EMPLOYMENT TRIBUNALS

Claimant: Mr R Thomas

Respondent: AMC XL Ltd

Heard at: **Bristol** **On:** **26, 27 and 28 June 2023**

Before: **Employment Judge Livesey**
Mr H Launder
Mrs S Maidment

Representation
Claimant: Mrs Thomas, the Claimant's mother
Respondent: Mr Smith, counsel

JUDGMENT having been sent to the parties on 11 July 2023 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a claim form dated 1 November 2021, the Claimant brought complaints of constructive unfair dismissal (both under ss. 95 and 103A of the Employment Rights Act, the latter on the grounds of public interest disclosure) and discrimination on the grounds of disability.

2. The evidence

2.1 The Claimant and his mother gave evidence and Mrs Draper, the Respondent's Office Manager, was called to give evidence under a witness order.

2.2 On behalf of the Respondent, the following witnesses were called;
- Mr Crowley, Service Engineer;
- Mr Hamilton, Managing Director of Aquidata XL, an associated business;
- Mr Laird, CEO.

2.3 The following documents were produced;
- C1; the Claimant's closing submissions;

- R1; the final hearing bundle;
- R2; the supplementary bundle;
- R3; the Respondent's core reading list;
- R4; a chronology (not agreed);
- R5; an agreed joint cast list;
- R6; a bundle of documents relevant to the Claimant's strikeout application.

The Respondent's counsel also handed in a number of authorities to accompany his closing submissions.

3. The issues

3.1 The issues had been discussed and agreed at the Case Management Preliminary Hearing which had been held on 23 February 2023 by Employment Judge Rayner. Her Summary reflected the following issues which fell to be determined at the hearing;

3.1.1 Jurisdiction (time);

3.1.2 Constructive unfair dismissal; the Claimant relied upon eight breaches of the implied term of mutual trust and confidence (see paragraph 2.1 of the Case Summary);

3.1.3 Automatic unfair dismissal as a result of a public interest disclosure, a disclosure allegedly contained within the Claimant's grievance of 11 July 2021 which related to matters concerning health and safety and/or breach of a legal obligation;

3.1.4 A complaint of a failure to make reasonable adjustments in relation to one PCP (an alleged failure to provide adequate time to read written material before a grievance hearing). The Claimant's disability, dyslexia, was said to have prevented the quick assimilation of written material. He argued that more time ought to have been provided. The Claimant's disability had been determined by Employment Judge Cadney at the Preliminary Hearing held on 23 August 2022. That decision resulted in the loss of a complaint under s. 15 and a further s. 20 claim as a further claimed disability was not proved.

3.2 Employment Judge Rayner's Case Management Order had recorded a number of adjustments which were proposed for the final hearing (paragraphs 10 to 17 of the Order). Those too were discussed and implemented during the hearing as and when the Claimant requested or required them.

4. The Claimant's strike out application

4.1 At the hearing before Employment Judge Rayner on 30 May 2023, the Claimant's mother had made an application to strike out the Respondent's response on the grounds of its failure to comply with case management directions. The Employment Tribunal Rules were explained to Mrs Thomas and she was informed of her ability to pursue the application at the final hearing (see paragraphs 27 to 34 of the Order of 30 May).

4.2 In further correspondence, that application was pursued and Employment Judge Bax directed that both sides should reduce their arguments to writing before the matter was considered by us at the start of the hearing. The Claimant's arguments were set out on pages 1-3 of the bundle R6 and the Respondent's response at pages 13-16.

Relevant legal principles

4.3 The Claimant's application invoked the principles of rule 37 (1)(c) and, possibly, (b).

4.4 Striking out a case as a result of the behaviour of a party was undoubtedly a drastic sanction and it must have been proportionate to the offence (*Bennett-v-Southwark LBC* [2002] IRLR 407 and *Bolch-v-Chipman* [2004] IRLR 140). Even if unreasonable conduct had been demonstrated under rule 37 (1)(b), the Tribunal still have to consider whether striking out the claim would have been a proportionate sanction and, in a case where a fair trial was still possible, that would rarely have been the case (see, also, *Arriva London-v-Maseya* UKEAT/0096/16/JOJ).

4.5 Striking out the claim or a response for non-compliance with an order was also a draconian step which the Court of Appeal indicated should not have been too readily exercised (*James-v-Blockbuster Entertainment Ltd.* [2006] EWCA Civ 684). Such a decision clearly also needed to have been proportionate to the offence.

4.6 The guiding principle was the overriding objective (rule 2) which we kept at the forefront of our minds. We considered all of the relevant factors including the prejudice caused by the conduct or breaches, whether the nuclear option of striking the case out was proportional, whether a lesser sanction would have sufficed and, critically, whether a fair trial was still possible.

4.7 In *Blockbuster*, the Court of Appeal held that striking out could only have been justified if the offending party had been guilty of deliberate and persistent procedural disregard or unreasonable conduct which had made a fair trial impossible. More recently, in *Emuemukoro-v-Croma Vigilant (Scotland) Ltd* UKEAT/0014/20/JOJ, Choudhury J stated that that test was not absolute; if a fair trial was not possible within the trial window listed, "*the power to strike-out is triggered*" (paragraph 18). The fairness of a trial also had to be assessed with regard to the parties' expenditure and the finite resources of the court (*Arrow Niminees-v-Blackledge* [200[WLR 775004 at paragraph 55). It might have been possible to have a fair trial if enough resources were deployed and the case took precedence over others in a list, but that would have been "*inconsistent with the notion of fairness generally*" (*Emuemukoro*, paragraph 19).

