Case Number: 3313861/2021 and 3300245/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Robert Debont	v	1. Marsh Farm Futures 2. Removed 3. Mr Mohammed Rafi 4. Mr Barry Patel

Heard at: Bury St Edmunds Employment Tribunal

On: 21, 22, 23, 24, 29 and 30 August 2023
(7 September 2023 in Chambers) (By CVP)

Before: Employment Judge K J Palmer

Members: Mr Alan Hayes, Mr Michael Kydd

Appearances
For the Claimant: Mr M Nadin (solicitor)
For the Respondent: Ms A Johns (Counsel)

RESERVED JUDGMENT Pursuant to a hearing by CVP

It is the unanimous Judgment of this Tribunal that:

1. The Claimant's claim for unfair dismissal succeeds.
2. The Claimant's claims under s 47B and 103A of the Employment Rights Act 1996 fail and are dismissed.

3. The Claimant's claims for indirect disability discrimination under s 19 of the EQA fail and are dismissed.
4. The Claimant's claims under s 15 of the EQA for discrimination arising from a disability succeed in part.
5. The Claimant's claims for a failure to make reasonable adjustments under s 20/21 of the EQA fail and are dismissed.
6. The Claimant's claims for harassment under s 26 of the EQA succeed in part.
7. The Claimant's claim for automatic unfair dismissal under s 100 of the ERA fails and is dismissed.

REASONS

1. The Claimant presented two claims for this Tribunal. The first on 22 July 2021 and the second on 15 January 2022. The claim is home made and, at the time of presentation of both claims, the Claimant was not represented. He pursues claims against his employer who are a registered charity and included claims against three other individual Respondents of the Respondent charity.

2. The Tribunal is bound to comment that CVP for a seven day hearing was not desirable or ideal. The difficulties with remote hearings meant that this hearing would have been better served in person. The Employment Judge in particular had difficulty hearing the Claimant's evidence, the evidence of Mr Rafi and Mr Patel.

3. Both claims have been consolidated.

4. The claims included claims for disability discrimination, unfair dismissal, whistle blowing, breach of contract and unauthorised deduction of wages.

5. The claims were first case managed on 23 August by EJ Beddoe in a Case Management Hearing which took place by Cloud Video Platform.

6. He consolidated the claims and gave various orders, principle amongst which was to list this matter for further Preliminary Hearing and a Final Hearing. It is not clear why the final hearing was listed to take place by Cloud Video Platform.

7. At the same time, EJ Beddoe dismissed all claims against the Second Respondent and all claims entirely in respect of breach of contract and unauthorised deduction from wages. For the purposes of this Judgment the Third Respondent, Mr Rafi becomes the Second Respondent and The Fourth Respondent Mr Patel becomes the Third Respondent.

8. He also, in his Dismissal Judgment, concluded the following:

> "In claim number 3300245/2022, the claims against the Second, Third and Fourth Respondents are dismissed, based on the Claimant's withdrawal".

9. All three Dismissals were included in a single judgment dated 23 August 2022 and sent to the parties on 28 August.

10. Subsequently the Respondents sought to have one of those Dismissal Judgments reconsidered under Rule 70 of the Employment Tribunal Rules of Procedure. The one they wish to be considered is the one set out above.

11. The reason they put forward is the wording above does not reflect the fact that it is only the unfair dismissal claim against the Second, Third and Fourth Respondents which was dismissed on withdrawal and that that is not made clear in EJ Beddoe's Judgment.

12. Case number 3300245/2022 was in fact the second claim presented in January 2022 and added to the first claim in July. The second claim advanced only unfair dismissal and notice pay and holiday pay claims.

13. The other claims were all essentially raised in the first proceedings under 3313861/2021.

14. For some reason the application for reconsideration was not dealt with by Employment Judge Beddoe prior to the commencement of this full Merits Hearing.

15. The Employment Tribunal Rules of Procedure 2013, Schedule 1, Rule 72(3) clearly states as follows:

> *"Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full Tribunal which made it and any reconsideration under paragraph 2 shall be made by the Judge, or as the case may be, the full Tribunal which made the original decision. Where that is not practicable, the President, Vice President or Regional Employment Judge shall appoint another Employment Judge to deal with the application or in the decision by a full Tribunal shall either direct that reconsideration to be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part".*

16. Employment Judge Beddoe retired as a salaried Employment Judge towards the end of 2022.

17. Accordingly, it was necessary for this Tribunal to seek the guidance of Regional Employment Judge Foxwell under 72(3), as set out above.

18. Regional Employment Judge Foxwell deemed that it was not practicable for Employment Judge Beddoe to reconsider his Judgment. Paragraph 1 of his

Judgment dated 23 August 2022 and duly appointed E J Palmer to deal with that reconsideration.

19. The Respondents offered no response to the application to reconsider.

20. Having looked at Employment Judge Beddoe's Judgment, it is very clear to me that by referring only to case number 3300245/2022, he is clearly stating that only those claims in unfair dismissal are withdrawn against the Second, Third and Fourth Respondents. However, if and insofar as that is unclear, I make it clear that all of the Claimant's other claims proceed against the Third and Fourth Respondents insofar as they can and are deemed to be set out in the later Case Management Orders of EJ Postle on 7 December 2022. All claims against the Second Respondent were, in any event, withdrawn.

Application to amend

21. There was also extent an application to amend before this Tribunal as a preliminary issue. This was raised by the Claimant's Representatives in a letter dated 5 July 2023. That application was put before my colleague, Employment Judge Ford, who rightly concluded that it would be best dealt with at the outset of this full Merits Hearing.

22. The application concerns a document sent to the Luton Borough Council by the Claimant dated 11 March 2022 in an email. The Claimant relies upon that email as one of his alleged protected disclosures in these proceedings.

23. Currently the Claimant had raised and relied upon three protected disclosures. These were clarified and incorporated in the detailed list of issues set out by EJ Postle, pursuant to the Case Management Summary on 2 December 2022.

24. The first of these is as follows:

"Notifying the Respondents that holding face to face training was prohibited by Covid Regulations (February) March 2021."

25. The Claimant's Representatives argue that a specific email at 11 March should be incorporated as an amendment as being a specific protected disclosure. The 11 March email was the culmination of exchanges between the Claimant and the Respondent about the legitimacy/legality of conducting face to face training during Covid restrictions. Mr Nadin on behalf of the Claimant, point out that the claim is already there and that referring to the specific email at the end of the exchanges, referred to in the first protected disclosure set out in the list of issues, is merely a re-labelling exercise and a clarification of a claim already raised.

26. He addressed the Tribunal on this and the other aspects that we must consider when considering an amendment, including the necessary authorities, principle amongst which is the case of Moore v Selkent Bus Company Ltd [1996] ICR 836, EAT. He said the facts are already pleaded and the email has been obliquely referred to. He said it does not alter in any way, the nature of the claim which the Respondents must face and therefore there is no hardship or injustice to the Respondents in allowing a specific amendment to include reference to this email. He included it as an amendment in the Claimant's particulars of claim and that amendment was attached to the original application on 5 July.

27. He said that the application of 5 July was actually nearly two months before the full Merits Hearing in this matter and if prejudice is now visited upon the respondents by that amendment being allowed at the last minute, it is not of the Claimant's making. The amendment was included at paragraph 48b in the particulars of claim.

28. Miss Jones, Counsel on behalf of the Respondent , opposed the application to amend. She said the claim was lodged on 15 January 2022 and albeit that an application to amend was raised on 5 July 2023, nearly a month before the Full Merits Hearing it was still very late in the day. She said it was not minor. The fact that it was an oversight admitted by Mr Nadin, was of no consequence.

