EMPLOYMENT TRIBUNALS

Claimant: Ms W Creaney
Respondent: Sheldon Bosley Knight Ltd
Heard at: Birmingham

On: 10, 11 October 2022, 31 July, 1, 2, 3 August 2023 (and 4 August 2023 for deliberations in chambers)

Before: Employment Judge Meichen, Mrs R Pelter, Mr D Faulconbridge
Appearances:
For the claimant: Ms M Bouffe, counsel
For the respondents: Mr D Flood, counsel

JUDGMENT ON LIABILITY

1) By her email of 12 July 2020 the claimant made a protected disclosure within the meaning of s 43B Employment Rights Act 1996 and a health and safety disclosure within the meaning of s 44(1)(c) Employment Rights Act 1996.

2) The respondent did the following on the ground that the claimant made the disclosure:

a. Re- furloughing the claimant from 13 July 2020.
b. Mr Cleary's email of 28 September 2020 taking exception to the health and safety issues being raised by the claimant.
c. On or around 24 December 2020 not receiving Christmas vouchers.

3) By the above acts or failures to act the respondent subjected the claimant to detriment.

4) The above acts or failures to act were part of a series of similar acts or failures and the last of them were in time.

5) Alternatively, the above acts or failures to act were part of an act extending over a period and the end of the period was 24 December 2020 and it is therefore in time.

6) The other allegations made by the claimant fail and are dismissed.

REASONS

Introduction and the issues

1. On Sunday 12 July 2020, the claimant sent an email to Mr Mike Cleary, the Managing Director of her employer, the respondent. The claimant says that as a result, the respondent subjected her to 10 detriments.

2. The agreed issues for us to determine are as follows:

Health & safety detriment – Employment Rights Act 1996 ("ERA") section 44(1)(c)

Did the claimant bring to the respondent's attention by reasonable means circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health or safety by sending the email of 12 July 2020?

If so, did the respondent do the following things:

a. 12 July 2020 – being required to stay at home;
b. 13 July 2020 – being re-furloughed;
c. 28 September 2020 – Mr Cleary's email to the claimant taking exception to the health and safety issues being raised by the claimant;
d. 29 Oct 2020 – the attempt to vary the claimant's contractual terms;
e. 6 November 2020 – placing the claimant on furlough;
f. 21 Dec 2020 – not having a work review;
g. On/around 24 Dec 2020 – not receiving Christmas vouchers;
h. 7 January 2021 – not allowing the claimant to return to work on the premise that property inspections were not taking place;
i. 17 Feb 2021 – Advertising roles for vacancies within the company
j. 12 July 2020 to 6 April 2021 – Not allowing the claimant to return to work.

By doing so, did it subject the claimant to detriment?

If so, was it done on the grounds set out in ERA section 44(1)(c)?

Whistleblowing disclosure detriment - section 43B and section 48 ERA

Did the claimant make a qualifying protected disclosure as defined in section 43B of the Employment Rights Act 1996? The claimant relies on the email of 12 July 2020 sent to Mr Cleary.

Did she disclose information?

Did she believe the disclosure of information was made in the public interest?

Was that belief reasonable?

Did she believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered;

Was that belief reasonable?

Did the respondent do the things set out above at a to j?

By doing so, did it subject the claimant to detriment?

If so, was it done on the ground that she made a protected disclosure?

Time limits

Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 12 November 2020 may not have been brought in time.

Were the detriment complaints made within the time limit in ERA section 48? The Tribunal will decide, in relation to each alleged detriment:

When was the date of the act or failure to act complained of, bearing in mind that: where an act extends over a period, the date of the act means the last day of that period; a deliberate failure to act is treated as done when it was decided on?

Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of the act or failure to act complained of?

If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

3. The claimant had indicated at an earlier stage that she also wished to rely on s.44(e) ERA (in respect of the same factual allegations set out above). In closing submissions Ms Bouffe clarified that the claimant no longer wished to rely on that subsection.

The law

Health and safety disclosure

4. Section 44 ERA protects an employee from suffering detriment for raising a health and safety disclosure:

(1)An employee 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—
…
(c)being an employee at a place where—

(i)there was no such representative or safety committee, or

(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

5. It was agreed that the claimant was an employee at a place where there was no health and safety representative or committee.

6. There are analogous provision in s. 100 ERA protecting employees from dismissal. Section 100(c) protects employees who raise a health and safety disclosure in the same way as s.44(1)(c).

7. The question of what amounts to reasonable grounds for believing that there were circumstances harmful to health and safety for the purpose of section 100(1)(c) was considered in Kerr v Nathan's Wastesavers Ltd EAT 91/95. The EAT emphasised that not too onerous a duty of enquiry should be placed on the employee. The fact that concern might be allayed by further enquiry need not mean that the employee's concern is not reasonable. The EAT also stated that it was irrelevant whether or not the employer had acted unreasonably when considering a claim under this subsection.

8. Under Section 44(1)(c), a claimant does not have to show that his belief was one shared by his employer, or correct. It is sufficient if the employee's belief was reasonably held (Miles v. Driver and Vehicle Standards Agency (Unreported) [2023] EAT 62).

9. Mr Flood drew our attention to a passage from Harvey summarising how we should approach the question of reasonable belief. Harvey puts the matter as follows:- *"… the employee is expected to behave reasonably. They must reasonably believe that their working conditions or other circumstances are harmful or potentially harmful to health and safety. And they must raise their concerns with the employer by reasonable means. These are potentially litigious points. The employment tribunal must hold the balance between cavalier dismissiveness on the part of the employer and undue sensitivity on the part of the employee".*

Whistleblowing disclosure

10. The relevant sections of the ERA state:

43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(d) that the health or safety of any individual has been, is being or is likely to be endangered.

47B Protected disclosures

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.

11. It was agreed that the claimant made her disclosure to her employer in accordance with s. 43C ERA and so we need to consider whether the disclosure fell within s. 43B ERA and if so whether the claimant was subjected to any detriment on the ground that she made the disclosure.

12. The word 'disclosure' does not necessarily mean the revelation of information that was formerly unknown or secret. Section 43L(3) of the ERA provides that 'any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention'. Accordingly, protection is not denied simply because the information being communicated was already known to the recipient. This was confirmed by the EAT in Parsons v Airplus International Ltd EAT 0111/17.

13. The worker's reasonable belief must be that the information disclosed tends to show that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure has occurred, is occurring, or is likely to occur. In other words, the worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable — rather, the worker must establish only reasonable belief that the information tended to show the relevant failure.

14. This point was considered by the EAT in Soh v Imperial College of Science, Technology and Medicine EAT 0350/14. It was explained that there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'.

15. The EAT has stated that the test of 'belief' in section 43B establishes a low threshold. However, the reasonableness test clearly requires the belief to be based on some evidence — rumours, unfounded suspicions, uncorroborated allegations and the like will not be enough to establish a reasonable belief (Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4).

16. If the claimant reasonably believed that the information tends to show a relevant failure there can be a qualifying disclosure of information even if they were later proved wrong. This was stressed by the EAT in Darnton v University of Surrey 2003 ICR 615, EAT. The EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the tribunal.

17. In Kilraine v London Borough of Wandsworth 2018 ICR 1850, the Court of Appeal held that 'information' in the context of S.43B is capable of covering statements which might also be characterised as allegations - 'information' and 'allegation' are not mutually exclusive categories of communication. The key principle is that in order to amount to a disclosure of information for the purposes of S.43B the disclosure must convey facts.

18. In Kilraine the Court of Appeal held:

    (i) In order for a statement to be a qualifying disclosure, it had to have sufficient factual content and specificity such as it was capable of tending to show one of the matters listed in subsection (1).

    (ii) Whether that was the case was a matter for the tribunal's evaluative judgement in the light of all the facts. It was a question which was closely aligned with the other requirement of s.43B(1), namely that the worker making the disclosure should have a reasonable belief that the information they disclosed tended to show one of the listed matters. If the worker subjectively believed that the information they disclosed tended to show one of the listed matters, and their disclosure had sufficient factual content and specificity such that it was capable of tending to show that matter, it was likely that their belief would be reasonable (see paras 30-36 of judgment).

    (iii) The context in which the statement is made is crucial. The measure of whether the information disclosed could in all the circumstances reasonably have sustained the belief that the information tended to show the relevant failure is the objective element of the test which calls for the evaluative judgment of the ET. Sales LJ emphasised the need for this to be assessed in the light of all the circumstances of the case.

19. As explained by the Court of Appeal in Babula v Waltham Forest College 2007 ICR 1026 a worker does not have to prove that the facts or allegations disclosed

are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation. As long as the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is, in the tribunal's view, objectively reasonable, it does not matter that the belief subsequently turns out to be wrong, or that the facts alleged would not amount in law to the relevant failure.

Detriment

20. "Detriment" does not have a statutory definition. However in Jesudason v Alder Hay Children's NHS Foundation Trust [2020] IRLR 374 the Court of Appeal accepted that the discrimination precedents are applicable and in particular applied two general principles: (1) 'detriment' is to be given a wide interpretation; and (2) it is to be considered subjectively in relation to the particular claimant, so that there is a detriment *'if a reasonable employee might consider the relevant treatment to constitute a detriment'.*

21. In Ministry of Defence v Jeremiah 1980 ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage'.

22. As Ms Bouffe pointed out it is relevant to note that employees are protected from any detriment: there is no test of seriousness or severity and the relevant provisions could well be breached by detrimental action that seems minor to an objective observer.

