# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr K Brimson | AND | Howden Joinery Limited |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT** Bodmin **ON** 24, 25 and 26 April 2023

**EMPLOYMENT JUDGE** N J Roper **MEMBERS** Ms R Hewitt-Gray
Ms R Clarke

**Representation**

**For the Claimant:** **In person,**
**(Assisted by Mr D Salter, Non-practising Solicitor)**
**For the Respondent:** **Mr R Ryan of Counsel**

## JUDGMENT

**The unanimous judgment of the tribunal is that:**
**1. The claimant's claim for detriment on the grounds of protected public interest disclosures is dismissed on withdrawal by the claimant; and**
**2. The claimant's claim that he was unfairly dismissed because he had made protected public interest disclosures is dismissed; and**
**3. The claimant's more general unfair dismissal claim is also dismissed.**

## REASONS

1. In this case the claimant Mr Kevin Brimson, who was dismissed by reason of capability, claims that he has been unfairly dismissed, and that the reason for this was because he had made protected public interest disclosures. The respondent contends that the reason for the dismissal was capability, that the dismissal was fair, and it denies the public interest disclosure claim.
2. We have heard from the claimant, and from Mr Justin Boundy on his behalf. We also accepted a statement from Mr William Salter on behalf of the claimant, but we were only able to attach limited weight to it because he was not present to be questioned on his evidence. For the respondent we have heard from Mr Gary Claydon, Mrs Geraldine Locke, Mr Gary Edwards and Mr Phil Brown.
3. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The Facts:
5. The respondent Howden Joinery Limited is a supplier of kitchens operating from a network of approximately 800 depots across the United Kingdom. The claimant Mr Kevin Brimson was born in 1962. He commenced employment with the respondent as an Area Handyman in January 2016. His job duties changed shortly thereafter to that of a Solid Surface Fitter when the respondent introduced that service, although he was not issued with a contract of employment which reflected the job title of Solid Surface Fitter until January 2019.
6. The respondent created a number of two-man Solid Surface Fitting teams consisting of the Solid Surface Fitter and an Assistant. These teams will travel to prearranged jobs at customer locations where material will already have been delivered to them in advance by the local depot. The Solid Surface Fitter is required to measure, cut and finish the product on site. It is the Solid Surface Fitter's responsibility to ensure the highest production fitting standards are maintained and that all health and safety regulations are adhered to. This includes the moving and use of various power tools. It is often the case that granite or quartz kitchen worktops, which typically weigh between 90 and 100 kg, will need to be manoeuvred, lifted and cut and polished on site. The job therefore requires considerable heavy lifting and manual handling of the worktops and the power tools.
7. On 20 March 2018 the claimant reported an injury at work and commenced a period of sickness absence because of "back pain". He returned to work on 4 April 2018. The claimant then suffered another injury at work on 29 October 2018 and commenced a period of certified sickness absence because of "acute back pain - lumbar". The claimant did not return to work.
8. The claimant reported the circumstances of this accident at work on 29 October 2018. Three granite worktops had been positioned lengthwise on a sort of rack on the ground. When he tried to move one of these, and was still holding it, all three moved together, with the result that he injured his back. He considered this to be a serious breach of health and safety. The respondent made the necessary reports to its insurers and to the HSE on the relevant HSE RIDDOR form. The claimant was of the view that the respondent's reporting procedures had deliberately played down the circumstances and the seriousness of the accident by suggesting that it was a mere lifting accident. The claimant felt aggrieved by this process and he described the RIDDOR report as "fraudulent". He pursued a potential claim for personal injury, which was not supported by his insurers because, on the basis of the reports submitted, he was advised that the claim did not enjoy reasonable prospects of success. This added to his sense of grievance, which was compounded because there was friction between the claimant and his supervisor Mr Bill White.