29. Mr Nadin also pointed out that the Claimant had been unrepresented at the outset of these proceedings and that his firm had subsequently been instructed but he took responsibility for the failure to bring this specific amendment to the Tribunal's attention in the period between his firm's instruction and 5 July.

30. The Tribunal retired to consider this application.

31. Having regard to the issues raised by Mr Nadin, it is clear that the original claim, as clarified by EJ Postle in the Case Management Discussion of December 2022, refers to this email. The fact that it has not been specifically cited as a protected disclosure, does not change the fact that it is in the original claim.

32. To tag or highlight it as a specific protected disclosure rather than the more general terms set out in paragraph 1a of the issues set out by EJ Postle, means that it is nothing more than a mere re-labelling exercise.

33. Based on the Authorities, in principle the case of Moore v Selkent Bus Company Ltd [1996] ICR 836 EAT, there is no need to consider whether the additional amendment is out of time as it is already extent in the claim at the outset.

34. The key issue to determine whether to allow such an amendment is the balance of hardship. It is clear that a balance of hardship lies very heavily in the favour of the Claimant. The Respondent will suffer no hardship in this amendment being allowed. It does not affect their case, they are prepared to deal with it as is evident in the Witness Statements before us.

35. There would be some hardship to the Claimant in disallowing the application as the specific email to the Luton Borough Council, which effected the alleged protected disclosure, would be omitted.

36. Accordingly, we allow the amendment and the issues are to be read as set out in the amended proceedings.

37. The application to amend is allowed.

The issues.

38. The issues before this Tribunal are set out in the Case Management Summary of EJ Postle on 7 December 2022. We do not propose to repeat those issues, save for in this judgment we will deal with each in turn in due course.

39. There were, however, some minor tweaks that were required by way of clarity in those issues as set out in that Summary.

40. First, the issues set out under the heading 'Unfair dismissal' include questions that would usually be required to be answered by a Tribunal in a case where the Respondent was relying on conduct as the reason for the dismissal. Those populate paragraphs 6, 7, 8 and 9 of the issues set out under the heading 'Unfair dismissal' in the Summary. Miss Jones pointed out that it was not the Respondent's position that the reason for dismissal was conduct but that the reason for the dismissal was some other substantial reason under s.98(1)(b) of the ERA SOSR. Accordingly, we removed 6, 7 8 and 9.

41. She also pointed out that in respect of the Claimant's claims and disability discrimination broken down into various claims under s.15, s.19, s.21 and s.26 of the Equality Act 2010 and more particularly with reference under s.15, the "something arising" had not been identified.

42. The Claimant relied upon a disability of dyslexia and heart failure. The something arising from his dyslexia was his difficulty in communicating in written text and the something arising from his heart failure was difficulty in carrying out physically exertive activities.

43. It was also necessary to point out that the acts relied upon were mis-headed with the term “less favourable treatment” which should be removed as it is only relevant in direct discrimination claims in which there are none here.

44. It was then possible to get underway and hear evidence at 2.00 pm on the second day of the Full Merits Hearing.

45. The Tribunal had before it Witness Statements from the Claimant, from the Claimant’s wife on behalf of the Claimant and from Mr Rafi, CEO of the First Respondent on behalf of the First Respondent and on behalf of himself, from Cathy McShane, the Community and Youth Manager at the First Respondent and from Barry Patel, the Chair of the Personnel Committee at the First Respondent who gave evidence on behalf of the First Respondent and on his own behalf as the Third Respondent.

46. The Tribunal had before it an electronic bundle running to some 744 pages.

47. Navigation of the electronic bundle was, however, difficult. Pages had clearly been added after it had first been submitted. This resulted in difficulty in locating page numbers at the bottom of the bundle. The reason is that if one punches in the PDF number of the page that one was seeking, it would take the reader to a part of the bundle up to 100 pages adrift. This caused difficulty throughout the hearing and was unfortunate. If parties seek to rely only upon electronic bundles, it is their responsibility to make sure that they are navigable.

Findings of fact.

48. The Claimant was employed as a Facilities Manager between 16 November 2015 and 27 October 2021 at the Respondents. We clarify the date of dismissal in the body of this Judgment below.

49. He was dismissed purportedly for some other substantial reason. He pursues the suite of claims set out in a record of the Preliminary Hearing by EJ Postle on 7 December 2022, as amended above.

50. The Claimant was employed as a Facilities Manager and had overall responsibility within the First Respondent for health and safety matters.

51. The First Respondent is a registered charity. The Claimant is a disabled person for the purposes of s.6 of the Equality Act 2010. This is admitted by the Respondents. The disabilities submitted are dyslexia and heart failure.

52. The Respondents do not, however, concede that they have the requisite knowledge of those disabilities at the material time.

53. It is clear from documents before the Tribunal that the Respondents were aware of the Claimant's dyslexia from a fairly early stage in his employment.

54. It is clear from the evidence we heard from the Claimant, Mr Rafi, and the documents before us, that at an early stage in his employment the Respondent and Mr Rafi, in particular, were aware that the Claimant suffered from dyslexia and that this had an effect on his ability to communicate in writing.

55. The Respondents accept that the Claimant is a disabled person by reason of dyslexia at the material time. However, they dispute that they had the requisite knowledge or constructive knowledge, in respect of the Claimant's claims under section 15 and section 21.

56. The Claimant's dyslexia and its effect on his ability to produce written work are well documented and in fact, it is the Respondent's case that they made significant attempts to alleviate the effects of the dyslexia by making provision for colleagues to assist him in proof reading and in providing Dragon Dictate software. Moreover, Mr Rafi, in his evidence, suggested that he also became involved in assisting in proof reading.

57. It is clear to us from the evidence before us, that the Respondent, in particular Mr Rafi, were well aware of the effects of the Claimant's dyslexia and in fact Mr Rafi's reaction to what he perceived to be those effects that form part of the Claimant's claims in this matter in disability discrimination.

58. As for the Claimant's heart condition, we also make a finding that the Respondents were aware of the Claimant's heart failure for some considerable time. More particularly, however, in March 2020, we had documentary evidence before us that the Directors of the Respondents were aware of the conditions. As to the effect of that condition, there is some evidence before us, both from the Claimant, Mr Rafi and in the extensive bundle, that the Respondent's did consider the Claimant's heart condition when assessing whether he should be allowed to work from home during the Covid 19 pandemic.

59. However, we do find that there was little detailed medical evidence for the Respondent's to rely upon when considering the effect of the Claimant's heart condition. Certainly, in September 2017 when the Claimant was admitted to hospital as a result of his heart condition, there was an adjustment made to reflect that event on the basis that the Claimant should engage in no heavy lifting for 6-8 weeks.

60. However, the events which formed the subject matter of these claims took place some years later.

61. The Respondents did have a medical report of sorts before them, which we had before us at page 176.1 of the bundle. However, this was in the context

of the Covid 19 pandemic rather than in respect of his ability to carry out his job as Facilities Manager in light of his heart condition. The doctor's report is largely non-comital.

62. The first event, which is the subject matter of the Claimant's claims, took place in the early part of 2021. Certain Covid restrictions were still in place at that time. The Claimant clashed with, in particular a Cathy McShane in respect of a training course which she proposed to run at the Respondent's premises. The evidence of the Claimant and Miss McShane and Mr Rafi is at variance at this point. What is clear is that the Claimant was strongly resisting the proposed course on the grounds that it was his view that such courses could not proceed during the Covid restrictions.