4.8 Nevertheless, even if these tests were met, it did not follow the claim *had* to be struck out. A tribunal was always left with a discretion (the use of the word '*may*' at the start of rule 37) which had to be exercised in accordance with the guidance summarised above.

Consideration and conclusions

4.9 The Claimant's email of 19 June contained several points which were no longer relevant or material at the date of the hearing (for example, paragraphs 1 and 2). The point made in paragraph 3 might have been something which could have been used as the foundation for a preparation time order but the real issue concerned the hearing bundles and it unfolded as follows.

4.10 Orders in relation to disclosure and the preparation of the hearing bundle were made on 24 February 2023. The index was to have been agreed by 7 April and a physical bundle produced to the Claimant by 28 April. By the time of the 30 May hearing, disputes over the contents of the bundle remained; the Claimant had received some redacted documentation from the Respondent. He had also received them in an unredacted form from a non-party, GWR, following a Freedom of Information request. Employment Judge Rayner clearly thought that it was probable that the Respondent held the documents in an unredacted form as well and she considered that they ought to have been disclosed (see paragraphs 11 and 12 of her Order). She therefore directed that a supplementary bundle should have been provided for them.

4.11 On 2 June, the Respondent's solicitors wrote to indicate that the supplementary bundle had been put together but that *all* of the material documents (whether redacted or otherwise) had been provided to them by GWR and that the Respondent itself did not hold any unredacted versions, despite an extensive search.

4.12 On 16 June, the Claimant alleged that the Respondent had disclosed more documents which caused him to disclose further documentation.

4.13 The Respondent's detailed response (pages 14-16 of R6) was somewhat typical of the sorts of exchange that a tribunal sees between parties when a claimant's representative is tenacious and the parties' views of the relevance of documentation differed.

4.14 We went through all of the documentation at the start of the hearing with Mrs Thomas and counsel for the Respondent. There was nothing more that Mrs Thomas wanted us to see (she even withdrew an application which she had made previously to introduce to audio recordings) and nothing more that the Respondent believed was outstanding. In other words, the case was ready for hearing and the evidence had been finalised. There was no suggestion that a fair trial was not possible.

4.15 Accordingly, although it might have been possible to conduct a minute audit of the Respondent's preparation and conduct leading up to the hearing, as Mrs Thomas was no longer alleging that documents were outstanding and/or that the hearing could not proceed, it was not proportionate and/or in accordance with the overriding objective, to strike out the Respondent's response and deny it the ability to defend itself. The application was therefore dismissed.

5. The facts

5.1 The Tribunal reached the following factual findings on the balance of probabilities. Page numbers cited within these Reasons are to pages within the hearing bundle, R1, unless otherwise stated and have been provided in square brackets. References to the supplementary bundle are as follows; [R2;…].

Introduction

5.2 The Respondent is a technology and engineering business which supplies and maintains automotive, safety and metering services to the oil, gas and

utilities sectors. Its offices are near Devizes, Wiltshire and it is now part of the XL Global Group of companies.

5.3 The Respondent itself employs about 18 to 20 people, including the Claimant, who was employed from 1 January 2014. He started work as a Service Engineer before the Respondent was acquired by the XL Global Group, which occurred in 2019. The Claimant's father had previously co-owned the business before its acquisition and remained employed as the Operations Manager thereafter.

5.4 The Claimant's contract had been refreshed upon his promotion in 2018 [83-91]. His signature upon it indicated that he had read the Employee Handbook which contained, amongst other things, the Alcohol and Drugs Misuse Policy which stated that random drug and alcohol tests may have been performed on those who worked in safety critical roles [263-4]. The consequences of not providing a sample were clearly set out within the Policy;

> "*In circumstances in which you refuse to undergo a test, or in which you fail a drug or alcohol test administered by the Company, client or third party, this will normally be treated as gross misconduct and may result in dismissal without notice.*"

5.5 The Respondent is often required to undertake work in environments which are highly hazardous, known as ATEX areas (Hazardous Areas and Explosive Atmosphere Environments). Much work involving meter calibration is undertaken on sites regulated by the Control of Major Accidents and Hazards Regulations 2015 ('COMAH'). The Respondent is accredited in various ways in terms of its health and safety standards, as set out in Mr Laird's witness statement at paragraphs 16 and 17.

5.6 The Claimant's work involved the calibration of certain metering equipment at railway sites. The sites were owned and controlled by GWR but the Respondent provided undertook such work through Integral which was contracted to GWR.

5.7 Prior to any particular work on a site, the Claimant and his colleagues were expected to be provided with a Permit to Work ('PTW') from the site controller. Generally, they had to sign a Risk Assessment and Method Statement ('RAMS') which the Respondent created having assessed the work and the risks associated with it on site. RAMS were sent to site so that the site controller was satisfied that the Respondent's employees were adequately aware of the risks associated with working at its premises. The RAMS were generally printed and signed by the Respondent's employees on site before the work was undertaken and the PTW would then be issued.