9. Under the terms of his employment the claimant was entitled at that time to contractual sick pay of four weeks, and thereafter Statutory Sick Pay (SSP) only. On 16 November 2018 the claimant exhausted his entitlement to contractual sick pay, and he was paid SSP thereafter. The claimant was strongly of the view that the respondent should have exercised its discretion to pay him full contractual sick pay, particularly given that he felt that the accident at work was the respondent's fault. He complained that another employee, Mr W Salter, had received extended sick pay in similar circumstances, although the respondent's records suggest that Mr Salter was entitled to longer contractual sick pay and had returned to work within his extended sick pay period.
10. The claimant remained on certified sickness absence and with the claimant's consent the respondent obtained an Occupational Health Report (OH) from its OH supplier AXA on 14 February 2019. He was assessed as having "severe mechanical low back pain" and advised that he was unfit for work "including any amended or light duties". On 12 March 2019 the claimant then attended an Informal Sickness Review meeting with his line manager Mr Bill White. It was clear that the claimant was unable return to work pending further advice. When the claimant was asked what the respondent could do to support the claimant in his return to work the claimant replied: "it's not for me to tell the company what I want, the company should be telling me what they can offer, all I want is to be paid wages from the start for work related injuries …"
11. This sense of grievance from the claimant continued, and in early May 2019 he sent three emails to various of the respondent's senior managers. The claimant relies upon these three emails as being protected public interest disclosures. The first two disclosures are in an email dated 3 May 2019 to Mr Andy Witts and Mr Andrew Livingstone of the respondent. In the first place the claimant raised health and safety concerns about the unsafe working practices which he claimed the respondent had imposed or required of the Solid Surface Fitters, and which also attached a video which had been posted by fitters on the WhatsApp group. The third disclosure was another email to Mr Andy Witts and Mr Andrew Livingstone of the respondent which was dated 7 May 2019 in which the claimant attached a copy of his formal grievance against Mr Bill White and repeated his concerns that Mr White had falsified the RIDDOR reports of March 2018 and October 2018.
12. The claimant also raised a formal grievance on 6 May 2019, and the claimant attended a grievance hearing chaired by Mr Gary Claydon, the respondent's Regional Director for the Southwest, from whom we have heard. This grievance hearing took place on 14 May 2019. The claimant's grievance was to the effect that Mr John Bearham, the Area Manager for the Southwest, and Mr Bill White the claimant's immediate line manager, had failed to deal with his health and safety concerns; had failed to deal with the claimant's concerns relating to personal protective equipment (PPE); had failed to extend his sick pay; and had falsified the RIDDOR reports.
13. Mr Claydon investigated the matter in detail and reached four conclusions. In the first place it was clear that the claimant was well respected and very good at his job, but that he seemed to resent his line manager Mr Bill White. Although there was a strained relationship Mr Claydon could not make any finding beyond this. Secondly there was no evidence of any collusion or falsification of health and safety documents. Thirdly, with regard to the provision of PPE, the gazebos which had already been provided to fitters to protect them against adverse weather conditions had not been fit for purpose, and once the issue been brought to the respondent's attention, new more suitable gazebos were then purchased. With regard to lifting clamps for the quartz worktops, although these had been provided, the majority of fitters preferred to work without them. They had always been available if any fitter wished to use them. Finally, with regard to sick pay, Mr Claydon was satisfied that the claimant had been paid properly in accordance with the respondent's contractual procedures.
14. For these reasons Mr Claydon rejected the claimant's grievance, and he was informed of that decision on 26 June 2019. The claimant was afforded the right of appeal against that decision, but he did not pursue an appeal.

15. Meanwhile the claimant remained on certified sickness absence, and his entitlement to SSP was exhausted on 18 May 2019. The respondent then made arrangements to obtain a second OH report. This second OH report was dated 3 October 2019 and was prepared by Dr Nimmo, a Consultant in Occupational Medicine. This report concluded: "His normal duties involve fitting granite worktops in showrooms and customers' homes which involves heavy and awkward manual handling. He has to lift granite worktops weighing 96 kg with one assistant from ground level to waist height … He remains off work and he cannot see himself returning to his own role in the next three months … Although the available medical evidence suggests that this employee remains temporarily unfit for the substantive duties of his physically demanding role, in my opinion he may be fit for amended duties which do not require him to lift weights any more than 5 kg … As mentioned above a return to his substantive role is unlikely to be achieved for another three months. A return to alternative duties may help hasten a return to work, and with appropriate training relevant to the new role, a phased return over a 4 to 6 week period and ergonomic assessment should this be a desk-based role, there is potential to return to full time hours in the [next] two months or so …"
16. On 22 January 2020 the claimant then attended an Informal Sickness Review Meeting chaired by Mr Gary Edwards, from whom we have heard. Mr Edwards had become the respondent's Area Manager for the Southwest. This meeting been delayed at the claimant's request. The claimant was accompanied by Mr Salter, a non-practising solicitor who also assisted the claimant at this hearing. They discussed the second OH report of October 2019 in detail. The claimant was unable to give any information as to whether he would be able to return to work in the near future, and he agreed with and relied upon the OH report. The claimant became upset, and Mr Edwards decided to adjourn the meeting. It was rearranged for mid-February 2020, but again postponed at the claimant's request. It was rescheduled for 24 March 2020, but this was then superseded by the national lockdown for the Covid-19 pandemic which had commenced on 23 March 2020.
17. The parties then discussed the claimant's position by exchange of emails, and this included the possibility of two desk-based roles either as Business Admin Support, or a Telesales Business Developer. The claimant was provided with the job descriptions and asked to confirm whether these roles were of any interest. The claimant was told that neither of these roles appeared to be a natural fit for the claimant's skillset and that he would be able to apply for these roles under the respondent's usual procedures. Because the claimant was already an employee of the respondent, this would have involved an approach to the relevant depot manager and a discussion with that manager. The respondent's HR department then ensured that the claimant had the appropriate link to the available job vacancies and confirmed that the respondent would support the claimant in any search for alternative roles within the business. They agreed that a further OH report would be helpful, and the respondent offered to make a payment to the claimant for accrued holiday pay as a goodwill gesture. By email dated 24 April 2020 the respondent confirmed to the claimant that the only desk-based roles which required no lifting were the Business Development and Business Administrator roles for which details had already been provided to him. The salary bands for these alternative roles were also included which would have involved a substantial reduction from the claimant's current salary.
18. On 5 May 2020 the claimant then sent a detailed email setting out his concerns. He confirmed: "I'd like to say that I don't want another job within Howden's from the one I'm employed for … I could still do much fitting work without heavy lifting … I'm concerned Howden's should have been actively trying to help me back into my contracted job so that I can use my skills and help the team." The claimant then set out six examples of light duties which he thought he could do: (i) picking up tooling and distributing to fitting teams; (ii) checking kitchen plans for possible mistakes and problems that might arise which causes downtime; (iii) on-site surveys to check if the site is "safe and fit health and safety wise"; (iv) liaising with depots; (v) picking up power

