Case No: 2602331/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr J Charlton

Respondent: John Pye and Sons Ltd

Heard at: Nottingham Employment Tribunal

On: 3, 4 and 5 July 2023

Before: Employment Judge K Welch
Mr A Saddique
Mr C Pittman

Representation
Claimant: In person
Respondent: Miss G Kennedy-Curnow, Litigation Consultant

JUDGMENT having been handed down in an oral judgment on 5 July 2023 and written reasons having been requested on 6 July 2023 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the following reasons are provided.

ANONYMISATION ORDER

Pursuant to rules 50(1) and (3)(b) of the Employment Tribunals Rules of Procedure 2013 and Art 8 of the European Convention on Human Rights it is **ORDERED** that there shall be omitted or deleted from any document entered on the Register, or which otherwise forms part of the public record, any identifying matter which is likely to lead members of the public to know the real identity of Persons A, B, C, D, E, F, G and H.

REASONS

Background

1. The claimant was employed by the respondent from 31 May 2021 until his resignation on 6 August 2021. The claimant brought a claim on 22 September 2021, following a period of ACAS early conciliation from 9 August 2021 until 20 September 2021.
2. The case had previously been case managed by Employment Judge Britton on 25 February and by Employment Judge Butler on 30 June 2022. The former Case Management Summary had provided detail on the claims being brought and the latter was to deal with a dispute over disclosure.

The proceedings

3. The hearing took place at Nottingham Employment Tribunal and all parties and their witnesses attended in person. The Tribunal was provided with an agreed bundle of documents of just over 100 pages. The claimant wished to adduce one additional document, but as the respondent accepted the point that the document made, it was unnecessary for this to be added to the bundle and it was agreed to leave the document out. The respondent wished to adduce one additional document, and there being no objection from the claimant this was added to the bundle. We were also provided with an agreed cast list.
4. It was agreed that the claimant's wife's evidence was only relevant to remedy, and that she would be called to give evidence should the claimant succeed on liability, which would be considered first.
5. We therefore heard evidence for the claimant from the claimant himself. On behalf of the respondent we heard from;
    a. Claire Haddon, Office Manager of the respondent;
    b. Nick Burke, Sales Room Manager for the respondent;

c. Sandra Hartshorn, HR Manager of the respondent; and

d. Dean Lees, Site Manager of the respondent's Derby site.

6. All of the witnesses had provided written statements which stood as their evidence in chief. The claimant's statement also referred to the Case Management Summary of Employment Judge Britton dated 4 March 2022, relating to a telephone case management hearing which had been held on 25 February 2022. He stated in his statement that "*everything else is immortalised (sic) by the previous judge that I had for the telephone preliminary hearing and following zoom call*." The claimant was given an opportunity to read the Case Management Summary and confirmed that paragraphs 5 to 20 of that summary were to stand as his evidence in addition to his statement.

7. The evidence and submissions were completed at lunch time on the second day, and the Tribunal deliberated on the case and gave its oral decision on the afternoon of the third day.

8. As stated above, it was agreed that the hearing would deal with liability first and only go on to consider remedy should the claimant succeed in any of his claims. Therefore, the issues on liability were agreed at the start of the hearing as follows:

9. It is accepted by the respondent that the claimant made the following protected disclosures:

    a. In a meeting on 21 July 2021 with Caroline Davis, Adam Cooke and Nick Burke that:

        i. Person A was involved in illegal drug taking which was continuing;

        ii. Other named individuals were involved in drug taking; and

        iii. stealing was taking place;

    b. In an email dated 27 July 2021 to the Respondent's HR officer that:

        i. the people he had named for drug use/alcohol use were still in

employment; and

ii. concerns over the safety of the new handing out system, resulting in congestion on site.

Unfair dismissal

10. Was the Claimant dismissed?

11. To the extent this is in dispute, did the respondent fail to deal with the claimant's public interest disclosures in an appropriate way by doing the following things:

    a. Appoint Person A as the claimant's supervisor;

    b. Fail to investigate the claimant's concerns over drug use and/or drug dealing at the respondent's premises;

    c. Fail to suspend the individuals he named;

    d. Fail to take action on the health & safety issue about the handing out of goods?

12. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

    a. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

    b. whether it had reasonable and proper cause for doing so.

13. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

14. If the Claimant was dismissed, what was the reason or principal reason for dismissal – i.e. what was the reason for the breach of contract? Was it that the claimant had made protected disclosures on 21 and/or 27 July 2021?

15. If so, the claimant was automatically constructively unfairly dismissed.

Detriment for making protected disclosures (section 48 Employment Rights Act 1996 ('ERA'))

16. Did the respondent do the following things:
    a. Fail to remove the supervisor Person A from supervising the claimant;
    b. Fail to suspend Person A or others he had complained about;
    c. Require the claimant to return to work before his grievance was resolved?
17. By doing so, did it subject the claimant to a detriment?
18. If so, was it done on the ground that he made a protected disclosure(s)?