5.8 RAMS were generally produced annually by the Respondent, to reflect any changes in the risks on site and/or methods of working. Often, jobs did not change year on year and the applicable RAMS were not therefore altered. Evidence of the RAMS having gone to Integral in January was produced [246]. Evidence of Integral's own health and safety documentation going to the Respondent's staff was also available [R2; 16-27].

5.9 At GWR sites in 2021, however, things were a little less stringent; GWR did not require the Claimant to receive RAMS on site and/or sign PTWs. They

may have existed, but GWR did not require that level of formality. That was not the same as other sites that the Claimant had worked at. Mr Crowley and the Claimant agreed in that respect.

Knowledge of disability

5.10 The Respondent did not admit that it had had the necessary knowledge of the Claimant's disability, dyslexia.

5.11 Mr Thomas, the Claimant's father, knew of it. That was evident from the Claimant's witness statement and he was not cross-examined on the point. But the Claimant said that his father had told him that he had told Mr Laird about it in or around April 2019 (see paragraph 5 of his witness statement).

5.12 Mr Laird, however, said that that did not happen; he had not been told about the Claimant's dyslexia and Mrs Thomas did not cross-examine him at all on the point. Mrs Draper, the Claimant's own witness, also said that she had not known of it. Mr Hamilton too denied any knowledge of it. We accepted their direct evidence on that point.

5.13 Although the Claimant had self-certified as fit on one occasion, there was nothing within the declaration which had touched upon his dyslexia [105]. During the course of his evidence, although he admitted to having made mistakes in some of his paperwork, he conceded that he did not attribute any of the mistakes to dyslexia when he discussed them with Mrs Draper.

The 20 May 2021 'near miss'

5.14 The Claimant was working with his colleague, Mr Crowley, at a GWR site in Bristol on 20 May 2021. Mr Crowley was junior to the Claimant in terms of his experience.

5.15 They were removing two long hoses from Mr Crowley's vehicle when a small amount of heavy fuel oil, which had become more fluid as it had heated in the vehicle on a sunny day, came out of the hose and onto the Claimant. The fuel seeped through his clothing, between the knee and ankle of his tracksuit bottoms. There was a small spill in the vehicle too.

5.16 The Claimant did not report spill to GWR on site, as might have been expected, but he did phone the Respondent's offices and spoke to Mr Kozlowski to ask for a spill kit. The Claimant's father emailed the office on 21 May and asked for the Claimant's jogging bottoms to be replaced. A 'near miss' form was then completed. The Claimant and his father initially completed the Form and suggested that certain remedial action be taken [113-5]. The Respondent then finalised the Form and, having reviewed the incident, it specified its own, slightly different, remedial action which focused upon the use of new personal protective equipment ('PPE') [R2; 45-7].

The new PPE

5.17 Mr Laird became aware that the Claimant's father had asked for some new bottoms to be ordered for his son [104]. He was not satisfied that they were sufficiently safe and, in particular, fire retardant (paragraph 24 of his witness statement). He asked Mr Montgomery to assess which PPE would better suit the GWR environment. Once done, alternative PPE was purchased [116]; it was both high visibility and fire retardant and was a coverall, not just a pair of leggings.

5.18 The previous site RAMS were also changed to reflect the new PPE; the words 'flame retardant' appeared in front of the word 'overalls' (see [R2; 31] and [135]). Mrs Draper believed that Mr Edwards, one of the other former owners of the business, made the change.

5.19 On 1 June, the Respondent informed the Claimant that new PPE was to have been supplied to him for his work on the 9th [117]. His father, however, raised concerns about the PPE and the possibility of heat exhaustion [117]. He repeated those concerns on 4 June [119] and Mr Laird responded that day; he was firm in his direction that employees needed to be safe, that the new PPE provided that safety and that a failure to wear it would be a serious matter [120-1];

> "*Let me be clear, the breach of the Health and Safety Legislation, client safety instructions or company safety policy is an act of gross misconduct and will not be tolerated. Continued refusal to wear the required and provided PPE will result in disciplinary action. I trust that this email provides sufficient clarity on the law, client requirements and company policy and no further action or discussion will be necessary."*

5.20 The Claimant's father replied [124]. He appeared to accept the 'paramount' need to maintain health and safety, but he nevertheless asked that his son be taken off railway work until the matter have been resolved. Mr Hamilton then expressed his view [123], which was that the Claimant ought to continue to work in accordance with his job description unless or until there was a medical reason for not doing so, which had not been asserted.

Reading

5.21 The Claimant and Mr Crowley were required to attend the GWR site at Reading on 9 June 2021 to do some work on fuel calibration systems. The Claimant had undertaken work on that site on several occasions before, but that was the first time that he had been required to wear the new PPE.

5.22 Mr Laird became aware that the Claimant had telephoned the office complaining that there were no RAMS available at the site. He maintained that GWR had asked for them. Mr Laird then ensured that a further copy was forwarded to Mr Prentice, the GWR site contact. The RAMS were sent by Mrs Draper [125-138]. Ordinarily, such documents would have been supplied by the Respondent to its contractor, Integral. The Claimant was duly provided with a copy on site when it had arrived, but he nevertheless refused to sign it until his queries were sorted out. Meanwhile, site induction was carried out as normal and the Claimant and Mr Cowley were given site-specific health and safety information by GWR.