tools that needed refurbishment from fitters; and (vi) carrying out remedial work which might crop up instead of involving fitting teams.

19. The respondent's managers then discussed this suggestion, and Mr Darnbrook replied by detailed email on 14 May 2020. He confirmed: "The business has considered various adjustments you have requested to your current role to enable you to return. Having done so the conclusion reached is that it will not be possible to adjust your role as requested for the following reasons: (i) the fitting teams pick up the tooling from their own local depot when they need them and stock the van so they never run out so no additional resource is required and this would not be cost-effective; (ii) checking kitchen plans for possible mistakes is not necessary because there is already a process in place for this and the checking is done by the depots; (iii) health and safety risk assessments are already carried out by the installers themselves who have all the relevant training; (iv) it is the role of managers to visit and liaise with depots and attend managers' meetings; (v) if any power tools needed refurbishing then that is already within the role of the managers; and (vi) as for remedial work, there are not sufficient remedial referrals for one staff member and in any event some remedial work would still involve changing worktops which would require a two-man lift. Mr Darnbrook concluded "Your role does not lend itself to carrying out light duties. This would essentially involve the creation of an entirely new bespoke role, which is simply not required within the business."
20. Mr Darnbrook also requested again that the claimant gave consent for a report from his own GP to assist the OH service. He said: "As per my email of 3 April 2020 I would like to obtain a report from your GP to understand your current prognosis and whether it is possible for you to return to your substantive role in the foreseeable future, and/or whether it is possible to make adjustments to this role. This is necessary given the previous report dates back to October 2019. As you have currently been absent for 18 months, we do need to consider whether a return to your substantive role in the short to medium term will be possible or the company may have no option but to consider your capability to perform the role of Solid Surface Fitter … I have attached a consent form for you to complete and would be grateful if you could please complete this as soon as possible so I can start the process of obtaining this report." He also pointed out that "In the absence of consent to obtaining a medical report we would then have no option but to make decisions based on the information available to us".
21. The respondent then obtained its third OH report which was prepared by Dr Halliday-Bell a Consultant Occupational Physician dated 30 June 2020. She concluded that the claimant was only fit for alternative work, albeit with immediate effect, but only if the moving and handling elements of his role were reduced to him lifting no more than 25 kg. She suggested resumption on a phased basis but only if the lifting was restricted to no more than 25 kg. She confirmed that only if the adjustment not to lift more than 25 kg could be accommodated would the claimant then be able to resume his usual role. It is also clear from that report that a separate report been requested from the claimant's GP. That report was never forthcoming, despite the fact that the claimant had seen his GP, and his initial delay in consenting to that report became an apparent reluctance for some reason to persuade his GP to provide that report.
22. There was then a further Informal Sickness Review meeting which Mr Edwards chaired on 30 July 2020. He confirmed that the claimant's current sicknote had continued to report that the claimant was not fit for work, and that the third OH report had suggested that he could only resume as a Solid Surface Fitter in the event that he never lifted more than 25 kg at any time. Mr Edwards sought the claimant's views on whether he would be able to resume his role if he was unable to lift more than 25 kg and if so what adjustments would be required. The claimant's response was to the effect that he thought the respondent was "trying to catch him out" and that he could only "go by what the Doctor says". When pressed as to what adjustments might be appropriate to assist him back to work the claimant repeated the six adjustments which had previously been considered and rejected. Mr Edwards asked if there were any other adjustments and the claimant replied: "there's no point suggesting anything as it will be thrown back in

my face … That is the way I'm feeling. I'm not going to suggest anything. My depression has got worse. There is no point suggesting anything …"