Unlawful deduction from wages

19. Was the claimant entitled to be paid between 27 July 2021 and 6 August 2021?
20. What was he paid?

Application for anonymisation order

21. After the claimant's request for written reasons dated 6 July 2023, the respondent made an application for an anonymisation order for the names of the individuals against whom the claimant made allegations as part of his protected disclosures. The application cited 10 individuals who were not party to, nor witnesses at the hearing. The application stated:

"*This claim involves several allegations made against other employees relating to drug dealing, drug taking, alcohol use while working, stealing and sleeping on site. In the circumstances the Respondent respectfully requests that an order be made in accordance with Rule 50 to prohibit negative consequences for those involved and protect their right to private and family life*." It went on to say that it would be unfair to have the names of the above individuals made public when serious allegations have been made against them without findings of fact, and without their attendance and ability to comment on their innocence. The use of initials would not provide adequate protection as these individuals could be identified from their

initials due to the size of the Derby site. It also stated that "*when balancing the need for open justice with these individuals' right to a private family life the priority comes in favour of their privacy as the same justice can be achieved without the need to name them*."

22. The claimant was given the opportunity to object to the application, which he did on 20 July 2023. In his email of objection, he stated in part, "*I feel it is in the public interest to name all involved in this case to highlight the seriousness of the matter. I believe this was a travesty of justice and the judge was deliberately mislead by the respondents representative and the judge totally ignored my human rights and the health and safety at work law act*."
23. I considered the application on the papers and granted the anonymisation order for the reasons set out below.

Findings of fact

24. The respondent is an auction house which holds auctions at 7 sites. The claimant was employed as a porter in its Derby site from 31 May 2021 to 6 August 2021. His contract of employment [P59-66] provided:

"*We may deduct from your salary, or any other sums owed to you, any money owed to us by you from time to time including (but not limited to): …where your salary or expenses have been overpaid…*"

25. On 13 July 2021 there was an anonymous phone call made to the respondent identifying that drug dealing and drug taking was occurring within the respondent's Derby site.
26. It was clear and accepted by both parties that this phone call was made from the claimant's former lodger, who had been dismissed for stealing from the respondent's business some weeks prior to making the call.
27. On 14 July 2021, the respondent's HR Manager, Ms Hartshorn attended the Derby site and arranged for the drug testing of two individuals suspected of drug taking as

a result of the anonymous phone call. These tests resulted in a negative result for the supervisor, referred to as Person B, and a non-negative result for Person C, the site manager. Person C was immediately suspended whilst a laboratory confirmed the results and Person B was moved to one of the respondent's alternative sites. Person C resigned from the respondent's employment and did not return to work.

28. As a result of this action, new management took over the respondent's Derby site, namely Dean Lees, who became the interim site manager. He met with the workforce and informed them that help was needed to turn the site around and asked them to report any concerns which would be dealt with.

29. On 21 July 2021 the claimant spoke in passing to Nick Burke, a supervisor at the Derby site at the time, to say that the respondent had not got rid of all of the people involved in drug taking or drug dealing on the respondent's premises. The claimant was asked if he would agree to attend a meeting to discuss this. The claimant agreed and a meeting was arranged on the same day between the claimant, Caroline Davies, Nick Burke and Adam Cooke.

30. The claimant's evidence, which we accept, was that this took place in a meeting room, which other staff and agency workers may have seen him attend. We accept the respondent's evidence that no one was made aware of what was discussed in this meeting.

31. The meeting was classed by the respondent as an informal meeting and notes of this meeting were at pages 68-69 of the bundle. The notes recorded that there was a "*lot of witnessing of Alcohol and Drugs use on Site at Derby led by [Person A] including cocaine etc*." The claimant could not give specific dates and/or times of when these incidents of drug dealing and/or drug use were taking place, since it was an ongoing problem. The drug dealing took place in a part of the respondent's site where there was no CCTV footage available to investigate further.

32. During the meeting, the claimant raised concerns about the following employees/

agency workers:

a. Person A as being the drug dealer and taking drugs himself whilst at work;

b. Person C and Person B, who had already been tested for drug use on 14 July 2021 and had been suspended or moved from the respondent's site;

c. Person D who had asked for "tick" i.e. credit, which the claimant assumed was for drugs, although could not say for certain that this was the case;

d. Person E had been allowed to sleep on site;

e. Two other employees had been dismissed "*over alcohol*" although one of them, referred to as 'Smurf', who could not be identified by either the claimant or the respondent, had been reinstated the next day, although no specific complaints were made about these individuals; and

f. Person F, who the claimant believed was intending to steal from the respondent, as he had been videoed changing auction Lot numbers under the table, although the claimant accepted in cross-examination that this could have been for legitimate reasons.