63. We had before us a number of email exchanges. The exchanges were somewhat exacerbated by the fact that the Claimant and Miss McShane were not happy work colleagues and had for some time clearly not been getting on. Having carefully considered the evidence and studied the documents before us, the Tribunal concludes that the training which Cathy McShane was proposing to roll out, was first aid training which is difficult to do in any way other than face to face. The Claimant was adamant that running a face to face training event of the type that was proposed was in breach of the then Covid Regulations. This was endorsed by a view he had sought from Fiona Burns at the British Safety Council. However, contrary reviews were also on offer and an opinion was sought by Mr Rafi from a Dominic Greenwood, the Senior Health Safety and Environmental Management Consultant and National Safety Trainer at HR Solutions whose view was that, where other courses were classed as essential and could not be done on line, they can still be carried out. There was also evidence that the British Red Cross were still running face to face courses.

64. The Tribunal therefore considers that the position was open to interpretation. The Claimant took a particular view of Miss McShane and Mr Rafi, reasonably based on other points of view, took the contrary view.

65. The Claimant, in his evidence, felt that the risk was that individuals travelling to attend the course on public transport may be at greater risk of catching or spreading Covid 19. He also reasonably believed, based on the exchanges of emails we have seen, that despite his objections, the course was going to proceed. There was an exchange between the Claimant and Mr Rafi on 8 March 2021, the Claimant reiterated his view that any face to face training was not authorised due to National Lockdown rules. In that email timed at 16.15, he expressed what appeared to be some irritation and said that he felt his advice was not being trusted.

66. In his response Mr Rafi denied that that was the case and also asked for further clarification of points he had raised in an earlier email. The Claimant takes particular exception to that email. The Tribunal does not find that email to be in anyway offensive, aggressive or unpleasant. It is part of an

exchange where opinions differ, no more than that. Cathy McShane, after taking other advice from Rachel Doyle at Luton Borough Council, deemed the training essential and proposed to go ahead. Ultimately, the training did not go ahead and was cancelled.

67. It did appear, however, that the Respondents were intending to press ahead with the training pretty much until the last minute when they decided to cancel.

68. Part of the Claimant's claim in respect of alleged unfavourable treatment under his section 15 claim and his harassment claim, is based on these exchanges and in particular the Claimant's evidence that the Second Respondent, Mr Rafi, refused to have a verbal discussion with the Claimant concerning his views on the position of running face to face training but insisted that he reduce it to writing.

69. This request took place in a telephone conversation on 8 March. The Claimant gave evidence that he was told to reduce the advice to writing. Mr Rafi, in his evidence, does not deal with this matter at all in his witness statement but under cross-examination from Mr Nadin, Mr Rafi initially said there had been no conversation over the phone and later admitted that there might have been but he has no recollection of it. For the avoidance of doubt the Tribunal does not consider a general instruction to reduce something to writing in a communication between the Claimant and Mr Rafi as particularly sinister. There was a myriad of written communications between the Claimant any number of people at that time and whilst it is understood that the Claimant, because of his disability had greater difficulty when entering into written communication, he certainly engaged in much of it. It is entirely coherent and understandable, even if there are, as one would expect, some spelling mistakes and poor grammar.

70. The next significant event took place on 29 March 2021 when the Claimant attended a Board Meeting. The Tribunal had the minutes of this meeting before us in the bundle. It was in this meeting that the Claimant argues that he made a protected disclosure by advising the Respondent's Board that its health and safety policies had not been amended since 2017 and that it was in breach of its own code of conduct and health of safety statement. He accuses The Respondent of negligence by not following its own policies, which is a breach of duty of care under s.2 of the Health and Safety Act. There is certainly a section of minutes from that meeting timed at 15.44, where the Claimant states this. The Tribunal's view is that the Directors react to that and accept the seriousness of the Claimant's warnings. There is then an exchange where the Claimant answers that it is the responsibility of the CEO to make sure such documents have been updated. Mr Rafi, being the CEO responds and it is here that he raises what he perceives to be issues about the Claimant's drafting abilities. This appears at the top of page 248 in the bundle. It is this that founds another allegation of unfavourable

treatment in the Claimant's section 15 claim and is cited as a detriment in the Claimant's whistle blowing claim.

71. Subsequently, Mr Rafi followed up those comments with an email dated 13 May 2021. The Tribunal had this email before it. This email takes the form of an email from the Claimant to Mr Rafi with various points attached that Mr Rafi then responds to by writing his comments in blue on top of the original email. It is at the top of the second page of that document that Mr Rafi says the following:

> "In all your policies there are many mistakes and they are incoherent. Your last set of policy documents and the HNS statement which you wanted me to send to the Board for March 2021 Board Meeting, was reviewed by me, contained many mistakes and were disjointed and confusing. After reading these I pointed this out to you and you agreed to change these at the last minute before being sent to the Board. You are also aware that the Board agreed to review all policies now since staff have not agreed to work and sign up to policies which are badly written and are jumbled and confusing, otherwise they feel that they would be signing up to policies that they do not understand which they can't be asked to work to. The Board has instructed (me) to complete this work through an HR specialist advisor."

72. The Claimant then accepts in his evidence that he became involved in instructing an external advisor to assist in the proper preparation of fresh HR policies and documents.

73. It is clear that about this time there was some friction between the Second Respondent and the Claimant. The Second Respondent clearly felt a degree of frustration at his interactions with the Claimant and the criticisms being levelled at him by the Claimant. In turn, the Second Respondent explained that he found it very frustrating and difficult to have any discussion with the Claimant because of the Claimant's habit of interrupting him whilst he was in the middle of speaking. He reiterated this in the email of 13 May.

74. Prior to this in April 2021, a situation arose where the Respondents had a new tenant moving into their building and was necessary to prepare the office they were moving into for them. The Claimant's evidence is that he made it clear that the office needed to be completely redecorated due to the fact that the previous tenant had left hundreds of pieces of Blu Tack on the wall.

75. The incident that took place on 9 April forms part of the Claimant's disability discrimination claim in that the Claimant argues that the request to assist the Respondent's handyman in preparing a new office for incoming tenants, there was unfavourable treatment under his section 15 claim in that he was asked to assist in the removal of Blu Tack from the walls.

76. The Claimant's evidence on this was rather variable. In his witness statement he talked about hundreds of pieces of Blu Tack but this became thousands during the giving of evidence under cross-examination.

The evidence generally.

77. The Tribunal was not impressed with the evidence of the Claimant, Mr Rafi or Mr Patel.

78. The Claimant appeared to have difficulty in the giving of his evidence and this manifested itself in appearing as if the Claimant was deliberately seeking to avoid answering questions in cross examination or from the Tribunal. It is not unusual for witnesses to "gild the lily" when giving evidence of events which they are relying upon as Acts complained of in claims before Employment Tribunals. It is clear from the evidence that we have heard that the Claimant had difficulty in forming positive relationships with colleagues at the Respondents. He clearly fell out with a number of them, most particularly Miss McShane and Mr Rafi.

79. However, we do take into account the Claimant's dyslexia being one of the disabilities he relies upon, which is accepted by the Respondents in this case as a disability and the fact that giving evidence under cross examination this is a stressful and difficult time for anyone, let alone someone who is doing so by video link and suffers from dyslexia. The Claimant, whilst being expected to refer to documents in the bundle and his witness statement, with his dyslexia, would have been particularly challenging for him. We therefore do very much take into account that he was in a more difficult position than the other witnesses we heard from.