23. Mr Edwards then confirmed that the respondent was not in a position to create a new role for the sake of it and there had to be a current job available. He enquired again whether the claimant was interested in the desk-based roles in the depot but the claimant confirmed: "I never said I was interested in a desk job or put it forward to anyone". Mr Edwards then encouraged the claimant to chase his GP for the report so that OH could prepare a final view and the claimant agreed to do so. Mr Edwards concluded the meeting by saying: "Depending on the content of the GP report and based on your length of absence, it may be necessary to hold a Formal Capability Review Meeting. If there is no prospect of a return to your substantive role in the short to medium-term and there are no other adjustments which would allow you to return to work, the company may have no option but to consider termination of employment on the grounds of medical capability." The claimant replied: "It is company policy I suppose. I can't argue against what the doctor or the consultant says …"
24. The claimant was then invited to attend a Formal Capability Meeting by letter dated 17 September 2020, and he attended a meeting which was chaired by Mr Edwards on 8 October 2020. The claimant had been notified that the meeting might result in the termination of his employment, and he was offered the opportunity to be accompanied at that meeting but agreed to continue without a companion. He confirmed that there was no medical report from his own GP. The respondent's OH advisers had requested this weekly for a period of over three months but in the absence of a response had not changed the third OH report. The claimant has not given any evidence, or produced any further medical report, to suggest that if a report from his GP had been provided at that time then this would have altered the conclusions of the OH advisers at that time.
25. Mr Edwards asked the claimant if there had been any changes to his medical condition since the last meeting on 30 July 2020 and the claimant confirmed: "Nothing has changed since the last meeting with the ailments that are due to the accident". Mr Edwards confirmed that at the previous meeting the respondent had been unable to make any adjustments that did not require lifting more than 25 kg and reminded the claimant that the OH report advised that the claimant would not be able to lift 25 kg at any point in the future. He asked whether or not the claimant agreed with that advice to which the claimant replied: "I can't dispute what the doctors have said or the consultant says". On discussing alternative employment, the claimant confirmed: "I'm not interested in applying for any other job in the company … Redeployment is different from applying … Howdens have never discussed redeployment."
26. During that meeting the claimant also mentioned the accidents which he had had at work two years previously, and the grievances which he had raised against Mr Bearham and Mr White. Mr Edwards had not been previously aware of the grievances or the health and safety complaints which the claimant had raised, and he noted that the grievance process had been concluded. He did not see this issue as directly relevant, and he continued to discuss possible alternative roles or redeployment. These discussions were inconclusive because the claimant had not wished to apply for other desk-based roles, and only wished to consider the adjustments to his Solid Surface Fitter's position, which had already been considered and rejected.
27. Mr Edwards decided to dismiss the claimant by reason of capability, given the claimant's long-term sickness absence of two years. He confirmed his decision in a detailed letter dated 19 October 2020 which ran to six pages. Mr Edwards took into account that the claimant had been absent for two years and the medical evidence in the OH reports which confirmed that the claimant was not capable of carrying out his normal duties, and that there was no prospect of him returning to his substantive role. He also formed the view that the claimant had been unwilling to apply for other roles and had concluded that the claimant's suggestions for the adjustments to his existing fitter's role were not appropriate or manageable. In particular, he bore in mind that the claimant was unable to lift more than 25 kg and that lifting was an essential requirement

for the Solid Surface Fitter role. In discussing the potential desk-based roles the claimant had confirmed that he did not want any other job within the business other than the role for which he was employed.

28. Mr Edwards was unaware of the three protected public interest disclosures which the claimant had raised by way of his emails in early May 2019. The claimant had raised the issue of his grievances and complaints about health and safety matters at their meeting on 8 October 2020, and the fact that he thought that the RIDDOR form had been fraudulently completed, but Mr Edwards thought this was an historical complaint which had been investigated and concluded through the grievance process. We accept Mr Edwards' evidence that his decision was in no way influenced by the emails which the claimant had sent in early May 2019. That issue did not form any part of his decision-making process.
29. The claimant was afforded the right of appeal against his dismissal, and he submitted a letter of appeal on 27 October 2020. That letter ran to six paragraphs which raised the following matters: (i) the poor management of his situation by his line manager Bill White; (ii) the lack of dealing with his health and safety complaints concerning his accidents and the aftermath of his accidents; (iii) the demise of his mental health which had not been addressed; (iv) the failure to consider redeployment rather than having to apply for another job, and specifically the possibility of redeployment to a new depot which was opening in Helston in Cornwall; (v) failure to offer the claimant a templating job, given that the respondent had expanded its business and taken on board a granite worktop company where templates for fitted kitchens could be cut off site; and (vi) that if these issues have been acted upon the claimant could still be at work.
30. An appeal hearing was arranged and then postponed at the claimant's request. It took place on 16 December 2020 and was chaired by Mr Phil Brown, the respondent's Area Manager for the Southwest (North), from whom we have heard. He was based in Cheltenham and had had no dealings with the claimant or his employment issues before. At that meeting the claimant raised two other matters; first that another employee Mr Redstone had been allowed to return to work on light duties with adjustments having been made for him when the claimant was not offered that opportunity; and whether the claimant's assistant Mr Penfound was capable of using the necessary tools without the claimant's assistance so that they could continue working as a team. The claimant also raised the matter that Mr W Salter been paid in full for sickness absence when the claimant had not been. Mr Brown agreed that he would investigate these matters further and he reviewed the relevant correspondence. This included the minutes of the previous meetings; the OH reports; the correspondence between the claimant and Mr Edwards during 2020; and the reasons for the claimant's dismissal set out in Mr Edwards' dismissal letter.
31. Following these investigations Mr Brown made the following conclusions. The respondent was opening a new depot in Helston but there were a limited number of vacancies, and the manager was hoping to recruit staff who had good experience of the existing roles. There was only one opportunity for a desk-based job without any lifting, and Mr Edwards was unaware that this opportunity had arisen. However, Mr Edwards confirmed that the claimant had been offered the opportunity to apply for depot-based jobs previously but had decided not to do so, not only because the salary would have been lower, but also because he confirmed that he did not wish to have any other role than a Solid Surface Fitter. With regard to the employee Mr Redstone, his OH assessment had recommended a temporary adjustment whereby his assistant would drive and use the necessary power tools. This followed an assessment that his ability to lift was reduced but that it would improve over the next two months. This arrangement did not work well and caused complaints from other managers and in any event the OH advice later changed to the effect that Mr Redstone's difficulties had become long-term. Mr Brown did not think these were comparable circumstances because a short-term temporary arrangement had been tried for Mr Redstone, which was not successful.