33. The claimant gave evidence that the notes of the meeting were not accurate and did not capture all of the complaints he made about his colleagues, including that he raised concerns over two further colleagues, Person G and Person H, for drug taking and alcohol use. We accept the respondent's evidence that these individuals were not referred to in the meeting itself, although we accept that the claimant believed that he had mentioned them. We are satisfied that, whilst the notes are not word for word, they reflect the main topics which were discussed. There would have been no reason for the respondent to omit the further allegations from the

notes of the meeting and accept Mr Burke's evidence that these were not raised by the claimant during the meeting.

34. It is accepted that the claimant had raised protected disclosures in the meeting.

35. Following the meeting, the claimant went back to his usual work. His evidence was that he worked under the supervision of Person A for the rest of the day and the following day until Person A went on holiday, which turned out to be Person A's last day of working with the claimant, being 23 July 2021. The claimant also worked with some of the individuals against whom he had raised complaints. His evidence was that none of his colleagues treated him differently following his disclosures made during the meeting and prior to his departure from site, which supports the respondent's contention that no one was made aware of the contents of the meeting on 21 July.

36. The claimant's belief was that Person A had been made his supervisor at some point, and in evidence, suggested that the former site manager, Person C, had allowed Person A to take on supervisory responsibilities. The respondent's evidence was that Person A, as agency staff and not an employee of the respondent, had not, and would not have been promoted to a supervisor role. The only supervisors were clearly identified by Mr Burke in his evidence and this did not include Person A.

37. We do not consider that Person A was ever promoted to the position of supervisor, although he may himself have taken on some of the responsibilities associated with that role. We do not accept that the respondent viewed Person A as superior to the claimant, in fact we find the reverse to be the case, since the claimant was an employee of the respondent's and Person A was an agency worker.

38. The claimant continued working without incident until 27 July 2021.

39. As stated above, Person A went on holiday from 23 July 2021, and did not return to work at the respondent's premises, since his engagement as an agency worker was

terminated by the respondent, as they did not want him back on site. Unfortunately, the fact of Person A's departure was not communicated to the claimant.

40. On 27 July 2021 the claimant attended work as normal. There was an auction that day and so customers were on site to collect their purchased items, which resulted in a very busy working environment. Additionally, the respondent had introduced a new double-checking system, which caused additional congestion with collections taking longer to process. This resulted in a bottleneck of people on site queuing to collect their items in the area where cars and other lorries were parked or were moving, which concerned the claimant. The claimant considered this to be a genuine health & safety risk to the public and members of staff working on site.
41. The claimant was visibly upset by what was happening and decided to leave site. He encountered Claire Haddon in the staff room before leaving and told her that he was leaving site and could not continue. He said, "*it's chaos*" and "*I'm done*" but did not elaborate on the reasons for this. Ms Haddon asked the claimant if he had spoken to anyone about his concerns and the claimant replied that he had not.
42. The claimant's evidence was that he had spoken to another porter about his reasons for leaving site, but there was no supporting evidence of this and we accept Ms Haddon's evidence that the claimant confirmed that he had not spoken to anyone before leaving, but can understand that he was upset at the time. Also, Mr Lees' evidence confirmed that the other porter the claimant referred to had been to see him about the congestion and told him that the claimant had been upset and left the premises, but that the claimant had not told him the specific reason for doing so.
43. Mr Lees, on being told that there was congestion and "*loads of people*", arranged for a second roller shutter to be opened, to relieve the bottleneck of people around the one roller shutter, until the number of people queuing had died down, when it would revert to one roller shutter for collections.
44. The claimant sent an email on 27 July 2021 [P70] to the respondent's HR Officer,

Ms Hartshorn. This referred to his meeting on 21 July 2021 and the disclosures he had made, and that, "*not much is being listened to it seems*." He mentioned the new system of handing out goods to customers causing what he termed, "*a health & safety nightmare*". Finally, he mentioned that Person E had an electronic tag on his ankle, despite a requirement for employees to have a DBS check carried out.

45. The respondent accepted that this email made protected disclosures to the respondent.

46. Ms Hartshorn responded the same day [P71] to say that she took his allegations very seriously and would liaise with Caroline Davies who had taken the minutes of the meeting and look into his concerns. Also, that she had raised his concerns over the health & safety issue with the interim site manager (Mr Lees) and the respondent's H&S manager, and that remedial actions would be taken.

47. Ms Hartshorn confirmed that she would not discuss personal matters concerning other colleagues (which we assume to be Person E). Finally, she asked whether his departure from site was authorised by the claimant's manager and reminded him of the need to do so in accordance with the respondent's attendance policy.