Causation and the burden of proof

23. The leading authority on what is meant by the term "done on the ground that" is Fecitt and others v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372. In that case the Court of Appeal stated that: "*liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act."*

24. In Aspinall v MSI Mech Forge Ltd EAT 891/01 the EAT held that the words 'on the ground that' require a causal nexus between the fact of making a protected disclosure and the decision of the employer to subject the worker to the detriment. This mirrored the approach adopted in the context of victimisation by the House of Lords in Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065. In that case it was held that the proper approach was not to ask whether 'but for' the protected act having taken place the treatment would have occurred, but rather what, consciously or unconsciously, was the employer's reason or motive for the less favourable treatment. Where a tribunal finds a motive for the less favourable treatment, and is satisfied that this is not consciously or unconsciously related to the protected act, the less favourable treatment cannot be said to be 'by reason' of the protected act. Accordingly, there is no victimisation. The EAT in Aspinall followed the approach in Khan when concluding that, '*for there to be detriment under S.47B "on the ground that the worker has made a protected disclosure" the protected disclosure has*

to be causative in the sense of being "the real reason, the core reason, the causa causans, the motive for the treatment complained of".

25. Section 48 (2) ERA provides that *"…. it is for the employer to show the ground on which any act, or deliberate failure to act, was done".* This does not mean that once a claimant asserts that he or she has been subjected to a detriment, the respondent must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

26. In Kuzel v Roche Products Ltd [2008] ICR 799, the Court of Appeal considered the operation of the burden of proof as regards the reason for the dismissal in an unfair dismissal case brought by reference to section 103A which protects employees from dismissal for having made a protected disclosure. Mummery LJ envisaged that the tribunal will decide first whether it accepts the reason for the dismissal advanced by the employer before turning, if it does not find that reason to be proved, to consider whether the reason was the making of the protected disclosure.

27. In his judgment Lord Justice Mummery also rejected the contention that the burden of proof was on the claimant to prove that her making of protected disclosures was the reason for her dismissal. However, Mummery LJ was in agreement with the EAT that, once a tribunal has rejected the reason for dismissal advanced by the employer, it is not bound to accept the reason put forward by the claimant. He proposed a three-stage approach to S.103A claims:

    (i) First, the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely requiring the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason.

    (ii) Second, having heard the evidence of both sides, it will then be for the employment tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or reasonable inferences.

    (iii) Thirdly and finally, the tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the tribunal's satisfaction that it was its asserted reason, then it is open to the tribunal to find that the reason was as asserted by the employee.

However, this is not to say that the tribunal must accept the employee's reason. That may often be the outcome in practice, but it is not necessarily so.

28. The EAT in Osipov v International Petroleum Ltd UKEAT/0058/17/DA explained the approach to be taken to drawing inferences and the burden of proof in detriment claims is analogous to the approach set out in Kuzel. The EAT described it as follows:

"Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference: see by analogy Kuzel v. Roche Products Ltd [2008] IRLR 530 at paragraph 59 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure.

….

Mr Forshaw submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:

(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996 , the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight at paragraph 20.

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."

29. There are a number of authorities dealing with the potentially tricky situation where the employer claims that the reason for dismissal or detriment was not the protected disclosure itself but the manner in which the disclosure was made or some conduct associated with it. It is now well established that misconduct associated with a disclosure may be a potentially fair reason for dismissal or detriment separate from the disclosure itself. Mr Flood drew our attention in particular to the Court of Appeal judgment that remains the leading authority in this area. In Bolton School v Evans 2007 ICR 641 the Court of Appeal found that as the employer's principal reason for disciplining the claimant was its belief that he had, at the same time as making the disclosure, committed an act of misconduct this meant that the claim under section 103A ERA must fail, as the disclosure was not the reason for the dismissal. We agree with the respondent's submission to the effect that the principle behind this decision must apply equally to detriment claims where it is possible to draw a distinction between

detriments emanating from the protected act and detriments emanating from acts of misconduct and/or breaches of the employer's rules.

30. We should also bear in mind however that in Parsons v Airplus International Ltd EAT 0111/17 the EAT identified that there is a danger that a whistleblower may be perceived as a difficult colleague — sometimes with justification — and that *'it can be all too easy to think it is the manner of blowing the whistle that is the issue, when really it is simply the whistleblowing itself'.*

Time limits

31. Section 48 ERA provides as follows:

*(3)An employment tribunal**]** shall not consider a complaint under this section unless it is presented—*

(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4)For the purposes of subsection (3)—

(a)where an act extends over a period, the "date of the act" means the last day of that period, and

(b)a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

32. As to what is meant by "not reasonably practicable" the most important case is Palmer v Southend Council [1984] ICR 372. In that case May LJ made it clear that the issue is pre-eminently one of fact for the employment tribunal and that whether something is "reasonably practicable" is a concept which comes somewhere between whether it is reasonable and whether it is physically capable of being done. It was suggested that it means something like "reasonably feasible". May LJ outlined various matters that may be relevant for an employment tribunal to consider. Among these are the question of what the substantial cause of the failure to present the claim within time was and also whether there was any "substantial fault" on the part of the claimant.

33. Lady Smith in Asda Stores Ltd v Kauser EAT 0165/07 explained the test as follows: *'the relevant test is not simply a matter of looking at what was possible*

but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.

34. The onus of proving that presentation in time was not reasonably practicable rests on the claimant and *'That imposes a duty upon him to show precisely why it was that he did not present his complaint'* (Porter v Bandridge Ltd 1978 ICR 943*)*. Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable (Sterling v United Learning Trust EAT 0439/14*)*.

35. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, the tribunal must then go on to decide whether the claim was presented within a further reasonable period. In University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12 the EAT explained that this does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired.

36. The Tribunal may need to consider whether the respondent's alleged detriments constituted a "continuing act", i.e. an act extending over a period for the purposes of section 48(4)(a) ERA. The leading case on continuing acts is Hendricks v Metropolitan Police Commissioner [2003] IRLR 96. The effect of Hendricks is that in cases involving numerous allegations it is not necessary for an applicant to establish the existence of a 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what the applicant has to prove, in order to establish conduct extending over a period, is (a) that the incidents are linked to each other, and (b) that they are evidence of 'an ongoing situation or continuing state of affairs' (Hendricks at [52]). As the Court of Appeal stated in the same paragraph, *'The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed'.*

37. A critical distinction has to be made between a one - off decision which has continuing consequences (and is not conduct extending over a period) and a continuing act or state of affairs, where time will therefore run from the end of the period in question: Barclays Bank v Kapur [1991] IRLR 136.

38. Where an act extends over a period of time, the date on which it will be deemed to have been done for the purposes of calculating when the time limit begins to run is the last day of that period — S.48(4)(a). Where there has been a deliberate failure to act, the time limit will begin to run on the date when the deliberate failure to act was 'decided' on — S.48(4)(b). In the absence of evidence to the contrary, an employer will be taken to decide on a failure to act when it does an act inconsistent with doing the failed act. If no inconsistent act is done, then the employer will be taken to have decided on a failure to act when

the period expires within which it might reasonably have been expected to do the failed act if it was to be done — S.48(4)(b).

39. In Flynn v Warrior Square Recoveries Ltd 2014 EWCA Civ 68, CA, the Court of Appeal stressed the need for tribunals to identify with precision the act or deliberate failure to act that is alleged to have caused detriment when considering whether an act/omission extended over a period of time for the purposes of S.48(4)(a). It is a mistake in law to focus on the detriment and whether the detriment continued.

Findings of fact

40. The claimant commenced her employment with the respondent on 3 January 2006. The claimant resigned shortly before the start of the final hearing of this claim.

41. The claimant has worked for the respondent as a secretary and at the material time for the purpose of this claim she was a letting agent in the Evesham office

42. The respondent is a firm of land and property professionals. It has approximately 78 employees working across nine locations.

43. As a result of covid the claimant was placed on furlough from 25 March 2020 until 31 May 2020. A number of other letting agents were also placed on furlough including the claimant's colleague Tim Smeaton who worked from the same office as her and who was also a letting agent. Following a period of annual leave after her furlough the claimant returned to work on 8 June 2020. Mr Smeaton did not at that stage return from furlough. The claimant was clearly keen to return to work as she had been emailing the respondent on a regular basis asking to return.

44. Prior to covid a key part of the claimant's job was to perform property inspections. The demand for such inspections drastically reduced during covid and the lockdown. The reason why the claimant was brought back to work rather than Mr Smeaton was because the claimant had more experience of office work and therefore it was thought that she would be better placed as more of an "all-rounder" to come back to work.

45. In anticipation of staff returning to work during covid the respondent introduced a new workplace safety and social distancing policy. That policy set out that employees shared responsibility for achieving safe working conditions and they must take care of their own health and safety and that of others by observing applicable safety rules and instructions. The policy stipulated that employees should adhere to social distancing by maintaining a distance of at least 1 metre and 2 metres where possible between individuals. The policy also set out how visitors' entry into the office should be managed. The policy stipulated that a locked door policy should be maintained. This was in order to safely manage entry into the office so that only one visitor was allowed in at a time. The policy

also set out that signage should be displayed advising, among other things, both staff and customers to maintain a 2-metre distance.