32. Mr Brown was satisfied that the respondent had both a medical diagnosis and a medical prognosis to the effect that the claimant was unable to carry out his normal duties, and that he would not be able to do so in the future. The claimant did not contest the accuracy of that medical position. He did not believe that the alleged poor management of the claimant by Mr Bill White, or the lack of attention to his health and safety concerns were relevant to the current considerations. Although the claimant had complained that his mental health was suffering, this had been addressed by Mr Edwards in their meeting. There were no current vacancies for a templating job and the respondent had no intention to recruit for one in the imminent future. The claimant's skill set as a Solid Surface Fitter was fundamentally different to the skill set required for a desk-based role. He been advised repeatedly that he was welcome to apply for any such alternative role if he were interested, but he failed to do so, and had repeatedly told his managers that he did not wish to apply for the roles other than the one he was employed to do. Mr Brown also concluded that the claimant had been paid the correct contractual company sick pay and that Mr Salter was paid more sick pay because he was entitled to a longer period of company sick pay than the claimant. Mr Salter had also returned to work before exhausting his full company sick pay entitlement. He concluded that the claimant's position was different from that of Mr Redstone who was given temporary adjustments because at the time there was an expectation that Mr Redstone would return to substantive duties in the imminent future. He also concluded that the claimant's assistant Mr Penfound did not have the full range of skills and capabilities to enable him to do the work and use the power tools without the claimant's supervision.
33. The claimant had also suggested that he should been offered a templating job and that such a job already been offered to an external candidate. The background circumstances are that the respondent had acquired the assets of a solid surface manufacturer in August 2020 and was beginning to develop a design template and fit capability. Such a role would have fitted the claimant's skill set. However, it was not the case that these jobs were available at the time of the claimant's dismissal. Mr Brown considered the matter, and he confirmed his view in his detailed letter dismissing the appeal. This was to the effect that the claimant was incorrect to assert that a templating job had been given to an external candidate, and the respondent was not advertising for any such vacant position at that time, nor did it intend to do so in the imminent future.
34. For all of these reasons Mr Brown decided that the decision to dismiss the claimant was appropriate, and he rejected the claimant's appeal. He confirmed his reasons in a detailed letter dated 12 January 2021.
35. Mr Brown was unaware of the three protected public interest disclosures which the claimant had raised by way of his emails in early May 2019. Mr Brown had read the minutes of the claimant's meeting with Mr Edwards on 8 October 2020, and the claimant had also raised the issue of his grievances and complaints about health and safety matters in his letter of appeal, and directly to Mr Brown at the appeal meeting. Mr Brown was of the view that this was an historical matter which had been addressed during the grievance process and did not form part of his decision-making process during the appeal. We accept Mr Brown's evidence that his decision was in no way influenced by the emails which the claimant had sent in early May 2019.
36. The claimant commenced the Early Conciliation process with ACAS on 26 November 2020, and ACAS issued the Early Conciliation Certificate on 9 January 2021. The claimant then presented these proceedings on 19 February 2021.
37. Having established the above facts, we now apply the law.
38. <u>The Law</u>
39. The reason for the dismissal was capability which is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 ("the Act").
40. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size

and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

41. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (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, or is likely to be deliberately concealed.
42. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it 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.
43. Under section 103A of the Act, an employee is to be regarded 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.
44. Under section 47B of the Act, 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. Under s47B(2) of the Act, the provisions relating to detriment do not apply where the detriment in question amounts to dismissal.
45. Under section 48(2) of the Act, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
46. We have considered the cases of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; Fecitt and Ors v NHS Manchester [2012] ICR 372 CA; Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ; Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8 Parsons v Airplus International Limited EAT IDS Brief 1087 Feb 2018; Ibrahim v HCA International Ltd [2019] EWCA Civ 2007 Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401 IDS Brief 1073 July 2017 p8; Martin v London Borough of Southwark (1) and the Governing Body of Evelina School UKEAT/0239/20/JOJ; Williams v Michelle Brown AM UKEAT/0044/19/00; Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 EAT; GE Daubney v East Lindsey District Council [1977] IRLR 181 EAT; BS v Dundee City Council [2013] IRLR 131 CS; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.
47. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015) ("the ACAS Code"). We also note that it is arguable that the Code may well not apply to long-term absence for ill health, (rather than repeated short-term absences akin to conduct).
48. The claimant's claims:
49. The claimant's claims to be determined by this Tribunal were agreed at a case management preliminary hearing and set out in the Case Management Order of

Employment Judge Midgley dated 20 September 2022. They were subsequently confirmed in a Case management Order of Employment Judge Cadney dated 31 January 2023. The claimant's claims are for unfair dismissal, both generally, and under section 103A of the Act for automatically unfair dismissal having raised protected public interest disclosures. Five disclosures were originally relied upon, but reliance on the last two of these was withdrawn by the claimant at this hearing. In addition, the claimant withdrew his claim for detriment on the grounds of having made protected public interest disclosures because the first alleged detriment (relating to the failure to extend contractual sick pay) predated all of the disclosures and therefore could not be said to have been caused by them, and the second alleged detriment was expressed to be the act of dismissal, which cannot be pursued as a detriment by virtue of section 47B(2) of the Act, and in any event remains covered by the claim under section 103A of the Act. There was no claim for disability discrimination under the provisions of the Equality Act 2010. The claims which fell to be determined at this hearing were therefore the two unfair dismissal claims: the automatically unfair dismissal claim for having made protected public interest disclosures; and the claim that the dismissal was otherwise generally unreasonable and unfair.

50. Protected Public Interest Disclosures:

51. The claimant relies upon three protected public interest disclosures. The first two disclosures are in an email dated 3 May 2019 to Mr Andy Witts and Mr Andrew Livingstone of the respondent. In the first place the claimant raised health and safety concerns about the unsafe working practices which he claimed the respondent had imposed or required of the solid surface fitters, and which also attached a video which had been posted by fitters on the WhatsApp group. The third disclosure was another email to Mr Andy Witts and Mr Andrew Livingstone of the respondent which was dated 7 May 2019 in which the claimant attached a copy of his formal grievance against Mr Bill White and repeated his concerns that Mr White had falsified the RIDDOR reports of March 2018 and October 2018.

52. The statutory framework and case law concerning protected disclosures was helpfully summarised by HHJ Eady QC in Parsons v Airplus International Limited UKEAT/0111/17 from paragraph 23: "[23] As to whether or not a disclosure is a protected disclosure, the following points can be made - This is a matter to be determined objectively; see paragraph 80 of Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.

53. The statutory framework and case law concerning protected disclosures was also summarised by HHJ Tayler in Martin v London Borough of Southwark (1) and the Governing Body of Evelina School UKEAT/0239/20/JOJ. He referred to the dicta of HHJ Auerbach in Williams v Michelle Brown AM UKEAT/0044/19/00 at para 9: "it is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

54. Having heard from the claimant we are satisfied that for each of these three disclosures (i) the claimant disclosed information, rather than just expressing an opinion; (ii) he believed that the disclosure was in the public interest given that this could have affected

the safety of members of the public and work colleagues, and involved an official HSE form; (iii) it was reasonable for the claimant to hold that belief; (iv) the claimant believed that this information tended to show that that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and/or that the health or safety of any individual has been, is being or is likely to be endangered, and (v) this belief was reasonably held.