48. Ms Hartshorn had contacted Dean Lees by telephone on 27 July 2021, and he confirmed that a second roller shutter had been opened to alleviate some of the congestion on site whilst collection was taking place. She also referred the matter to the respondent's H&S manager.

49. The claimant replied the same day at approximately 11pm [P72] to say that he did not feel able to return to work until the issues he had raised had been fully investigated, and that he needed to take further advice from the Citizens Advice Bureau and ACAS.

50. Ms Hartshorn obtained a copy of the notes of the meeting on 28 July 2021. She found that 5 of the people named by the claimant had already left the respondent's business. Of the 4 remaining, she did not feel able to action the allegations about

Person F (intending to steal) or Person E (sleeping on site). She also considered that both Person A and Person D should have their agency contracts terminated as a precaution.

51. The claimant sent a further email titled, "Formal Grievance" on 29 July 2021 [P73] which referred to the "*poor reply*" from Ms Hartshorn and confirmed that he wished to raise a formal grievance having whistleblown about people committing crimes on the respondent's premises. The claimant asked how it could be right to put someone who he had whistleblown about in charge of him. He confirmed in evidence that he was referring to Person A. Although by this time, Person A had not worked with the claimant since 23 July 2021. This email did not raise concerns over the health & safety issue and why he had left the site on 27 July.
52. The grievance was acknowledged by Ms Hartshorn [P74], who confirmed that Mr James had been appointed to hear the claimant's grievance and would be in touch on his return from holiday on 2 August.
53. Following the claimant's email to Mr James on 3 August querying when the hearing would take place, the claimant was told by email that day that it would take place on 5 August [P76]. This email confirmed that the claimant was currently on unpaid leave but was "*free to return to work prior to this meeting and remain at work whilst I conduct an investigation following our meeting*."
54. There was further email correspondence between the claimant and Mr James relating to whether he should be paid for the days following 27 July when he had left work. The claimant's position was that he should be paid for those days, and the respondent's position was that he was on unpaid leave.
55. The claimant was invited to a grievance meeting by email attaching a letter dated 3 August 2021 [P82-83]. The hearing was to be held via zoom on 5 August 2021 at 10am.
56. The claimant was unable to attend the hearing and emailed at 11.07am on 5 August

2021 [P84] to say that he did not know that he had to download zoom and that it was downloading at the time of the meeting. He also asked if there was "*even any point having this meeting as [the respondent had] already pointed out that what [the claimant had previously] told [the respondent] does not change [the respondent's] position*." He went on to state that he would seek further advice and would contact the respondent once he had done so.

57. Mr James replied at 11.36am [P85] saying that the claimant was absent without authorisation, having made a choice not to work, that the grievance would be heard at 2pm that day and that a new zoom link would be sent to the claimant.

58. The claimant did not respond to that email and did not attend the grievance hearing. A letter was sent to the claimant by email [P86] on 5 August 2021 which stated that as the claimant had been absent since 27 July and the respondent had not "*received a legitimate reason to explain [his] absence",* the respondent now considered the claimant to be "*AWOL*" and that, unless he returned to work or provided a legitimate reason to explain his absence by the end of 9 August 2021, they would have "*no option but to assume you have abandoned your employment and resigned from the business*".

59. The claimant then sent a further email at 5.27pm [P87], which stated that he considered this to be victimisation for his whistleblowing and reiterating the point in his previous email that he would contact Mr James as soon as he had been able to speak with ACAS.

60. Later that day the claimant emailed Mr Pye, the Managing Director of the respondent [P88]. He referenced his complaints about colleagues' drug dealing, drug taking, being under the influence of alcohol at work, theft and fraud. He also referred to an "*accident waiting to happen*" caused by the new handout system. He asked how he could return to work when the people he had whistleblown against were still there and had been put in charge of him.

61. Mr James replied to the claimant's email [P89] on 6 August. It did not provide any explanation of what had been done about the claimant's complaints raised in the meeting on 21 July 2021, but did confirm what had happened with the claimant's health & safety complaint about the new handout system. The claimant was told that he had failed to attend the grievance hearing and the re-arranged hearing and no reasonable reason for missing them was given prior to those meetings. In the letter, the claimant was again told that unless he could provide an explanation of his absence, which the respondent considered to be reasonable and legitimate, they would have no option but to assume that he had "*abandoned his employment and resigned from the business*".
62. The claimant resigned on 6 August 2021 with immediate effect by email [P90] to Mr Pye. His resignation confirmed that he was to claim constructive dismissal, breach of contract, failure of duty of care and victimisation.
63. The respondent accepted his resignation by letter of the same date [P93].
64. Also on this date, Person D had his assignment as an agency worker with the respondent terminated.
65. The claimant had been paid for the month of July 2021, despite not working from 27 July. He had not worked at all in August 2021 prior to his resignation. Therefore, his final payslip for August provided no pay for August (although it was set out as a payment and then a deduction) and amounts for holiday pay from which a deduction was made for the overpayment of salary made in July.