46. When she returned to work the claimant reported to the lettings manager who was Karen Downie. The claimant found her return to work challenging. Not only was she required to do more office work than she had in the recent past been used to but the respondent was also working with a new computer system which had only recently been implemented and the claimant (along with other staff) found the move to this new way of working difficult. In an email to Mr Cleary the claimant described how she was feeling frustrated because she was carrying out new tasks that felt "alien" to her. This was a fair indicator of how difficult the claimant was finding things, but she was not alone in finding the new computer system difficult along with all the other challenges associated with working in lockdown.

47. On or around 20 June 2020 the claimant had an altercation with a colleague, Tara Doughty. Tara Doughty was the lettings operations manager in the Stratford office. She had moved to the Evesham office in order to support the move to the new computer system. As we have mentioned the claimant found the new system difficult to navigate and it seems this is what led to the altercation as the claimant was keener to use the old way of working.

48. Following the altercation Tara Doughty phoned Mike Cleary who was the managing director and he visited the office and spoke to Karen Downie, the claimant and Tara Doughty. In his discussions with Tara Doughty and Karen Downie Mr Cleary raised concerns to the effect that the claimant had not got to grips with working in the office as well as had been hoped. Mr Cleary was concerned that the claimant was not the all-rounder that he had thought she was. However Mr Cleary did not make any drastic decisions as to what to do about the situation. In particular he did not decide to re-furlough the claimant. He did not communicate to anybody that he was planning to re-furlough the claimant. It seems that following these discussions Mr Cleary elected to persevere with the situation and support the claimant. This is demonstrated by his email to the claimant on 20 June when he said *"We will get there and please learn [lean] on Tara for help…".*

49. Although Mr Cleary had concerns about the claimant it is also worth pointing out that this was a difficult time for everybody and the claimant was not the only person who was struggling. The staff who had returned to work following the initial period of furlough were faced with operating a new computer system at a time when they had to deal with the effects of pandemic. They were also severely understaffed and those who returned to work were extremely busy. The tribunal got an impression as to how difficult it was for everybody from Karen Downie's evidence to us and also an email which the claimant sent to Mr Cleary on 23 June. In that email the claimant described how Karen Downie had had a "meltdown" as she had been trying to hold things together but was severely overworked and struggling. In her evidence Karen Downie disagreed with the term meltdown but she was frank about how hard she had found the situation. In her email the claimant asked for Mr Cleary to come over and

provide some help as the office did not have sufficient resources. Therefore Mr Cleary was aware that the office needed additional support.

50. As a result of this situation it was decided to bring back Jo Rowland to support in the Evesham office. Before Jo Rowland returned it was intended that she would receive some intensive training on the new computer system. On 9 July 2020 Jo Rowland was booked in for a week of training in a different office to commence on 13 July and following that she would return to the Evesham office. Even by this stage the respondent had not made any plan to re-furlough the claimant or replace her with Jo Rowland. The respondent was instead continuing to monitor the situation. As we have pointed out it was clear that the staff as a whole in the Evesham office were under resourced, struggling and needed help. At the time he decided to bring back Jo Rowland Mr Cleary did not communicate to anybody that he planned to replace the claimant with her and re-furlough the claimant. The tribunal finds this is simply because he had not made any decision to do so. We find that Jo Rowland was brought back to provide the additional support which Mr Cleary had been made aware was required.

51. On Sunday 12 July 2020 at 5:58 PM the claimant sent Mr Cleary an email with the subject “safety in the workplace”. The body of the email read as follows:

Hi Mike

Sorry to disturb you on a Sunday, but yesterday I was feeling quite unwell, I doubt it is corona related, but spent the day in bed and all through the night.

In between dozing on and off feeling quite ill it made me think about what will happen if I do end up with the virus! I am being honest with you now, I am scared of getting it. We do not know enough about each person coming into the office to know where they have been and if they have somehow contracted the virus

I do not think our office is kitted out to prevent someone coming into the office and spreading the virus. Everywhere you go, whether it be the supermarket or the newly opened hairdressers etc, they have some kind of shielding in place.

My desk is now right by the front door and people come in and stand far too close as there are no guidelines in place to help customers understand what is acceptable under the current circumstances! taking away chairs from our desks is not enough, people come in and stand too close. I don't want to be awkward, but I do feel we need some kind of shielding.

On Friday afternoon one of our tenants came in and was standing right by my side showing me stuff on her phone talking and breathing all over me, regardless of my comments about safe distancing - there are just no guidelines in place. Please help. I really want to stay in work, but I also want to feel safe. Yesterday was a wake up call for me when I felt so ill.

Thanks and I do hope you don't think I am being difficult, I just want to feel safe, this situation does scare me.

52. Mr Cleary responded to that email at 6:05 PM. He said as follows:

Hi Wendy

Please stay at home tomorrow. I will update you but I cannot believe you have looked at a tenant's phone in the circumstances you describe.

Keep safe
Mike

53. At 6:21 PM the claimant wrote back to Mr Cleary:

Hi Mike

I really do not want to stay at home. I want to be there doing what I can. It is just that without guidelines in place we are just getting on with the job and not giving enough thought to the current situation. I just like to help people in every way I can and what we are going through just now is so awful and bizarre.

It would be far easier to have something in place that gives customers the correct way to enter the office and allow us to do our job in a safe manner. After all, we all want the same thing, to have the business do well and get through this, but in a safe environment. I do hope you understand.

Thanks
Wendy

54. Mr Cleary responded to that as follows:

Wendy
Re read all my emails please
I will be in touch, stay at home tomorrow
Mike

55. The claimant attended the office following morning on Monday 13 July at 7 am to collect some work so that she could work from home. The claimant explained that in an email sent to Mr Cleary at 9:15 AM. The claimant also explained that she had read the health and safety policy but a lot of the advice was proving difficult to do. The claimant requested plastic shielding to be fitted around the desks and some indicators outside the door and on the floor to help guide visitors as to what is acceptable.

56. At 1:31 PM on Monday 13 July Mr Cleary wrote to the claimant as follows:

Hi Wendy

I've now caught up with Tara and so am clearer on what we need done work-wise this week. Recognising that the new system has not been properly embedded in to the working practices of the Evesham office, last week we decided to provide Jo intensive training in Leamington office this week in advance of her return. It was always the plan that Tara would provide this to Karen after her holiday too. When I made these decisions it was in all likelihood that, if work volumes didn't increase, that we would need to re-furlough you. Having now looked at what is booked for this week and the current staffing capacity, I've decided that we should re-furlough you as of tonight please Wendy.

I appreciate you may think that this could be because of our recent exchanges over Guidelines, but please be assured that this isn't the case, certain actions were commenced early last week.

I would however urge you to consider the guidelines we've issued and the actions you've taken (or not) to comply with them. I hope you haven't got the virus and endangered yourself, the team and your family by looking at the phone of a tenant who was breathing all over you last Friday.

Perhaps you'd return to the office tomorrow and we will be in touch when demand warrants a return to work?

Thanks for helping out over the last few weeks

57. Forms were then quickly sent out to the claimant to obtain her agreement to being re-furloughed and the claimant was re-furloughed with effect from Tuesday, 14 July 2020.

58. As Ms Bouffe pertinently observed during the hearing Mr Cleary did not seek to address or even engage with the health and safety matters that the claimant raised. Mr Cleary was in fact dismissive to the point of ignoring the health and safety concerns the claimant had raised. Instead he focused entirely on his suggestion that the claimant had somehow been at fault in what she was reporting in her email on 12 July and had breached the policy that had been put in place. Mr Cleary emphasised to us that he viewed the claimant as having been at fault for the matters she raised in her email.

59. We do not think that the claimant's email of 12 July does indicate that she was at fault or had failed to follow guidelines or the policy. What the claimant reports is that visitors to the office are standing too close and therefore it would assist to have shielding or signs or guidelines on the floor to improve the safety of the office. As we have recorded the safety policy which the respondent had put in place did anticipate that visitors would still come into the office. As regards the specific occasion of a tenant coming in and breathing all over the claimant the claimant made it clear that it was the tenant who had breached social distancing by standing by her side and that her comments to the tenant about social distancing had been ignored. This was the main reason why the claimant was

saying that shielding or signage or guidelines on the floor would help to comply with social distancing and the respondent's policy.

60. We should also note at this juncture that when she returned to the office early in the morning of 13 July the claimant took some pictures. Those pictures clearly demonstrate that there was no shielding around the desks in the Evesham office, there was no markings on the floor to indicate where people should stand in order to maintain social distancing and there was no signage around the office reminding employees or customers as to their responsibilities in particular around social distancing.

61. On 21 August 2020 the claimant wrote to Kath Cleary. Kath Cleary is the respondent's HR consultant and she is also the wife of Mike Cleary. In her email the claimant pointed out that she raised health and safety issues prior to being re-furloughed but had not received any response other than being asked to read the company's health and safety policy. The claimant reminded the respondent that the specific point she was requesting was whether plastic sheeting could be fitted along with appropriate signage in order to ensure appropriate social distancing. The claimant said she would welcome any updates and would be willing to discuss her concerns if that was considered the best way forward.

62. On 27 August the claimant received a response from Kath Cleary to say that she would aim to respond in the next couple of weeks. Given that the claimant's concern had been raised nearly 7 weeks earlier on 12 July it is unclear to us why a further couple of weeks would be needed to respond. This was a straightforward concern and even allowing for all the difficulties associated with the pandemic it was reasonable for the claimant to expect a response within a shorter timeframe.

63. The claimant did not receive a response within the next couple of weeks as Kath Cleary had indicated. She wrote again to Kath Cleary on 18 September again pointing out that her concerns had not been answered. The claimant asked for any risk assessment that may have been carried out and she explained that she was seeking peace of mind. She said she was eager to return to work but would feel far more reassured if she felt appropriate measures had been put in place to keep everyone safe.

64. The claimant received no response to her email of 18 September.

65. The claimant wrote again to Kath Cleary copying in Mr Cleary on 24 September and again chased a response.

66. This brought about an intemperate response from Mike Cleary. In his email to the claimant on 28 September Mr Cleary said that he was taken aback and had taken absolute exception to the claimant's email of 18 September. Mr Cleary's particular objection was that the claimant was chasing any further updates on health and safety within the office and when and whether any decisions had been made regarding making the office a safe environment to work in. Mr

Cleary summarised the respondent's approach to safety during the pandemic and he referred back to the claimant's email of 12 July. The clear implication from Mr Cleary's email was that the respondent was doing the right thing regarding following guidelines but the claimant's email of 12 July indicated that she had not. Once again Mr Cleary failed to respond to or engage with the claimant's clear concerns about health and safety and the specific requests that she had made, such as plastic shielding.

67. In his evidence to the tribunal Mr Cleary suggested that his intemperate response to the claimant was done because the claimant had been "haranguing" him and Mrs Cleary. We find that the claimant was not haranguing either Mr Cleary or Mrs Cleary. The claimant was entirely reasonably seeking a response to her clear health and safety concerns and requests that she had raised over 2 ½ months ago. To put it bluntly the claimant's concerns were being ignored by Mr Cleary and she had been stonewalled by Mrs Cleary. If anything it was the claimant who was entitled to feel frustrated (by the respondent's lack of engagement with her concerns), and not Mr Cleary. We find that the tone of Mr Cleary's email indicates his ongoing hostility towards the claimant as a result of her email sent on 12 July. We do not accept that this hostility arose because of a belief that the claimant's email showed she had not followed guidelines or that the claimant was haranguing. As we have explained a fair reading of the email does not show that the claimant had failed to follow guidelines and it is incorrect to suggest that the claimant was haranguing in light of the lack of response to her health and safety concerns raised 2 ½ months previously.

68. On 13 October 2020 Mr Cleary met with the claimant and Tim Smeaton to discuss returning to work on a job share basis. This would have been under the new job support scheme which was the next phase in the government's plans for employees following furlough. The respondent's intention as communicated to both the claimant and Mr Smeaton was that they would each work half a month for the next three months and then the situation would be reviewed. Under the job support scheme the claimant (and Mr Smeaton) would be paid in full for the hours they worked and then for the hours they didn't work they would receive roughly 2/3 of their normal pay.

69. Unfortunately, shortly after this proposal the country went into a further period of lockdown, the furlough scheme was extended and the job support scheme was delayed. As a result the respondent withdrew the offer for the claimant and Mr Smeaton to return under the job support scheme. The claimant was informed that she would instead remain on furlough as per the agreement that had been reached in July 2020. This decision was confirmed to the claimant in an email sent by Kath Cleary on 6 November 2020.

70. On 1 December 2020 the respondent decided to end Mr Smeaton's furlough and he returned to work. The claimant's furlough continued.

71. The respondent arranges Christmas vouchers for its staff. In Christmas 2020 the claimant did not receive a voucher. The claimant was aggrieved about this,

in particular because she learned that her colleagues in Evesham including Mr Smeaton had received a voucher.

72. The tribunal accepts the claimant's evidence that her colleagues in Evesham including Mr Smeaton received a voucher. It seems to us this would be a natural thing for the claimant to discuss with her colleagues and her sense of grievance about the issue was founded on her having learned that her colleagues had received the vouchers and she hadn't. The claimant explained (see page 168 of the bundle) that her colleagues had told her in December and January that they had received vouchers and we accept that. As we shall explain in a bit more detail below, the respondent's evidence about this issue was very unsatisfactory and we did not feel we could attach much weight to it.

73. On 12 December 2020 Mr Cleary wrote to all staff with an end of year update. As part of that he offered the staff the opportunity to have a one-to-one review meeting. Mr Cleary made it clear that such a meeting would not necessarily be with him and it may need to be early next year. On 20 December 2020 the claimant responded to Mr Cleary to ask for a review. On 21 December 2020 Mr Cleary wrote back to the claimant to say he thought that was a good idea. He said a review could be arranged when the claimant came back from furlough and it would be with Tara Doughty.

74. On 30 December 2020 Mr Cleary wrote to all staff with a further update. This update was concerned with how the respondent would cope with the developing situation regarding the pandemic and rules around lockdown. In his email Mr Cleary mentioned that property visits are to be the exception but not ruled out.

75. As we have said a key part of the claimant's role had been property inspections. Therefore Mr Cleary's email prompted a response from the claimant on 4 January 2021. The claimant asked whether in light of the fact that property visits were not to be ruled out there was an opportunity for her to return to work.

76. Mr Cleary responded to the claimant's email on 7 January 2021 to say that the country was in a new lockdown and he didn't anticipate returning to normal in the near future. He suggested that the back end of February would be an appropriate time to revisit whether the claimant could return to work.

77. On 11 January 2021 the claimant raised a grievance. The grievance was about the respondent's handling of health and safety issues arising as a result of covid. The claimant explained that she felt that as a result of her raising her concerns she had been dealt with inappropriately and unprofessionally by Mr and Mrs Cleary and suffered detriment.

78. The claimant attended a grievance investigation meeting on 20 January 2021 with Tara Doughty. As Ms Bouffe, again we think rightly, pointed out the main focus of the meeting was not on the claimant's health and safety concerns or the fact that she considered she had been treated detrimentally as a result of raising them but instead the respondent's apparent belief that the claimant's email of 12 July disclosed that she had not properly adhered to guidelines. As

a result the tone of the meeting appeared to be accusatory towards the claimant. We think it is very likely that this somewhat hostile approach emanated from Mr Cleary. It is consistent with his overall approach to the claimant's email.

79. As a result of the focus on her actions the claimant gave a comprehensive account of the incident with the tenant in the meeting. She explained that the tenant who came into the office didn't speak much English and she came straight up to the claimant's desk. The claimant explained that the tenant wasn't listening to her when she told her to stay back. The claimant suggested that if there had been signage or screens it would have been easier to stop the tenant getting too close. The claimant emphasised that it was the tenant who got too close and she was trying her best to keep the tenant at arm's length but the tenant kept pushing herself forward. The claimant explained that had there been signs on the floor it would have been easier to point to those in order to encourage the tenant to remain at a safe distance. Similarly the claimant felt that if she had a screen she would have been better protected.

80. The tribunal accepts the claimant's account of this incident. It is consistent with the initial account which the claimant gave in her email and also the claimant's evidence to the tribunal which we found credible. In fact we do not think that the respondent contests the claimant's account. Mr Flood in his closing submissions actually relied on this account in order to develop one of his arguments. What the claimant's account shows is that she was not in fact at fault; it was the tenant who was breaching guidelines and not the claimant. Nevertheless the respondent has persisted in pushing forward the suggestion that the claimant had not followed guidelines. This is not apparent from the initial concern the claimant raised on 12 July and it is not consistent with the later, unchallenged, account which the claimant gave. The unchallenged account the claimant gave in the grievance meeting should have put to bed any concern that the claimant had been at fault or not adhering to guidelines. However, the respondent, in particular Mr Cleary, has continued to focus on that suggestion as a means of justifying his obvious dissatisfaction with the claimant for sending the email of 12 July. We do not accept that this dissatisfaction arose because of a belief that the claimant's email showed she had not followed guidelines. As we have explained a fair reading of the email does not show that the claimant had failed to follow guidelines, and this was confirmed by the claimant's later more detailed explanation of the incident with the tenant in the grievance meeting.

81. Mr Cleary wrote a statement as part of the evidence obtained to deal with the claimant's grievance. His statement is dated 17 February 2021. In his statement Mr Cleary described in detail his reaction to having received the claimant's email on 12 July. It is consistent with the evidence which Mr Cleary provided to the tribunal, and in particular his concession that he was frustrated to receive the email. In his statement Mr Cleary described himself as totally incredulous at having received the claimant's email, that the claimant had demonstrated total ignorance and he queried how could someone be so reckless. He suggested that the claimant was seemingly ignoring all advice about the virus.

This was a gross overreaction to what was a relatively straightforward raising of health and safety concerns. In the tribunal's view Mr Cleary completely mischaracterised the claimant's email in his statement.

82. In his statement Mr Cleary went on to emphasise that the rules and procedures that the respondent had in place were appropriate and adequate. Tellingly, Mr Cleary then explained in his statement the reasons why he had decided to bring Mr Smeaton back from furlough in December rather than the claimant. Mr Cleary identified four reasons why Mr Smeaton had been selected at that point rather than the claimant. As Ms Bouffe fairly pointed out the first three of those reasons all relate to the email which the claimant sent on 12 July. We find that this statement demonstrates Mr Cleary's state of mind and in particular his continuing negative and hostile view of the claimant as a result of her email of 12 July. We do not accept that this negative and hostile view arose because of a belief that the claimant's email showed she had not followed guidelines. As we have explained a fair reading of the email does not show that the claimant had failed to follow guidelines and Mr Cleary had in fact completely mischaracterised the email in his response to the claimant's grievance.