55. We find that each of these three disclosures satisfies the statutory test in s43B(1)(b) and (d) of the Act, and they are therefore qualifying public interest disclosures which are capable of protection under the Act. Each of these disclosures was made to the respondent, and we find therefore that they were protected public interest disclosures under s43C(1)(a) of the Act because these qualifying disclosures became protected disclosures when they were made by the claimant to his employer.
56. The respondent does not dispute that these disclosures which the claimant made were protected public interest disclosures. Having made these disclosures we find that this engages the potential protection afforded to the claimant under section 103A of the Act.
57. Automatically Unfair Dismissal section 103A of the Act:
58. The main difficulty which the claimant faces with this claim is that the disclosures relied upon were made in early May 2019 which is some 17 months before his dismissal in October 2020. If there were to be any causative link between the disclosures and the decision to dismiss the claimant, in all probability this would have happened very much sooner, so as to suggest that the disclosures prompted the dismissal.
59. Instead of this, when the claimant raised the three emails which amounted to the disclosures, they were investigated thoroughly and promptly by the respondent in the context of the claimant's grievance. The respondent did not agree with the claimant's concerns, but rather than taking any detrimental action against the claimant, the respondent invited him to discuss his concerns directly with the relevant managers who were responsible for health and safety so that they could attempt to allay his concerns.
60. In any event we have accepted the evidence of Mr Edwards the dismissing officer, and Mr Brown the appeal officer, in the following respects. Mr Edwards was not aware of the three disclosures relied upon and had never seen them. At the Formal Capability Meeting on 8 October 2020 the claimant discussed with him his dissatisfaction with his supervisor Bill White, the health and safety issues, and what he perceived to be a "fraudulent" RIDDOR report following his accident on 29 October 2018. Mr Edwards was aware of these concerns but understood them to have been investigated and aired during the previous grievance process, which had not upheld the claimant's grievance and in respect of which he did not appeal. He thought the matter was concluded. He did not consider the circumstances arising from the accident nearly two years previously to be relevant to the decision before him, and we accept his clear evidence that it played no part in his decision-making process.
61. Similarly, Mr Brown was not aware of the three disclosures relied upon and had not seen them. Mr Brown had read the minutes of the meeting on 8 October 2020, and he would have seen the comments made to Mr Edwards mentioned above. The claimant's dissatisfaction with health and safety matters was also raised in his letter of appeal. However, Mr Brown did not consider the circumstances arising from the accident nearly two years previously and the earlier health and safety complaints to be relevant to the appeal decision before him, and we also accept his clear evidence that it played no part in his decision-making process.
62. We are satisfied therefore that the protected public interest disclosures made by the claimant in May 2019 had no bearing on the decision made by Mr Edwards to dismiss the claimant in October 2020, nor by Mr Brown to reject the appeal against dismissal in December 2020. Put another way, and applying Fecitt, the disclosures had no material influence on the decisions to dismiss the claimant or to reject his appeal.
63. We cannot find therefore that the reason, or if more than one the principal reason, for the claimant's dismissal was because he had made protected public interest disclosures. We therefore dismiss the claimant's claim under section 103A of the Act.

64. Unfair Dismissal s98(4) of the Act
65. We now turn to the claimant's remaining claim for unfair dismissal generally arising from his dismissal for capability.
66. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
67. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.
68. In general terms there are two important aspects to a fair dismissal for long term illness or for injury involving long-term absence from work. In the first place, where an employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait longer for the employee to return (see Spencer v Paragon Wallpapers Ltd). In S v Dundee City Council the Court of Session held that the Tribunal must expressly address this question and balance the relevant factors in all the circumstances of the individual case. Such factors include whether other staff are available to carry out the absent employee's work; the nature of the employee's illness; the likely length of his or her absence; the cost of continuing to employ the employee; the size of the employing organisation; and, balanced against those considerations, the "unsatisfactory situation of having an employee on very lengthy sick leave".
69. The second important aspect is that a fair procedure is essential. This requires in particular consultation with the employee; a thorough medical investigation (to establish the nature of the illness or injury, and its prognosis); and consideration of other options, in particular alternative employment within the employer's business. An employee's entitlement (if any) to enhanced ill health benefits will also be highly relevant.
70. The importance of full consultation and discovering the true medical position was stressed by the EAT in East Lindsay District Council v Daubney. Mr Justice Phillips stated: "Unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done … Only one thing is certain, that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done"
71. Applying these principles to this case, we find as follows.
72. In the first place we consider whether the respondent could have been expected to wait longer for the claimant to return. At the time of his dismissal the claimant had been off work for two years. He did not dispute that he was unable to carry out his normal

duties, nor that he would not be able to do so in the future because of the heavy lifting involved, and he never disputed therefore that he was not capable of returning to his normal duties either imminently or at all. His absence disrupted the respondent's system in place at the time which required a Solid Surface Fitter accompanied by an Assistant, and other teams had to carry out the work which the claimant would have undertaken with an assistant. The respondent is a large employer but nonetheless it faced an ongoing cost to retain the claimant who did not dispute that he could never return to his normal duties. The situation of having the claimant on very lengthy sick leave was clearly unsatisfactory for the respondent. It seems to us that the key issue in this case is the possibility of alternative duties or redeployment, which we discuss below.