Submissions

66. Both parties were given the opportunity to address the panel orally.

<u>The respondent's submissions</u>

67. The respondent provided a written closing submission and answered queries on this but did not address us further. The respondent's written submission included a statement of the law as regards whistleblowing detriment and automatic unfair

dismissal for having made protected disclosures. It also stated that Person A was never in the position of supervisor over the claimant, and this could not therefore amount to a detriment. The claimant had contradicted himself on a number of occasions about Person A's supervision of him. If he had supervised or controlled the claimant, the respondent was not aware of this, and this was not done because the claimant had whistleblown.

68. Appropriate action had been taken by the respondent against all of the individuals the claimant named in his whistleblowing meeting on 21 July 2021. Whilst the claimant continued to work with Person A following the meeting, this was only for 1.5 days and the claimant confirmed that he was not treated differently by his colleagues following the meeting. Even if there was a detriment, it was not because of the disclosures made, but rather that there was insufficient evidence against some of the staff members. The claimant did not make disclosures relating to Person G or Person H until the preliminary hearing and when agreeing the cast list with the respondent.

69. The respondent provided a safe environment for the claimant following his disclosures. There was no evidence to suggest that the individuals against whom the claimant made complaints were made aware of his complaints. The claimant was able to work between 21 and 27 July 2021. The claimant was asked to return to work and was informed that he was on unpaid leave, but was not threatened with disciplinary action for his non-attendance. If he was required to work, it was because he was absent from work without legitimate reason and not for his disclosures.

70. There was no fundamental breach of the claimant's contract to give rise to a constructive dismissal claim. The claimant alleges that the fundamental breach was the respondent's failure to deal with the public interest disclosures in an appropriate manner. The claimant resigned because he thought that the respondent had failed to deal with matters, which is different from the respondent actually failing to deal

with them. Had the claimant attended the grievance hearings, he would have been informed what the respondent had done. His resignation was based on a presumption of breach rather than an actual breach.

71. There had been no unlawful deductions from wages. The respondent was entitled to deduct the wages paid for the entire month of July, which included payment following his departure from site on 27 July 2021.

The claimant's submissions

72. The claimant provided the panel with two screenshots referring to whistleblowing protection and retaliation for having whistleblown. He also addressed us orally.
73. The claimant referred us to invoices for the agency workers [P97-98], which, in his view, showed that Person A and Person D had been employed longer than the respondent had stated in evidence.
74. He read out part of a blog from DAS Law and had provided us with a screen shot of this. This stated that if an employee felt that their place of work was unsafe, they would be protected in taking certain measures. An example of this could be refusing to attend work. The Law is there to protect employees and their safety, and not to subject them to a detriment to having taken such steps. If an employee had been treated unfairly, had been dismissed or had chosen to resign, they may have a claim against their employer under ERA.
75. There were inconsistencies in Mr Burke's evidence, including that he asked the claimant to attend a meeting on 21 July and he could recall saying that individuals had to be caught red handed.
76. The claimant referred to Northwhistle.com webpage regarding whistleblower retaliation. This referred to the burden of proof being reversed.
77. The claimant relied upon the email to Mr Pye [P88] as evidence of his whistleblowing allegations and that the letters at pages 84-87 had changed to '*AWOL'* from '*unpaid leave'*.

78. To the extent that any issue mentioned by either party is not referred to, that should not be taken as any indication that we have not considered the issue, but rather that the submissions set out above are a summary, rather than a repeat of the full submissions made by each representative.

Law

79. Section 95 Employment Rights Act 1996 ('ERA') provides: "*Circumstances in which an employee is dismissed*

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if)— …

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

80. In the leading case in the area of constructive unfair dismissal, Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: '*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*'.

81. A breach of the implied term of trust and confidence can be caused by one act or by the cumulative effect of a number of acts or a course of conduct. A last straw incident which triggers the resignation must contribute something to the breach of trust and confidence, but need not amount to a breach of contract itself.

82. There is no need for there to be proximity in time or in nature between the last straw and previous acts.

83. Any breach of the implied term is a fundamental breach since it necessarily goes to the root of the contract.

84. A dismissal is 'automatically' unfair if the reason or principal reason is that the person dismissed has made a protected disclosure. Section 103A of the ERA provides that "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure*."

85. In a complaint under section 103A of the ERA an employee does not need to have two years' continuous employment. Where an employee does not have two years' service however, the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair one lies with the employee.