80. We were not very impressed with the evidence we heard from Mr Rafi. Mr Rafi appeared to be poorly prepared. His witness statement was brief and did not deal with many of the issues in this claim. He appeared wholly unprepared for many of the areas to which he was taken in cross examination and it is difficult to escape the feeling that he was deliberately seeking to avoid answering questions put to him. He contradicted himself on more than one occasion and, having indicated that he did not remember something, then accepted that he did. We also found him evasive.

81. We found the evidence of Mr Patel to be unsatisfactory. He spoke very quickly, which is not to be held against him but he also appeared poorly briefed and unprepared. We do not think that the Respondents were assisted by the evidence which Mr Rafi and Mr Patel gave.

82. The Claimant was summoned at short notice to a meeting on 25 May 2021 where he was placed at risk of redundancy. We had before us a document at page 620 in the bundle which was headed, "Facilities post". This was mis-described as business case in Mr Rafi's witness statement at paragraph 19. Mr Rafi had great difficulty in identifying the origin of this document, who had produced it and to whom it had been sent and when it had been produced. It sets out a rationale for making business cuts and, in particular, considering

redundancy of the role of Facilities Manager. It specifies that the Claimant will be put at risk.

83. When cross-examined, Mr Rafi indicated that others were also put at risk of redundancy and ultimately made redundant although he was uncertain as to whom this applied to and when it happened. He eventually alighted on suggestion that other redundancies occurred at the end of 2021. The Tribunal notes, however, that there was no evidence to support this in the bundle.

84. Mr Patel, on this point, said that other people had been made redundant at the same time but he couldn't specify who or in what roles. Mr Patel also could not identify the source of the document mis-described by Mr Rafi at page 620. He said he had no idea when it had been created or when it had been put to the Board or who had created it and to whom it had, or had not been distributed.

85. Further, at page 629 in the bundle, was an advertisement on the Respondent's headed paper for a Building Manager. The description of this role seemed remarkably similar to that of Facilities Manager carried out by the Claimant. Both Mr Rafi and Mr Patel were at a loss to explain why this role was created, or indeed why, on the Respondent's website, the Claimant's role of Facilities Manager was indicated to be vacant shortly after the Claimant was put at risk of redundancy. Mr Patel in particular, had difficulty in remembering when the new advertisement had been created. He initially said it was only created two or three months ago i.e. two or three months before August 2023. When pressed, that changed to six to five months ago. It turned out that the Committee, of which Mr Patel is Chairman, was the Committee which authorised seeking of the new role. The Tribunal find it strange that he had such great difficulty in recollecting when that was.

86. Mr Rafi was questioned about the document at page 620 and could not enlighten the Tribunal as to whom it was shared with when it was produced.

87. The meeting on 25 May took place by zoom. Mr Rafi indicated that he had not sent the document at page 620 to the Claimant. The Tribunal accept the evidence of Mr Rafi and Mr Patel that the Claimant reacted badly to being told he was at risk of redundancy. However, we do not accept Mr Rafi's evidence that this is the sole reason why the Claimant was immediately sent home and locked out of all company systems, including his company email account. We considered that this was likely to, on the balance of probabilities, have been a pre-meditated decision in light of the fact that the Respondents Mr Rafi and Mr Patel considered the Claimant to be a difficult individual. The Claimant was immediately sent home, asked for his key and access card which the Claimant gave to Mr Rafi in his office. We do accept that on the balance of probability, it is likely that the Claimant reacted aggressively. For the avoidance of doubt, however, we do not consider that

this justifies effectively shutting the Claimant out of the company in every respect during what was purported to be the ensuing period of consultation.

88. We regard it as most irregular for an individual who is apparently subject to a period of consultation which may, or may not, result in their dismissal by reason of redundancy, being effectively shut out of their employment from the moment that they are placed at risk.

89. We do not consider that this is good practice. Mr Nadin questioned Mr Rafi extensively in cross-examination and referred Mr Rafi to documents in the bundle that were before us, in particular at pages 284.1 and 349. At page 284.1 were minutes of a Board Meeting held on 1 June 2021. Point 2 was the ratification of minutes pursuant to a meeting on 29 March 2021. Under the heading HMS Policies there is evinced an intention for the CEO (Mr Rafi), or his nominee, to replace the Facilities Manager in the Health and Safety statement and for that individual henceforth to act as Lead Officer for Health and Safety Management.

90. It was put to Mr Rafi by Mr Nadin that this showed that a decision had been taken to dismiss the Claimant by reason of redundancy and that the proposed consultation was a sham. He said the die was cast, the decision had been made. The Tribunal was unimpressed with Mr Rafi's response which was that, as the Claimant was at home, it was necessary to appoint someone as cover. The minutes do not say that and we do not accept that evidence from Mr Rafi.

91. It is the Tribunal's finding, based on the evidence before it, both oral and written, that on the balance of probabilities the Respondents, and in particular Mr Rafi, had decided that the Claimant essentially had to be dismissed and that the redundancy process and the consultation were nothing more than a device or a sham to facilitate the swift removal of the Claimant. Nothing in the evidence of Mr Rafi or Mr Patel persuaded us otherwise. The Respondent clearly considered himself to be effectively already dismissed. On 27 May the Respondent sent out an email to two Directors of the Respondent and his local MP, which forms one of the claimed protected disclosures. That document was before us and we do not propose to repeat the contents here.

92. Nevertheless, the redundancy process did not continue to fruition. On 17 June Mr Rafi decided to convert the redundancy process to a disciplinary process. This was, on the Respondent's evidence, as a result of a series of complaints that were received about the Claimant's behaviour. This followed a telephone call between the Claimant and Mr Domonic Greenwood, the Health and Safety Consultant at HR Solutions who had been commissioned to initially assist the Claimant with health and safety policies and a review of them but subsequently had been brought in by the Respondents to conduct a full audit of the Respondent's health and safety policies pursuant to the

Claimant having been sent home and shut out of the Respondent's systems on 25 May.

93. The Tribunal accepts that the Claimant may have acted in an inappropriate manner during the course of that telephone call and it is clear that the complaint from Mr Greenwood is a genuine complaint, worthy of investigation. We did not hear evidence from Mr Greenwood but we have no reason to doubt the contents of the email from him giving a statement of account of the call on 10 June 2021.

94. It was as a result of this and a raft of other complaints raised that Mr Rafi decided to switch the apparent redundancy process and turn it into a disciplinary process. Prior to that, Mr Rafi had written to the Claimant indicating that, in any event, the At Risk Consultation process would be suspended pending dealing with the Appellant's email of 27 May as a grievance.

95. It was on 17 June, however, that Seina Okoli sent an email to Mohamed Rafi at 16.54, lodging a series of complaints. The email made it clear that the complaints were about incidents that had all occurred some considerable time ago. In fact the first one, from 8 August 2019, had been the subject of an investigation and the Claimant had received a warning. There was no evidence of this investigation on the file and we heard no evidence from anyone who could tell us in detail about it. The other complaints were in respect of incidents in January and February of 2020, some 18 months earlier. On the very same day a complaint was received from Jackie Barker at Luton Borough Council, concerning the behaviour of the Claimant on 20 May 2021 when he allegedly behaved badly towards a number of removal men who were removing property from the Respondent's premises. This prompted Mr Rafi to write to the Claimant indicating that a disciplinary process would be initiated. He was invited to an investigatory meeting with Abbey Ashford from HR Solutions Ltd.

96. The very next day Mr Rafi, himself, produced a lengthy witness statement setting out 20 complaints against the Claimant, some of which were complaints about the Claimant's behaviour towards him.

