EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Cox	**v**	Park Lane Windows Ltd

Heard at: Cambridge ET **On**: 26/27/28/29 September 2023

Before: Employment Judge Conley
Mr C Davie
Mr S Holford

Appearances
For the Claimant: Mr Nadin, solicitor
For the Respondent: Mr Ramsbottom, representative

JUDGMENT

1. The claimant's claim of constructive dismissal is well founded and succeeds.

2. The claimant was wrongfully dismissed.

3. The claimant did not make protected disclosures within the meaning of section 43B Employment Rights Act 1996 and was not subject to a detriment on the ground that he had made a protected disclosure contrary to section 47B Employment Rights Act 1996.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 8 March 2022, following a period of early conciliation between 11 November 2021 and 22 December 2021 the Claimant sought to pursue the following complaints:

   i) Unfair constructive dismissal;

ii) Wrongful dismissal;
iii) That he suffered a detriment as a result of having made a series of Public Interest Disclosures ('Whistleblowing').

2. The claim was resisted by the respondent who presented a Response and on 21 April 2022 presented comprehensive Grounds of Resistance.

THE EVIDENCE

3. The evidence in this case came from the following sources:

    a) The written and oral evidence of the Claimant;
    b) The written and oral evidence of Andy Daly (Managing Director of the respondent), Roanne Richards (Finance Director), Paul Stanyer (Sales Director) and Jeremy Bush (Operations Manager/ Installations Manager)
    c) A comprehensive bundle of documents amounting to 280 pages.

FINDINGS OF FACT

4. The claimant commenced employment with the respondent as a fabricator on 18 June 2001. Having been promoted on a number of times during the course of his 20 year period of employment, he was working as an Installations Manager during the course of the events that are relevant to these proceedings.

5. On 12 November 2019, the claimant's basic salary was increased from £600.00 to £640.00 per week, an increase of 6.67%

6. By the time of his resignation, the claimant's annual salary was £37,440.00

7. His period of employment was terminated on 5 November 2021 when he submitted his resignation contemporaneously with the submission of an appeal against a grievance that had been rejected, save for in one respect, namely that there had been a shortfall in his salary owing to a miscalculation following the changeover from weekly to monthly payments.

8. He resigned with immediate effect and therefore did not work through his contractual notice period. He had acquired statutory employment rights by virtue of the fact that he had been continuously employed by the respondent for a period greater than 2 years.

<u>History of the respondent company</u>

9. The respondent company had essentially started out as a family business, and both the claimant and Mr Andy Daly (the managing director) had family connections to the business. Mr Daly had commenced employment with the respondent in 1990 as a salesman, remaining with the business for three years in that role; he was the nephew of one of the owners of the business at the time, Mr Eddie Daly. Andy Daly left the business in the 1990s, returning in April 2017 when he bought out the owner Mr David Page and his former business partner who remained a shareholder.

10. The claimant as already stated began working for the respondent as a fabricator in 2001, and he is the son in law of Mr Page.

11. Mr Daly did not play an active role in the business for the first six months after his acquisition because at the time his wife had serious health issues. He resumed his management role in 2018. This coincided almost immediately with some degree of conflict between himself and the claimant, which was to continue, off and on, throughout the duration of the claimant's employment; likewise, Mr Daly became aware of a number of concerns about the profitability of the business, concerns raised by customers regarding the standard of service that they were receiving, and issues with the claimants relationships with the fitters that he was tasked with managing.

12. This led to a number of measures implemented by the respondent to try to identify the causes of the inefficiencies and remedy them. Various people were brought into the business to try to support the claimant in his role. Tony Scarf joined the company as a surveyor; Andrew Stanyer joined as a consultant; and over the course of the next two years, the claimant was provided with a number of assistants in his role (including people named Laura, Jo, Jordan Travill, and Jamie Mills), none of whom remained with the respondent for very long. Mr Mills, upon leaving the respondent, made a series of disparaging comments about the claimant

13. It is clear that even at this stage there was concern over the claimant's ability to perform his role effectively, and the respondent sought to establish the cause of difficulties within the business and, as far as possible, seek to resolve those difficulties by both monitoring and supporting the claimant.

14. The claimant perceived these measures as being targeted at him in the sense of being unfairly and oppressively monitored; however, the Tribunal is not persuaded that - at this stage at least - the management measures put in place by the respondent were for anything other than legitimate business reasons.

<u>Bonus scheme</u>

15. It was apparent from the evidence that during the course of Mr Daly's tenure as MD of the respondent, there operated a discretionary bonus scheme, the precise operation of which is to say the least unclear from the evidence.

16. There is evidence that, on at least one occasion in 2018, the claimant was not paid his bonus in a timely way, that Mr Daly was reluctant to pay the bonus that was due to the claimant under the scheme as it operated at that time, and that he (Mr Daly) was critical of the claimant's performance. However, following a discussion with the claimant about this, Mr Daly did agree to pay the bonus in cash.

17. The bonus scheme was in due course amended again in the summer of 2021, which will be referred to below.

<u>Covid - furlough scheme</u>

18. On 23 March 2020, the Prime Minister announce that the UK would be going into 'lockdown', and as a result, all but essential workers would be required to work from home.

19. On 24 March 2020, the respondent announced by way of a company memo that the business would be closed 'for a minimum of 3 weeks, as under guidelines given by the government'. Clearly, as with the rest of the world, the respondent could not at that time possibly have known that the true length of the COVID 19 emergency and associated protective measures would be significantly longer than was first anticipated.

20. In the context of these proceedings, two consequences of significance flowed from these events: firstly all employees of the respondent were to cease working and would be paid 80% of their salary by means of a government grant under what would eventually become known as the Coronavirus Job Retention Scheme, commonly referred to as 'furlough'; and secondly, and as a result of the implementation of the furlough scheme, the respondent took the decision to change the frequency of payment of employees salaries from weekly to monthly.

<u>Cessation of work</u>

21. On the day of the respondent's announcement, the claimant, in his capacity as Installations Manager, was asked to make a number of phone calls to existing customers who were expecting installation of window in order to inform them that fitters would not be in a position to attend their homes to carry out works. The Tribunal finds that this work would not have taken any more than an hour, and may well have taken considerably less time.

22. In addition, fitters attended a customers premises in order to ensure that a partially-completed fitting was made watertight. The precise length of time this job took is not known but again we conclude that it was not a substantial length of time.

23. In considering the issues raised in relation to the work that was undertaken after the announcement of 'lockdown', the Tribunal has had regard to the Treasury Direction under sections 71 and 76 of the Coronavirus Act 2020, which was issued on 15 April 2020. This was the first time that the precise operational regulations of the scheme were published, despite the fact that the broad principles under which the scheme was being proposed was announced on the 20 March 2020 and was made retrospective to the 1 March 2020.

24. The Tribunal is entirely satisfied that the respondent could not possibly have known or been expected to understand with precision how the scheme was to operate, on the day of its inception when businesses around the country were thrown into an unprecedented situation, when the regulations were not published for a further 3 weeks.

25. Even if they had, we consider that the making of a small number of phone calls to reassure customers that were expecting the installation of windows is unlikely to have been regarded as a serious breach of the regulations or one that could

have been deemed to be fraudulent - or one that anyone working for the respondent - the claimant included - would have thought improper.

26. In any event the evidence from the claimant's own witness statement is that much of this work was conducted before the official announcement was made at around 1pm on the 24 March 2020, and that the office was completely empty by 2.30pm on that date.

27. The claimant, in his witness statement, also made reference to some additional work that Mr Daly asked him to perform toward the end of the furlough period, in which he was asked to speak to some clients to start booking installation jobs for when the fitters returned to work and also dealing with a number of emails and discussions relating to the purchase of PPE.

28. The Tribunal does not accept the evidence of the claimant that this took up to two hours per day for a number of weeks. We find that the work that he the claimant refers to was minimal, and furthermore that it is unrealistic to expect that a small business such as the respondent would be able to operate in a vacuum immediately prior to the resumption of normal business at the conclusion of the furlough period. The work described was no more, in our view, than making rudimentary preparation for the return to normality. Despite raising the issue with the parties, the tribunal has not been taken to the specific regulations and invited to make any finding as to whether this activity, which we consider to be *de minimis* would have constituted a breach of the regulations.

29. Of more importance to the issues that we have to determine is the fact that we find no evidence that either the claimant or indeed anybody else working for the respondent was in any way concerned about requests that work be undertaken during the furlough period. For reasons that we will come onto in due course we find that the disclosure of a concern about work that the claimant was asked to perform whilst on furlough was made for the very first time in the aftermath of his grievance hearing, and we do not find that the disclosure was made out of a genuinely and reasonably held belief that he was acting in the public interest.

<u>Change of frequency of payment of salary</u>

30. Prior to the adoption of the furlough scheme, the respondent paid salaries on a weekly basis. As part of the announcement on the 24 March 2020 of the implementation of the furlough scheme it was also announced that "from this point and because we will not receive our government grant until first may 2020 all salaries will be paid monthly."

31. The notice went on to give an option to all employees to carry on being paid weekly but if they chose to do so they would only receive their statutory guaranteed pay of £29 per day.

32. In our judgment, the unprecedented circumstances in which the Respondent and indeed the country found itself required requires businesses to make decisions of importance quickly in order to adapt to the changing situation, and this included the need to seek to vary employment contracts at least on a

temporary basis, to ensure the preservation of jobs and businesses. The adoption of the furlough scheme necessitated certain measures in order to be compliant which inherently required the variation of certain terms of contracts, in this case the frequency of payment of salary . The Tribunal does not find anything unfair or unreasonable about the way the respondent acted on 24 March 2020.

33. The same cannot necessarily be said about the decision made at the end of the furlough period, when on 20 May 2020 Mr Daly wrote to the claimant (and presumably all employees) indicating that "with immediate effect or future payroll will be set to monthly pay. This will be paid on the last Thursday of every month".

34. The respondent ought to have consulted more widely and thoroughly with its staff when considering whether to make permanent what had been a temporary variation to an employment contract, and to this extent we find the respondent to have acted in error.

35. However, once again there is no evidence that anyone working for the respondent, the claimant included, raised any complaint in relation to this decision either at the time or at any stage subsequently until the matter was raised as part of his grievance.

36. The most serious consequence of this decision was the fact that, as a result of the change from weekly to monthly payments, the claimant suffered a deduction from his wages of £40 per month for a period of 17 months, which was raised as part of his grievance and is pleaded in these proceedings as amounting to a repudiatory breach of contract in its own right, or either singly or combination with other matters, as amounting to a breach of the implied term of mutual trust and confidence.

37. However, despite this pleading, both parties accept that the deduction was as a result of a clerical error and was not deliberate; and that when the shortfall was identified, the respondent agreed that the money was due to the claimant. In circumstances where there appears to be no dispute about this, the Tribunal finds that it was not a deliberate act on the part of the respondent.

<u>Changes to role</u>

38. In summer of 2020, one of the fitters working for the respondent, Adam Sandle was promoted to work as Installations Manager, whose remit was to manage the fitters out in the field externally; the claimant's role meanwhile was amended to that of Installations Co-ordinator, with his duties being limited to the co-ordination of installations internally, as an office based role.

39. This restructuring of the claimant's role had initially been proposed as a splitting of the management role into separate 'External' and 'Internal' management positions. We consider that this was most likely as a sop to the claimant in order to placate him over the erosion of aspects of his role. However, in due course this facade was dropped.

40. We prefer the evidence of the claimant that he was not consulted by Mr Daly in relation to the appointment of Mr Sandle; and we find that this amounted to a demotion in that although the claimant had retained his salary, a number of his core responsibilities had been removed from him and reallocated to another member of staff who, previously, had been in a significantly subordinate role to himself, but was now in a position of management.

41. It was not made clear in the evidence whether the claimant was actually required to report to Mr Sandle in that role, but the fact that the claimant was stripped of his title of 'Manager', which was then ascribed to Mr Sandle, and re-labelled as a 'Co-ordinator' represents a significant reduction in status and level of responsibility.

42. Despite this, the claimant continued to work in his role, and as it turned out Mr Sandle did not remain long in post, leaving the respondent in December 2020 amid complaints that he was being undermined by the claimant, continuing the pattern of high staff turnover in positions associated with the claimant.

<u>The computer system</u>

43. In March 2021, the respondent, in order to try to improve efficiency, sought to migrate their processes from a paper-based manual system which relied upon the use of large boards in the office, to a Computerised CRM system called 'Adminbase', operated by a software company called Ab Initio.

44. The claimant was resistant to the adoption of this system and struggled to adapt to this new way of working. The Tribunal does not accept that he was provided with insufficient training. We find that, for a company the size and scale of the respondent, his training was adequate, which included access by telephone to the software company as necessary.

45. We find that the claimant was simply not adaptable and was reluctant to embrace change having been working with a manual system for many years.

<u>Changes to Bonus Scheme</u>

46. In August 2021, the respondent implemented a number of changes in the way that the discretionary bonus scheme was to be administered. The scheme that came into effect in this time was based upon seven teams of fitters achieving £360,000 of installations per month, 80% of which must be paid for by the last Thursday of the following month; and in addition, 80% of any old debt should be collected within the bonus month. If that target were to be reached, a bonus would be payable of 1% of the £360,000 between 6 people.

47. The claimant complained that the targets could not be reached due to the fact that the scheme did not operate *pro rata* in that it did not take into account staff absences, either through annual leave, self isolation due to COVID or absence due to sickness. Mr Daly's evidence was that the targets increased because the number of fitters had increased and that there was no unfairness in the way the scheme operated; and that in any event no bonuses could have been paid at that time due to the fact that the business was struggling financially. He also

made the point that he did not feel that bonus schemes were effective at incentivising staff.

48. In our judgment, it would be far too complicated to administer a scheme such as this if it were to be made *pro rata*. The administrative burden would be disproportionate. We do not see any unfairness in the decision by the respondent to retain a simple bonus scheme, and we do not find any evidence that the targets had been made deliberately unachievable.

49. Once again, we have been presented with no evidence that anyone other than the claimant complained about the bonus scheme.

<u>Introduction of Mr Bush</u>

50. In the same month, Mr Jeremy Bush was brought in from the respondent's sister company, Nu Look, in which he had occupied the role of Installations Manager. The reasons for this were explained by Mr Daly as being that, having worked for Nu Look for over 12 months, Mr Bush had done a great job and had streamlined the installation process at the other business. Mr Daly felt that Mr Bush had the knowledge and experience to improve the processes in the respondent's business and he was asked to adopt a similar role to that which had been given to Adam Sandle a year earlier.

51. The Tribunal does not find that the decision to bring Mr Bush across into the respondent whilst the claimant was away on a holiday for a period of 10 days was coincidental. On the contrary, it seems to us that Mr Daly and others in the respondent's company, including Mrs Roanne Richards the Finance Director, would have been well aware of the likely reaction of the claimant to yet another attempt to remove responsibilities from him and give them to another member of staff.

52. Upon his return from annual leave, the claimant was called into a meeting at 9:00am on the 23 August 2021 with Mr Bush and Mrs Richards. The minutes of that meeting prepared by Mrs Richards identify Mr Bush as being the Installations Manager and the claimant as been the Installations Co-ordinator. This would have been the first that the claimant would have known of these changes to his role, his job title, his hours, and the way in which his overtime would be calculated.

53. And it didn't end there: at the meeting, the claimant was presented with a document (which can be found at page 241) of the bundle dated 23 August 2021 and which describes the job specification of his new position as 'Installation Co-ordinator', and in particular identifying that he was "to support the Installation Manager as and when is requested", the Installation Manager being Jeremy Bush, a position which he the claimant had held prior to going off on his holiday 10 days earlier. It is plainly apparent that this was not a consultation of any sort but was presented to the claimant as a fait accompli.

54. The Tribunal rejects entirely the evidence of Mrs Richards that the reference to the claimant as Installations Coordinator was either an error or a mistake. We find that it was quite deliberate and intentional. We do not accept her evidence

that she was oblivious to the importance which the claimant placed upon his job title.

55. This was without doubt a demotion, and one which was carried out in an underhanded and egregious manner.

56. On 24 August 2021, there was an incident in which the claimant verbally abused Mr Paul Stanyer in the course of an argument over a decision by Mr Stanyer to try to fit an extra job into the fitting schedule for the following day. The Tribunal finds that the claimant did swear and used the words as alleged against him in the presence of Jeremy Bush and other members of staff. Mr Stanyer reported this incident to Mr Daly at his (Mr Daly's) home address later that day.

57. On 25 Aug 2021, Mr Daly met the claimant during which the claimant admitted to using the language concerned. Mr Daly informed the claimant that he was not going to be subjected to disciplinary action but was warned about his behaviour. However, the Tribunal is satisfied that in these circumstances disciplinary action could have been justified.

58. Later the same day, the claimant approached Mr Daly and invited him to make a financial offer in order for the claimant to leave the business. The Tribunal accepts that this suggestion took Mr Daly by surprise, and that in fact Mr Daly did not wish to lose the claimant. We do not find that the object of the behaviour to which the claimant was subjected was in order to try to force him out of the business altogether, as he believes. However, we do find that there was a concerted effort to reduce his responsibilities and status.

59. On 26 August 2021, a settlement was offered by Mr Daly to the claimant, the precise terms of which have not been disclosed. The claimant was invited to take the following day off, and take the weekend to consider the offer. However, at 1658 on 27 August 2021, Mr Daly received an email from the claimant's solicitor in relation to the settlement offer. It was clear from the evidence that Mr Daly was not prepared to engage in direct negotiations with the claimant's solicitor, and as a result he wrote back to them on Saturday 28 August 2021 withdrawing the offer.

60. The claimant was expected back at work on the 1 September 2021 but did not return and was at this time signed off from work by his doctor as being unfit due to stress and anxiety. He subsequently submitted a series of sick notes, the effect of which were that at no stage did he return to work prior to his eventual resignation.

61. On 2 Sept 2021, the claimant submitted a grievance raising the following points, all of which were enlarged upon considerably.
    - He had been subjected to unfair treatment and 'insurmountable pressure';
    - There had been continued attempts to remove him from company;
    - He had been subject to demotion;
    - There had been unlawful deductions from his wages as a result of the change from weekly to monthly pay;
    - There had been an underpayment of his wages for 17 months.

62. On 3 September 2021 the claimant was issued with a new contract, which re-affirmed the decision by the respondent to demote him to the position of Installations Coordinator.

63. On the 7 September 2021, it was confirmed that a grievance meeting would take place on the 15 September 2021 that would be chaired by Mark Callahan, the Building Manager. However, 2 days before the grievance meeting was due to take place, Mr Daly sent an email to the claimant which contained the following passages:

    'The situation we are now heading for could have been so easily avoided, in fact it would have probably been finalised now with you being a lot better off financially, but you just had no trust that I was actually trying to help you. We both know that there are a catalogue of issues that were being hidden within your role, as we are now discovering, some I already knew about as they were brought to my attention as you are aware and others I have had no idea about…even more reason for you to be made accountable for the mistakes you have and continue to make…Maybe now is the time for me to take note of page 15 of the Company Handbook under Standards (A) Wastage (3) (b).'

    'If you really want to go down this road of a grievance then obviously that is your choice. The whole idea of a grievance is to actually have a resolution. I am struggling to see what resolution you are going to achieve…The other alternative is to make me an offer to purchase Park Lane back into the hands of your family. It now seems quite clear to me that you have never really been happy since the day I bought the company from your father in law…I am assuming you feel that you could do a much better job of owning and running the company than I have, so please feel free to make me an offer…'

64. In our judgment to send an email such as this so shortly before the grievance meeting was unwise in the extreme. It effectively destroyed any prospect of a satisfactory grievance procedure taking place, and amounted to a menacing ultimatum to the claimant that he was either going to walk away from his job empty handed or else be re-engaged in an even lower status role than before.

65. On 15 September 2021 at 10am the grievance meeting took place. It only lasted a mere 16 minutes. The claimant was extremely uncommunicative. He did not set out any suggested resolution and said on a number of occasions that he had nothing to add to his written grievance. In these circumstances it would seem that the grievance process was unlikely to lead to any form of meaningful resolution.

66. Having had every opportunity to raise whatever he wanted during the course of the meeting, the claimant sent an email to Mrs Richards for the attention of Mr Callahan at 16:42 setting out 3 purported public interest disclosures, namely, the decision to unilaterally change the pay arrangements from monthly to

weekly, the requirement to work during furlough, and the purported breach by the respondent of FENSA registration.

67. We do not accept that these disclosures were made at stage prior to the email of 16:42, nor do we accept that they were made in the public interest. It seems to us that these 'disclosures' were essentially retaliatory in nature, and were not made in the public interest but in the claimant's own self-interest. At no stage had any of them ever formed a part of his grievance.

68. We note that FENSA is not regulatory body; it is government-authorised scheme that monitors building regulation compliance for replacement windows and doors. The respondent was FENSA approved which means that they were registered (Registration number 11012) with FENSA which operates a self-certification scheme for the installation of replacement windows, doors and the like in England and Wales. The purpose of the scheme is to allow approved persons to self-certify the compliance of controlled work in buildings, thus removes the need to seek approval from Building Control.

69. The Tribunal accepts Mr Daly's evidence that the claimant did not raise any concerns about FENSA or the number of certified Fitters. In any event, as the person responsible for installations it was the claimant's job to ensure compliance and so had he raised such a concern he would essentially have been reporting his own wrongdoing.

70. On 28 October 2021, Mr Callahan conducted interviews with Mrs Richards, Mr Stanyer and Mr Daly in connection with the claimant's grievance. The decision was reached on 29 October 2021 that all aspects of the grievance were rejected, save for the issue of the underpayment. The respondent accepted that the underpayment had been made and confirmed that they would reimburse the balance owed to the claimant. The grievance outcome letter made no reference to the whistleblowing claims.

71. On 2 November 2021, the claimant indicated that he wished to appeal against the grievance and was told by Mrs Richards later that day that his appeal would be handled by Mr Bush. The Tribunal finds that this was a bizarre decision given the history of the situation and the clear and obvious conflict of interests that existed between the claimant and Mr Bush.

72. On 5 November 2021, in a detailed email, the claimant simultaneously set out his appeal against the grievance outcome and tendered his resignation with immediate effect. The email concludes with the assertion that the claimant had been constructively dismissed and intended to pursue a complaint to the Employment Tribunal.

73. On the 8 November 2021, the claimant's resignation was acknowledged, but he was invited by Mrs Richards to retract his resignation and return to work. It was not clear from the email as to in what capacity he would be returning to work.

74. The letter states that he has always retained his original job title 'as is proven on email signature'. It seems to us that the claimant's email signature is insignificant and does not prove anything other than that he never changed it.

75. The date for the claimant's grievance appeal was set as being the 16 November 2021. The claimant indicated that he did not intend to attend the appeal hearing and requested that it be considered on the papers. Mrs Richards in an email of the 16 November 2021 acknowledged this but encouraged the claimant to attend. She also indicated that the appeal would now be conducted by Naomi Fox, the Nu Look office manager rather than by Mr Bush.

76. Mr Daly submitted written replies to the claimant's appeal which were in themselves quite menacing in tone and referred once again to a threat to pursue the claimant for the losses which were allegedly attributable to him. In the end this is exactly what did happen - the claimant was issued with an invoice, the first of which simply offset the monies owed to the claimant for underpayment against the value of the alleged losses.

77. The appeal hearing, chaired by Ms Fox, took place on 19 November 2021 and provided a perfunctory and wholly inadequate decision on the appeal amounting to a single sentence. There is no evidence from the minutes that she conducted any sort of assessment of any of the issues raised. All in all it amounted to a lamentably bad grievance process, one of the worst that the Tribunal has seen in its experience.

THE LAW AND CONCLUSIONS

<u>Protected Disclosures</u>

78. The relevant statutory provisions in relation to Protected Disclosures are Employment Rights Act 1996 43B and 47B, which read as follows:

    Section 43B 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, 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.
(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority,
on the ground that W has made a protected disclosure.

79. *Cavendish v Munro Professional Risks Management Ltd v Geduld* [2010] IRL 38 made clear that:

> *In order to fall within the statutory definition of protected disclosure, there must be a disclosure of information. There is a distinction between "information" and an "allegation" for the purposes of the Act. The ordinary meaning of giving "information" is conveying facts. For example, communicating information about the state of a hospital would be stating that: "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". However, an allegation about the same subject-matter would be "you are not complying with the health and safety requirements".*

80. Applying this definition, we do find that the disclosures outlined are capable of amounting to protected disclosures under s43B(1)(b), in that they do amount to disclosures of information (as opposed to bare allegations) which *could* tend to show that the respondent has failed, is failing or is likely to fail to comply with any legal obligation to which it is subject - but we must next go on to consider the questions of whether the claimant reasonably believed that they *did* have such a tendency, and if so whether the disclosures were made in the public interest.

81. Section 43B makes it clear that the claimant must show not only that he had a reasonable belief that the disclosure tended to show one of the statutory failures but also that it was made in the public interest. This has both a subjective, what the claimant believed and an objective element, was it reasonable in the circumstances. In *Babula v Waltham Forest College* [2007] IRLR 346 the Court considered the requirement of reasonable belief holding as follows:

> *'It is also, I think, significant that s.43B(1) uses the phrase 'tends to show' not 'shows'. There is, in short, nothing in s.43B(1) which requires the whistleblower to be right. At its highest in relation to s.43B(1)(a) he must have a reasonable belief that the information in his possession 'tends to show' that a criminal offence has been committed: at its lowest he must have a reasonable belief that the information in his possession tends to show that a criminal offence is likely to be committed. The fact that he may be wrong is not relevant, provided his belief is reasonable, and the disclosure to his employer made in good faith (s.43C(1)(a)). In this context, in my judgment, the word 'belief' in s.43B(1) is plainly subjective. It is the*

particular belief held by the particular worker. Equally, however, the 'belief' must be 'reasonable'. That is an objective test. Furthermore, like the EAT in Darnton, I find it difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knows or believes that the factual basis for the belief is false. In any event, these are all matters for the Employment Tribunal to determine on the facts.'

82. In *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)* (2018) ICR 731 CA, the Court stated that even where the disclosure relates to a breach of the worker's own contract of employment or a matter that is personal in nature, there may still be features of the case that make it reasonable to regard the disclosure as being in the public interest, as well as in the personal interest of the worker. It suggested that the following factors might be relevant:
    - the numbers in the group whose interests the disclosure served
    - the nature of the interests affected and the extent to which they are affected
    - by the wrongdoing disclosed
    - the nature of the wrongdoing disclosed, and
    - the identity of the alleged wrongdoer.

83. Addressing the questions set out in the List of Issues prepared by EJ Laidler at the Case Management Hearing on the 18 January 2023, and applying the law accordingly, the Tribunal has reached the following conclusions.

84. In relation the first of the alleged Public Interest Disclosures, namely that the claimant had 'raised concerns about the respondent breaching employees' contract and committed an unlawful deduction from wages by unilaterally moving all employees from weekly to monthly pay', we accept that this was capable of of amounting to a qualifying disclosure under s43B(1)(b), in that it was a disclosure of information; that it tended to show that the respondent had breached its contractual obligations to its employees, albeit (initially at least) in exceptional circumstances. We also accept that the claimant reasonably held this belief, particularly in light of his later discovery that, as a result of the changeover, his wages had been reduced due to a calculation error.

85. In relation to the second alleged PID, namely that the claimant 'raised concerns that he and other colleagues were required to work while on furlough', whilst we accept that this was a disclosure of information which could in certain circumstances have a tendency under s43B(1)(b), we do not find that the claimant reasonably believed this to be the case. As set out in our findings of fact, the work that the claimant was asked to carry out was so minimal and was limited to, in our judgment, making a small number of essential telephone calls whilst the furlough rules were not even operational, and a small number of further calls during the transition back to normality. We are not persuaded that the claimant believed that this amounted to a breach of legal obligations, still less that it would have been a reasonable belief.

86. Thirdly, and finally, any belief that the issue relating to FENSA registration was a breach of a legal obligation (if it existed) was founded upon a misunderstanding as to the nature of the relationship between the respondent and FENSA. There was no 'legal obligation' as such that arose from this certification, and moreover, as stated above, the responsibility for compliance lay with the claimant himself. We therefore find that in relation to this complaint, the claimant did not have the necessary 'reasonable belief'.

87. For completeness we should state that, whatever the claimant's beliefs as to the three matters set out above, the Tribunal reiterates its view that the disclosures were not made in the public interest. The circumstances in which the disclosures were made, in particular their timing, lead us to the view that the disclosures were retaliatory in nature and arose during a period in which the relationship between the claimant and respondent was one of open hostility.

<u>Constructive Unfair Dismissal</u>

88. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by his employer (Section 94 of the Employment Rights Act 1996). The Claimant plainly had worked the relevant qualifying period at the point of his resignation.

89. The relevant law is contained within Section 95 of the Employment Rights Act 1996, which reads as follows:
(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if) –
…
(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

90. An employee will be considered to have been constructively dismissed where the employee shows that:
    a. The employer has committed a repudiatory breach of contract;
    b. The employee resigned in response to such a breach;
    c. The employee did not affirm or waive the breach prior to resigning.

<u>Repudiatory Breach</u>

91. It is not every breach of contract that will justify an employee resigning their employment without notice. The breach must be sufficiently fundamental that it goes to the heart of the continued employment relationship.

92. Whether or not an employer's actions or omissions amount to a repudiatory breach of a term of the contract is an objective test (*Bournemouth University Higher Education v Buckland* [2009] IRLR 606)

93. A breach of the implied term of trust and confidence is always repudiatory. The 'duty of trust and confidence' was defined in the well-known decision of *Malik and Mahmud v BCCI* [1997] ICR 606, HL as being an obligation that the employer shall not:

> *"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

94. The Claimant claims that he was forced to resign by reason of the Respondent's conduct, and that as a result, this was in fact a dismissal for the purposes of Section 95, rather than a resignation.

95. When looking at the manner of an employer's conduct, "the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it" (*Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666,EAT).

96. It is for the Claimant to prove that there was no reasonable and proper cause for the Respondent's actions (*RDF Media Group plc and anor v Clements* [2008] IRLR 207, QBD).

97. *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1, CA noted that a fair disciplinary procedure when viewed objectively could not destroy or seriously damage the relationship of trust and confidence.

<u>Course of Conduct</u>

98. Where an employee relies on a course of conduct, the Tribunal must look at the totality of the evidence and consider whether, when taken as a whole, the employer's conduct as amounted to a breach of the contract (*Lewis v Motorworld Garages Limited* [1985] IRLR 465)

99. A constructive dismissal is not automatically unfair (*Savoia v Chiltern Herb Farms Ltd* [1982] IRLR 166). As a consequence, the Tribunal must look at the basis for the employer's conduct and whether or not they were acting reasonably. The Tribunal must also look at the conduct of the employee and all the surrounding circumstances in their assessment.

<u>Breach must have caused resignation</u>

100. The employee must resign at least in part because of the professed breach (*Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859).

<u>Breach not affirmed</u>

101. The breach must not have been waived or affirmed prior to resignation (*Kaur).*

102. Where an employee relies on a course of conduct, they must identify a last straw which precipitated their resignation *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481, CA, the last straw:
    a. Must, objectively, be more than entirely innocuous;
    b. Should be an act in a series whose cumulative effect amounts to a breach of the implied term; and
    c. Must add at least something to the breach of the implied term.

103. If the last straw relied upon is found to be entirely innocuous, a constructive dismissal claim will only succeed where there was previous conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to the unaffirmed, previous breach (*Williams v Governing Body of Alderman Davies Church in Wales Primary School* EAT 0108/19).

104. *Kaur* offers guidance in cases where an employee who alleges that the implied term has been breached because of the cumulative effect of ongoing conduct.

a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
b. Has he or she affirmed the contract since that act?
c. If not, was that act (or omission) by itself a repudiatory breach of contract?
d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? If so, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.
e. Did the employee resign in response (or partly in response) to that breach?

105. In certain circumstances, a dismissal may by ‘fair’ notwithstanding the fact that it came about because of a repudiatory breach of contract by the employer, if it was for a potentially fair reason, and that, if so, the employer acted reasonably in treating it as a sufficient reason for dismissing the employee, as per Employment Rights Act 1996, Section 98(1) and (4) which reads as follows:

98 (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.
…
(4) Where 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.

106. In this case, the claimant has identified a series of incidents during the course of 2020/2021 which he submits support his claim that he was the subject

of unfair treatment which ultimately justified his resignation. These incidents can be summarised as follows:

i. The underpayment of wages of £40 per month for the last 17 months of his employment;
ii. Unilateral changes made to the bonus scheme in August 2021;
iii. The setting of unachievable targets linked to said bonus scheme;
iv. Unilateral demotion from Installations Manager to Installations Co-ordinator without consultation on 23 August 2021;
v. Being accused of being obstructive and negative without justification;
vi. Being invited to resign on 26 August 2021, the alternative being further demotion.

107. The claimant further prays in aid the history of his employment in which he had suffered a previous attempt at demotion in 2020 when the respondent appointed Adam Sandle, an employee who had previously been his subordinate, to be Installations Manager in the claimant's place. Whilst this incident has not been expressly pleaded on the List of Issues, we nevertheless consider that it is highly material to the issues in this case and we do take it into account in reaching our conclusions.

108. Taking matters shortly, we do not find that factors i, ii, iii, or v either individually or cumulatively amount to a repudiatory breach of contract, for the reasons which we hope are clear from what is set out above in our findings of fact.

109. However, we do find that the claimant was the victim of repeated attempts by the respondent to demote him by stripping him of responsibilities, reducing his status in terms of his job title and description, which in turn reduced his authority in the eyes of his colleagues. We also find that this was done in a way which the claimant would have found humiliating, in that it was done repeatedly, without consultation, and that he found himself answerable to colleagues who had previously had more junior roles to himself.

110. We find that the ultimatum that was presented to the claimant - to resign or be demoted - would have been reason enough to justify resigning without notice; but when considered together with the previous attempts by the respondent to demote him, the Tribunal is of the view that remaining in the respondent's employ would have been intolerable for the claimant.

111. The claimant resigned because of the breach and there was no affirmation; and there was no fair reason for his dismissal; although the respondent has alleged incompetence against him, it does not seem to us to justify dismissal in these circumstances, particularly as there had been no investigation of any sort into the allegations at the time of dismissal (and certainly not a procedurally fair one). The claimant was therefore constructively unfairly dismissed.

112. That said, we cannot ignore the evidence that we have heard about substantial financial losses suffered by the respondent as a direct result of the supposed incompetence of the claimant whilst he was in post; as well as some

other conduct issues including verbally abusing a colleague in front of other staff members. We found the evidence from Mr Bush about the 'graveyard' of windows which was discovered following an audit of the warehouse to be a rather startling image.

113. We therefore invite the parties to make representations at the remedy hearing on the questions of contributory fault and *Polkey* which we consider may well have the potential to affect the level of compensation that we will award in this case.

114. We would also welcome some further representations in relation to the question of wrongful dismissal, which was not dealt with in sufficient detail at the merits hearing to enable us to make a determination.

____
Employment Judge Conley

Date: 21 November 2023

Sent to the parties on:
22 November 2023

For the Tribunal Office