Detriment for making Public Interest Disclosure

86. Section 47B ERA provides the protection for workers who have made protected disclosures from being subjected to detriments. It provides: "*47B Protected disclosures*

(1) 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."

87. The burden of proof in detriment claims is set out in section 48(2) of the ERA: "*On a complaint under subsection … (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done*."

88. The concept of 'detriment' is very wide, and a detriment can exist if a reasonable worker would or might take the view that the action of the employer was, in all the circumstances, to his detriment. 'Detriment' can include general unfavourable treatment and there is no test of severity that the Tribunal must apply.

89. However, there must be a causal link between the detriment and the fact that the worker made a protected disclosure. The provisions of section 48(2) of the ERA

mean that, once a claimant shows that there was a protected disclosure, and a detriment which the respondent subjected the claimant to, the burden shifts to the respondent to show that the worker was not subjected to the detriment on the ground that he made the protected disclosure.

90. Tribunals can draw inferences as to the motivation of the person subjecting the worker to a detriment.

91. The claimant makes a claim for unlawful deductions from wages. The protection is given in section 13 ERA:

"*13 Right not to suffer unauthorised deductions*

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or …

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion."

92. Rule 50 of the Employment Tribunal Rules of Procedure 2013 provide:

"50 Privacy and restrictions on disclosure

(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include…

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;"

93. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

"*Article 6 Right to a fair trial*

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

94. *"Article 8 Right to respect for private and family life*

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as it in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

95. "*Article 10 Freedom of Expression*

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

(2)*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*."

96. These rights were incorporated into UK law by the Human Rights Act 1998.

97. Guidance on determining applications for orders derogating from the open justice principle was given in the EAT case of Frewer v Google UK Limited and others [2022] EAT 34. This case quoted Simler J (President) in the case of Fallows v

News Group Newspapers [2016] ICR 801 in saying how such applications should be determined by the Employment Tribunal:

"*48 The authorities to which both I and the employment judge were referred, including In re Guardian News and Media Ltd [2010] 2 AC 697, A v British Broadcasting Corpn (Secretary of State for the Home Department intervening) [2015] AC588, In re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593 and Global Torch Ltd v Apex Global Management Ltd [2013] 1 WLR 2993, emphasise the following points of relevance to this appeal:*

(i) That the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice.

(ii) Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, courts and tribunals should credit the public with the ability to understand that unproven allegations are no more than that. Where such a case proceeds to judgment, courts and tribunals can mitigate the risk of misunderstanding by making clear that they have not adjudicated on the truth or otherwise of the damaging allegation.

(iii) The open justice principle is grounded in the public interest, irrespective of any particular public interest the facts of the case give rise to. It is no answer therefore for a party seeking restrictions on publication in an employment case to contend that the employment tribunal proceedings are essentially private and of no public interest accordingly.

(iv) It is an aspect of open justice and freedom of expression more generally that courts respect not only the substance of ideas and information but also the form in which they are conveyed. …

49 As for the balancing exercise itself, Lord Steyn described the exercise to be conducted in In re S (A Child), para 17 as follows: "What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test."

Conclusion

98. In coming to our conclusions, we carefully considered the evidence of all of the parties, the documents before us and the submissions made. Our conclusions were made unanimously.

99. We note that the respondent accepts that the claimant made protected disclosures both during the meeting on 21 July 2021 and in his email on 27 July 2021. Therefore, we need to go on to consider whether the reason or principal reason for his constructive dismissal was that he made protected disclosures, and separately whether he was subjected to detriments on the ground that he had done so.

100. Considering firstly the constructive unfair dismissal claim, the claimant relied upon the failure of the respondent to deal with his public interest disclosures in an appropriate way. In particular, that the respondent:

    a. appointed Person A as the claimant's supervisor;
    b. failed to investigate the claimant's concerns over drug use and/or drug dealing at the respondent's premises;
    c. failed to suspend the individuals he complained about; and/or
    d. failed to take action on the H&S issue he raised about the handout procedures.

101. We do not accept that Person A was the claimant's supervisor, and particularly do not accept that he was appointed or put in charge of the claimant following the claimant's meeting on 21 July 2021.

102. Person A worked alongside the claimant from 21 to 23 July 2021, although not in any supervisory capacity. Whilst Person A may have taken on responsibility for some supervisory roles during this time, it was clear that this was not under the instruction or knowledge of the respondent.

103. The respondent did investigate the concerns raised by the claimant, as far as it was able to. The concerns about drug dealing/ drug taking could not be verified by CCTV footage, due to the location of the activities which took place. The claimant was unable to give specific dates and times of these incidents, and we recognise that it would be difficult to take action against employees with employment protection without having clear evidence of misconduct.

104. However, what the respondent did do, was remove Person A from site following his holiday such that he did not work for the respondent after 23 July 2021. We note that this was not immediately actioned (i.e. immediately following the meeting on 21 July 2021), and that the claimant was not told of his removal, but accept that this may have been discussed with him had he attended his grievance meeting.

105. We accept that consideration was given by the respondent, namely Ms Hartshorn on 28 July 2021, as to what action could be taken regarding all of the allegations made by the claimant in his meeting on 21 July 2021.

106. We accept that the respondent considered that it was not appropriate to discipline Person E for sleeping on site, as it was thought this may have been authorised by the former site manager, Person C, who had, by then, resigned following his non-negative drug test.

107. Person F, who the claimant alleged was intending to steal from the respondent, was to be monitored, and Person D had his agency work terminated on 6 August

2021.

108. We do not accept that the respondent failed to take action about the claimant's health & safety concerns relating to the new handout system. On raising this, Ms Hartshorn immediately contacted the respondent's H&S manager and the interim site manager, Dean Lees. He confirmed that some remedial action had already been taken, namely the opening of the second roller shutter.

109. On balance, we consider that the respondent took appropriate action in light of the claimant's public interest disclosures, which an employer acting reasonably may have taken in these circumstances.

110. We have to consider whether the respondent failed to deal with the public interest disclosures and/or treated the claimant in the way he alleges in the list of issues, such as to amount to a fundamental breach of the implied term of trust and confidence. We do not consider that the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. It took what action it could and had reasonable and proper cause for doing what it did.

111. We therefore do not find that there had been a fundamental breach of the claimant's contract of employment, such as to justify him resigning and claiming constructive unfair dismissal.

112. We accept that the claimant resigned due to his perception that the respondent had failed to properly deal with his public interest disclosures. This may have been because he was unaware of what action had been taken by the respondent. The respondent may well have intended to inform the claimant about what had been done during the grievance hearings, but these did not take place, and the claimant was therefore unaware of the full extent of the actions carried out by the respondent. Earlier and/or clearer communication between the parties may have resolved the issues between them, however, we have to consider whether the respondent was

in fundamental breach of contract, and we do not find that to be the case.

113. However, even if we were to find that there had been a fundamental breach of contract by the respondent, the reason or principal reason for any such alleged breach was not that the claimant made protected disclosures. There was no causal link between the alleged breaches relied upon by the claimant and his protected disclosures. Therefore, his constructive automatic unfair dismissal claim for making protected disclosures must fail.

114. Turning to the claim for being subjected to detriments for having made protected disclosures, we will deal with each alleged detriment separately.

115. Firstly, we do not accept that Person A was appointed as the claimant's supervisor following his protected disclosures. As stated above, whilst we acknowledge that Person A may have taken on some of the supervisory responsibilities, this was not in the knowledge or at the request of the respondent, and particularly, it was not following the claimant's meeting on 21 July 2021. Person A and the claimant continued working for 1.5 days following this meeting in the same way that they had prior to the meeting. This therefore cannot amount to a detriment.

116. We accept that the claimant being left to work alongside the individuals he had complained against, could amount to a detriment, in light of the wide definition given to what constitutes detriment. Therefore, failing to suspend or remove all of the individuals about whom the claimant complained is capable of amounting to a detriment.

117. We note that there was no retaliation by any of the employees or agency workers, who the claimant had complained about and with whom the claimant had to continue working, but can understand that the claimant was concerned about whether they would get to know of his complaints and this, in itself, we thought to be a detriment.

118. Being required to work prior to a grievance being heard is again capable of amounting to a detriment. The respondent did not force the claimant to work

following his departure on 27 July 2021. Rather, it confirmed that he would not be paid should he fail to return to work. However, taken in its widest sense, we accept that this could be a detriment.

119. As it was accepted that the claimant made protected disclosures, and as we have found that the claimant was subjected to two detriments, we have to consider whether the respondent has proven the reason for the detriments and whether this was on the ground that the claimant had made a protected disclosure(s).

120. Firstly, when looking at the alleged failure to suspend individuals, we accept that the respondent did remove Person A, the main culprit in respect of the drug dealing/taking with effect from 23 July 2021. We also accept that the respondent had already removed Person C and Person B at the time of the claimant's meeting on 21 July 2021. Person D was subsequently removed, although not until 6 August 2021. Person D had not been witnessed taking drugs, but asking for "tick", which the claimant assumed was for credit for drugs.

121. We further accept that the reason for the respondent failing to suspend and/or remove the other individuals the claimant complained about (i.e. Person F and Person E) were valid reasons, relating to having insufficient evidence of their misconduct.

122. In any event, as regards any failure to suspend or remove individuals about whom the claimant raised complaints against, we do not find this was motivated by the claimant's protected disclosures.