73. With regard to the procedure adopted by the respondent, we find that there was an extensive and considered two-way consultative process, which was more than just reasonable in the circumstances of this case. In the first place there was extended consultation with the claimant in both informal and formal meetings at which the claimant had the opportunity to be accompanied. The claimant attended informal sickness review meetings on 12 March 2019, 22 January 2020 and 30 July 2020. There were detailed and lengthy emails exchanged between the claimant and the respondent's managers. There was a detailed grievance hearing on 14 May 2019. There was a formal capability meeting on 8 October 2020 and an appeal meeting on 16 December 2020. At each of these meetings the respondent discussed the current position with the claimant and sought his views. It is clear that the respondent engaged in detailed consultation with the claimant throughout his two years of sickness absence.
74. Secondly, the respondent also carried out detailed medical investigation into the claimant's position. There were three OH reports. At no stage did the claimant challenge the conclusions as to his medical position which was set out in the OH reports. The respondent's OH advisers tried to obtain a medical report from the claimant's own GP, and although the claimant eventually gave consent, he was unable to ensure that his GP completed a report within a reasonable period of time so as to assist this process. The claimant has not suggested that there was any relevant information which his GP might have provided which would have affected the conclusions reached by the OH advisers, which was before the respondent at the time it took its decisions. We are satisfied therefore that the respondent had before it at the relevant times an accurate medical diagnosis as to the then current position, and an accurate prognosis as to both the imminent and long-term chances of recovery. The stark reality was that the claimant never disputed the conclusions that even after two years of sickness absence he remained unable to carry out his normal duties, because of the lifting involved, and would never be in a position to return to his normal duties whilst lifting was required.
75. It seems to us that an important aspect of this case is the possibility of adjustments, redeployment or alternative options, and these were clearly addressed by the respondent and discussed with the claimant. The claimant makes a number of arguments to this Tribunal which were simply not put to the respondent at the relevant times. The claimant was invited to apply for alternative desk-based roles, but he had made it clear repeatedly that he did not wish to be employed in any role other than his original Solid Surface Fitter role. He now claims that the respondent should have redeployed him into an alternative role, but the reality is that at the relevant times he made it clear that he did not want any alternative role, other than his existing job with amended duties.
76. The claimant also argues that he should have been retained and given a job undertaking templating work. The circumstances are that the respondent had acquired the assets of a solid surface manufacturer in August 2020 and was beginning to develop a design template and fit capability. Such a role would have fitted the claimant's skill set. However, it is not the position that these jobs were available at the time of the claimant's dismissal. At the time of the dismissal meeting on 8 October 2020 Mr Edwards was unaware of any such possible positions, which did not exist at

that time, and the claimant did not raise the matter then. The claimant did raise the matter in his appeal letter dated 27 October 2020. Mr Brown considered the matter on appeal, and he confirmed his view in his detailed letter dismissing the appeal. This was to the effect that the claimant was incorrect to assert that a templating job had been given to an external candidate, and the respondent was not advertising for any such vacant position at that time, nor did it intend to do so in the imminent future.

77. The claimant had made it clear that he wished to continue in his Solid Surface Fitter role but with a number of specific adjustments, which were not expressed to be short-term or temporary. The respondent considered those suggestions carefully, and it gave cogent reasons to the claimant as to why they could not be accommodated. In short this is because the suggested duties were already carried out by others, and it would have involved the creation of a new position which was not needed in the current structure and would have added an unnecessary overhead.
78. The claimant now argues that he should been accommodated on alternative light duties in the same way that Mr Redstone was. There are however clear differences in their circumstances. Mr Redstone was also a Solid Surface Fitter and the respondent made adjustments by way of light duties for him. However, at the time that these were put in place, they were for a temporary period because the OH advice was that temporary light duties would assist his imminent return to work. In the event this did not assist for two reasons. His inability to carry out his full range of duties caused difficulties and complaints, and in any event his condition deteriorated, and the arrangement could not continue. This occurred after the claimant's case had been considered and during which it was clear that the claimant would never return to his normal duties unless he was required to do no lifting on a permanent basis. That was never offered to Mr Redstone, and it would not appear to have been reasonable for the respondent to have offered such a solution to either of them.
79. The short summary of this case is as follows. The claimant never disputed the medical advice to the effect that he was not capable of carrying out his normal duties, nor that he would remain unable to return to them whilst they involved lifting. The claimant made it clear at the relevant times that he did not wish to apply for alternative roles which were desk-based with no lifting, and that all he was prepared to consider was an amended version of his Solid Surface Fitter's position. The respondent considered the practicalities of that suggestion, which it rejected for good reason. The respondent considered other possible adjustments, but there were none which were obvious or appropriate. There was no vacancy for a templating job at the relevant times which might well have fitted the claimant's skill set in the event that he became fit enough to undertake that job. The claimant had been off sick for two years which the respondent was no longer prepared to countenance. The claimant was clearly incapable of fulfilling his duties and although the respondent is a large organisation there was no compelling reason why it should have been expected to wait any longer.
80. Bearing in mind all the above we find as follows. There is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair. It is not for us to substitute our view for that of the respondent, and we find that dismissal was within the band of reasonable responses open to the respondent when faced with these facts.
81. Accordingly, we find that, even bearing in mind the size and administrative resources of this respondent, the decision to dismiss the claimant by reason of capability was fair and reasonable in all the circumstances of the case. We therefore dismiss the claimant's unfair dismissal claim.
82. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 36; a concise identification of the

relevant law is at paragraphs 38 to 47; how that law has been applied to those findings in order to decide the issues is at paragraphs 48 to 81.

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Employment Judge N J Roper
Dated 26 April 2023

Judgment sent to Parties on 04 May 2023

For the Tribunal Office