5.23 The Claimant telephoned the office again, complaining about the heat and the fact that the RAMS did not deal with the wearing of PPE in particularly hot conditions. Mr Hamilton then spoke to him and told him to take breaks, use the water/refreshment stations as and when required and to use is common sense.

5.24 The Claimant then got to work, but he finished much earlier than expected because he received a notification that his father had received a Covid-19 close contact alert which caused him, as a close contact, to be ordered off

site by GWR. The various telephone calls that day were recorded in Mrs Draper's witness statement.

5.25 Subsequently, the Claimant's father asked to discuss his son and the difficulty that he had with heat and the use of certain PPE. That discussion took place by video on 14 June and Mr Thomas *then* asserted that there was a medical reason for the Claimant's problems. An occupational health ('OH') assessment was therefore agreed, recommended by the Claimant's GP [255] and organised, with the referral specifically directed to that issue [144-7]. The Claimant received an appointment request for an OH screening and a Fit to Work Medical [148]. He was withdrawn from railway site work in the meantime.

OH appointment, grievance and resignation

5.26 The Claimant attended for his medical examination with OH on 9 July. In accordance with the Respondent's Alcohol and Drugs Misuse Policy, he was asked to provide a urine sample. He failed to do so. He said that he had relieved himself in a public car park before entering for the assessment. He was offered more to drink, but declined it. The Doctor warned him of the consequences of not providing a sample. Nevertheless, the position did not change. In the Claimant's witness statement, he said that he had found the whole experience very stressful.

5.27 The Doctor's account of the Claimant's attendance that day indicated that he had been in the clinic for about 1½ hours and had been repeatedly offered water. He said that he would not have been able to pass urine, however long they had waited [179]. The Claimant's account [161] was accepted to have been wrong during cross examination; he said that he had not relieved himself upon arrival at the Health Centre, but had done so in a car park beforehand. The Doctor's account was not challenged by him during his own evidence.

5.28 The report which was subsequently prepared revealed no medical reason why the Claimant was not able to wear the PPE that had been provided [152-3].

5.29 Later on the day of the appointment, Mrs Thomas sent an email in the following terms [256];

> "*I am emailing you all to advise that Ryan will not be attending work next week. I am arranging an appointment with an employment solicitor. You are only to contact myself in connection with this, as you are aware no one present can discuss with Mark anything to do with work as he is unwell this also applies to Ryan who has given me permission to act on his behalf.*"

The Claimant's work was therefore re-allocated and his vehicle and equipment were recovered.

5.30 On 11 July, the Claimant submitted a grievance; he complained about the unexpected sample request at the OH appointment and raised the PPE issue again [154-6]. He specifically asked for six classes of documents to be disclosed to him; the PTW which had been issued on 21 May (the date of the 'near miss'), the Respondent's and GWR's RAMS relevant to that date, the Respondent's and GWR's report and actions following the 'near miss' and a copy of his OH referral.

5.31 On 12 July, as a result of the Claimant's refusal to provide a sample on the 9th, he was asked to attend a disciplinary investigation on the 15th [159]. He immediately indicated that he would not be attending such a meeting [159]. The following day, he sent the Respondent a letter addressed to GWR in which he claimed that RAMS had not been in place at the time of the May 'near miss' and that he had not been given a PTW. He also set out his account of the events of 9 June [161].

5.32 The Respondent invited him to a grievance hearing on 16 July [160], to which he responded by saying that he would not attend until he received all of the relevant paperwork (the documents identified within his grievance) [164].

5.33 The Respondent replied on 14 July [169]; it was stated that some of the documents which the Claimant had requested contained confidential and sensitive information, 'uncontrolled' copies of which would not be sent to him. He was told that the documents would nevertheless be made available to him ahead of the grievance hearing at the Devizes offices. He was also told, alternatively, that he could supply written submissions to the grievance investigation or that a video conference could be set up instead. It was suggested that the documents could have been viewed (no doubt by some form of screen share arrangement) which would have been supervised by the General Manager who would not then have been involved in the grievance hearing.

5.34 During Mr Smith's cross examination of both the Claimant and Mrs Thomas, he suggested that the perceived sensitivity relating to the documents concerned their possible use by the Claimant's father in competition with the Respondent's business. That was not a case which had been advanced in the Response, nor one which had been made out in any of the contemporaneous correspondence. It was not even a case advanced by the Respondent's witnesses themselves. There was simply no evidence to support such a suggestion. Given the nature of the documentation concerned, it was difficult for the Tribunal to understand that there was any significant commercial value in the relevant documents.

5.35 In relation to the disciplinary issue and in light of the Claimant's refusal to attend an investigatory meeting, questions were put to him in writing [172-3]. He responded the same day [178-182]. It was noteworthy that he did not challenge the Doctor's account of their interactions on 9 July, but he did say that he had not *refused* to provide a sample but, rather, that he had just not needed 'to go to the toilet'.

5.36 Later that same day, the Claimant resigned [184];

> "*I've had enough, AMXCL are withholding information from me thus not giving me a fair hearing, to be told I can look at the paperwork just before attending a grievance meeting is grossly unfair, it takes me ages to read and absorb information. Also it appears to me as you have now taken my Company vehicle and requested tools etc for jobs that are weeks away and requesting my credit card receipts you have already made up your minds on dismissing me anyway for not giving a urine sample in my medical examination, again grossly unfair as I*

wasn't advised beforehand that this would be required and I went to toilets prior to attending so was unable to give a sample."

