter (see paragraph 139 of Respondent's counsel's submission). We cannot agree. The resignation letter at page 331 jointly addressed to Messrs Harvey and Carroll does make the references to being *asked to work long hours with no breaks under a lot of pressure',' I was told to lift in high winds'… 'harassed and bullied by staff on site and my supervisor if I objected to breaching health and safety regulations…ignored and bullied by my supervisor when I was asking for help… my rights and responsibilities were never clearly presented to me and when I probed to get some information on them, I was ignored.'* Although expressed in more general terms these sentences and phrases are a clear pointer to the Claimant's conclusion that he was removed from Stamford Hill because of his objection to lifting in high winds and insistence on proper breaks which in turn caused the PC/FC to demand his removal and, crucially, that no information or explanation was thereafter supplied by the Respondent as can be seen from the final bullet point in the resignation letter.
In addition, the cogent written and oral evidence of the Claimant and his wife is that a chain of events thereafter occurred as described in paragraphs 56-61 of the Claimant's witness statement i.e. that he was intensely distressed on 12 June 2020, went straight to hospital, was '*mentally and physically wiped out'* signed off from work' *severe stress related problems at work'* and ultimately diagnosed with depression. Despite treatment with drug therapy, rest and counselling he remained highly anxious and' *just could not comprehend returning to an environment which made me feel so vulnerable and unsafe'* so that he decided to resign. We are satisfied that his resignation was in response to the facts alleged at 2.14 in the agreed List of Issues.

ii) That he has not pleaded any failure by the Respondent to investigate or explain the ending of his assignment at Stamford Hill. First, we must emphasise that the insistence that there was a 'conversation' with the PC of which there is no evidence and conversely that there should have been an investigation of which there is no evidence, and which Mr Harvey frankly admitted was not communicated to the Claimant either as to its terms of reference or its conclusions, is a matter entirely raised for the first time by Mr Harvey himself at the Hearing. It is the Respondent which put these matters into issue and about which Mr Harvey gave voluntary detailed oral evidence. He told us that the Claimant knew nothing of a conversation and/or investigation and heard nothing of an explanation when '*perhaps he should have done*'. In these circumstances we consider it to be a legitimate part of the Tribunal's task to determine the legal implications of the failures admitted by the Respondent's sole but senior witness. Those are failures of information-giving which could not be pleaded by the Claimant because he did not know of the source of information. Secondly, we are satisfied that there are sufficient references to failure by the Respondent to provide reasonable support, for example, at paragraph 1.4 in the List of Issues ' *the Respondent failed in its duty to provide reasonable support in terms*

of harassment, disruption from colleagues and inadequate facilities' to encompass a wider failure to communicate about crucial issues of deep concern to the Claimant. The Claimant states at paragraphs 53 and 55 of his witness statement that on 12 June 2020 he received '*no answer to my question…I was being ignored…I had lost faith in the Respondent's duty to protect me'.*

In paragraph 39 of his witness statement the Claimant, albeit in the context of whistleblowing detriment, does state his '*expectation that the Respondent will conduct thorough investigations and rectify the issues as soon as possible. However, this was not the case'.*

We are therefore satisfied that his claims in this case do encompass allegations of a failure by the Respondent to investigate and then inform, reassure, and support him in relation to the events of 12 June 2020. These were fundamental failures to communicate which amount to a constructive dismissal of a long serving and good employee.

51. Earlier damage to the employment relationship caused by the Respondent. With reference to our finding in paragraph 35 above we are satisfied that there is evidence amongst the other thirteen factual allegations set out in paragraph 2 of the amended List of Issues which demonstrates a contextual repudiatory intention by the Respondent to damage the relationship of trust and confidence with the Claimant particularly in relation to reasonable support, essential communication, and giving of necessary information to him.

52. It is not necessary, because we have found that the Respondent's actions and omissions (2.14) in the period between the period between 12 June and 5 August 2020 amount by themselves to a fundamental breach of the employment contract, to make findings about each of those thirteen allegations 2.1-2.13 and determine whether all or any of them was similarly a breach or part of a series of cumulative breaches. Certainly, allegation 2.11 relates to an incident which we have dealt with as part of the factual matrix involved in the 2.14 allegation.