123. Turning to the requirement for the claimant to return to work prior to his grievance being investigated, we do not find that the reason for this was because he made protected disclosures. We accept the respondent's evidence that the claimant had raised concerns, which had been looked into, concerning drug dealing and/or drug taking, alleged stealing and the health and safety concern on site.

124. The claimant had worked on site from 21 to 27 July 2021 with no incident taking

place and it was the health and safety incident which caused him to leave work on 27 July 2021. This health & safety concern was looked into by the respondent and remedial action had been taken. The claimant may not have been satisfied with this remedial action, but it was never discussed with him as the claimant did not attend his grievance meetings. However, Ms Hartshorn and Mr James had provided the claimant with an emailed response to the health & safety issue he raised.

125. Therefore, as the respondent had taken action concerning all of the allegations raised by the claimant in his protected disclosures, they considered he should return to work unless he could provide a valid reason not to. As they did not consider that he had given a legitimate reason for staying away from work, they treated him initially as being on unpaid leave and then as AWOL, as set out in their emails/ letters to the claimant.

126. We do not accept that the requirement that the claimant return to work was made on the ground that he had made protected disclosures. Rather, this was because the respondent considered that he had no good reason for staying away from work and had failed to attend the grievance hearings, despite them being during working hours.

127. Therefore, the claims for detriment for having made protected disclosures fail.

128. Turning finally to the claim for unlawful deductions from wages, we note that the claimant did not work from 27 July 2021 until his resignation with immediate effect on 6 August 2021. Whilst he considers he was justified for staying away from work and feels that he should have been paid his contractual hours, we do not accept that to be the case. The claimant was not entitled to be paid for that period where work was available for him, and he chose not to work. Whilst he refers to having "contracted hours", this does not equate to having a right to be paid for hours which are not worked.

129. Therefore, in making the deductions from the claimant's salary and holiday pay

paid in August, there having been an over payment of salary in July, was not an unlawful deduction from wages.

130. The claimant's claims are therefore dismissed.

Application under Rule 50

131. Following the claimant's request for written reasons, I considered the respondent's application for anonymisation of the individuals who had been named by the claimant in his protected disclosures but had not attended as witnesses, nor were they a party to the claim. The Judgment did not include reference to two of the ten individuals for whom anonymisation was requested. I considered the application for the remaining individuals to be anonymised on the papers before me and incorporated my decision on this into the written reasons.

132. Rule 50 (2) provides that in considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression. When considering whether to make anonymity orders, three Convention rights are engaged and must be reconciled; namely Article 6, Article 8 and Article 10.

133. Firstly, I note that the requirement for open justice is of paramount importance, as stressed by the caselaw in this area. Also, that there is a need for the public/ press to know the identities of individuals cited in Tribunal claims. However, I have to balance this, together with the right to freedom of expression (article 10), against the individuals' rights to a fair trial (article 6) and their qualified right to private and family life (article 8).

134. I note that the respondent has the burden of providing clear and cogent evidence of the harm to the individuals should they be named. Whilst no evidence was provided, it is self evident that harm would be done to the individuals the respondent was seeking to protect since there would inevitably be damage to their reputation and future employment prospects should allegations about criminal activity be

published. Therefore, their right to a private and family life would potentially be breached.

135. I am concerned that, should the names or initials be used in the published Judgment, these individuals would not have had the opportunity of any kind of trial for the allegations of criminal activities (namely drug taking, theft and/or drug dealing) of which they were accused by the claimant. These individuals did not choose to bring these proceedings and were named by the claimant as part of his protected disclosures. These disclosures were accepted as having been made by the claimant and the substance of those disclosures remains part of this Judgment and within the public domain. I note the claimant's objection to the anonymisation of these individuals is to "*highlight the seriousness of the matter*", but I do not consider that the failure to name the individuals affects this in any way. The allegations remain in full in the Judgment.

136. In carrying out a balancing exercise and giving full credit to the public being able to differentiate between convictions and allegations, the reputations of the individuals concerned, would, in my view, clearly be substantially damaged by these allegations of criminal activity, together with allegations of alcohol use at work.

137. In my view, the individuals' right to family and private life outweigh the public's right to know of the identify of the people subject to unproven criminal allegations.

138. In my view, there is no need to name the individuals themselves, since the case did not turn on whether these individuals had carried out the crimes, or behaviour of which they were accused. The alleged behaviour taking place at the respondent's premises was still being reported in the Judgment. The respondent had rightly accepted that the claimant had made protected disclosures concerning these allegations.

139. I considered that in weighing up the respective rights, the intrusion into the individuals' private lives in the facts of this case meant that there should be a

derogation from the principle of open justice only in regards to their names. The facts relied upon by the claimant remain extant in the Judgment.

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Employment Judge Welch

Date of written reasons: 26 July 2023