5.37 In the Claimant's witness statement too, he said that he felt that the Respondent had decided to dismiss him in any event. That seemed to us an odd conclusion for him to have reached before he had even attended the grievance hearing or investigatory interview.

5.38 The Claimant undertook a subsequent drug/alcohol test independently on 16 July, a week after the OH appointment, with a negative result [193-6].

5.39 On 20 August, the Respondent received a solicitor's letter which contained the first indication, they said, that the Claimant had dyslexia [206-210].

6. Conclusions

6.1 The Tribunal's conclusions followed the issues and the numbering in the Case Summary [75-8].

Jurisdiction (paragraph 1)

6.2 No individual claims or complaints were said to have been out of time by the Respondent. The older allegations of breach of contract, which were said to have amounted to parts of the fundamental breach which entitled the Claimant to resign and claim constructive unfair dismissal, did not need to have been in time under ss. 95 and/or 103A as long as the resignation itself was in time.

Constructive unfair dismissal (paragraph 2); relevant legal principles

6.3 The implied term of trust and confidence was not breached merely if an employer had behaved unreasonably, although such conduct could point to such a breach evidentially. It was, however, breached if an employer participated in conduct which was calculated or likely to cause serious damage to, or destroy, that relationship (what has been referred to as the 'unvarnished *Malik* test' from the case of *BCCI-v-Malik* [1998] I AC 20). Breaches must have been serious. Parties were expected to withstand 'lesser blows' (*Croft-v-Consignia* [2002] IRLR 851). In the case of *Tullett Prebon-v-BGC* [2011] EWCA Civ 131, the Court of Appeal suggested that a tribunal should ask whether, looked at in the light of all of the circumstances objectively, the party's intention had been to refuse further performance of the contract (paragraph 27, per Kay LJ). Although intention was not an essential ingredient; an objective analysis of the likely effect was required (*Leeds Dental Team Ltd-v-Rose* [2014] IRLR 8).

6.4 It was also important to remember that there was a second consideration; there needed to have been no reasonable or proper cause for the conduct for it to have been regarded as a fundamental breach of the implied term. The danger of equating a breach of the implied term with the issue of reasonableness or the 'range or reasonable responses' test was highlighted in the case of *Bournemouth University-v-Buckland* [2010] ICR 908, CA.

6.5 The Tribunal was asked to consider whether the 8 events set out in paragraph 2.1 of the Case Summary, looked at together, could have amounted to a breach of that term as in *Lewis-v-Motorworld* [1986] ICR157. In doing so, we had to consider whether the last straw itself contributed to the breach of trust and confidence in at least some material way. It needed

to have been something more than merely trivial (*Omilaju-v-Waltham Forrest LBC* [2004] EWCA Civ 1493) but it was important to look at the case as a whole and consider whether any part of the Claimant's reason to resign had been the fundamental breaches relied upon, even if significantly less serious matters had arisen towards the end of the chain which had only partly contributed to the Claimant's decision (*Williams-v-The Governing Body of Alderman Davies Church in Wales Primary School* UKEAT/0108/19/LA).

6.6 In *Kaur-v-Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, the Court of Appeal reviewed cases on the 'last straw' doctrine and Underhill LJ formulated the following approach in relation to the Malik test;

> *"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?"*

6.7 As to the issue of causation, the breaches relied upon did not need to have been the only cause of the employee's resignation in order for the claim to succeed; *Wright-v-North Ayrshire Council [2013] UKEAT/0017/13/2706.* It was sufficient for them to have been *an* effective cause of the employee's resignation. Finally, in this case, the Respondent did not seek to advance any argument on affirmation or waiver.

Constructive unfair dismissal (paragraph 2); conclusions

6.8 We examined the breaches first (paragraph 2.1 of the issues [76]);

2.1.1 When they gave their evidence, both the Claimant and his mother had accepted the wisdom of wearing the PPE which was fire retardant and high visibility in the environments in which he had worked, but he nevertheless complained that it provided was too hot. We noted that he had only worn it for a few hours on 9 June. He did not, however, tell the Respondent that there were lighter options available if, indeed, there had been.

The 'near miss' in May had demonstrated that the Respondent's RAMS were not clear enough on PPE. There was therefore a reasonable and proper cause for the stipulations to have been issued concerning the wearing of the new, better PPE and OH did not identify any medical reason why the Claimant could not wear it;

2.1.2 The Claimant and his father complained about the issue, both before and on 9 June. He was sent to OH once the matter had been raised in connection with his health. OH reported that there was no physical reason why he could not use the PPE which have been provided and the Tribunal could not see, in those circumstances, what more a reasonable employer ought to have done.