53. Some of these other matters were either minor or were quickly resolved by the Respondent, for example, the allegations in 2.4,2.6,2.7,2.9 or were matters within the clear discretion of the Respondent where there is no evidence of any oppressive or unfair exercise of that discretion e.g. allegation 2.8 and 2.12.

54. Allegation 2.10 is dealt with in our decision regarding the Claimant's unpaid wages claim.

55. Allegation 2.13 , given that the offensive expletive was not used to describe the Claimant himself or directed at him and that the otherwise courteous text at page 317 from Mr Carroll to the Claimant does demonstrate a desire to assist the Claimant and explain the agreed paid climbing (7.30 am and 'paying an hour') and working times (8 until 6 with one hour break a day) as set out on page 293 in an email dated 8 June 2020 at 9:30 am, and agreed with the AP Doug Kilpatrick, we are unable to identify any intended or actual damage to the employment relationship which derives from these messages.

56. However there are remaining allegations about which we make the following concise findings of fact:-

57. Crane bases full of water. First, as we reiterate below, the Claimant made a protected disclosure in the public interest about this health and safety issue. On 30 September 2019 and 16 December 2019, he twice reported the base of the crane he was operating at a site for Hills at Rectory Park as being full of water. At page 253 on the Crane Daily Checklist for crane TC35 this is reported by the Claimant and at page 451 on the Weekly Checklist for a different crane TC255 at 'Oaklands'. On that December 2019 checklist it is also reported that there are no stairs/'starts' for him to climb and it is '*awkward to get inside'.* There are electrical cables, bolts and other equipment in the base of the crane which if submerged in water cannot be properly inspected and checked by the PC or the crane operator. There are photographs at pages 404-412 which demonstrate the obvious dangers. It is the Claimant's case that no prompt and appropriate action was taken by the Respondent to resolve this hazard and there is no evidence in the bundle that the Respondent took urgent steps to contact or call the PC to pump out the water. This is evidence which the Tribunal might have expected to see in relation to this health and safety concern; instead, the Respondent relies upon the fact that there was only one report by the Claimant in respect of each crane, that he continued to work on each crane and that we should conclude therefore that the water was removed quickly. We are unable to reach that conclusion based on the evidence disclosed. Mr Harvey says in his evidence that the checklists '*upon receipt …would be checked, referenced to the particular crane, saved to the respondent's master crane server and if there were issues raised by operators we would ask our client to look into the matter…I can only assume that it was managed expediently by the PC'.* Based on this procedure there is a failure of the Respondent to show evidence from its master crane server or elsewhere that the PC was asked to take prompt action and /or that the Respondent carried through any follow up.

58. Allegation 2.2 Working on 18 December on and among cranes whose anti-collision systems were turned off. The Claimant was working on 17-20 December 2019 and on 2 and 3 January 2020 at Galliford Try's site in Willesden Junction. The anti-collision systems on the cranes (ACMS) are described at paragraphs 21-23 of the Grounds of Resistance and Mr Harvey gives further details of ACMS at paragraphs 51- 56 of his witness statement. In summary the system is designed to ensure that when there are several cranes working in proximity on one site the jibs or lifting 'arms' cannot make contact because each crane has its own programmed zone of operation and will shut down automatically if it moves out of zone and into the zone of another crane. Page 146 of the bundle is part of the Respondent's Tower Crane Operator's Handbook and states '*any anti-collision or zoning system must not be overridden unless authorised by the appointed person'*

59. On 18 December 2019 as can be seen from page 267 the Claimant sent an email at 07:47 am, just as he started work, to the operators @londontowercranes.com address which is the method by which he communicates problems to the Respondent. He also texted Gary Kelly, Mr Carroll's deputy at 7:45 am '*hi – the anticollision systems in cranes are switched off on this construction side[*sic*] as the cranes are too close- this is what I have been told. I do not feel comfortable working on. And that is not compliant with the law. This may cause a threat to my safety as well as safety of other people. Please advise what I should do'.*

60. Mr Kelly was not a witness in this case. He responded at page 332 of the bundle '*we're on the case'.* There is no further text or message from Mr Kelly or Mr Carroll in the bundle which communicates any additional information or advice. There is nowhere in the bundle a copy of any authorisation given by the Willesden Junction AP to override the ACMS at the Galliford Try site on the relevant dates that the Respondent worked there.