97. At or about the same time, a further complaint from Cathy McShane was lodged against the Claimant. Whilst the document we had in front of us was not dated, we accept that it is likely that it was raised by Cathy McShane on or about 17 June.

98. The Respondents then proceeded through a disciplinary process. The disciplinary investigation was conducted by Abi Ashford who produced a report on 29 June 2021 that recommended moving to a disciplinary process. The Claimant's email of 27 May was subject to a grievance investigation conducted by an external consultant Ian Stewart and the disciplinary process was also contracted out to an external HR Consultant, Serena Bower.

99. We heard evidence that none of the investigations undertaken by these external Consultants involved them speaking to anyone other than the Claimant. There appears to be a dearth of notes surrounding those investigations and a tacit acceptance by Mr Rafi, Mr Patel and those in authority at the Respondents of their recommendations contained within them. There was then a very unfortunate set of circumstances in that the recommendation of the consultant to dismiss the Claimant was sent to the Claimant when it should not have been. The Claimant not surprisingly regarded himself as dismissed at that point. Mr Rafi realised the error and wrote confirming that the report had been sent in error and that the Claimant was not dismissed and explaining that he would consider the report and its recommendations and write again to the Claimant. He then wrote again confirming that the Claimant was dismissed having accepted the recommendations of the report. This letter was sent on 27 October 2021. This was the point of dismissal. Ultimately Mr Rafi made the decision to dismiss but he accepted the recommendation of the external consultant.

100. The Tribunal is also minded to comment on what appears to be a continuing failure of the Respondents and perhaps those representing them to deal properly with disclosure. Quite properly Mr Nadin, on behalf of the Claimant throughout the preparation for this hearing, sought detailed disclosure from the Respondents of communications between them and their HR Advisors. Such communications are, of course, not subject to privilege. It seems to this Tribunal that those communications may have been highly relevant as to the motivation and the thought processes of Mr Rafi, Mr Patel and the Respondent's Senior Board Members. Despite many, many requests from Mr Nadin, such documents were not forthcoming and those representing the Respondents, indicated that all relevant documents had been disclosed. The Tribunal is less certain that such documents do not exist. We were unconvinced by the responses from Mr Rafi in this respect.

101. We also take note of another issue which is that a number of paragraphs in the witness statement of Mr Rafi and Mr Patel are identical. Both claimed that they had written their own statements but it is clear that certain paragraphs from one have been lifted and cut and pasted and placed in the other, or vice versa. This brings into question not only their veracity but the thoroughness of the preparation of the Respondents for this hearing.

102. The Tribunal also considers that despite the Respondents in the shape of Mr Rafi bringing to the Claimant's attention, his failings in producing policy documents, both at the Board Meeting on 29 March 2021 and in his email on 13 May 2021, there was very little evidence in the bundle before us of such failings. We were referred to one document which was a policy document which included a car policy which was not needed and in that document there were some minor typos but generally we had no evidence in front of us of the Claimant's failings in this respect.

The Law.

103. **Unfair dismissal - Section 98 of the Employment Rights Act**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) …

(4) The employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

104. The Tribunal is assisted by a number of authorities in arriving at its decision in respect of the above. It is for the Respondent to show what was the reason for the dismissal. If then it was a potentially fair reason then the Tribunal must reach a decision based on whether the decision to dismiss was reasonable under section 98(4) (above).

105. In this respect the Tribunal is guided by the Authority of Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT. The Tribunal must determine whether, in all the circumstances, the decision to dismiss fell within a band of reasonable responses of an employer faced with that set of circumstances. It is very important to note that the Tribunal must not substitute its own view from what would, or should, have been reasonable.

106. Here, the Respondents argue that the dismissal was for some other substantial reason and that reason was a breakdown in trust and confidence between the parties. The Tribunal will need to determine whether, on the evidence, they consider that that was the reason before moving on to consider section 98(4) if they determine that it was.

Whistle blowing claims.

Section 43A
Employment Rights Act 1996.

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

Section 43B Employment Rights Act 1996

Disclosures qualifying for protection.

(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [F2 is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Section 47B

Protected disclosures.

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

Section 103A

Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

107. In this case it is imperative that the Tribunal applies the tests in section 43B to determine whether the alleged disclosures qualify for protection.

108. Due note will have to be given to section 43C as well to determine if they qualified for protection they were protected as a result of being disclosed to the employer or other responsible person.

109. In this case it may be key to determine under 43B, whether the Claimant held a reasonable belief when making the disclosure which was made in the public interest and tends to show one or more of a-f of 43B(1).

110. The Tribunal will also need to potentially apply the tests under 103A.

111. This renders the dismissal of an employee automatically unfair where the reason (or, if more than one reason, the principle reason) for his/her dismissal is that he/she made a protected disclosure. There may be more than one reason for the dismissal but an employee will only succeed in a claim for unfair dismissal under this section if the Tribunal is satisfied, on the evidence, that the principle reason is that the employee made a protected disclosure. We are guided by the Authority of Fecitt and Others v NHS Manchester (Public concern at work intervening) 2012 ICR372 (Court of Appeal) which tells us that the causation test for unfair dismissal is stricter than for unlawful detriment under section 47B. The latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as

the disclosure materially influences the Decision Maker, whereas section 103A requires the disclosure to be the primary motivation for the dismissal. This is therefore a relatively high bar. We are further guided by the cases of Mallik v London Borough of Hounslow and others and Schaathun v Executive Business and Aviation Support Ltd, UKEAT/0226/12/LA also Romanowska v Aspirations Care Ltd 0015/14 EAT.

112. When considering the detriment claims under section 47B, pursued by the Claimant, we are guided in our interpretation of what amounts to a detriment by various Authorities, including Ministry of Defence v Jeramiah 1980 ICR13 and the more recent case of Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR337.

113. It is important to remember that section 47B provides protection from any detriment. There is no test of seriousness or severity and the provision could well be breached by detrimental action that seems very minor to an objective observer. It must be a detriment to which the worker has been subjected in the employment field and it must be because of the ground that the worker has made a protected disclosure. There therefore has to be a causal connection between the disclosure and the detriment.

114. It is important to remember that section 48(2) is one of the rare instances where there is a reversal of the burden of proof. Ordinarily, a Claimant in civil proceedings will bear the burden of proving his/her claim on the balance of probabilities. In the detriment claim under section 47B, it is for the employer to show the ground on which any act or deliberate failure to act was done.

115. Section 48(2) is often misunderstood. It does not mean that, once a Claimant asserts that he/she has been subjected to a detriment, the Respondent must disprove the claim. Rather, it means that once all the 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 Claimant was not subjected to the detriment on the ground that he/she had made the protected disclosure.

Disability discrimination.

116. The Respondents accept that the Claimant was a disabled person by reason of dyslexia and heart failure at the material times.

117. It remains an issue, however, pertinent to the Claimant's claims under section 15 and section 21 and the defence being pursued by the

respondents, that they did not know, or did not have constructive knowledge that the Claimant suffered from those disabilities.

118. The Claimant pursues claims under section 15, section 19, section 20, section 21 and section 26 of the Equality Act 2010, all on the protected characteristic of disability.

Section 15 Discrimination arising from disability

(1)A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation.

Section 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Section 21 - Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

119. The Claimant relies on six Acts in respect of his claim under s.15, three Acts in respect of his claim under s.19 and four of the six Acts in respect of his claim under s.26. We will deal with those six Acts in turn in our conclusions.

Section 15.

120. The Claimant has to show that he has been treated unfavourably because of something arising in consequence of his disability. We were able to clarify the somethings arising at the outset of the hearing.