A heat stress risk assessment, as a tool, was only discovered by Mrs Thomas after the Claimant's resignation and through her communications with the rail regulator, the ORR. It was designed as a precursor to a medical examination which the Claimant underwent in any event [226];

2.1.3 The Claimant was not personally 'threatened'. His father was told that breaches of the Respondent's policies would not be tolerated and might constitute misconduct [120]. The Tribunal appreciated why the Respondent had reasonable and proper cause for stringently enforcing the wearing of appropriate PPE in these types of working environments;

2.1.4 & 5 The Claimant did receive RAMS at Reading on 9 June. He did not receive them prior to that date at GWR sites, but that was as a result of the site owner not having required them and/or not having gone to the lengths of issuing formal PTWs. The Claimant never complained or raised it as an issue before 9 June, despite having worked on GWR sites on many occasions previously. He had never previously alleged, for example, that he had not known what to do on such sites and/or that he had felt unsafe.

The Respondent's case was that these two allegations were primarily aimed at GWR. It could not say, however, that it was GWR's responsibility to ensure that *its* employees were safe. The Respondent had that duty. If GWR were cutting corners, it needed to ensure that that ended, but that was not the nature of the Claimant's allegation;

2.1.6 This allegation was in two parts. First, the OH assessment was an agreed way forward. The Claimant himself said that his GP had told him that he would have to see OH [143].

As to the second part, the Tribunal failed to see the merit in the argument that employees ought to have been forewarned about alcohol and/or drug tests. Such warnings would have significantly undermine their purpose. The Respondent's Policy specifically stated that random tests ought to have been expected for anyone in a safety critical role;

2.1.7 & 8 The Respondent did not require the Claimant to attend Devizes. It was very clear that he was offered the opportunity to have the hearing conducted by video or by written submissions. The possibility of sharing the documents on screen before a video hearing was also offered to him. Whilst we did not accept or

understand the Respondent's position that the documents contained sensitive or confidential information, given the nature and the Claimant's right of access to them as an employee, there were lots of alternatives that might have been discussed, which simply were not explored. The Claimant reached his decision precipitously without raising issues in relation to his assimilation of the material and/or any perceived difficulties that he might have had in travelling, but we have no indication that the Respondent would not have been flexible and/or amenable to such discussions.

6.9 For all of those reasons, therefore, the Respondent was not in fundamental breach of the implied term of mutual trust and confidence as a result of the matters complained of, either individually cumulatively when considered as a course of conduct in accordance with the final straw doctrine.

6.10 The following further findings were made in relation to the other issues within paragraph 2 of the Case Summary;

2.3 The Claimant resigned, in our judgment, because he panicked. He was upset about the PPE issue, the invitation to the grievance hearing and, most importantly, the disciplinary issue. He was described by his mother as 'hot headed' during the hearing as he took an unwise, hasty decision to resign which neither of his parents had wanted him to. He resigned for those reasons, not any fundamental breach;

2.4 No positive case was advanced in that respect;

2.5 This issue was academic in light of the Tribunal's other findings and was not seriously advanced in any event;

2.6 No submissions were made on this point and they would only have been relevant if the Tribunal has reached a determination of issues relating to remedy.

<u>Public interest disclosure dismissal (paragraphs 3 & 4); relevant legal principles</u>

6.11 In accordance with the stepped approach recommended in the case of *Williams-v-Michelle Brown* UKEAT/0044/19/00, first, we had to determine whether there had been a disclosure of '*information*' or facts, which was not necessarily the same thing as a simple or bare allegation (see the cases of *Geduld-v-Cavendish-Munro* [2010] ICR 325 in light of the caution urged by the Court of Appeal in *Kilraine-v-Wandsworth BC* [2018] EWCA Civ 1346). An allegation could contain '*information*'. They were not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to '*information*' under the section. The question was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-(f) (see, further, *Simpson-v-Cantor Fitzgerald* UKEAT/0016/18). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. The issue was a matter for objective analysis, subject to an evaluative judgment by the tribunal in light of all the circumstances.

6.12 Next, we had to consider whether the disclosure indicated which obligation was in the Claimant's mind when it was made such that the Respondent was given a broad indication of what was in issue (*Western Union-v-*

Anastasiou UKEAT/0135/13/LA). A whistleblower did not have to have had the precise legal basis of the wrongdoing asserted in his mind before they were protected (*Twist DX-v-Armes* UKEAT/0030/20/JOJ). We also had to consider whether the Claimant had a reasonable belief that the information that he had disclosed had tended to show that the matters within s. 43B (1)(b) or (d) had been or were likely to have been covered at the time that any disclosure was made. To that extent, we had to assess the objective reasonableness of the Claimant's belief at the time that he held it (*Babula-v-Waltham Forest College* [2007] IRLR 3412, *Korashi-v-Abertawe University Local Health Board* [2012] IRLR 4 and *Simpson*, above). To that extent, it was a mixed objective and subjective test. 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. The test was not met simply because a risk *could* have materialised (as in *Kraus-v-Penna* [2004] IRLR 260 EAT). Further, the belief in that context had to have been a *belief* about the information, not a doubt or an uncertainty (see *Kraus* above). 'Breach of a legal obligation' under s. 43B (1)(b) was a broad category and has been held to include tortious and/or statutory duties such as defamation.

6.13 Next, we had to consider whether the disclosure had been '*in the public interest.*' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, we had to consider the objective reasonableness of the Claimant's belief at the time that he possessed it (see *Babula* and *Korashi* above). That test required us to consider his personal circumstances and ask ourselves the question; was it reasonable for him to have believed that the disclosures were made in the public interest when they were made? It was therefore a mixed objective and subjective test.