83. The claimant made it clear in the grievance process that she considered she had been subject to a detriment by not being awarded a Christmas voucher. As to that Mr Cleary simply said in his statement that the claimant was not the only person not to receive a voucher. He made no attempt to explain why the claimant had not been selected to receive a voucher or what the system was for choosing who would receive a voicer or even to identify anybody else who had not received a voucher.

84. On 5 March 2021 Victoria Beasley, the respondent's head of finance, held a meeting with the claimant to communicate the outcome of her grievance and this was confirmed in writing on 9 March 2021. The decision was that the claimant's grievance was not upheld. It was identified that a particular concern of the claimant was that she viewed not having received the Christmas vouchers as a detriment. As to that Ms Beasley simply said that not all members of staff had received vouchers. Once again there was no attempt to explain why the claimant had not been selected to receive a voucher or what the system was for choosing who would receive a voicer or to identify anybody else who had not received a voucher. Ms Beasley nevertheless went on to find that the claimant had been treated equally. This missed the point that the claimant had not been treated equally compared with the other staff who had received vouchers.

85. The claimant appealed the outcome of her grievance on 12 March 2022. The claimant's appeal was heard by Daniel Jackson and he did not uphold the claimant's appeal.

86. The claimant returned to work on 2 April 2021. This was shortly after she had gone through early conciliation and then lodged her ET1 claim form on 25 March 2021.

Analysis

The email of 12 July 2020

Was the email a health and safety disclosure within the meaning of s.44(1)(c) ERA?

87. We will firstly consider whether in her email the claimant brought to the respondent's attention by reasonable means circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health or safety.

88. It was agreed that the email was sent by the claimant to Mr Cleary and therefore she brought it to the respondent's attention.

89. It was agreed that by doing so the claimant raised matters by reasonable means and that she identified circumstances connected with her work.

90. It was disputed whether the claimant reasonably believed that the circumstances she identified were harmful or potentially harmful to health and safety. We found that the claimant did believe that the circumstances she identified were harmful or potentially harmful to health and safety and that that belief was reasonable. We will explain our reasons.

91. In his submissions on behalf of the respondent Mr Flood said that in her email the claimant described circumstances which were caused by her own breach of the respondent's guidelines. Mr Flood did not specify which part of the guidelines the claimant had breached. He did not refer to a particular part of the respondent's policy that the claimant was meant to have breached.

92. On a fair analysis the email does not describe circumstances which were caused by the claimant's own breach of guidelines/policy. The specific situation concerning the tenant coming in and standing too close was not caused by the claimant. The respondent's own policy anticipated that a visitor would still be able to enter the office and the tenant stood close to the claimant even when the claimant told her not to. The situation was therefore caused by the tenant, not the claimant.

93. Mr Flood drew our attention to emails the respondent had sent to its staff by the time of the email (in particular at pages 138, 150 and 153 of the bundle). These referred to the importance of not taking risks and adhering to social distancing. Again it is not clear what part of this guidance the claimant is supposed to have breached. It was the tenant, and not the claimant, who was taking risks and breaching social distancing. Mr Cleary was wrong to say, as he did in the hearing, that the incident was the claimant's fault. It was the tenant's fault.

94. If the respondent's point is that the claimant should have done more to avoid the risky situation of the tenant coming too close to her and breathing on her (other than telling them to stay back) then this is the very point the claimant is making in her email. What the claimant was saying, we think quite clearly and

obviously, is that extra resources like plastic shielding and signage, would assist to adhere to social distancing and keep everyone safe. As the claimant pointed out in her email these were in fact common measures during the pandemic in businesses like shops where visitors would still come in. No doubt the reason for that was because even if staff adhered to proper social distancing there could be no guarantee that customers would do the same. This is precisely the point the claimant, again we think quite clearly and obviously, was making. We see nothing at all unreasonable in this point, and in making it the claimant was not revealing that she was breaching guidelines. On the contrary, the claimant was seeking assistance to ensure the guidelines were adhered to.

95. For these reasons we do not accept the respondent's central argument that the claimant was merely describing circumstances which were caused by her own breach of guidelines/guidance/policy.

96. We find that in her email the claimant clearly identified circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health or safety, in particular in the following passages:

We do not know enough about each person coming into the office to know where they have been and if they have somehow contracted the virus

I do not think our office is kitted out to prevent someone coming into the office and spreading the virus. Everywhere you go, whether it be the supermarket or the newly opened hairdressers etc, they have some kind of shielding in place.

My desk is now right by the front door and people come in and stand far too close as there are no guidelines in place to help customers understand what is acceptable under the current circumstances! taking away chairs from our desks is not enough, people come in and stand too close. I don't want to be awkward, but I do feel we need some kind of shielding.

On Friday afternoon one of our tenants came in and was standing right by my side showing me stuff on her phone talking and breathing all over me, regardless of my comments about safe distancing - there are just no guidelines in place. Please help. I really want to stay in work, but I also want to feel safe. Yesterday was a wake up call for me when I felt so ill.

97. The circumstances reported by the claimant are that people are coming into the office who may have the virus, the people coming in to the office are standing too close, the office is not well kitted out to prevent the spread of the virus and encourage safe distancing in particular because of the lack of shielding and signage/guidelines for the customers and on a specific occasion a tenant came in and stood too close despite the claimant telling them about safe distancing and after that the claimant felt ill. We see nothing at all unreasonable in the claimant's behaviour in identifying and reporting these circumstances or in her belief that they were harmful to health and safety. The circumstances the claimant identified related to the risk of the spread of a deadly pandemic, covid.

It was reasonable for the claimant to believe these were harmful or potentially harmful to health and safety.

98. In assessing the reasonableness of the claimant's belief Mr Flood encouraged us to take into account the steps the respondent had taken to minimise risk and the claimant's reaction to them and he referred in particular to the case of Miles (supra). In Miles the EAT upheld the employment tribunal's finding that the claimant's belief under section 44(1)(e) ERA had not been reasonable given his reaction to the steps that his employer had taken to minimise risks. However in this case the claimant has decided not to rely on section 44(1)(e) and instead rely solely on 44(1)(c). In Miles the tribunal accepted that the claimant had a reasonable belief for the purpose of section 44(1)(c).

99. In any event the findings in Miles were that the claimant's assessment of the risk levels had lost objectivity, he had not informed himself properly and he had reached a premature conclusion. These findings do not chime with the findings we have made about the claimant in this case. We consider the findings in Miles are not replicated here, because:

    a. The claimant was describing to the respondent a straightforward but significant issue – people coming in and standing too close. We do not consider that she had lost objectivity in believing that to be harmful or potentially harmful to health and safety.

    b. The claimant was clearly informed as to the importance of social distancing because that is why she had raised the concern and, as she described in her disclosure, she advised the tenant about social distancing at the time.

    c. We do not think the claimant had reached a premature conclusion. She had been back in the office for over a month at this point and the immediate prompt for her to report was the tenant coming in and standing too close to her which demonstrated that the situation needed addressing.

    d. This was not a case where the claimant's reaction to the steps put in place by the respondent was in any way inappropriate. What the claimant was doing was identifying further steps which may have assisted – in particular guidelines/signage for customers and plastic shielding. These steps were commonplace at the time and the photographic evidence produced by the claimant demonstrates that they were not in place at the time the claimant raised her concerns.

100. We do not find that the claimant was being unduly sensitive. We have found that the respondent was dismissive of the concerns raised and failed to engage meaningfully with them within a reasonable timescale. The photographic evidence submitted by the claimant indicates that there was a proper basis for her concerns along with her own experience over the last month and the particular occasion where the tenant came in and stood too close.

101. These factors reinforce our conclusion as to the reasonableness of the claimant's belief.

102. For these reasons we concluded that in her email of 12 July the claimant brought to the respondent's attention by reasonable means circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health or safety.

Was the email a protected disclosure within the meaning of s.43B ERA?

103. We next consider whether in her email the claimant made any disclosure of information which, in her reasonable belief was made in the public interest and tended to show that the health or safety of any individual has been, is being or is likely to be endangered.

104. It was agreed that the claimant disclosed information.

105. It was agreed that the claimant believed that the disclosure of information was made in the public interest.

106. It was agreed that that belief was reasonable.

107. It was disputed whether the claimant reasonably believed that the information tended to show that the health or safety of any individual has been, is being or is likely to be endangered.

108. The respondent repeated the submissions it made in relation to section 44(1)(c) ERA. We do not accept those submissions for the reasons we have already explained.

109. We find that the claimant reasonably believed that the information tended to show that the health or safety of any individual has been, is being or is likely to be endangered. The relevant information was contained in the passages we have already set out above. The claimant believed that tended to show that health and safety of herself and other people in the Evesham office has been, is being or is likely to be endangered. The information disclosed by the claimant related to the risk of the spread of a deadly pandemic, covid. It was reasonable for the claimant to believe that that showed that her health and safety and the health and safety of anybody else in the Evesham office had been, was being or was likely to be endangered. We refer to our fuller reasoning as to the reasonableness of the claimant's actions and belief set out above.

110. We therefore conclude that the claimant's email of 12 July contained a protected disclosure within the meaning of section 43B ERA and a health and safety disclosure within the meaning of section 44(1)(c) ERA. The information making up the different types of disclosure was the same (i.e. the excerpt set out above). We shall refer to this as the claimant's disclosure.

Detriments

111. In relation to each allegation we will consider whether it occurred, whether it was a detriment and whether it was done on the ground of the disclosure.

12 July 2020 – being required to stay at home

112. It was agreed that this occurred.

113. We find it was not a detriment. There was no loss or inconvenience to the claimant and she was not disadvantaged by this decision. The claimant had in her email reported that she had been ill and had been bedridden. She doubted it was covid but she did not know. She was clearly worried about having contracted the virus. The appropriate thing to do in those circumstances was to tell the claimant to stay at home. This would be best for the claimant to allow her to recuperate and best for everyone else as it would reduce the risk of the virus spreading (as the claimant was concerned about). A reasonable worker would not take the view she had been subject to a detriment in these circumstances.

114. We find it was not done on the ground of the claimant's disclosures. The reason why the claimant was told to stay at home was because of her admission in the email that she was ill and had been bedridden that weekend. The respondent has proved this was the reason for this decision.

13 July 2020 – being re-furloughed

115. It was agreed that this occurred. It was a decision taken by Mr Cleary on 13 July 2020.

116. It was agreed that this was a detriment.

117. We find it was done on the ground that the claim made the disclosure.

118. We found that the claimant established a strong case that the reason for the detriment was her disclosure. The relevant factors included the following:

a. The claimant was re-furloughed only a month after being brought back from furlough, at a time when the respondent and the Evesham office in particular was severely overworked.

b. The claimant was furloughed less than 24 hours after raising her disclosure. Prior to 13 July Mr Cleary had not communicated to anyone any decision, even of a provisional nature, to re-furlough the claimant. This bore all the hallmarks of a kneejerk reaction. In his email sent to the claimant communicating his decision to re-furlough Mr Cleary even recognised that it looked as though the decision was because of the claimant's disclosures about health and safety (i.e. "*recent exchanges over Guidelines")*.

c. As recently as 20 June the claimant had been told by Mr Cleary "We will get there and please learn [lean] on Tara for help…". This indicates that Mr Cleary was anticipating that the claimant would remain working. There is no change that could have led to him to decide to re-furlough other than the claimant's disclosure.

d. There was a wealth of evidence, such as his comments in his grievance statement and in his email of 28 September and indeed his concession in his evidence to us that he was frustrated, which demonstrated that Mr Cleary had taken exception to the claimant's email of 12 July. He continued to refer back to it and express hostility about it months afterwards. As we have explained on a fair analysis any suggestion that Mr Cleary was concerned about the claimant breaching guidelines is unfounded. The tribunal concluded that Mr Cleary was simply annoyed and frustrated that the claimant had raised concerns and suggested as part of her disclosure that the respondent was not doing everything it could to reduce the risks of the pandemic.

119. It was submitted on behalf of the respondent that the reason for the decision to furlough the claimant was that the claimant's return to work had not worked out as hoped. The tribunal does not accept that this was the reason. There were a number of problems with this suggestion:

a. As Ms Bouffe referred to her in written submissions those who were working in the office with the claimant, Ms Downie and Ms Doughty, did not support the idea that there were performance concerns about the claimant following her return from furlough which could justify re-furloughing the claimant. They distanced themselves from any suggestion that they had recommended that the claimant should be re-furloughed or even that they had been specifically consulted about this decision. The picture they painted was that it was a difficult and busy time for everybody and the claimant's help was appreciated. It was recognised there were issues with the new computer system but the claimant was not alone in finding that transition difficult.

b. Mr Cleary did not communicate his decision to re-furlough the claimant or even refer to it as a serious possibility to anyone, including the claimant, at any point prior to 13 July. It was wholly unclear what made Mr Cleary suddenly decide to furlough the claimant on 13 July other than the disclosure. There was no cogent evidence of any diminution in work and on the contrary the evidence demonstrated that the office was extremely busy. Similarly there was no cogent evidence of any performance concern which justified the re-furlough of the claimant on 13 July.

c. The suggestion relied principally on the argument that Mr Cleary had decided to re-furlough the claimant prior to 12 July and the booking of training for Jo Rowland on 9 July demonstrated that because she was to replace the claimant. The tribunal does not accept this argument. Once again Mr Cleary had not mentioned to anybody that his intention was to

replace the claimant with Jo Rowland. The tribunal considers it would not make sense to do so. The fact that Jo Rowland would need a week of training before she could start on the work that the claimant was finding difficult does not suggest that Jo Rowland was any better equipped to undertake the work than the claimant. It was unclear to us why the claimant could not simply have been trained up rather than Jo Rowland given she was the one who was already back at work. Moreover, the claimant was furloughed on the day Jo Rowland was due to start her training rather than the day she was due to start work a week later. For these reasons the tribunal did not accept that Jo Rowland was brought back to replace the claimant. It is much more likely that the plan was to bring back Jo Rowland to support the office generally as they were overworked, and we have found that was in fact the reason.

120. In view of the above the tribunal found that the claimant had shown that a reason for the detriment was the disclosure. The respondent's alternative explanation for why the detrimental treatment was done was unconvincing and we did not accept it. The respondent had not satisfied us that there was a reason other than the disclosure. We concluded that the claimant's disclosure was a material influence on the decision to re-furlough the claimant on 13 July 2020.

<u>28 September 2020 – Mr Cleary's email to the claimant taking exception to the health and safety issues being raised by the Claimant</u>

121. It was agreed that this occurred. It was an act done by Mr Cleary on 28 September 2020.

122. It was agreed that this was a detriment.

123. We find it was done on the ground that the claimant made disclosures.

124. The relevant context here is that the claimant had raised health and safety concerns in her email of 12 July that had not been responded to or engaged with by the respondent. She had chased a response. It was incorrect of Mr Cleary to suggest that was haranguing which justified his intemperate email, especially in view of the lengthy delay in the claimant obtaining any sort of meaningful response. We found that the claimant was not haranguing and she was acting quite reasonably in the face of her concerns being ignored by Mr Cleary and the lack of assistance from Mrs Cleary. In his email Mr Cleary says he is taking exception to the claimant chasing updates on health and safety in the office and whether any decision had been made regarding making the office a safe environment to work in. This is clearly the claimant chasing a response to her email of 12 July and the health and safety concerns she raised in it. The claimant says as much in her email of 18 September to which Mr Cleary took exception; *"I am very conscious of the fact that my previous concerns have not been answered".* In his email Mr Cleary refers to and even quotes from the claimant's email of 12 July, demonstrating that it was that email that has provoked his hostile response. Mr Cleary's email is entirely consistent

with the other evidence indicating that Mr Cleary was irked by the claimant raising health and safety concerns and the suggestion contained in her disclosure that the respondent was not doing all it should to prevent the spread of the virus. The tribunal considers this all amounts to a strong case that the reason for the detrimental treatment was the disclosure.

125. It was submitted on behalf of the respondent that Mr Cleary's email was sent as a response to assertions which the claimant made in her email of 18 September which were false and in referring to the 12 July email Mr Cleary was simply pointing out that the claimant had failed to follow guidelines. The tribunal does not accept that. The claimant did not make any assertion in her email of 18 September which was false. She was entirely right to point out that her previous concerns had not been answered. We have found that the suggestion that Mr Cleary was concerned about the breaching of guidelines was unfounded. Similarly we have found that the suggestion that Mr Cleary was annoyed about the claimant haranguing is also unfounded. We consider that Mr Cleary was simply annoyed and frustrated that the claimant had raised concerns and suggested in her disclosure that the respondent was not doing everything it could to reduce the risks of the pandemic. This was what provoked the hostile email which he sent to the claimant on 28 September.

126. In view of the above the tribunal found that the claimant had shown that a reason for the detriment was the disclosure. The respondent's alternative explanation for why the detrimental treatment was done was unconvincing and we did not accept it. We concluded that the claimant's disclosure was a material influence on the email sent by Mr Cleary on 28 September 2020.

<u>29 Oct 2020 – the attempt to vary the claimant's contractual terms</u>

127. This allegation relates to the respondent's attempt to bring the claimant back to work though the government's Job Support Scheme. As we explained the respondent proposed as part of this that the claimant would job share with Mr Smeaton and they would each work half a month for the next three months and the situation would then be reviewed.

128. We do not accept that this was an attempt to vary the claimant's contractual terms. It was an attempt to bring the claimant back to work through the next phase of the government's schemes to deal with employees affected by covid. It would have entailed a temporary change to the claimant's pay, hours and ways of working in a similar way to the furlough scheme.

129. We find this was not a detriment. The claimant wished to come back to work and this was a means of achieving that. At this juncture the respondent was attempting to bring the claimant back to work in accordance with the government scheme which was available at the time (although it was later postponed). We do not consider that a reasonable worker would consider they had been subjected to a detriment here.

130. This was not done on the ground of the claimant's disclosure. It was done because the respondent was utilising the government scheme that was available at the time to bring employees back to work. It was proposed that Mr Smeaton, who had not raised a disclosure, be treated the same way. The respondent has proved this alternative reason for the act.

6 November 2020 – placing the claimant on furlough

131. The decision complained of here is to put the claimant back on furlough following the delay of the job support scheme.

132. It was agreed that this occurred.

133. It was agreed that this was a detriment.

134. We find it was not done on the ground that the claimant made the disclosure.

135. We found that this took place because of the announcement of a further period of lockdown, the delay of the implementation of the job support scheme and the government's extension of the furlough scheme. Again Mr Smeaton was treated the same way at this stage and he had not raised a disclosure. The respondent has proved this alternative reason for the detriment.

21 Dec 2020 – not having a work review

136. The claimant did not have a review on 21 December 2020. However, Mr Cleary did not refuse the claimant a review on that date. He indicated that the claimant could have a review when she returned to work, but it would not be with him. Mr Cleary had pointed out to all staff when he made the offer that reviews would not necessarily be with him so we do not see anything untoward or detrimental about that.

137. We find this was not a detriment. The claimant had been off work for nearly 6 months with no imminent return planned so there was no need for a review immediately. Mr Cleary agreed a review would be a good idea and the claimant was assured she could have one when she returned. We consider that was practical and sensible in the circumstances. We find a reasonable worker would not consider they had been subjected to detriment here.

138. We find that Mr Cleary's response of 21 December in which he agreed to a review but said it would take place when the claimant returned was not done on the ground that the claimant made a disclosure. It was done because the claimant had been on furlough for 6 months, she was still on furlough with no imminent return planned and so there was no need for a review at this stage. The respondent has proved this alternative reason for the act.

On/around 24 Dec 2020 – not receiving Christmas vouchers

139. It is agreed this occurred. As we shall explain we have found that Mr Cleary was behind the decision not to award the claimant a Christmas voucher. It is recorded in the agreed issues that this failure to act took place on or around 24 December 2020. It was not suggested that the date can be ascertained any more precisely than that. In submissions for the respondent Mr Flood accepted this allegation was in time (see paragraph 6 of the respondent's written closing submissions). We think that must be correct because (in the absence of any other relevant evidence) the failure of the respondent to provide the vouchers to the claimant is deemed to take place when the period expired within which the respondent might reasonably have been expected to provide the vouchers. We think that date must be 24 December 2020.

140. We find this was a detriment. Even on the respondent's own case the majority of the workforce (60 – 70%) received a Christmas voucher. The claimant was not provided with an explanation as to why she did not receive a voucher, even when she raised it as a grievance issue. We found that the claimant's immediate colleagues in Evesham, including Mr Smeaton, got a voucher. This was clearly something that was intended to be a Christmas bonus or treat. It is obviously something that employees would appreciate receiving at Christmas. In short the voucher was a good thing to get, the claimant's colleagues got it, the claimant didn't and she didn't get any explanation as to why not. In our judgement this is clearly a detriment and a reasonable worker would take the view it was a detriment.

141. We found that the claimant had shown that a ground or reason for the detrimental treatment was the disclosure. The claimant's colleagues who worked in Evesham, including Mr Smeaton who only came back to work at the start of December, received Christmas vouchers and she did not. She was not given any explanation why not, even when she specifically complained about it as a grievance issue. Latterly the respondent has suggested that the vouchers were a sort of reward for those who had worked hard throughout furlough. The claimant had been furloughed for much of 2020 but she had worked for a period in June/July when times had been particularly difficult whereas Mr Smeaton had not. Both employees had therefore worked for similar periods during the pandemic, yet Mr Smeaton was rewarded with a Christmas voucher and the claimant was not. We therefore consider that even the explanation which has been provided latterly does not add up. The decision not to award the claimant a voucher came against the background we have described of Mr Cleary being annoyed by the claimant's disclosure and the claimant being subjected to detriment because of it. The decision not to award the claimant a voucher is consistent with the other evidence showing Mr Cleary's hostile attitude towards the claimant as a result of her having made the disclosure. We draw an inference from these factors that the reason why the claimant was not awarded a voucher was her disclosure.

142. The respondent has failed to provide a cogent explanation in its evidence to us as to why the claimant did not receive a Christmas voucher. The respondent has not cogently identified who the decision maker was in respect of Christmas vouchers, who got one and who didn't or the rationale for not

awarding the claimant a voucher. The respondent's witnesses all appeared to want to distance themselves from the issue rather than just clearly explain who made the decision and how.

143. We found that the respondent's evidence about the Christmas vouchers was extremely vague and unsatisfactory and we could not attach much weight to it. Although he was uncertain Mr Cleary's evidence was that 30 – 40 % of the staff did not receive them. He described the vouchers as an afterthought and the vouchers were given to managers to distribute as they saw fit. Mr Cleary's understanding, although he said he couldn't be sure, was that vouchers had been given to people who worked throughout 2020 on furlough. We have found that is incorrect as the claimant's colleagues in Evesham, including Mr Smeaton who had been furloughed for much of 2020, received a voucher.

144. The other problem with Mr Cleary's evidence and in particular his assertion that managers were given the responsibility to distribute vouchers as they saw fit, is that it is not consistent with the other respondent witnesses. The managers and other witnesses who we heard from in fact denied they had any responsibility for deciding who got a voucher:

a. Karen Downie, who was the Lettings Manager in Evesham and the claimant's line manager, said in her statement that the vouchers were "a decision made by Head Office".

b. Tara Doughty moved to the Head Office in January 2020 and became the Lettings Operations Manager. Ms Doughty had some managerial responsibility for the claimant and she also looked at the vouchers issue as part of the grievance investigation she undertook. In her statement Ms Doughty said she was not involved in the Christmas vouchers at all and was not part of the decision-making processes. In the hearing Ms Doughty said that the vouchers were organised by the directors and managers were not aware, even of how many people got them.

c. In her statement Victoria Didcot-Beasley said that she had ordered the vouchers but the decision as to who got them was not made by her and she had no input into the decision-making process. Ms Didcot-Beasly is the respondent's finance director.

d. None of the other witnesses provided any evidence about the vouchers, other than to repeat the assertion that not all staff received one. This included Mr Jackson, who is also a director of the respondent.

145. It seems to us that in view of the above the respondent has failed to provide a satisfactory explanation as to why the claimant did not receive a voucher. The respondent's evidence about the matter has been vague and inconsistent. The respondent's alternative explanation for why the detrimental treatment was done was limited and unconvincing and we did not accept it. The respondent has failed to put forward or even identify a witness who made the decision not to award the claimant a voucher or who distributed the vouchers.

This is despite the fact that the respondent is legally represented and the vouchers were clearly identified as an issue. In these circumstances it seems appropriate to us to draw an adverse inference against the respondent. The inference we draw is that the real reason why the claimant was not awarded a voucher was her disclosure.

146. We do not accept Mr Cleary's explanation that vouchers were given to managers to distribute as they saw fit. As we have explained this was not supported by the managers we heard from. We consider it is more likely than not that Mr Cleary himself was behind the decision as to who got the vouchers. This is consistent with the evidence that the vouchers were a decision made by Head Office and the fact that no other director accepted responsibility. In light of the analysis above we concluded that a material factor in Mr Cleary's decision not to award the claimant a voucher was her disclosure.

<u>7 January 2021 – not allowing the claimant to return to work on the premise that property inspections were not taking place</u>

147. The context here is that on 30 December 2020 Mr Cleary wrote to all staff with an update, in which he mentioned that property visits from that point were to be the exception but not ruled out. On 4 January the claimant wrote to Mr Cleary to ask whether in light of the fact that property visits were not ruled out there was an opportunity for her to return to work. Mr Cleary responded to that email on 7 January to say that the country was now in a new lockdown and he didn't anticipate returning to normal in the near future. He suggested that the back end of February would be an appropriate time to revisit whether the claimant could return to work.

148. In her statement at paragraph 48 the claimant made it clear that the reason why she considered this to be a further detrimental act is because she believed Mr Cleary had refused to allow her to return to work on a basis that was untrue. This is because the claimant believes she had been told that property inspections had not been taking place when they in fact were.

149. The tribunal finds that the factual premise of this allegation has not been made out. In his response on 7 January Mr Cleary did not specifically mention property inspections as the reason why the claimant could not come back to work. He explained his decision on the basis of a new lockdown which had "kicked the can" further down the road in terms of returning to normal. Furthermore, the tribunal accepts the respondent's evidence that whilst some inspections (vacating tenants, public spaces, commercial tenants) were continuing, the scheduled residential inspections the claimant carried out were not as the Government had not deemed them essential. That is why the claimant returned to a large backlog of approximately 300 inspections to be done in April 2021. Therefore we do not accept that the claimant was misled as alleged and we do not accept the factual basis for this alleged detriment. We find the detriment did not take place as alleged.

150. Even if there was a detriment here we would have found that it was not done on the ground of the disclosure. Mr Cleary did not allow the claimant back to work because of the announcement of a further period of lockdown and the fact that the respondent was not doing the residential inspections which had been the key part of the claimant's job pre covid. The respondent has proved this alternative reason for the treatment.

17 Feb 2021 – Advertising roles for vacancies within the company

151. It is accepted that this occurred. The context is that from February 2021 the respondent began recruiting into some roles. These were set out in Mr Cleary's statement at paragraph 60. Mr Cleary said that the claimant did not have the relevant experience for these roles and/or did not meet the minimum criteria in particular because a number of the roles would have been promotions. In her evidence the claimant said she could have done the roles related to sales – sales manager and sales negotiator. The claimant accepted she had never done a full-time sales role for the respondent but said she had helped out in sales. She also said she had sales experience earlier in her career while working for a firm of solicitors in Scotland. It was clear from Mr Cleary's evidence that he was unaware of the claimant's previous experience and the detail of what she may have done on a day-to-day basis while working for the respondent.

152. The tribunal finds that the respondent advertising vacancies that it needed to fill was not a detriment to the claimant. The claimant was not at risk of losing her job; she was on furlough and she returned to her role when the furlough came to an end. The vacancies that were advertised were not to replace the claimant and they were not in fact related to her role at all. If she had wanted to the claimant could have applied for any of the roles advertised. We do not see any disadvantage to the claimant here and in our judgement a reasonable worker would not take the view they had been subject to a detriment.

153. In her closing submissions on behalf of the claimant Ms Bouffe focused on the lack of any consultation with the claimant about whether she would be interested in and able to do any of the advertised roles. Albeit it is not spelt out in the agreed list of issues it transpired that the substance of this allegation is that the respondent advertised the roles without consulting the claimant. We agree that the claimant was not consulted about the roles. However we do not think this is a detriment either. The claimant was not going through a process akin to a redundancy exercise. Her role was not at risk. The respondent was not under duty to consult with the claimant (or other furloughed staff). The roles that were being advertised were not to replace the claimant and they were not similar to her role. It was not obvious that the claimant had sufficiently relevant experience for the roles but if she felt she had and she had wanted to apply she could just have done so. In these circumstances we do not see any disadvantage to the claimant here and in our judgement a reasonable worker would not take the view they had been subject to a detriment.

154. Even if we had concluded that there was a detriment we would have considered it was not on the ground of the claimant's disclosure. We find that the reasons why the respondent did not consult with the claimant were because they believed she did not have sufficient experience for the roles and they saw no need to do so given that the claimant's role was not at risk. The respondent has proved this reason for the treatment.

12 July 2020 to 6 April 2021 – Not allowing the claimant to return to work

155. This allegation was widely formulated. It was described at the hearing as a catch all. We agree with the submissions made by the respondent that this does not work as a single allegation. It does not describe a single act or failure to act. It encompasses a number of different decisions to keep the claimant on furlough. Some of these decisions are the subject of other specific allegations of detriment – in particular the 13 July 2020, 6 November 2020 and 7 January decisions. We have found that the original decision to furlough the claimant on 13 July was a detriment for having made the disclosure but not the other decisions.

156. Plainly the original decision to furlough the claimant was a significant act which had consequences. Exactly what those consequences were and how long they continued might be the subject of argument at a remedy hearing and so we will not say anything more specific about that for now.

157. In her closing submissions on behalf of the claimant Ms Bouffe focused on the decision to bring Mr Smeaton back to work over the claimant on or around 1 December 2020. Ms Bouffe focused her submissions on the evidence we have referred to above which was Mr Cleary's grievance statement where he identified the reasons why he considered that Mr Smeaton was the better option and three out of the four reasons related to the claimant's disclosure. We found this was a telling indicator of Mr Cleary's state of mind and in particular his ongoing hostility to the claimant as a result of her disclosure. It indicated that he remained preoccupied with the disclosure many months after it was made and it had led him to form a negative view of the claimant. This was an important part of the evidential picture and it formed part of our decision making when we came to draw inferences and reach our conclusions set out above.

158. However we must bear in mind that (curiously) the claimant has not made a specific complaint about the decision to select Mr Smeaton to return to work in December 2020 rather than her. She has not alleged that that was an act causing detriment on the ground of her having raised her disclosure. The claimant has been professionally represented throughout and has not made any application to add this as a specific complaint. At this stage in order to be fair we can only determine the case as set out in the agreed list of issues. It is clear there were a number of different decisions made over this period and if the claimant wanted to specifically complain about the decision of 1 December she could have done so. In her otherwise comprehensive submissions Ms Bouffe said little about this allegation other than the point about Mr Cleary's

decision on 1 December. We think this rather betrays the fact that this catch all does not work as single allegation.

159. As we have mentioned the case law tells us that there is a distinction between a one-off decision which has continuing consequences and a continuing act or state of affairs (Kapur). As per the Court of Appeal decision in Flynn we should avoid concentrating on the alleged detriment rather than the specific acts or deliberate failures to act complained of. This catch all allegation does not in our view focus on a specific act or decision rather it focuses on the detriment complained of. We think this catch all allegation blurs the distinction identified in Kapur and we should follow Flynn by focusing on the specific acts or decisions complained of as set out in the list of issues.

160. We find that between 12 July 2020 to 6 April 2021 the claimant was not allowed to return to work. We find this was a detriment. The reason why the claimant was not allowed to return to work was because she was furloughed. There were a number of decisions made to continue the claimant's furlough. We have found that the original decision to re-furlough the claimant on 13 July was a detriment on the ground of her disclosure. We have not found that any of the other decisions complained of by the claimant to continue the claimant's furlough were detriments on the ground of her disclosure. Therefore we do not at this juncture find that not allowing the claimant to return to work between 12 July 2020 and 6 April 2021 was on the ground of her disclosure. If necessary however we reserve our decision as to whether a consequence of the original decision to re-furlough was the claimant remaining off work until 6 April 2021 until after we have heard argument at the remedy stage.

Jurisdiction

161. The Claimant entered conciliation on the 11 February 2021, received her ECC on 25 March 2021 and issued these proceedings on that day. It was agreed in the list of issues that all matters complained of that occurred before the 12 November 2020 are therefore prima facie out of time, i.e. they are out of time unless the claimant can show either that it was not reasonably practicable for the claim about them to have been brought in time or that they were part of a continuing act lasting until after 12 November 2020.

162. Alternatively, the claimant submitted that as per s.48(3)(a) ERA 1996 the detriments relied upon were part of a series of acts. In Arthur v London Eastern Railway Ltd (t/a One Stansted Express) 2007 ICR 193 the Court of Appeal held that s.48(3)(a) could cover a situation where the complainant alleges a number of acts of detriment by different people where, on the facts, there is a connection between the acts or failures to act in that they form part of a 'series' and are 'similar' to one another. This is distinct from the concept of an act extending over a period of time in the context of s.48(4)(a).

163. We have upheld three of the claimant's allegations of detriment for having made the disclosure. The last of these – Christmas vouchers – is in time

as we have already mentioned. The first two – furloughing the claimant and Mr Cleary's email of 28 September 2020 - are prima facie out of time.

164. The claimant has not discharged the burden of showing that it was not reasonably practicable for her to present her claim about the first two allegations in time. Ms Bouffe's argument on this matter rested on supposition and there was little to no evidence presented as to why it was not reasonably practicable for the claim to have been brought in time. We do not accept the central argument presented in the claimant's written reply on jurisdiction that it was not reasonably practicable to raise a tribunal claim when the claimant was seeking to return and resolve matters. We consider it was reasonably feasible for the claimant to have presented a claim in this period.

165. We find that the three allegations we have upheld were part of a series of acts or failures for the purposes of s.48(3)(a) ERA 1996. Alternatively, we find that the three allegations we have upheld were part of an act extending over a period. The acts/failures were all the done on the ground of the claimant having made her disclosure in her email of 12 July 2020. The same person was behind all three of the acts/failures causing detriment – Mr Cleary. The evidential picture showed quite clearly that Mr Cleary was frustrated to have received the claimant's disclosure, it created a mindset where he formed a hostile and negative view of the claimant and this led him to treat the claimant detrimentally in the ways we have identified. As we have observed Mr Cleary remained preoccupied with the disclosure over the relevant period. This was the link between the allegations. We find that the allegations formed part of a series and were similar to each other. We were also satisfied that this was an ongoing situation where the incidents causing detriment were linked to each other rather than a succession of unconnected acts.

166. Applying s.48(3)(a) ERA 1996 the last act or failure in the series of similar acts or failure was 24 December 2020 and the claim is in time. Alternatively applying s. 48(4)(a) ERA the last day of the period over which the act extended was 24 December 2020 and therefore the claim is in time.

Conclusion

167. By her email of 12 July 2020 the claimant made a protected disclosure within the meaning of s 43B ERA and a health and safety disclosure within the meaning of s 44(1)(c) ERA.

168. The respondent did the following on the ground that the claimant made the disclosure:

168.1 Re- furloughing the claimant from 13 July 2020.
168.2 Mr Cleary's email of 28 September 2020 taking exception to the health and safety issues being raised by the claimant.
168.3 On or around 24 December 2020 not receiving Christmas vouchers.

169. By the above acts or failures to act the respondent subjected the claimant to detriment.

170. The above acts or failures to act were part of a series of similar acts or failures and the last of them were in time.

171. Alternatively, the above acts or failures to act were part of an act extending over a period and the end of the period was 24 December 2020 and it is therefore in time.

172. The other allegations made by the claimant fail and are dismissed.

173. That concludes the tribunal's judgment.

Next steps

174. The claim has succeeded in part. This means there may need to be a remedy hearing to decide compensation. We express a hope that the parties may be able to talk to one another and come to an agreement. We shall list a remedy hearing in any event. If the date provided is not suitable the parties have 7 days from the date of the notice of hearing to provide alternative dates which both sides can do. As both parties are professionally represented we request that agreed directions for the remedy hearing are filed within 21 days of the date this judgment is sent. If directions cannot be agreed the parties should identify the areas of dispute within the same timescale.

Employment Judge Meichen

22 September 2023