121. The treatment has to be unfavourable, not less favourable, and therefore there is no need for a comparator. Here, knowledge is relevant and is a defence to a claim under s.15 under sub-section 2.

122. Even if the Claimant succeeds in persuading the Tribunal that he was treated unfavourably because of something arising in consequence of his disability, the Respondent can justify that treatment under 15(1)(b) if it can show that the treatment is a proportionate means of achieving a legitimate aim.

Automatic unfair dismissal – Health and safety reason S. 100 ERA 1996

100X1 Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

123. Here, the Claimant argues that the reason he was dismissed was the fact that he had challenged the Respondent in his capacity as the person responsible for health and safety at the Respondents.

Submissions

124. We heard oral submissions from Ms Johns and Mr Nadin, Mr Nadin then produced detailed written submissions for which we are grateful. We do not propose to repeat those submissions here.

Conclusions

Unfair dismissal

125. The Tribunal concludes that the Claimant was dismissed by reason of some other substantial reason. In our findings of fact we make findings that the Respondent had decided in May, or even before, that they were going to dismiss the Claimant. The redundancy, albeit justified by potentially difficult financial circumstances, which we accept were extant at the time, was we consider a device or a sham to bring about the removal of the Claimant. The Claimant's reaction to that redundancy we find prompted Mr Rafi to decide to convert the redundancy process into a disciplinary process which ultimately led to the Claimant's dismissal.

126. However, we do consider that the Respondents genuinely felt that the relationship between the parties had broken down and this is the reason they ultimately decided to dismiss the Claimant.

127. However, that decision was a foregone conclusion. We consider it suspicious in the extreme that a variety of complaints against the Claimant were all produced at, or about, the same time in June 2021. Moreover, many of the allegations ranged against the Claimant were historic, being years before, one of which had already been dealt with.

128. We were not impressed with the evidence of Mr Rafi or Mr Patel and consider that Mr Rafi, in particular, had decided that it was "necessary" to get rid of the Claimant.

129. The process was therefore fatally flawed and it is also the Tribunal's Judgment that the dismissal was substantively unfair.

130. The decision was taken pre-May 2021 and not effected until October 2021.

131. Applying s.98, we do find that the dismissal was a potentially fair reason being SOSR.

132. However, in all the circumstances of having decided to dismiss the Claimant, the process of doing so was a sham and largely trumped up. It was therefore not reasonable for the Respondents to treat this as a sufficient reason for dismissal.

133. The decision to dismiss cannot, on the findings of fact and the evidence before us, constitute a decision which falls within the band of reasonable responses of an employer faced with that set of circumstances.

134. The decision was ultimately taken by Mr Rafi but no proper consideration of any evidence was undertaken by the Respondents. The HR Consultants who were engaged in the disciplinary process made recommendations which were simply rubber stamped by the Respondents and Mr Rafi.

135. Dismissal is therefore substantively unfair.

Whistle blowing – protected disclosures.

136. The Claimant relies on four protected disclosures, one of which was allowed as an amendment at the commencement of these proceedings.

137. These are as follows:

    a. Notifying the Respondents that holding face to face training was prohibited by Covid Regulations (February/March 2021)

    b. On 29 March 2021, advising the Respondent's Board that its health and safety policies had not been amended since 2017 and that it was in breach of its own code of conduct and health and safety statement.

    c. Sending an email dated 27 May 2021 to two Directors of the Respondent and their local MP, alleging various failures set out in the issues 1-6.

    d. Added by amendment. The Claimant's email of 11 March to Luton Borough Council's LBC, Director of Public Health.

138. With respect to these four alleged disclosures, we have applied the appropriate tests as set out in s.43B of the Employment Rights Act 1996 and 43C.

139. With respect to the first disclosure the Tribunal does conclude that the Claimant satisfies the tests in that he was making a disclosure of information in the public interest which tended to show that under s.43(B)(1)(b) and s.43(B)(1)(d) and that he held a reasonable belief.

140. With respect to the second alleged disclosure, we conclude the same in that the Claimant held a reasonable belief that he was making a disclosure in the public interest which tended to show 43(B)(1)(b) and 43(B)(1)(d).

141. In respect of these first two disclosures, the public interest is satisfied by the fact the Respondents operate a public facility and therefore it is necessary for health and safety policies and provisions to be in place for the greater protection of those using the facility. Moreover, in respect of the first disclosure, the disclosure was relating to the interpretation of then Covid restrictions which were of general public interest and for general public protection.

142. In respect of the third disclosure, we also conclude that this was a protected disclosure in that the Claimant reasonably believed he was making a disclosure in the public interest which tended to show 43(B)(1)(b) and 43(1)(d). Each of the six issues raised in the email of 27 May, fall into this category albeit we do not accept that 4, 5 and 6 amount to protected disclosures because we do not find that the Claimant's belief was reasonably held on the evidence we have heard. So that only points 1, 2 and 3 in the email of 27 May, constitute a protected disclosure.

143. We find that the disclosure relied upon, being the email of 11 March, does constitute a protected disclosure in that it was in the reasonably held belief of the Claimant that he was making a disclosure in the public interest which tended to show 43(B)(1)(a) and/or (1)(d). This also related to the proposed face to face training and the application of the Covid Guidelines.

144. We are satisfied that all of the disclosures which we have concluded fall under s.43B were made in accordance with 43C. In the case of the first three disclosures, they were made to the employer and in the case of the third, also to a Local MP. The fourth disclosure was made to the Local Council which has responsibility for health and safety matters. We regard the Local Authority as a prescribed person on the basis that the disclosure related to matters which may affect the health or safety of any individual at work and included matters which may affect the health and safety of any member of the public arising out of, or in connection with, the activities of persons at work. We arrive at this conclusion by reference to s.43F of the

Employment Rights Act 1996 that we conclude that the Claimant reasonably believed that the failure he was describing fell within the description of matters in respect of which Luton Borough Council is so prescribed and that s.43F(1) and, without the information disclosed and any allegation contained in it are substantially true. This is under s.43F(b)(i) and (ii).

145. We conclude under s.43F(1)(b)(ii) that the information was substantially true, albeit that there was a different interpretation of the Covid Guidelines at that time, illustrated by the change of emails between the Claimant and others at or about March 2021.

146. For the reasons described above, therefore, all of the disclosures relied upon by the Claimant in these proceedings, (save for paras 4, 5 and 6 in the e mail of 27 May as explained above) are protected disclosures.

Claim for automatic unfair dismissal under s.103A of the Employment Rights Act 1996.

147. It is clear to us that the recommendation made for dismissal to the Respondents by Serena Bower, HR Consultant, which was adopted by the Respondents in their decision to dismiss the Claimant, he included reference to disclosures made by the Claimant, in particular it is very critical of what she has described as the discrediting of the reputation of the CEO by the sending of the 27 May email to an MP. It also opines on the smearing of the name of the CEO with Luton Council and the Respondent's Board.

148. Mr Nadin asked us to consider that without the disclosures, the dismissal would not have occurred as the recommendation at the end of the report at page 563 of the bundle, opines that whilst there is a sufficient case to confirm a case of gross misconduct, a final written warning would perhaps have been appropriate. He asked us to conclude that the difference beyond that final written warning was because of the protected disclosures.

149. We cannot agree. The decision to dismiss was actually taken by Mr Rafi, albeit there was an unfortunate mix up with the recommendation being sent to the Claimant such that he felt he had been dismissed on 22 October, the decision was actually taken by Mr Rafi and he endorsed those recommendations save for that at paragraph 3 of the dismissal letter of 27 October, he concludes that the gross misconduct did warrant a dismissal without notice but he goes on to say that the reason for the dismissal is the irrevocable breach of trust between the parties.