6.14 The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Normohamed* [2017] IRLR 837 was of assistance in which the Court of Appeal determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure. As to the need to tie the concept to the reasonable belief of the worker;

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest*" (per Supperstone J in the EAT, paragraph 28).

The position was to be compared with a disclosure which was made for purposes of self-interest only, as in *Parsons-v-Airplus International Ltd* UKEAT/0111/17).

6.15 Finally, we did not have to determine whether the disclosure had been made to the right class of recipient since the Respondent accepted that it had been made to the 'employer' within the meaning of section 43C (1)(a).

6.16 Since the Claimant had two years' service, we considered and applied the test in *Kuzel-v-Roche* [2008] IRLR 530, paragraphs 56-60. This was a

different case for the usual dismissal situation; we had to consider whether the matters which had caused the Claimant to resign had been caused by his disclosure. To that extent, it was similar to an analysis had the case been brought under s. 47B.

Public interest disclosure dismissal (paragraphs 3 & 4); conclusions

6.17 Our conclusions in respect of the issues in paragraph 3 [77-8] were as follows;

3.1.1 The Claimant relied upon his grievance of 11 July [154-6];

3.1.2 The email itself contained nothing more than a broad allegation [154], but the attachment, within paragraph 6, contained material which broadly related to health and safety issues on a generous reading. Certainly, in the context of the Claimant's previous emails and his father's communications, there was enough information to amount to a disclosure that broadly related to matters relating to the Claimant's health and safety;

3.1.3 & 4 The disclosure was, however, entirely personal to the Claimant himself; it concerned *his* tolerance to heat and/or *his* ability to wear the PPE which had been provided. Yet further, most of the information appears to have been fed to the Claimant by his parents, particularly his father. The context to the email was his father's reasonable beliefs about his son's health and safety, not those which he had expressed himself. The public interest test was not met here;

3.1.5 & 6 No legal obligation was identified although, as stated above, the issue within paragraph 3.1.5.2 was probably satisfied;

3.2 It was agreed that the grievance had been sent to the Claimant's 'employer';

4.1 Referring back to paragraph 2.1, the matters referred to in paragraphs 2.1.1 and 2.1.6 predated the disclosure relied upon. They could not have occurred because of it.

As to paragraphs 2.1.7 and 2.1.8, the Claimant did not resign because of the manner in which the grievance hearing was set up alone, although that had been one of his stated reasons for having done so. Causation only needed to have been proved to the extent that the resignation had been influenced by the treatment *(Harrow London Borough Council-v-Knight* [2002] UKEAT 80/0790/01). That element of the complaint may have succeeded had it not been for the problems identified above.

6.18 This complaint also, therefore, failed.

Reasonable adjustments (paragraph 5); relevant legal principles

6.19 The Respondent denied knowledge of the Claimant's disability. Ignorance itself was not a defence under Schedule 8, paragraph 20. We had to ask whether the Respondent knew or ought reasonably to have known that the Claimant was disabled. In relation to the second part of that test, we had

to consider whether, in light of *Gallop-v-Newport City Council* [2014] IRLR 211 and *Donelien-v-Liberata UK Ltd* [2018] IRLR 535, the employer could reasonably have been expected to have known of the disability. In that regard, we had to consider whether the Respondent ought reasonably to have asked more questions on the basis of what it already knew and we have had in mind Lady Smith's Judgment in the case of *Alam-v-Department for Work and Pensions* [2009] UKEAT/0242/09, paragraphs 15 – 20. If a Tribunal concluded that an employer could reasonably have made enquiries, it must also consider what the result of those enquiries would have been. In *A Ltd-v-Z* UKEAT/0273/18/BA the claimant would have concealed the true facts about her mental health condition and therefore the employer succeeded in the knowledge defence even though it had not made reasonable enquiries.

6.20 The Code suggested that "*Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person*"" (para 5.14). The Code gives an example, at paragraph 5.15, of where a sudden deterioration in an employee's time-keeping and performance and change in behaviour at work should alert an employer to the possibility that these were connected to a disability and lead the employer to explore with the worker the reason for the changes and whether difficulties are because of something arising in consequence of a disability, in this example, depression. Further, at paragraph 6.19 of the Code says: 3 "*The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend upon the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially. Example: A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements.*"

6.21 Knowledge on the part of a person employed by the Respondent was likely to be imputed to it. It will either have been actual knowledge, or knowledge which ought reasonably to have been transmitted to the appropriate person. Knowledge of disability held by an employer's agent or employee, such as an occupational health adviser or HR manager, will usually be imputed to the employer.

6.22 The phrase in Schedule 8, paragraph 20 was *con*junctive; the employer must have known about the disability *and* that the Claimant was likely to have been placed at the substantial disadvantage claimed (see *Wilcox-v-Birmingham CAB Services* [2011] EqLR 810). An employer will therefore have had the requisite knowledge if it knew of the disability (or ought reasonably to have done (*McCubbin-v-Perth and Kinross Council* UKEATS/0025/13)) and its consequences.