61. We reiterate that in the context of the Claimant's constructive dismissal complaint we looked at the factual allegations, preceding 12 June 2020, which show failures to communicate with the Claimant over safety matters and which he says damaged his trust and confidence in the relationship with the Respondent. In relation to this ACMS concern the Claimant agrees that Mr Carroll did telephone him to give permission to turn off the anti-collision system on his crane. He wanted written confirmation, as he very clearly tells the banksman in the transcript on page 431'*I can switch it off if they confirm it on the paper, that someone's gonna sign it but they don't wanna do it'.* The banksman replies '*you're right'.*

62. However, there is no written reply to the email at page 267 which either provides reassurance or gives instruction or information to the Claimant. He did not receive a written confirmation from Mr Carroll until 3 January 2020.

63. The message at page 268 starts '*Happy New Year to you…Macie you have full permission to turn off the AMCS to remove the screen and obviously watch out for each other whilst doing this'.*

64. The Claimant therefore worked at Willesden Junction for at least 4 working days in a situation where the AP, the banksman and other site operatives were asking him verbally to switch off the ACMS. At page 420 there is a transcript of a conversation between the Claimant and the banksman (Janel) in which the Claimant is recounting to Janel that *'Martin',* who he understood to be a senior site manager, (<u>not</u> the Respondent's employee) has told him to '*play the game otherwise I will have to get another driver'.* Janel responds '*I heard that. Well, how will they get another driver this time for tomorrow? No chance'.*

65. The banksman is in fact supportive and does not pressurise the Claimant as is evident from the record of their exchange on page 421.The Claimant in fact did not switch off and he did no lifts. Nonetheless he was obliged by the Respondent's lack of effective intervention and communication until after the Christmas break 3 January 2020 to sit in the cab doing nothing whilst being asked to do lifts, potentially from a different crane but still with ACMS turned off, as can be seen on pages 420 -421. This was a stressful and difficult period of work for him caused by the Respondent's acknowledged failures of communication. Mr Harvey says at paragraph 59 of his statement '*I have not seen any text message between the Claimant, Mr Carroll and/or Gary Kelly'.*

66. <u>Allegation 2.3 being required to take breaks in the crane cab rather than climbing down for breaks.</u> This incident took place on Monday 6 January 2020 when the site operator (the Claimant was by then at Midgard in Fulham Wharf) insisted that the Claimant stay up on the crane in his cab all day '*or go home'.* The Claimant again asked Mr Carroll to intervene; in a message on page 270 of the bundle, irrespective of the fact that he was offered extra payment per day (£30), he states he does not

feel '*physically fit to work 10 hours flat without breaks every day'.* The crane cab is obviously very cramped, there are no toilet facilities and all food and drink must be taken up at the beginning of the day when the operator climbs; the crane driver needs to know the day before if he is required to prepare and bring food and drinks for himself- this incident was on a Monday. If the crane operator stays in the cab this usually saves time/ provides flexibility for the PC or FC because he is there to carry out lifts at any time even if designated breaks may be interrupted. The Claimant did not wish to be in this situation and describes the problem in his paragraph 10 as '*random breaks here and there or simply no breaks at all…I was always criticised for this'.*

67. Again, despite the urgency of the message received from the Claimant and the concerns he expresses for his own welfare the Respondent took no action to intervene with the site operator. Mr Carroll simply writes '*ok mate, please can you bear with it for this week and then I'll see what I can do about moving you to another job'.* Mr Harvey does not deal with this factual allegation in his witness statement but in his response to cross examination he agreed that proper breaks for the operator are a health and safety issue and that those operators who wish to climb down for breaks and get out of the cab should be permitted to do so subject to reasonable flexibility on timing. He said '*we would review, discuss with client and get common ground… we would tell the client that they have to permit it… he should not have been told that he's not allowed down'.* Mr Harvey conceded that Mr Carroll should have told the PC that the Claimant should be allowed to climb down for breaks; he agreed that the Respondent has produced no evidence that Mr Carroll went to the PC and asked for this arrangement to be put in place.

68. Our conclusion is that this factual allegation 2.3 is another example of the Respondent's disinclination to in any way 'stand up' for the Claimant when the Claimant requests intervention and/or is under pressure. It is an illustration of failure of reasonable support and indicative of repudiatory intention.

69. <u>Factual allegation 2. 5 Operating a crane with a missing window pane as reported on daily checklists and in emails 10/2/20,(24/2/20 (pages 274-6),2/3/20 (page 278) and 9/3/20 (page 279).</u>

First, these complaints are made during winter and very early spring when the weather is cold. The cab has a heater (which was quickly replaced when broken) but a missing panel in the cab makes the cab uncomfortable letting in cold air and the Claimant says it is 'dangerous' because of reduced visibility even though the door opened on to a platform with railings. In fact, the window panel was not missing entirely but the broken glass was replaced by a 'temporary fix' as can be seen from the photograph on page 403 with a plastic panel heavily sealed with tape and this seems to reduce visibility in the lower part of the cab.

Mr Harvey told us that he regarded the temporary fix as '*fit for purpose'* and explained that it was hazardous to take a heavy pane of glass up the steps of a working crane at height. Instead, the full glazing repair must wait until the crane is dismantled. But this is not an explanation given to the Claimant at the time: there is no document in the bundle from any one of the Claimant's managers expressing concern or conveying information. He appears to have been left to get on with it without explanation, as Mr Harvey conceded under cross examination.

70. Detriment done on the ground of protected disclosures

In paragraph 9 above we have summarised the three disclosures identified in the agreed List of Issues. We have made findings of fact about the reports by the Claimant to his employer of water in the crane base and switching off anti-collision systems in cranes on site. We are satisfied that these are qualifying protected disclosures made in the public interest as defined in section 43B Employment Rights Act 1996. The Claimant had a reasonable belief that he was making disclosures of information which tended to show that the health or safety of any individual has been, is being or is likely to be endangered, including his own health and safety.

71. We have reached the same conclusion regarding the issue of a faulty seal on the crane cabin door allowing water in to the cab when it rained. This is reported to the Respondent in weekly checklists dated weeks commencing 19 September and 1 October 2018 which are pages 465 and 467 of the bundle where it states '*17. water coming inside the cab after/while rain'*; it is the same crane TC118 on both occasions.

72. We do not accept the submissions of the Respondent that, in respect of information on the daily and weekly checklists, there is evidence that the Claimant had no reasonable belief that he was making disclosures in the public interest and/or that the wording on the checklists tended not to show endangerment to health and safety. The argument made by Ms Hosking, e.g. at paragraph 59-63 of the Respondent's submissions, that the failure of the Claimant to fill in the said checklists correctly demonstrates lack of reasonable belief is gainsaid, first, by the fact that the Claimant was never disciplined, reprimanded or indeed re-trained in respect of any failure to tick the check box showing '*Reported to LTC Office'* or in relation to filling in the checklists mistakenly.

73. The Claimant explained that he ticks each of the 30 daily and 46 weekly items to show they have been checked by him. However, instead of placing an x to show a fault as is indicated in the top left hand corner of the checklists he mistakenly entered the item number of the faulty part e.g. '*17'* in the Comments/Observations box and therein described the problem. This was a cogent explanation given by him in oral evidence at which point he only then realised that he should have put an x. However, we are satisfied that the employer received and noted the information he was disclosing and treated the observations/comments as reported faults; there was no evidence from Mr Harvey to the contrary and no documents in the bundle which show any different approach.

74. The six acts or failures to act by the Respondent as employer, i.e. not acts or omissions of any PC/FC, are recorded by us at paragraph 10 above. The 10 May 2020 text from Mr Carroll is at page 288 and we find that it shows no act by the Respondent causing the Claimant detriment. Mr Carroll merely gives information by replying '*nothing yet'* to the Claimant's message asking when his site will re-open after lockdown in March 2020.The response may have been unwelcome news to the Claimant but the content and nature of the act of giving a negative response is not something which a reasonable employee/worker would consider to be to their disadvantage or detriment; the Claimant was given the information he requested.

75. We have asked ourselves the question whether any or all of the three protected disclosures materially influenced the Respondent's treatment, consisting of the six identified detriments (we now identify five), of the Claimant, following his

whistleblowing. We are satisfied that the Claimant has failed to discharge his burden of proof in showing that the disclosures were the (more than trivial) reason for the detrimental treatment he alleges. In addition, and in relation to the most serious allegation of detriment about the Claimant's removal from the Stamford Hill site on 12 June 2020 we have made a finding of fact that the Respondent has clearly shown why that act was done and that it was not as a result of any protected disclosure identified by the Claimant in these proceedings.

76. The disclosures relating to rain coming in to the cab of the Claimant's crane were made in September/October 2018. The earliest of the detrimental acts he alleges was on 6 January 2020 when the Claimant was asked fifteen months later, not 'required', to stay in the cab during his breaks and not climb down for breaks over the course of a working week. We have seen and heard no evidence of any causal link between disclosures and alleged detriment in this instance, particularly given the gap in time.

77. We note that it was not put in cross-examination to the Respondent's witness Mr Harvey that any of the alleged detriments were materially influenced or caused by all or any one of the protected disclosures. The alleged causal link was not explored with him.

78. The submissions of Mr Powlesland on behalf of the Claimant only briefly address the alleged causal link between the disclosures and the detriments caused by acts or failures to act done on the ground that the Claimant made those disclosures. The submission is that the Respondent subjected the Claimant to detriment, particularly as set out in factual allegation 2.14 '*being bullied and being removed from the Stamford Hill site'* on the ground that the three health and safety concerns communicated by the Claimant to the Respondent were matters of '*refusal to cut corners or break rules'* which would annoy the '*Site Operators'*. In paragraph 23 the submission is '*The Respondent's main driver was clearly to keep the Site Operator happy in order to retain their business and income. The Respondent therefore subjected the Claimant to the detriments in order to try and stop him from raising further concerns that would annoy the Site Operators'.*

79. We cannot agree with this analysis. First, the Claimant worked at six or seven different sites over the period which is relevant to these proceedings. The disclosures relate to only three possible sites. Mr Harvey gave clear evidence that it is the policy and procedure of the Respondent to intervene, without reproach or penalty to the crane operator himself, for example, in requesting removal by the PC/FC of water from the crane base. Our findings of fact above relate to the failure of the Respondent to properly keep the Claimant informed and reassured about remedial action; there is no conclusion that the Respondent actively discourages the raising of concerns by its workers. We have also seen several transcripts on pages 415-433 which show support, concern and assistance offered to the Claimant by employees e.g. banksmen of the relevant PC/FC during particular incidents including the shutdown of the ACMS at Galliford Try, Willesden Junction.

80. The three detriments as described in factual allegations 2.7(holiday entitlement) 2.8 (furlough) 2.10 (wage reduction) are clearly un-connected to the contractual relationship between the Respondent and its client or to the '*tripartite relationship between the Claimant, the Site Operator and the Respondent'*. It is highly unlikely in

our view that the client would know of such disclosures of internal dispute let alone rely upon them as a way of pressurising the Respondent to impose detriment on the Claimant and stop him raising health and safety concerns on site. There is no logic to this argument.

81. We are satisfied that the removal of the Claimant from Stamford Hill site on 12 June 2020 occurred as a result of the PC insisting that he be taken off site. The '*bullying'* said to be a detriment done by the Respondent was in fact an allegation of bullying made by the Claimant at page 318 about the PC's operatives, not done by the Respondent or its employees. He says that *Luciano*, one of the OHOB supervisors is giving him '*extra stress'* about the length of his breaks. This alleged bullying is not an act or failure to act done by the Respondent.

82. The Respondent has, as we state above, shown the clear reason for the removal of the Claimant from Stamford Hill and that reason is, we are certain, not the making of all or any one of the three pleaded protected disclosures. The Claimant was unfairly constructively dismissed because that reason was never, to his knowledge, properly investigated or queried and little or nothing was communicated to him despite his requests for proper information and despite his absence by reason of mental illness.

83. In all the circumstances of this case the complaint of unfair dismissal succeeds. The claim for unpaid wages succeeds. The claim under section 43B of the 1996 Act fails.

84. There shall be a remedy hearing held at East London Hearing Centre by CVP video facility listed for one day on **16 June 2023 commencing at 10 am.** The Claimant and any other witness may give evidence from Poland because there is an existing consent in this case. An interpreter in Polish is required.

85. **No later than 2 June 2023** the Claimant must send an updated Schedule of Loss to the Respondent and to the Tribunal.

Employment Judge B Elgot
Dated: 28 April 2023