150. We consider it a high bar to persuade a Tribunal that the making of the protected disclosure was the principal reason for the dismissal and we do not consider this bar has been reached. The protected disclosure certainly played a part in the reason for dismissal but we, on the balance of

probabilities and the reasons and the evidence before us cannot conclude that it was the reason or principal reason. The automatic unfair dismissal claim therefore fails and is dismissed.

Whistle blower – Whistle blower detriment claims.

151. The Claimant alleges under s.47B(1) TRA 1996 that the Claimant suffered detriments on the ground that he had made the protected disclosure set out. The detriments he relies upon are as follows:

    a. Humiliating the Claimant in the Board Meeting on 29 March 2021.

    b. Humiliating the Claimant in an email dated 13 May 2021.

    c. Putting the Claimant at risk of redundancy on the basis of a non existent and implausible business reorganisation which only affected the Claimant's role.

    d. Removing the Claimant's access to emails and work documents including health and safety documents.

    e. Instructing a Health and Safety Consultant to conduct a review of the Respondent's health and safety policies without allowing the Claimant to participate in the review on account of his access to emails and documents being blocked and ensuring that most of documents/policies were not available for review. This resulted in a biased report that was damming of the Claimant.

    f. Ending the redundancy consultation and instead starting a disciplinary procedure.
    g. Putting the Claimant through a disciplinary process on the basis of protected disclosures made on 27 May 2021.

A and B above.

152. The Tribunal does conclude that the actions of Mr Rafi, both at the Board Meeting on 29 March and in the email of 13 May, was a detriment to the Claimant. Based on the evidence we have heard, we have seen insufficient evidence to suggest that the allegations arranged by Mr Rafi both at the Board Meeting and in writing on 13 May, are substantively correct. We have seen insufficient evidence in the bundle of this. Even if there was truth in those comments, raising them in the way which he did at the Board Meeting and using the language used in the email of 13 May, certainly put the Claimant at a detriment. However, we are not persuaded

by the evidence before us that the reason that this was done was that the Claimant had made a protected disclosure. There is insufficient evidence for us to concluded that there was a causal connection. We have considered the effect of s 48 (2) in arriving at this decision. That is we find that on the evidence of the Respondents they have convinced us that there was no causal connection.

C and D above.

153. We also do not conclude that there was a causal connection between C and D albeit that both of these amount to detriments. We do consider that there was probably a plausible business argument for a redundancy but we do not believe that was the real reason why the Claimant was placed at risk. The Respondents had concluded that there had been a sufficient breakdown between the Claimant and the Respondent for the Claimant to have to be dismissed. It was as a result of a variety of factors but we have not been persuaded by the evidence before us to conclude that the threshold to make the causal link between the detriment and the protected disclosure has been reached. We have applied the test in s 48 (2) to the Respondents evidence

E above.

154. We do not consider that this constitutes a detriment. The Claimant was involved in the instruction of the Consultant and albeit the remit of the Consultant may have extended beyond that which the Claimant understood it to be, we do not consider that the instruction of that Consultant amounted to a detriment nor, in any event, was that instruction or the acts carried out by the Consultant in any way connected with the protected disclosure.

F above.

155. The Tribunal concludes that this is a detriment but, once again cannot find, on the balance of probabilities, a sufficient link between this and the protected disclosure. The Respondents, in the shape of Mr Rafi, we believe, had drawn the conclusion that the Claimant must be dismissed and switched the consultation to a disciplinary process to enable the ease of effecting this. But there is no evidence that this was as a result of the protected disclosure.We have applied the test in s 48 (2).

G above.

156. We reject this for the same reasons as set out in F above.

157. For the reasons set out above, the Whistle blower detriment claims fail and are dismissed.

Disability discrimination.

Section 19 – Equality Act 2010

158. The Claimant asked us to find that the acts of the Respondent amounted to disability discrimination.

159. We consider this claim to be misconceived. It has been improperly set out by the Claimant as no PCPs have been cited. The three acts relied upon are not provisions criterions or practices which apply to the workforce generally which, under the terms of section 19, discriminate against the Claimant indirectly. As Miss Jones points out, these are acts the Claimant complains of having been perpetrated against him personally. None of those acts can constitute a provision criterion or practice as envisaged under s.19. This claim is misconceived. It fails and is dismissed.

Discrimination arising from disability s.15 of the Equality Act 2010.

160. We established in the preamble to the hearing of evidence in this matter that the Claimant asked the Tribunal to consider that six acts amounted to unfavourable treatment because of something arising inconsequence of the Claimant's disability. We agreed that the something arising inconsequence in respect of the Claimant's dyslexia was his difficulty with written communication and the something arising in consequence of his heart disease was the difficulty in performing strenuous acts.

161. The six acts relied upon as constituting unfavourable treatment are as follows:

161.1 On or before 8 March 2021, did the Respondent refuse to verbally discuss health and safety concerns raised by the Claimant (relating to the Respondent holding in-person training during the lockdown and instead insists on the Claimant providing advice in writing?

161.2 On 8 March 2021, did the Respondent sent an email to the Claimant that was belittling of his attempt to provide this advice?

161.3 On 29 March 2021, did the Respondent humiliate the Claimant in a Board Meeting by highlighting mistakes he had made in written policies and implying that they were illegible?

161.4 Did the Respondent instruct the Claimant to strip a substantial amount of Blu tack from three walls (measuring 3x7 metres) of a large room?

161.5 On 13 May 2021, did the Respondent send to the Claimant an email which stated:

"In all your policies there are mistakes and they are incoherent… Your last set of policy documents in the health and safety statement that you wanted me to send to the Board for the March 2021 Board Meeting was reviewed by me and contained many mistakes and were disjointed and confusing… Staff have not agreed to work and sign up to policies that are badly written and are jumbled and confusing, otherwise they feel they would be signing up to policies that they do not understand which they cannot be asked to work to".

161.6 From 25 May 2021, did the Respondent remove access to the Claimant's work email and then insist on communicating with the Claimant via his private email address, despite the Claimant requesting that he stop?

162. In respect of all of the above the Tribunal must determine whether the Respondents, at the material time, knew of the Claimant's disabilities or conclude that they reasonably to have been expected to know that the Claimant had the disability.

Knowledge

163. Miss Jones asked us to conclude that the Respondents did not have knowledge or constructive knowledge of the Claimant's disabilities. This is simply not borne out by the evidence that has been put before us. There is ample evidence that the Respondents, in particular, Mr Rafi, had specific knowledge of the Claimant's dyslexia. There was plenty of written evidence in the bundle of discussions between Mr Rafi and the Claimant and others concerning his dyslexia. Moreover, there is evidence of attempts to assist the Claimant in coping with his dyslexia by the provision of Dragon software and by the indication that others, including Mr Rafi and Cathy McShane, would assist the Claimant by reviewing work produced by him. It is not credible to suggest that the Respondents did not have knowledge of the Claimant's dyslexia.

164. The same applies to the Claimant's heart failure. Whilst there is limited medical evidence before us in the bundle, there is no doubt that there was discussion between the Claimant and Mr Rafi as to his heart failure. Mr Rafi asked for more information about it indeed but that does not mean that he was unaware of it.

165. The Tribunal therefore concludes that the Respondent had knowledge of the Claimant's disabilities at the material time.

Whether the six acts constitute unfavourable treatment?