6.23 In dealing with the claim under ss. 20 and 21 of the Act, we bore in mind the guidance in the case of *Environment Agency-v-Rowan* [2008] IRLR 20

in relation to the correct manner that we should approach those sections. First, we had to identify whether and to what extent the Respondent had applied a provision, a criterion and/or a practice (the 'PCP'). Those words were to have been given their ordinary English meaning. They did not equate to an 'act' or 'decision'. In the context of defining a PCP, a 'practice' generally required a sense of continuum. Although it did not need to have been applied before or applied to everyone, a claimant had to demonstrate that it would have been applied or that it was capable of broad application. It was akin to an expectation which applied to other employees or was repeated (*Ahmed-v-DWP* [2022] EAT 107. A PCP connoted a state of affairs and one off, isolated acts relating to the Claimant alone were unlikely to satisfy that test unless they were capable of having had broad application (*Nottingham City Transport-v-Harvey* [2013] Eq LR 4, *Gan Menachem Hendon Ltd-v-De Groen* [2019] ICR 1023 and *Ishola-v-Transport for London* [2020] EWCA Civ 112).

6.24 In relation to the second limb of the test, it had to be remembered that a claimant needed to demonstrate that he or she was caused a substantial disadvantage when compared with those not disabled. It was not sufficient that the disadvantage was merely some disadvantage when viewed generally. It needed to have been one which was substantial when viewed in comparison with persons who were not disabled and that test was an objective one (*Copal Castings-v-Hinton* [2005] UKEAT 0903/04 and *Sheikholeslami-v-University of Edinburgh* [2018] 1090, EAT).

6.25 Further, in terms of the adjustments themselves, it was necessary for them to have been both reasonable and to have operated so as to have avoided the disadvantage. There did not have to have been a certainty that the disadvantage would have been removed or alleviated by the adjustment. A real prospect that it would have had that effect would have been sufficient (*Romec-v-Rudham* UKEAT/0067/07 and *Leeds Teaching Hospital NHS Trust-v-Foster* [2011] EqLR 1075).

6.26 We referred to the statutory Code of Practice and, specifically, paragraph 6 relating to the duty under ss. 20 and 21.

Reasonable adjustments (paragraph 5); conclusions

6.27 First, in relation to the issue of knowledge and paragraphs 5.1 and 5.4 of the issues [78], we broadly accepted the Respondent's evidence; we accepted that none of the Respondent's witnesses had known of the Claimant's disability nor was there any sufficient evidence which suggested that the Respondent reasonably ought to have known of the disability from what it already knew or ought reasonably to have known.

6.28 The Claimant's father, however, knew of his son's disability and was a manager within the business. Was that enough to impart knowledge to the Respondent more generally?

6.29 We asked Mr Smith to address that point in closing submissions. First, he submitted that there was no evidence that the Claimant's father had in fact known of his son's disability. We found that submission surprising. The Claimant's evidence contained such an indication and he was not challenged upon it. Secondly, he submitted that the management who made the decisions in the case did not know of the Claimant's disability

and that was sufficient to provide it with the defence. That submission, however, ignored the fact that the Claimant's father had owned the business prior to its acquisition by the XL Global Group in 2019 and, thereafter, he remained employed within the management structure.

6.30 In our judgment, the Respondent did have constructive knowledge of the Claimant's disability. We considered that, if a senior manager other than the Claimant's father had had that knowledge, the Respondent could not have relied upon the defence. It would have been incumbent upon that manager to inform his employer. In this case, although we found against the Claimant in respect of his assertion that his father had told others about his disability, it did not prevent the Respondent from being fixed with knowledge for the reasons given. His father *ought* to have done so.

6.31 In relation to paragraph 5.2 of the issues [78], we did not consider that paragraph 5.2.1 described a PCP as it was defined in law. There was no evidence that documents were habitually provided before grievances and, if they were, that they were sensitive and could not have been seen until the hearings themselves. This suggested that the PCP was a one-off event or occasion which had arisen as a result of the Claimant's personal request to view documents before the hearing had taken place. The matter concerned the Claimant's grievance alone and how *it* was addressed. The manner in which the Respondent approached it was not suggested to have been a universal or broad practice.

6.32 In relation to paragraph 5.3, we could accept that the Claimant's disability placed him at some disadvantage in relation to the assimilation of information from documents over a short period of time but, the documents described within the letter of 11 July were not complicated or lengthy and most of them would have been familiar to him, as Mrs Thomas accepted in her evidence. Further, we had no evidence from which we could assess the extent of any disadvantage which might have been caused as a result of his dyslexia and determine whether it would have been 'substantial' as required. Yet further and in any event, the Claimant did not actually suffer the substantial disadvantage complained of because the hearing did not take place. Without the event occurring, we did not know what might in fact have happened. The Respondent had appeared to be relatively accommodating in respect of the arrangements, but the Claimant's resignation prevented the hearing from ever taking place.

6.33 As to paragraphs 5.5 to 5.7, there was no suggestion that sufficient time would not have been provided had the Claimant waited to see what might have transpired and/or had he asked for more time, if the meeting had taken place in person or over a video conference call. He resigned the day that the offer of alternatives was put to him without exploring them. His parents had wished that he had seen the process through. The Tribunal shared that view.

6.34 For all of those reasons, the complaints were not well-founded and were dismissed.

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Employment Judge Livesey
Date 12 July 2023

Reasons sent to the Parties on 28 July 2023

For the Tribunal Office