Act 1

166. The Tribunal heard much evidence about the exchanges between the Claimant, Mr Rafi, Cathy McShane and others in early March 2021 concerning the in-person first aid courses the Respondents were proposing to run which were vehemently opposed by the Claimant. During the course of those exchanges Mr Rafi did ask the Claimant to clarify in writing, some of his advice. Evidence emerged that they had had a telephone discussion at the same time, albeit that initially Mr Rafi could not remember it, but the Tribunal concludes that nothing Mr Rafi did during the course of this exchange of emails amounts to unfavourable treatment. The request to reduce some of the advice to writing so that he could show it to others seems, to this Tribunal, to be entirely reasonable. Therefore, neither 1 or 2 of the acts relied upon can constitute unfavourable treatment.

Act 3

167. Being Mr Rafi's comments in the Board Meeting on 29 March 2021, do constitute unfavourable treatment. We consider that it was unnecessary for Mr Rafi to descend into the level of criticism which he did in the Board Meeting about the nature of the Claimant's difficulties in producing written work. This is clearly unfavourable treatment of the Claimant and it is also clearly unfavourable treatment because of something arising in consequence of the Claimant's disability, namely dyslexia.

168. We make exactly the same finding in respect of the email of 13 May 2021 (Act 5). That also constitutes unfavourable treatment because of the something arising in consequence of the Claimant's dyslexia.

169. With respect to claim 4, we do not conclude that this amounts to unfavourable treatment. The evidence produced by the Claimant on this was variable. Certainly there was a room that needed Blu tack removing and redecorating. Mr Rafi asked the Claimant to engage in that process as there was little time in conjunction with the other employee who was due to decorate the room. We cannot conclude, on the evidence before us, that this constituted unfavourable treatment. It was a simple request. There was insufficient evidence before us to suggest that it was a particularly onerous task. In any event the Claimant did not perform that task and the room was redecorated by the other employee.

170. As to allegation 6, this is undoubtedly unfavourable treatment as without warning and what was supposed to be the continuance of the Claimant's employment during a redundancy consultation process, he had access to

his work email and all other aspects of his work removed. However, we cannot see that this was because of something arising in consequence of his disability. It arose in consequence of the desire to dismiss him initially on the basis of purported redundancy. This did not arise out of his disability, either in dyslexia or heart failure.

171. In summary, therefore, we find that allegations 3 and 5 constitute unfavourable treatment because of something arising in consequence the Claimant's disability, namely, dyslexia. This finding is against the First Respondent and Mr Rafi.

Justification

172. We are asked therefore, to consider whether the Respondents were justified in their treatment of the Claimant and the test there is whether that treatment was a proportionate means of achieving a legitimate aim. Miss Jones asked us to consider that the legitimate aim was the proper production of readable and useable health and safety policies and accompanying documentation. We accept that as a legitimate aim. The question is whether the treatment was a proportionate means of achieving that.

173. We find that it was not. We had little, or no evidence before us as to whether the failings of the Claimant in the production of those policies was as set out by Mr Rafi, both in his exposition at the Board Meeting on 29 March and in his email of 13 May. We can see that there was a legitimate aim in having properly produced policies but we do not consider it proportionate to expose the Claimant's failure to the Board in general on 29 March nor to write to him and use the wording set out on 13 May.

174. For the reasons set out above, therefore, the Claimant succeeds against both the First Respondent and Mr Rafi in respect of allegations 3 and 5 under s.15 of the Equality Act 2010.

Claim for reasonable adjustments

175. This claim is not well put and not well structured. The PCPs relied upon have not been adequately set out. The Claimant's claim is based upon the requirement to make reasonable adjustments in respect of the Claimant's disabilities. Firstly, it would appear that the reasonable adjustment argued is that it would have been easier and appropriate for the Respondent to communicate with the Claimant verbally rather than insisting on written communication and we are asked to consider whether there was a duty to make reasonable adjustments by implementing Dragon dictation software and allocating colleagues to review his written work.

176. We have already dealt with the issue of knowledge.

177. As we say, the claim is not clearly put but our conclusion is that there is insufficient evidence before us to persuade us that a reasonable adjustment would have been to effect all communications with the Claimant verbally rather than in writing. The evidence before us suggests that both were undertaken. The Claimant had responsibility for producing certain documents. In his work it was necessary that he communicated both verbally and by email. It is not reasonable to expect him to be able to perform his role purely by verbal communication.

178. With respect of the other aspects raised, we do consider that the Respondents made reasonable adjustments, they did provide Dragon dictation software. There is little evidence before us as to what happened about that albeit we understand that the Claimant chose not to use it because it was difficult to operate in open plan. There was no evidence to suggest that the Claimant brought this to the Respondent's attention and attempted to further the use of Dragon by some further adjustments. The Respondents, seemingly, were not to know. Moreover, the Respondent did implement an adjustment which meant that colleagues would review the Claimant's written work, including Mr Rafi and Ms McShane. It appeared that this was less engaged than it might have been due to the difficult relationship between the Claimant and his colleagues. The evidence before us, however, is insufficient to persuade us that there was a failure here by the Respondent. For those reasons we do not consider that there was a failure to make reasonable adjustments under s.21.

Harassment

179. Under s.26 of the Equality Act 2010 related to the relevant protected characteristic of disability.

180. For the reasons already set out, we conclude that acts 3 and 5 perpetrated by Mr Rafi do constitute harassment under s.26 of the Equality Act 2010. Based on the evidence we have heard, the test set out in s.26(1)(a) and (1)(b), are satisfied. The two acts in question had the effect of violating the Claimant's dignity and creating an intimidating and hostile, degrading, humiliating and offensive environment for him.

181. We do not consider that the Claimant was unreasonably sensitive in this respect in respect of these two acts. It was reasonable for that conduct to have that effect.

182. For those reasons the Claimant succeeds on those two allegations as constitute to harassment under s.26 of the Equality Act 2010.

Automatic unfair dismissal – Health and safety reason (s.100 Employment Rights Act 1996).

183. For the reasons we have already set out, we do not consider that the reason for the Claimant's dismissal was that he had challenged the Respondent in his capacity as the person responsible for health and safety at the Respondents. There is simply insufficient evidence before us to allow us to draw such a conclusion we have given based on the evidence before us to allow us to draw such a conclusion we have given, based on the evidence before us. This claim appears to be something of an after thought as it has barely been referred to in these proceedings and we have received no submissions on it.

In summary

184. The Claimant succeeds in his unfair dismissal claim under s.98 against the First Respondent only.

185. The claim is substantively unfair and we cannot assess a Polkey reduction on the basis that it was only procedurally unfair.

186. We do consider, however, that the Claimant was not entirely blameless in bringing about a situation where the Respondents felt they had no alternative but to dismiss him and in a Remedy Hearing it will be necessary to consider a reduction in any award as a result of the Claimant's contributory fault.

187. The Claimant succeeds in two aspects of his s.15 of the Equality Act 2010 claim under allegations 3 and 5 and two aspects of his harassment claim under allegations 3 and 5. These succeed against the First Respondent and Mr Rafi. All other disability discrimination claims fail. All the Claimant's whistle blowing claims fail and are dismissed for the reasons already set out.

188. This matter will be listed for a Remedy Hearing to last **1 day** and will take place in person at the **Bury St Edmunds Employment Tribunal, 1st Floor Triton House, St Andrews Street North, Bury St Edmunds, Suffolk, IP33 1TR** before the same Tribunal. The parties should provide a stencil of dates to avoid to assist the listing office in effecting the listing of the Remedy Hearing.

Dated: 31 October 2023

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Employment Judge K J Palmer

Sent to the parties on:2 November 2023

For the Tribunal: